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BALANCING NECESSITY AND INDIVIDUAL RIGHTS IN THE FIGHT AGAINST TRANSNATIONAL TERRORISM: "TARGETED KILLINGS" AND INTERNATIONAL LAW

Karinne Coombes*

This article explores the restraints international human rights law and international humanitarian law place on a State's use of lethal force against suspected terrorists. Although the law restricts the ability to target suspected terrorists, it is argued that these limits should be respected in order to protect innocent civilians from undue harm. Under IHRL, it is argued that the right to life as a peremptory norm restricts extra-territorial targeted attacks of suspected terrorists. Accordingly, such action should only be considered lawful when it is necessary to protect the State's population from a known threat and lesser force would not suffice. Under IHL, it is argued that there is no third category of "unprivileged" or "unlawful" combatants who are subject to lawful targeting for the duration of the hostilities; rather, non-State actors who participate in an armed conflict may be lawfully targeted for the duration of their participation, including an ongoing chain of hostile acts.

Cet article explore les contraintes qu'imposent les lois internationales sur les droits de la personne ainsi que le droit international humanitaire à l'utilisation de force létale par un État contre des personnes soupçonnées de terrorisme. Quoique la loi limite l'habileté de cibler des personnes soupçonnées de terrorisme, on soutient que ces limites devraient être respectées afin de protéger les civils innocents contre des préjudices injustifiés. En rapport avec les LIDP, on soutient que le droit à la vie comme norme péremptoire limite les attaques extra-territoriales ciblées contre des personnes soupçonnées de terrorisme. Conséquemment, on ne devrait considérer de telles actions comme légitimes que si elles sont nécessaires pour protéger la population de l'État contre une menace connue et qu'une force moindre ne suffirait pas. En rapport avec le DIH, on soutient qu'il n'existe pas de troisième catégorie de combattants «non privilégiés» ou «illégitimes» que l'on peut cibler légitimement pendant la durée des hostilités; plutôt, les acteurs non étatiques qui participent à un conflit armé peuvent être ciblés légitimement pendant la durée de leur participation, y compris une série d'actes hostiles en cours.

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I. INTRODUCTION: THE USE OF LETHAL FORCE IN THE FIGHT AGAINST TRANSNATIONAL TERRORISM

On 26 October 2008, the United States military conducted a “successful strike” eight kilometers into Syrian territory to kill an alleged al Qaeda member who was suspected of smuggling money, weapons, and foreign fighters from Syria into Iraq.¹ Syrian officials protested the action, claiming that the strike killed eight and wounded one Syrian civilian. The Syrian foreign minister accused the U.S. of violating international law: “Killing civilians in international law means terrorist aggression.... We consider this criminal and terrorist aggression,”² while the U.S. Syrian Embassy spokesman asserted that the U.S. should have “share[d] their information instead of applying the law of the jungle.”³

On 22 July 2002, Israel destroyed the home of a wanted terrorist, Salah Shehade, in the city of Gaza. The blast from the one thousand kilogram bomb used in the attack injured dozens, and killed the target, his wife and family, and twelve neighbours.⁴ Part of Israel’s policy of “targeted frustration” of terrorism, this attack is one of many that Israel has undertaken during the second *intifada* against suspected members of terrorist organizations that are alleged to be involved in planning, launching, or executing terrorist attacks against Israelis.

Since the terrorist attacks in the United States on 11 September 2001, there has arguably been an increased recognition of the threat posed by transnational terrorism,⁵ which has spurred action at national and international levels. International law imposes restrictions on the use of lethal force by States; however, incidents like the ones described above illustrate recent challenges that the threat of transnational terrorism and the fight against it can pose to the limitations placed on a State’s use of lethal force against suspected terrorists.⁶ Central to the law restricting a State’s use of lethal force is concern for protecting the rights and lives of innocent civilians⁷ who may be caught in the crossfire of the fight against terrorism. The International Commission of Jurists has expressed concern regarding counter-terrorist operations,⁸ while United Nations Security Council

1 CNN, “Al Qaeda was U.S. target in Syrian attack, official says” CNN (27 October 2008), online: CNN Online <<http://edition.cnn.com/2008/WORLD/meast/10/27/syria.iraq/>>.

2 *Ibid.*

3 *Ibid.*

4 See *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 (Israel 11 December 2006) at para. 8 [*Targeted Killings*].

5 The qualifier “transnational” is used in this article to distinguish non-State from “international” or State-sponsored terrorism. Non-State actors committing terrorist attacks in the territory of other States will be considered transnational terrorism for the purposes of this article. Such groups can be located in one State or many.

6 Consider e.g., the U.S. strikes against suspected terrorists in Yemen in 2001, and its current targeting of suspected terrorists in Pakistan.

7 The term “innocent civilian” will be used in contrast to individuals who engage in terrorist attacks or armed conflicts, as they arguably retain the status of “civilian,” see section V.B.

8 See International Commission of Jurists, *Berlin Declaration*, 28 August 2004, online: International Commission of Jurists <http://icj.org/IMG/pdf/Berlin_Declaration.pdf> (“The world faces a grave challenge to the rule of law and human rights. Previously well-established and accepted legal principles are being called into question in all regions of the world through ill-conceived responses to terrorism. Many of the achievements in the legal protection of human

[UNSC] resolutions may also illustrate the growing recognition that counter-terrorist activities can lead to violations of international law.⁹

This article will explore the restraints on the use of lethal force against suspected terrorists under international human rights law [IHRL] and international humanitarian law [IHL].¹⁰ Although the law restricts a State's ability to target suspected terrorists, it is argued that these limits should be respected and enforced in order to protect innocent civilians from undue harm when a State uses force against suspected terrorists. The discussion is divided into four parts. Part two will explore the meaning of "terrorism" and the State's obligations when it acts against suspected terrorists. Part three will examine when and how IHRL and IHL apply to the use of force by States against suspected terrorists. Part four discusses the protections IHRL and IHL provide to civilians. Part five will consider the legality of so-called "targeted strikes" against suspected terrorists under IHRL and IHL. It is argued that, under IHRL and outside of the context of armed conflicts, the right to life guaranteed as a peremptory norm of international law restricts targeted attacks of suspected terrorists, both inside and outside of a State's borders. Under IHL, it is argued that there is no third category of "unprivileged" or "unlawful" combatants that are subject to lawful targeting for the duration of the hostilities; rather, non-State actors who participate in an armed conflict may be lawfully targeted for the duration of their participation in the hostilities, including an on-going chain of hostilities. This approach may achieve an appropriate balance, allowing States to act against credible threats when it is necessary to protect the State's population from harm, while protecting the rights and lives of innocent civilians who become caught in the cross-fire in the fight against transnational terrorism.

II. TERRORISM AND INTERNATIONAL LAW

A. The Threat of Transnational Terrorism

With rapid technological advances and a "shrinking world" fuelled by globalization, the ability of non-State actors to attack populations worldwide has argu-

rights are under attack.") and International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (International Commission of Jurists: Geneva, 2009) [International Commission of Jurists, Report] ("The Panel is worried... that some of the counter-terrorist responses do not accord with international law and themselves also pose a threat to individuals, communities, and to a number of deeply-held values. Some governments seem to have decided that the threat of terrorism justifies exceptional responses that are at risk of seriously undermining the rule of law. The legal framework explicitly negotiated to ensure international, national, and personal security is under attack" at 24).

- 9 Compare, e.g., Resolution 1618 of 2005, which reaffirms "the need to combat by all means, **in accordance with the Charter of the United Nations**, threats to international peace and security caused by terrorist acts" and Resolution 1822 of 2008, which reaffirms: "the need to combat by all means, in accordance with the Charter of the United Nations **and international law, including applicable international human rights, refugee, and humanitarian law**, threats to international peace and security caused by terrorist acts" (*Resolution 1618 (2005)*, SC Res. 1618, UN SCOR, UN Doc. S/RES/1618, preamble [emphasis added], *Resolution 1822 (2008)*, SC Res. 1822, UN SCOR, UN Doc. S/RES/1822, preamble [emphasis added]).
- 10 For a thorough discussion of this issue, see Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008).

ably increased in recent years. Some commentators believe that the attacks in the U.S. on 11 September 2001 illustrated the emergence of a new phenomenon “of transnational networks capable of inflicting deadly violence on targets in geographically distant states.”¹¹ The UNSC has recognized this phenomenon as a threat to international peace and security,¹² while Georges Abi-Saab, a former judge of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia [ICTY] has stated that the events of 11 September 2001 triggered a “shock of recognition” regarding the risk of terrorism that previously had been contemplated, but not truly understood.¹³ As the international community attempts to address the threat posed by transnational terrorism, the first question that arises is: what is “terrorism?”

Despite many attempts, the international community has been largely unsuccessful at defining terrorism.¹⁴ In 2004, the UN Secretary-General’s High Level Panel on Threats, Challenges and Change recommended that it be defined as:

any action... intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such attack, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.¹⁵

United Nations Secretary-General Kofi Annan endorsed this definition in

11 International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict* (Geneva: ICRC, 2003) at 17 [ICRC 2003 Report].

12 See e.g. *Resolution 1373 (2001)*, SC Res. 1373, UN SCOR, UN Doc. S/RES/1373.

13 Georges Abi-Saab, “The Proper Role of International Law in Combating Terrorism” (2002) 1 *Chinese Journal of International Law* 305 at 306; Christopher Greenwood, *Essays on War in International Law* (London: Cameron May, 2006) (“While international terrorism did not begin on that day, the scale of the attacks, the loss of life which they caused, and the means with which they were carried out set them apart from all prior terrorist atrocities no matter how awful”) at 409.

14 In 1934, member States of the League of Nations discussed drafting a convention outlawing terrorism. This led to the adoption of the *Convention on the Prevention and Punishment of Terrorism* in 1937, which defined terrorism as: “All criminal acts directed at a State and intended or calculated to create a state of terror in the minds of particular persons or groups of persons or the general public,” but it never entered into force due an inability to approve this definition; see United Nations Counter-Terrorism Committee, *The Role of the Counter-Terrorism Committee and its Executive Directorate in the International Counter-Terrorism Effort*, online: UN <http://www.un.org/terrorism/pdfs/fact_sheet_1.pdf> [Counter-Terrorism Fact Sheet]. In 1994, a UN General Assembly [UNGA] Resolution defined terrorism as: “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes,” and provided that such acts were “in any circumstances unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature:” see *Measures to Eliminate International Terrorism*, GA Res. 49/60, UN GAOR 49th Sess., UN Doc. A/RES/49/60 (1994).

15 United Nations High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 at para. 164.

2005.¹⁶ In the same year, the UN member States agreed on the need for a “clear and unqualified condemnation of terrorism” addressing the issue “in all its forms and manifestations, committed by whomever, wherever and for whatever purposes,” and to work toward a common definition of and a comprehensive convention against terrorism.¹⁷ Despite this expressed commitment, these efforts have stalled. Although there is no consensus by States on the definition of terrorism, Pierre-Marie Dupuy notes common elements: “Terror exercised on a civilian population as a political weapon is evidently at the core of any definition of terrorism, the international element being provided by the physical origin of the act and/or nationality of the wrongdoers.”¹⁸ Since at least 109 possible definitions of terrorism have been proposed,¹⁹ this article will not endorse one, but will consider the core elements to be: (i) the use of armed violence (ii) directed against a civilian population (iii) as a political weapon.

B. International Legal Obligations and State Actions

The sovereign equality of States is a fundamental principle of international law.²⁰ Through sovereignty, States enjoy freedom from interference in their internal affairs as a matter of custom and treaty.²¹ Sovereignty is not without limits, however, as international law places legal constraints on State activity. Under-scoring these constraints, a second principle of international law is that a State incurs responsibility when it or its agents, including its military forces, violate the State’s international legal obligations.²² As such, a State will be bound by its international legal obligations when responding to the threat of transnational terrorism. This article will argue that transnational terrorism poses particular challenges for States because, while States will endeavour to protect their populations from the threat of transnational terrorism, international law limits the lawful scope of their response to this threat.

A fundamental feature of transnational terrorism is that a non-State actor commits terrorist attacks outside of the State(s) in which it is based, without the sponsorship of the territorial State(s). To combat this threat, some States have proved willing to use armed force against suspected terrorists despite the fact that they are located in another State.²³ Practices such as targeted killings of suspected terrorists located outside of the State’s territory raise controversial legal, political, and moral issues. When a State uses such force, its actions can risk violating a number of areas of international law.

16 Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 at para. 91.

17 *Counter-Terrorism Fact Sheet*, *supra* note 14.

18 Pierre-Marie Dupuy, “State Sponsors of Terrorism: Issues of Responsibility,” in Andrea Bianchi ed., *Enforcing International Law Norms Against Terrorism* (Portland: Hart, 2004) at 5.

19 *Ibid.*

20 *Charter of the United Nations*, art. 2(1) [*UN Charter*].

21 Regarding customary status, see *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 at para. 205 [*Nicaragua*]; as a matter of treaty, *ibid.*, art. 2(1).

22 *State Responsibility for Internationally Wrongful Acts*, UN GAOR, 56th Sess., Annex, Agenda Item 162, UN Doc. A/RES/56/83 (2001), art. 1 [*Articles on State Responsibility*].

23 Consider, e.g., the instances noted in the introduction and note 6.

III. IHRL AND IHL AND THE USE OF FORCE AGAINST TRANSNATIONAL TERRORISM

As noted above, IHL (also known as *jus in bello* or the law of armed conflict) applies during armed conflicts. It regulates the conduct of hostilities and limits the lawful actions of the parties to an armed conflict. The law regulating the initial recourse to the use of force by a State, *jus ad bellum*, is a separate branch of the law. Although the legality of the use of force by States against suspected terrorists outside of armed conflicts would be regulated, in part, by *jus ad bellum*, this area of the law will not be a focus of this article. Rather, this article will examine the law protecting the rights of individuals when a State uses force against suspected terrorists outside of its territory, particularly IHRL and IHL. Despite this focus on how the law constrains State action against suspected terrorists, it is recognized that for international law to remain relevant—and respected—it must allow States and the international community to effectively respond to the threat of transnational terrorism. It is argued that a balance that allows States to protect their populations from the threat of transnational terrorism while ensuring adequate protection of the rights and lives of innocent civilians is necessary.

A. The Application of International Human Rights Law

International human rights law provides rights for individuals and, at times, groups. Founded upon the principle that “all men are born equal, and with equal natural right,” contemporary protection of human rights is based upon human dignity and the “inherent worth of human beings.”²⁴ The underlying concept of human rights is their universality, which is reflected in the *Universal Declaration of Human Rights*: “All human beings are born free and equal in dignity and rights.”²⁵ The rights protected by IHRL have been frequently established through multilateral treaties.²⁶ In turn, these treaties have helped shape customary international law, as widespread State acceptance of some human rights has resulted in their crystallization as customary law.²⁷ Unlike most areas of international law that regulate relations between States, IHRL is primarily concerned with the relationship between individuals and the State, and was traditionally focused on protecting individual rights from infringement by the State in which a person is located.²⁸ As such, questions may arise regarding State obligations when State actions affect individuals located in another State. In the context of

24 Mark Freeman & Gib van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at 25.

25 *Ibid.* at 26.

26 See e.g., *International Covenant on Civil and Political Rights*, 23 March 1976, 999 U.N.T.S. 171 [ICCPR]; *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 217 [African Charter]; *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 143 [American Convention]; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 [ECHR].

27 Freeman, *supra* note 24 at 54.

28 See e.g., *ibid.* at 28.

the fight against transnational terrorism, it must be determined if IHRL applies to a State's extra-territorial use of force.²⁹

Most human rights treaties provide that they apply where the States parties have jurisdiction, and have been interpreted as meaning "wherever State organs have effective control."³⁰ As such, it may be argued that a State is only bound by its obligations under a human rights treaty to which it is a party if it has effective control of the territory in which it uses force. Ralph Wilde has examined the extraterritorial application of human rights law and concludes that the law in this context is "highly contested," "underdeveloped," and will be subject to future "norm development."³¹ Despite this potential uncertainty, jurisprudence supports the extra-territorial application of a limited number of human rights obligations, albeit in limited circumstances.³² The European Commission on Human Rights, for example, considered the obligations of State parties to the Convention for the Protection of Human Rights and Fundamental Freedoms [*ECHR*] in the context of the partial occupation of Cyprus by Turkey and concluded that States parties were "bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their territory or abroad."³³ The Inter-American Court of Human Rights went further when it held that a State could be responsible for breaching its human rights obligations when it acts in the territory of a State that is not party to the treaty in question.³⁴ As Rene Provost notes, in many cases, "'jurisdiction' has been taken to refer to the state's power rather than the geographical or territorial limitation of this power."³⁵ In 2004, the UN Human Rights Committee [UNHRC] noted that the *ECHR* requires:

States Parties... to respect and ensure the rights laid down in the Covenant to anyone within the power or effective control

29 For a discussion of this issue, see David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?" (2005) 16 E.J.I.L. 171.

30 See e.g. *ICCPR*, *supra* note 26 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant," art. 2(1)); *ECHR*, *supra* note 26 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention", art. 1); Rene Provost, *International Humanitarian Law and Human Rights* (New York: Cambridge University Press, 2002) at 305.

31 Ralph Wilde, "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties" in Roberta Arnold & Noëlle Quénié, eds., *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Boston: Martinus Nijhoff, 2008) 133 at 153.

32 Provost, *supra* note 30 ("Narrow constructions of the applicability of human rights have been rejected to ensure that... they 'apply always and everywhere'. Thus, the provisions of many human rights treaties which restrict their application to 'individuals under the jurisdiction of the state concerned' have been interpreted to ensure the broadest application of these treaties" at 19).

33 Appl. 6780/74 and 6950/75 *Cyprus v. Turkey*, (1975) 2 Decision and Reports 125 at 136, cited *ibid.*

34 Provost, *supra* note 30 at 20, referring to *Second Report on the Situation of Human Rights in Suriname*, OAS Doc. OEA/Ser.L.V/II.66, doc. 21 rev. 1 (1985).

35 *Ibid.*, Provost at 19.

of that State Party, even if not situated within the territory of the State Party.... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained...³⁶

Such interpretations support the argument that, as a projection of a State's power, "all military operations abroad remain governed by the relevant human rights treaties."³⁷ This is also consistent with the UNHCR's finding that, "it would be unconscionable to so interpret the responsibility under article 2 of the [ICCPR] as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."³⁸ In the *Construction of a Wall* Advisory Opinion, the International Court of Justice [ICJ] endorsed the Committee's finding that the Covenant was applicable where a State exercises its jurisdiction on foreign territory.³⁹

A question that persists is what level of control or jurisdiction must a State exercise to be bound by its IHRL obligations? Where the State using force is an occupying power, as in the second example provided in the introduction to this article, that State would clearly be bound by its IHRL obligations. The situation is less clear, however, with respect to a targeted strike such as the first example, where the State's fleeting presence in the territory where its target is based is its use of extra-territorial force. The European Court of Human Rights decision in *Bankovic v. Belgium et al.* suggests that it may be difficult to establish a breach of IHRL in such instances.⁴⁰ In that case, residents of the Federal Republic of Yugoslavia (FRY) whose relatives who were killed by a NATO air strike on a Belgrade television station during the conflict in Kosovo sought to hold NATO States parties that were signatories to the *ECHR* liable for violating, among other rights, the right to life guaranteed by Article 2 of the Convention. The applicants argued that the case was admissible on the basis that "the impugned acts of the respondent States, which were either in the FRY or on their own territories but producing effects in the FRY, brought them and their deceased relatives within the jurisdiction of those States."⁴¹ When assessing the admissibility of the case, the Court adopted a restrictive view of jurisdiction:

36 *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN HRCOR, 80th Sess., 2187th Mtg., UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) at para. 10.

37 Provost, *supra* note 30 at 20-21.

38 *Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 88 (1984) at para. 12.3.

39 *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at paras. 108-111 (The drafters of article 2 "did not intend to allow States to escape from their obligations when they exercise jurisdiction outside of their national territory. They only intended to prevent residents abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of the State of residence" at para. 110) [*Construction of a Wall*].

40 *Bankovic et al. v. Belgium and 16 Other Contracting States* (Appl. No. 52207/99; adm. dec.), ECHR 12 December 2001.

41 *Ibid.* at para. 30.

As to the “ordinary meaning” of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, **the jurisdictional competence of a State is primarily territorial**. While international law does not exclude a State’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction... are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.⁴²

The Court concluded that the case was inadmissible because there was no jurisdictional link between the victims of NATO’s bombing and the extra-territorial use of force by the respondent States. Highlighting the potential difficulty in holding States accountable for alleged violations of IHRL during extra-territorial uses of force, the Court noted that:

The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.⁴³

Despite the Court’s decision in *Bankovic*, it is argued that the underlying purpose of IHRL strengthens the argument that a State is bound by at least some of its IHRL obligations when it acts extra-territorially. To conclude otherwise would be “incompatible with the very notion of the universality of human rights, which lies at the foundation of international human rights”⁴⁴ due to the un-universal effect of rendering lawful State action that would be unlawful but for the location of the affected person. Extra-territorial application is particularly justified when the right at issue is a peremptory norm:

While a state party’s treaty obligations are a function of the scope and application defined in the particular treaty, some of the substantive norms in human rights treaties that have been ratified by the vast majority of states in the world have now become peremptory norms of customary international law.⁴⁵

The character of some human rights as peremptory norms lends strength to the extra-territorial application of these IHRL obligations because such norms are binding on all States independent of their ratification of a specific treaty con-

42 *Ibid.* at para. 59 [emphasis added].

43 *Ibid.* at para. 80 [emphasis added].

44 Kretzmer, *supra* note 29 at 184.

45 *Ibid.* at 184-85.

taining the rule. As such, it may be argued that a State must abide by its peremptory IHRL obligations when it exercises counter-terrorist force (i.e., a projection of its power) in the territory of the other State.

B. The Application of International Humanitarian Law

At its core, IHL is a compromise that seeks to balance military necessity with the desire to protect humanity from the devastation of armed conflict.⁴⁶ The result is a legal regime that seeks a “middle road” that gives States involved in armed conflicts leeway to inflict destruction when it is militarily necessary, while their freedom of action is circumscribed in the name of humanitarianism.⁴⁷ Restrictions on the methods and means of warfare have existed for much of human history.⁴⁸ Evolving from medieval times to the present, the concept of “just war” in which any means were permissible provided that the cause was just gave way to a privileged class of belligerents, and finally a relatively high level of protection for civilians today.⁴⁹ The progressive codification of IHL gradually achieved this protection and placed limits on the conduct of hostilities in response to the horrors of war.⁵⁰ The modern bases for legal protection for individuals who do not or can no longer take part in fighting is found in the four 1949 *Geneva Conventions for the Protection of War Victims* [*Geneva Conventions*], which enjoy universal acceptance.⁵¹ In 1977, two Additional Protocols [*API* and *APII*] were added

46 See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (New York: Cambridge University Press, 2004) (“[IHL] in its entirety is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations. If military necessity were to prevail completely, no limitation of any kind would have been imposed on the freedom of action between belligerent States.... Conversely, if benevolent humanitarianism were the only beacon to guide the path of armed forces, war would have entailed no bloodshed, no destruction and no human suffering; in short, war would not be war”) at 16.

47 *Ibid.* (Such concern was first codified in the 1868 *St Petersburg Declaration*: “the progress of civilization should have the effect of alleviating as much as possible the calamities of war” at 9,) at 17.

48 See e.g. Green *supra* note 57.

49 See Judith Gail Gardam, “Proportionality and Force in International Law” (1993) 87 A.J.I.L. 395, and Kenneth Watkin, “Combatants, Unprivileged Belligerents and Conflicts in the 21st Century” *Background Paper* (Harvard University: Program on Humanitarian Policy and Conflict Research, 2003) at 6.

50 The *Hague II* convention of 1899 is an early manifestation of such protection, as it prohibited the bombardment of undefended settlements; see *Convention with Respect to the Laws and Customs of War on Land*, 29 July 1899 (The Avalon Project, Yale Law School), online: <http://avalon.law.yale.edu/19th_century/hague02.asp> [*Hague II*], art. 25. World Wars I and II were particularly important in this respect, as the involvement of entire societies in the war effort gave rise to the concept of the “total war” which was used to justify making non-combatants objects of attack and led to bombardment of cities with an intention of terrorizing the population and breaking their support for the war, see e.g., J. Marshall Beier, “Discriminating Tastes: ‘Smart’ Bombs, Non-Combatants, and Notions of Legitimacy in Warfare” (2003) 34 *Security Dialogue* 418.

51 Highlighting the concern with persons who do not take part in hostilities is *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 [*Geneva Convention IV*]. Regarding ratification of the *Geneva Conventions*, see ICRC, *The Geneva Conventions: The Core of International Humanitarian Law*, online: ICRC <<http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions>>.

to the *Geneva Conventions*, which address issues arising under international and non-international armed conflicts respectively and complement rather than supercede the *Geneva Conventions*.⁵² Although the Protocols do not enjoy universal ratification some of their content reflects customary international law.⁵³

It should be noted that there is debate regarding the ability of IHL to regulate an armed conflict that occurs between a State and a non-State actor based in the territory of another State.⁵⁴ Rather than examining this debate, this article will evaluate the legality of targeted strikes against suspected terrorists under the assumption that IHL would apply when the general conditions of an armed conflict are met.⁵⁵ Although subject to debate, these conditions include: i) identifiable parties that maintain a minimal level of organization; ii) an identifiable territory in which the conflict takes place; iii) armed violence exceeding the requisite threshold; and iv) the beginning and end of the conflict must be identifiable (or capable of future identification).⁵⁶

52 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3 [API]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 609 [APII].

53 See ICRC, *Geneva Conventions*, *ibid.* (168 States have ratified API and 164 States have ratified APII); regarding customary status, see Jean-Marie Henckaerts & Louise Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

54 See e.g. Geoffrey S. Corn, "Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict" (2007) 40 Vand. J. Transnat'l L. 295; Marco Sassoli, "Transnational Armed Groups and International Humanitarian Law" *Occasional Paper Series No. 6* (Harvard University: Program on Humanitarian Policy and Conflict Research, 2006); Roy Schondorf, "Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?" (2004) 37 N.Y.U.J. Int'l L. & Pol. 1; Derek Jinks, "September 11 and the Laws of War" (2003) Y.J. Int'l L. 1; Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'" (2003) 27 Fletcher Forum of World Affairs 55. For a discussion in the context of transnational terrorism, see Karinne Coombes, "Protecting Civilians during the Fight Against Transnational Terrorism: Applying International Humanitarian Law to Transnational Armed Conflicts" (2008) 46 Can. Y. B. Int'l Law 241.

55 It should also be noted that armed conflicts have been divided into two categories—international (State-to-State) and non-international (internal)—to which different rules apply. There has been a significant degree of convergence between these rules over time; see e.g., Theodore Meron, "Cassese's *Tadic* and the Law of Non-International Armed Conflicts" in Lal Chand Vorah *et al.*, eds., *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003) (As a result of the jurisprudence of the ICTY, "there has been a broadening of international law applicable to non-international armed conflicts, often through elimination of the distinctions between international and non-international armed conflicts" at 536). Given this trend of convergence, the ICRC undertook a comprehensive study of customary IHL, producing an authoritative treatise on the subject; see Henckaerts & Doswald-Beck, *supra* note 53. The study's findings are extremely relevant to identifying the protections IHL affords to civilians, as many of these rules have been recognized as customary law applicable to both international and non-international armed conflicts. Since the rules this article will focus on are applicable to both categories of armed conflict, the distinction between the two categories, and the potential difficulty in classifying an armed conflict between a State and a non-State actor based in another State as one category or the other will not be addressed in this article; for a discussion of these issues see citations *ibid.*

56 For a discussion of these criteria in the context of transnational terrorism, see Rona, *supra* note 54 at 55-74. See also, *Prosecutor v. Tadic* (Jurisdiction) ("an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental

An important aspect of IHL is its binding nature on all parties to a conflict, irrespective of the cause and regardless of whether war has been declared or recognized by any of the parties.⁵⁷ IHL also applies equally to all parties to a conflict, independent of the legality of the recourse to the use of force,⁵⁸ and remains effective even if a party denounces its application.⁵⁹ Furthermore, non-adherence to IHL cannot justify in-kind reprisals.⁶⁰ As such, if IHL applied to an armed conflict between a State and a non-State actor in the context of transnational terrorism, its provisions would bind both the State and non-State actor, and the State would be unable to deny the application of IHL simply by arguing that the non-State actor's unlawful terrorist attacks instigated the conflict.

C. International Humanitarian Law as *Lex Specialis*

Although the application of IHL is confined to armed conflicts and IHRL is generally understood as affecting State action in times of peace, Kenneth Watkin notes that, "the dividing line between the operation of... [IHL] and human rights law is not always clear or absolute," and "the relationship between the two is much more complex than this simple division of responsibilities implies."⁶¹ Concern for humanity is an underlying feature of both IHRL and IHL. In light of this common concern, IHRL has played a significant role in the development of the substantive provisions of IHL.⁶² Despite this interaction, major differ-

authorities and organised armed groups or between such groups within a State" at paras. 67 and 70).

57 Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3d ed. (Manchester: Manchester University Press, 2008) at 53.

58 See e.g., Dinstein, *supra* note 46 ("Breaches of [IHL] cannot be justified on the ground that the enemy is responsible for commencing the hostilities in flagrant breach of the *jus ad bellum*" at 5); Gerald L. Neuman, "Humanitarian Law and Counterterrorist Force" (2003) E.J.I.L. 283 at 284. See especially *API*, *supra* note 52 ("The provisions of the Geneva Conventions of 12 August 1949 and this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or the causes espoused by or attributed to the Parties of the conflict", preamble). Although IHL applies to all parties in a conflict, this is not to say that the obligations on the State will always be identical. In certain circumstances, IHL obligations may vary to a degree between parties to the same conflict (e.g., when a State has ratified the *Ottawa Convention* banning the use of land mines but another State has not and it continues to use them without violating IHL).

59 See Green, *supra* note 57 at 23.

60 See e.g. Marco Sassoli & Antoine A. Bouvier, eds. 2d ed. *How Does Law Protect in War?* (Geneva: ICRC, 2006) (When a State takes countermeasures against another State for a breach of an international obligation, "[t]hose measures must themselves conform to IHL..." while reprisals against protected persons and the civilian population by parties to a conflict are prohibited at 297).

61 Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict" (2004) 98 A.J.I.L. 1 at 2.

62 See e.g. Theodor Meron, *Humanization of International Law* (Boston: Martinus Nijhoff, 2006) ("Human rights law has influenced the provisions of the Geneva Conventions and of the Additional Protocols. Parallelism of content was attained in such matters as: right to life; prohibition of torture, cruel, inhuman or degrading treatment or punishment; arbitrary arrest or detention; discrimination on the grounds of race, sex, language or religion; and due process of law" at 45).

ences between the two bodies of law persist due to IHL's compromise between humanity and military necessity. As a result, IHL permits some actions during an armed conflict that would otherwise violate IHRL.

Although IHL applies during an armed conflict, it does not completely displace IHRL.⁶³ The ICJ has confirmed the continued application of IHRL during armed conflicts although it may be altered by the application of IHL. In the *Nuclear Weapons* Advisory Opinion, the ICJ considered the argument that the use of nuclear weapons would be unlawful because it would violate the right to life guaranteed by Article 6 of the *ICCPR*.⁶⁴ The Court rejected the claim that such a violation would not be possible because nuclear weapons would only be used during an armed conflict to which the *ICCPR* does not apply, as it held that IHRL would apply, but its substance would be influenced by IHL:

In principle, the right not arbitrarily to be deprived of one's life [per Article 6] applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 in the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁶⁵

According to the *lex specialis* maxim, "when two laws apply to the same situation at the same time, the more specific or more 'special' law takes precedence over the other"⁶⁶ to the extent they cannot concurrently apply. The effect of IHL as *lex specialis* is that its specific rules will supercede those of IHRL when the two bodies of law apply directly and contradictorily to the same issue, while the principles of IHRL would apply when IHL does not address an aspect of an armed conflict.⁶⁷ Although a thorough survey of how IHRL and IHL interact is

63 In 1970, the UNGA recognized the "dual application" of IHL and IHRL, noting that, "fundamental human rights, as accepted in international law and laid down by international instruments, continue to apply fully in situations of armed conflict"; see *Basic Principles for the Protection of Civilian Populations in Armed Conflicts*, GA Res. 2675 (XXV), UN Doc. A/RES/2675 (1970).

64 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 25 [*Nuclear Weapons*].

65 *Ibid.*

66 Natasha Balendra, "Defining Armed Conflict" (2008) 29 Cardozo L. Rev. 2461 at 2464.

67 See *Construction of a Wall*, *supra* note 39 (The Court recognized three potential situations: (i) where IHRL applies; (ii) where IHL applies; and, (iii) where both IHL and IHRL apply at para. 106). For a detailed discussion of the "fragmentation" or international law and the *lex specialis* maxim, see ILC, "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", 58th Sess., UN Doc. A/61/10 (2006), online: United Nations Treaty Collection <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf>.

not possible in this work, it should be noted that there is a strong argument to be made that the existence of an armed conflict should be construed narrowly because IHL may provide less protection for individual rights than IHRL.⁶⁸ Natasha Balendra argues that IHL may be considered an “exception” to IHRL in such circumstances, and that IHL should be interpreted in a manner that minimizes the “derogation” from IHRL.⁶⁹

IV. INTERNATIONAL LAW AND THE PROTECTION OF INNOCENT CIVILIANS

A. The Protection of Civilians under International Human Rights Law

When a person dies as a result of State action, the question arises whether the use of lethal force by the State was justified or if it violated the individual's right to life, which “is unquestionably one of the most basic or fundamental human rights.”⁷⁰ The right to life was recognized in the *Universal Declaration of Human Rights*, and was subsequently codified in all major international human rights treaties.⁷¹ Clearly, any State that is a party to such a treaty would be obliged to respect the right to life. Even if a State were not party to such an agreement, however, it would likely still be bound to respect the right to life because it has been widely recognized as a fundamental right guaranteed for all persons.⁷² Kurt Herndl argues that the right to life is a peremptory norm of international law:

Of all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights, from which the latter obtain their *raison d'être* and must take their lead. Protection against arbitrary deprivation of life must be considered as an imperative norm of international law, which means not only that it is binding irrespective of whether or not States have subscribed to international conventions containing guarantees of the right, but also that the non-derog-

68 See e.g. Balendra, *supra* note 66 at 2464.

69 *Ibid.* at 2464-66.

70 Noëlle Quénivet, “The Right to Life in International Humanitarian Law and Human Rights Law” in Roberta Arnold & Noëlle Quénivet, eds, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Boston: Martinus Nijhoff, 2008) 331 at 331; Watkin, *supra* note 61 (“When the right to life is deprived, it is impossible to enjoy any fundamental freedom” at 9).

71 *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., UN Doc. A/810 (1948) 71 (“Everyone has the right to life, liberty and security of the person”, art. 3). See, e.g., *ICCPR*, *supra* note 26, art. 6(1); *ECHR*, *supra* note 26, art. 2; *American Convention*, *supra* note 26, art. 4; *African Charter*, *supra* note 26, art. 4.

72 See e.g., Noëlle Quénivet, *supra* note 70 at 331; Alex P. Schmid, “Terrorism and Human Rights: A Perspective from the United Nations” in Magnus Ranstorp & Paul Wilkinson, eds., *Terrorism and Human Rights* (New York: Routledge, 2008) 19 at 19-20. There is a strong argument that States are bound to respect some human rights even when their activities are directed at and affect individuals outside of the State's territory, see *supra* section III.A.

ability of the right to life has a peremptory character at all times, circumstances and situations.⁷³

The UN Commission on Human Rights supports the view that the right to life is a peremptory norm of international law, noting in *General Comment No. 29* that:

The proclamation of certain provisions of the [ICCPR] as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 [the right to life] and 7 [the right to be free of torture or cruel, inhuman or degrading treatment or punishment]).⁷⁴

In light of its importance, a State would likely be bound to respect the right to life when it uses extra-territorial force against the threat of transnational terrorism because “[a] state’s duty to respect the right to life... follows its agents wherever they operate.”⁷⁵ As Nils Melzer, legal advisor to the International Committee of the Red Cross [ICRC] concludes, “the obligation to ‘respect’ the right to life is also a peremptory norm of general international law and, as such, is binding upon all States at all times and in all places.” Despite the fact that it may be at odds with the decision of the European Court of Human Rights in *Bankovic*, Melzer draws a distinction between the State’s obligation to respect and to protect the right to life and concludes that, “where the deliberate infringement of the right to life is involved, even marginal or punctual exercise of power may give rise to extraterritorial ‘jurisdiction’ of the action State, albeit only with regard to the precise act and to the individuals affected.”⁷⁶ He argues that a State with the ability to undertake a targeted strike “will also exercise sufficient factual control to assume legal responsibility” for any failure to respect the right to life, while the concept of actual control of the person or territory in question would be relevant to determining if the State is bound to actively protect the right to life.⁷⁷

Despite its peremptory nature, the right to life is not unlimited. Most international human rights treaties reflect this limitation by expressly prohibiting the “arbitrary deprivation” of the right.⁷⁸ Many human rights can be subject to derogation in limited circumstances, such as a “time of war or other public

73 Kurt Herndl, “Forward” in B.G. Ramcharan, ed., *The Right to Life in International Law* (Boston: Martinus Nijhoff, 1985) at xi.

74 *General Comment No. 29: States of Emergency (Article 4)*, UN HRCOR, 72nd Sess., 1950th Mtg., UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para. 11.

75 Kretzmer, *supra* note 29 at 185.

76 Melzer, *supra* note 10 at 138.

77 *Ibid.* at 138-39.

78 Henckaerts & Doswald-Beck, *supra* note 53 at 313 (emphasis added). The *ECHR* does not contain the word “arbitrary”, but limits the lawful denial of the right to life to specific enumerated circumstances, see *infra*, section III.

emergency threatening the life of the nation.”⁷⁹ Derogation, however, is “the exception and is always limited,” as a State must show that “a public emergency exists which threatens the life of the nation and must officially proclaim its existence.”⁸⁰ Although the right to life protects individuals from only “arbitrary” killings, it is considered non-derogable⁸¹ and therefore remains protected at all times. State practice has established the right to life as a rule of customary international law applicable during armed conflicts.⁸² As such, unless an individual’s death as a result of State action can be justified under IHRL and/or IHL, it would constitute an arbitrary deprivation of the right to life.⁸³ Given that States are bound to respect the right to life at all times, it may offer significant protection to innocent civilians during the counter-terrorist use of force by States.⁸⁴

B. IHL and the Protection of Civilians during Armed Conflicts

One of the underlying humanitarian features of IHL is the concern with the protection of individuals who take no part in the conduct of hostilities, which has progressively developed to such an extent that the UNHRC has found that, “the protection of civilians is a fundamental precept of IHL.”⁸⁵ Customary IHL recognizes as civilians “all persons who are not members of the armed forces,” while the “civilian population comprises all persons who are civilians.”⁸⁶ There are numerous principles under IHL that protect innocent civilians, including the principles of distinction and proportionality, and the requirement to take precautions in attack. Given this article’s focus on the legality of targeted killings of suspected terrorists, only the principle of distinction under IHL will be discussed.

The principle of distinction applies as customary IHL⁸⁷ and requires States

79 Jean-Marie Henckaerts, “Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim’s Perspective” in Arnold & Quéniévet, *supra* note 70, 253 at 258.

80 *Ibid.* at 253.

81 See e.g. *ibid.* at 256-58; Schmid *supra* note 72 (“While states can derogate during an emergency certain human rights, like the freedom of association, there are rights which cannot be derogated, including the right to life” at 20).

82 Henckaerts & Doswald-Beck, *supra* note 53 at 311-14 (Rule 80: “Murder is prohibited” at 311; “In their statements before the [ICJ]... several States which were not at the time party to the main human rights treaties stressed the elementary and non-derogable character of the right to life” at 313).

83 This limitation on the right to life will be explored in more detail below in section 4.1.

84 Although other human rights (such as the right to due process of the law) may be threatened through counter-terrorist activities, this article will limit its consideration of human rights implications to the right to life because of the focus on protecting innocent civilians.

85 Commission of Inquiry on Lebanon, *Report of the Commission of Inquiry on Lebanon* UN HRC, 3d Sess., UN Doc. A/HRC/RES/3/3 (2006) at para. 82.

86 This definition applies to both international and non-international armed conflicts, although the ICRC has noted that State practice “is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians” during non-international conflicts (Henckaerts & Doswald-Beck, *supra* note 53 at 17, “rule 5”).

87 The principle applies to both international and non-international armed conflicts; see Henckaerts & Doswald-Beck, *supra* note 53 “rule 1” at 3. This customary status has been recognized by the ICJ and other international tribunals: *Nuclear Weapons*, *supra* note 64 at paras. 61 and 434; see *ibid.*, note 35.

to, as much as is feasible, ensure that the “effects of war [are] limited to combatants and military objectives.”⁸⁸ The modern principle of distinction provides that, “[t]he parties to the conflict must at all times distinguish between civilians and combatants,” while “[a]ttacks may only be directed against combatants,” and “must not be directed against civilians.”⁸⁹ The principle of distinction also protects civilians from the adverse effects of hostilities by requiring States to distinguish between civilian “objects” and military objectives.⁹⁰ A lawful military objective must: (i) be tangible; (ii) contribute effectively to the military action of the enemy by its “nature, location, purpose or use;” and, (iii) offer a definite military advantage if destroyed, captured or neutralized.⁹¹ These criteria must be fulfilled “in the circumstances ruling at the time.”⁹² Through this requirement, Marco Sassoli argues that the drafters of *API* “avoid[ed] too large an interpretation” of the lawful objects of attack and thereby “exclud[ed] **indirect** contributions and **possible** advantages.”⁹³ Without these restrictions, he argues that, “the limitation to ‘military’ objectives [and thereby the protection afforded to civilians by the principle of distinction] could be too easily undermined.”⁹⁴ In addition to being considered unlawful targets of attack, civilians also enjoy protection from the effects of indiscriminate attacks.⁹⁵

88 Rona, *supra* note 54 at 66.

89 Henckaerts & Doswald-Beck, *supra* note 53 “rule 1” at 3 (Although the authors do not clearly state this in Rule 1, it is qualified by the fact that civilians who are directly participating in hostilities may be lawful targets of attack.)

90 The requirement to restrict attacks to military objectives, which is customary law applicable to international and non-international armed conflicts, was codified in *API*; see *API*, *supra* note 52 (Art. 48 identifies the “basic rule”: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”). Regarding customary status, see Henckaerts & Doswald-Beck, *ibid.*, “rule 7” (Although a similar codification of this rule was dropped from the draft of *APII* prior to its acceptance, “it has been argued that the concept of general protection [of civilians] in Article 13(1) of [*APII*] is broad enough to cover it” in non-international armed conflicts. Henckaerts and Doswald-Beck support the conclusion that the principle of distinction applies in non-international armed conflicts with reference to treaties dealing with the conduct of hostilities during non-international armed conflicts concluded after *APII*, numerous military manuals, national legislation, State practice, and the *Nuclear Weapons* case at 25, 27-28).

91 *API*, *ibid.*, art. 52(2). This understanding of military objectives also reflects customary international law applicable to international and non-international armed conflicts; see Henckaerts & Doswald-Beck, *ibid.*, “rule 8” at 29-32.

92 *API*, *ibid.*, art. 52(2).

93 Marco Sassoli, “Legitimate Targets of Attack under IHL” *Background Paper* (Harvard University: Program on Humanitarian Policy and Conflict Research, 2004) at 3 [emphasis in original].

94 *Ibid.*

95 *API*, *supra* note 52 (The Protocol expressly prohibits indiscriminate attacks and identifies, but does not limit, such attacks as: “(a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by [the] Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction”, art. 51(4)); see Henckaerts & Doswald-Beck, *supra* note 53 (The Mexico delegation stated that art. 51 “cannot be the subject of any reservations whatsoever since these would be inconsistent

C. The Challenge of Asymmetrical Conflicts

A conflict between a State and a non-State actor is almost always asymmetrical in nature, with the State enjoying a significant military advantage. In such situations, it is common for the disadvantaged party to employ tactics to overcome its disadvantage. Terrorist attacks are often characterized as such a tactic; since the group cannot prevail over the State militarily, it seeks to gain an advantage by targeting the vulnerable civilian population. Although the militarily disadvantaged party will likely breach IHL, this does not—and, it is argued, should not—excuse the other party from respecting its obligations under IHL.⁹⁶

Aside from directing attacks at civilians, non-State actors may use other tactics that breach IHL. Common tactics include “[t]he asymmetrically disadvantaged party either feign[ing] protected status or us[ing] proximity to protected individuals and objects to deter attacks.”⁹⁷ By concealing themselves within the civilian population, this practice arguably “turns the IHL principle of distinction on its head by incentivising its violation.”⁹⁸ The danger these tactics pose to civilians and the challenge they present to States responding to them is illustrated by the tactic of “human shielding,” which occurs when a party attempts to protect its position from attack by deliberately placing civilians in the line of fire. Human shielding is clearly contrary to IHL.⁹⁹ Although a party may benefit from its breach of IHL, civilians being used as involuntary shields are not lawful targets of direct attack and must be included in the proportionality considerations by a party planning to attack.¹⁰⁰

It is readily apparent that the tactics employed by a non-State terrorist group can challenge the ability for States to effectively respond to the threat they pose. It is argued that this difficulty does not and should not legitimize breaches of IHL and IHRL in the name of counter-terrorism, because accepting the con-

with the aim and purpose of Protocol I and undermine its basis” at 41). The prohibition on indiscriminate attacks is customary law applicable to international and non-international armed conflicts; see Henckaerts & Doswald-Beck, *supra* note 53, “rule 12” at 40.

96 See e.g. *API*, *supra* note 52 (“Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians” at art. 51(8)).

97 Michael N. Schmitt, “Asymmetrical Warfare and International Humanitarian Law” in Wolff Heintschel von Heinegg & Volker Epping, eds., *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen* (New York: Springer, 2007) 11 at 23.

98 *Ibid.* at 22.

99 Human shielding is prohibited in international and non-international armed conflicts under customary IHL; see Henckaerts & Doswald-Beck, *supra* note 53 at 337-40, “rule 97”.

100 This does not mean that a State will be automatically barred from attacking the object being shielded. Involuntary human shields must be factored into the proportionality consideration; if the target is a valid military objective, it may be possible for the State to attack it and not violate IHL as long as the resulting civilian casualties are not disproportionate to the valid military objective sought. Voluntary human shields would be lawful targets of attack because their activities constitute direct participation in hostilities. As Michael N. Schmitt notes, “[t]here have been suggestions that involuntary shields should not be included in the calculation of incidental injury, lest the lawbreakers benefit from their misconduct.” see Schmitt, *supra* note 97 at 27. This argument should not be accepted because it clearly contradicts the principle that violations of IHL do not release the other party of its legal obligations and could severely undermine the protections the law provides to innocent civilians.

trary may threaten the rights of innocent civilians and the rule of law itself.¹⁰¹ The rigours of the law should not be relaxed due to the difficulty of combating an asymmetrically disadvantaged party because accepting otherwise could lead down a slippery slope toward eroding the protection that innocent civilians have progressively attained during and outside of armed conflicts.

V. TARGETED KILLINGS AND INTERNATIONAL LAW

With the realization of the increased threat posed by transnational terrorism, a debate has arisen regarding the appropriate manner in which the threat should be addressed. At its core, terrorism remains a criminal act under domestic and international law, which supports the argument that, in non-armed conflict situations, law enforcement is the appropriate means to combat the threat by preventing and deterring terrorists through apprehension and criminal prosecution. When, however, a State uses extra-territorial force to address the threat of terrorism, an argument may arise that it is appropriate for IHL to apply. As noted above, however, IHL only applies during armed conflicts; as such, the legality of so-called “targeted killings” outside of times of armed conflict must be determined according to other legal regimes.

Using lethal force against suspected terrorists through targeted killings has been a growing tactic of States in their attempt to protect their civilians from the threat of transnational terrorism.¹⁰² Gabor Rona questions the legality of this practice:

[Targeted killing is] of dubious legality... for several reasons. First, unless the event is part of an armed conflict, humanitarian law does not apply, and its provisions recognizing a privilege to kill may not be invoked. The event must be analyzed under other applicable legal regimes. Second, even if humanitarian law applies, the legality of the attack is questionable because the targets were not directly participating in hostilities at the time they were killed, and because the attackers' right to engage in combat is doubtful.¹⁰³

This part will explore the legality of targeted killings through the framework of the law enforcement and armed conflict models. As seen above, IHRL will

101 *Ibid.* (“when asymmetry disrupts the presumption [that the parties to an armed conflict will abide by the rules of IHL] and one side violates the agreed rules, the practical incentive for compliance by the other fades. Instead, IHL begins appearing as if it operates to the benefit of one’s foes. When that happens, the dictates of the law appear out of step with reality, perhaps even ‘quaint’.... [T]he real danger is not so much that the various forms of asymmetry will result in violations of IHL. Rather, it is that asymmetries may unleash a dynamic that undercuts the very foundations of this body of law” at 47-48).

102 For e.g. Israel adopted a policy of “targeted killings” of suspected terrorists in response to the second *intifada* in 2000; the U.S. conducted strikes against suspected terrorists in Yemen in 2001 and Syria in 2008, and continues to target suspected terrorists in Pakistan.

103 Rona, *supra* note 54 at 65. Direct participation will be discussed *infra*, section V.B.

have a role in regulating the State's use of lethal force under the law enforcement model, while IHL will apply during an armed conflict. Of primary importance under IHL is determining the status of non-State actors as civilians or combatants, as this affects the ability of States to lawfully use lethal force and may act as a disincentive for individuals to participate in an armed conflict.

A. Targeted Killings Under International Human Rights Law¹⁰⁴

As explored above, a fundamental principle of IHRL is that a person cannot be arbitrarily deprived of the right to life, which arguably applies as a peremptory norm when a State uses force (i.e., exercises its power on a person) outside of the context of an armed conflict.¹⁰⁵ In order to determine the lawfulness of targeted killings under IHRL in contexts that do not amount to an armed conflict, it is necessary to explore when such action would not be considered "arbitrary."¹⁰⁶ The limitations to the right to life found in article 2(2) of the *ECHR* may illustrate when targeted killings breach IHRL:

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is **no more than absolutely necessary**: (a) in **defence of any person from unlawful violence**; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Setting aside other legal issues that could encumber a State's use of force in the territory of another State, David Kretzmer argues that targeted killings may be lawful under IHRL if they meet the proportionality test contained in this Article.¹⁰⁷ Applying this test, a State's extra-territorial use of lethal force against a suspected terrorist may be lawful under IHRL if the action is: (i) absolutely necessary; and, (ii) in defence of the civilian population that is being targeted for a terrorist attack. The European Court of Human Rights has strictly interpreted the requirement of absolute necessity.¹⁰⁸ Accordingly, two conditions must be satisfied. First, no other measures—such as apprehension of the suspected terror-

104 This article will focus only on the potential legality of targeted killings under IHRL, although there are clearly other legal regimes that would apply to the State's use of extra-territorial armed force, including *jus ad bellum*.

105 See discussion above, section III.A.

106 Although not central to this discussion, a second fundamental right is the right to due process of law. Targeted killings risk denying this right to individuals *suspected* of terrorist acts, and they may be considered subject to summary execution in violation of their right to life. Reflecting such concerns, targeted killings are often referred to as "extra-judicial execution", and it is argued that such killings amount to an arbitrary deprivation of the right to life because of the lack of due process; see Kretzmer, *supra* note 29 (extra-judicial execution "implies that the relevant law is a law-enforcement model and the applicable regime to assess state action is international human rights law" at 176).

107 *Ibid.* at 177.

108 See e.g., *McCann et al. v. The United Kingdom*, [1995] ECHR 31 ("force used must be proportionate to the achievement of the aims" set out in article 2(2) at para. 149); see *ibid.*

ists—could be used to protect the threatened persons.¹⁰⁹ Second, even when no other measures are available, it must be necessary to use lethal force rather than a lesser degree of force.¹¹⁰ Failing to meet these requirements, a State's use of lethal force against a suspected terrorist outside of an armed conflict would breach its IHRL obligations: "Any intentional use of lethal force by state authorities that is not justified under the provisions regarding the right to life will, by definition, be regarded as an 'extra-judicial execution.'"¹¹¹ In the context of transnational terrorism, it is conceivable that the use of lethal force against suspected terrorists could be lawful: "relying solely on the duty of the victim state under [IHRL] to respect the right to life, could it not argue that it has no choice but to resort to force against the suspected terrorist? That force was absolutely necessary to protect its civilians against unlawful violence?"¹¹²

In an effort to maintain the protection of innocent civilians, it is argued that a State should be required to respect the right to life—as a peremptory norm—when it targets suspected terrorists abroad. As noted above, it could be argued that a State is only bound by its IHRL obligations when its use of extra-territorial force amounts to an exercise of "effective control" over the territory in question and a targeted killing would not reach this threshold. If sustained, such an argument would clearly lead to States having more freedom to engage in such tactics. It should be noted, however, that since a State engaging in targeted killings would likely be required to justify its extra-territorial use of force as self-defence, it would be obliged to meet the requirements of *jus ad bellum* when using such force even if it were not bound by the absolute necessity requirements of IHRL.¹¹³ Although this would ensure that the action remains regulated by inter-

109 See Kretzmer, *ibid* ("Under the law enforcement model use of force can never be regarded as necessary... unless it is clear that there was no feasible possibility of protecting the prospective victim and apprehending the suspected perpetrator" at 179).

110 *Ibid.* at 178.

111 *Ibid.* at 176.

112 *Ibid.* at 179. See also Melzer, *supra* note 10 (He concludes that there may be situations where targeted strikes may be considered lawful; however, the requirements are stringent:

"In order to be lawful under the international normative paradigm of law enforcement [i.e., outside of an armed conflict], a particular State-sponsored targeted killing must, cumulatively:

- have a sufficient legal basis in domestic law, which regulates the use of lethal force in accordance with the international normative paradigm of law enforcement;
- not be of punitive but of exclusively preventive nature;
- aim exclusively at protecting human life from unlawful attack;
- be absolutely necessary in qualitative, quantitative and temporal terms for the achievement of this purpose;
- be the undesired ultima ratio, and not the actual aim, of an operation which is planned, prepared and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force" at 423).

113 See Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed. (New York: Cambridge University Press, 2005) (Dinstein considers such action "extra-territorial law enforcement." In circumstances where another State "permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down, and refuses to take action" he argues that, "the host government cannot expect to insulate its territory against measures of self-defense." He concludes that the State seeking to take action is required to first offer its

national law, this article argues that the status of the right to life as a peremptory norm supports finding that a State is obliged to respect this right when it engages in the practice of targeted killings, as this action may be understood as an exercise of the State's power over the person, and the State would have been obliged to respect this right if the person targeted were located in its territory. This argument is strengthened by considering the result in situations where the territorial State B (openly or privately) consents or acquiesces to, or even requests, State A's strike: by its consent or acquiescence, State B may explicitly or implicitly authorize what would have constituted a breach of IHRL if State B had itself used such force; or, it could attempt to avoid its obligations under IHRL entirely by secretly requesting the action. This situation would clearly erode the protection afforded by the right to life. In light of the absolute necessity requirement under IHRL, it is argued that a State would only be able to lawfully engage in targeted strikes where it has strong evidence of the identity of the suspected terrorist and the specific threat the individual poses to the State's population. Further, such action would only be absolutely necessary if, and when, the territorial State proves unwilling or unable to take action against the suspected terrorist. Otherwise, State A would not be able to show that it was unable to use less forceful means to combat the terrorist threat. Investigations may also be required after such a strike to determine the legality of the action, and compensation paid to victims if the act amounts to a gross violation of IHRL.¹¹⁴ Although a complete analysis of the legality of targeted strikes outside of armed conflicts is beyond the scope of

assistance to remove the terrorist threat, and if the host State refuses the offer of assistance and proves unwilling to act when it has the capacity to do so, it "must be prepared to bear certain unpleasant consequences," including the use of force in its territory by the other State. Dinstein argues that this extra-territorial law enforcement action may be justified because the injured State "is entitled to enforce international law extra-territorially if and when [the host State] is unable or unwilling to prevent repetition of the armed attack." Under this model, the State would be obliged to satisfy the traditional requirements of using force in self-defence, including being a prior victim of an armed attack: "The **necessity** to infringe upon [the host State's] sovereignty has to be manifest. The forcible measures employed... **must be reactive to an attack already committed by hostile armed bands or terrorists, and not only anticipatory** of what is no more than a future attack.... Additionally, a **repetition of the attack has to be expected**, so that **the extra-territorial law enforcement can qualify as defensive** and not purely punitive. **The absence of alternative means for putting an end to the operations of the armed bands or terrorists has to be demonstrated** beyond a reasonable doubt" [emphasis added] at 245-47). Despite Dinstein's argument, it is unclear if terrorist attacks committed by an armed group that are *not* attributable to a State would satisfy the requirement of an "armed attack" for the purposes of invoking the State's right to use armed force in the territory of the territorial State in self-defence; see *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] I.C.J. Rep. 5 at paras. 143-47 (The Court "ha[d] no need to respond to the contentions... as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces" at para. 147); see also Tatiana Waisburg, "Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors" *ASIL Insights* (22 August 2008), ASIL online: American Society of International Law <<http://www.asil.org/insights080822.cfm>>.

114 See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, UN GAOR 60th Sess. UN Doc. A/Res/60/147 (2006).

this article, the apparent willingness of some States to engage in this practice—with and without the apparent consent of the territorial State—ensures that the legality of such acts will remain an important and highly contested issue.

B. Targeted Killings Under International Humanitarian Law

1. The Status of Individual Terrorists: Combatants or Civilians?

As seen above, IHL affords significant protection to civilians during times of armed conflict. This protection, however, is limited. Under IHL, when civilians participate in an armed conflict, they lose their protection from being lawful targets of attack. When civilians lose this protection has been the subject of vigorous debate in the context of transnational terrorism.¹¹⁵ Although civilians lose their protected status by directly participating in hostilities, they do not automatically become “combatants” for the purposes of IHL. The *Geneva Conventions* and *Additional Protocols* define combatant status in the context of international (i.e., State-to-State) armed conflicts.¹¹⁶ Combatants in such conflicts have the specific right to participate directly in hostilities, and enjoy the protections of a prisoner-of-war [POW] if they fall into the hands of the opposing party.¹¹⁷ To promote the protection of civilians, combatants are generally required to distinguish themselves from the civilian population; therefore, persons failing to meet these requirements would not be considered combatants under IHL.¹¹⁸ During non-international armed conflicts, the armed forces of a State that is party to an armed conflict are considered combatants for the purposes of distinction. As combatants, members of the armed forces are lawful targets of attack and have the right to engage in hostilities without the risk of prosecution for actions that remain within the bounds of IHL because such acts would not be contrary to

115 See *Targeted Killings*, *supra* note 4 at paras. 31–40 and the authorities referred to therein; see also ICRC, “Interpretive Guidance on the Notion of Direct Participation under International Humanitarian Law” (2008) 90 Int’l Rev. Red Cross 991 [ICRC, “Direct Participation”].

116 See *API*, *supra* note 52 (“combatants” are members of the armed forces of a party to a conflict (other than medical personnel and chaplains), who “have the right to directly participate in hostilities”, art. 43(2)).

117 *Ibid.*, arts. 43(2) and 44(1); see Henckaerts & Doswald-Beck, *supra* note 53 (Prisoner of war status does not exist in non-international armed conflicts at 395).

118 There is a contested exception to this requirement where the nature of the hostilities prevent combatants from distinguishing themselves; see *API*, *supra* note 52, art. 44(3) (“Even in such circumstances, combatants are required to carry their arms openly during: (a) each military engagement, and (b) such time as the combatant is visible to the adversary while the combatant is engaged in a military deployment preceding the launching of an attack in which the combatant is to participate”, art. 44(3); however, this “is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict”, art. 44(4)). This restriction applies as customary law to international armed conflicts; see Henckaerts & Doswald-Beck, *supra* note 53 at 384, “rule 106” (Although they lose their entitlement to POW status upon capture and related benefits of combatancy, combatants who fail to distinguish themselves are still entitled to the fundamental guarantees of customary IHL applicable during armed conflict, including the right to a fair trial: “Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right of prisoner-of-war status”, “rule 100” at 389).

domestic law. The situation with respect to non-State actors is unclear because they cannot be considered armed forces of a State.¹¹⁹ The ICRC has recently recommended an interpretation of IHL that would dispel some of the uncertainty regarding non-State actors without granting them traditional combatancy status: "In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities."¹²⁰ Historically, the denial of combatant status to non-State actors party to an armed conflict with a State is predicated on the unwillingness of States to accord legitimacy to such groups by recognizing their status as "lawful" combatants.¹²¹ Without such status, non-State actors cannot claim POW status if apprehended (during an international armed conflict), cannot lawfully engage in combat, and may be liable for prosecution as a result of their participation.¹²²

The question remains whether, and when, non-State actors engaged in an armed conflict with a State may be lawfully targeted.¹²³ It is generally accepted that there are two legal statuses of persons under IHL: civilian or combatant.¹²⁴ Some commentators and States have argued that there should be a third category of "unlawful" or "unprivileged" combatants outside of the scope of IHL, who may be lawfully targeted for the duration of the conflict, but are not entitled to the benefits of combatancy.¹²⁵ Sitting as the High Court of Justice, the Israel Supreme Court recently held that customary international and treaty law does not support this position.¹²⁶ In light of the fact that such persons cannot be considered "combatants," members of non-State terrorist organizations who engage

119 See *ibid* ("[State] practice is not clear as to the situation of members of armed opposition groups. Practice does indicate, however, that persons do not enjoy the protection against attack accorded to civilians when they take a direct part in hostilities" at 12).

120 ICRC, "Direct Participation," *supra* note 115 at 995 and 1006-09.

121 See e.g. Green, *supra* note 57.

122 Although not benefiting from combatancy status, such persons are not without protection under IHL. If in the power of the opposing party, such individuals would retain rights as persons *hors de combat*, which are protected as "fundamental guarantees" under customary IHL including the rights to humane treatment, not to be subject to torture, etc. See Henckaerts & Doswald-Beck, *supra* note 53 at 299 and on. Although the subject of the precise rights available to detained non-State actors who have engaged in hostilities with a State in the context of transnational terrorism is an important issue, it will not be examined in this article.

123 Confusion may arise regarding their legal status due to the use of the term "combatant" to describe such individuals; see e.g. Henckaerts & Doswald-Beck, *supra* note 53 ("Persons taking a direct part in hostilities in non-international armed conflicts are sometimes labelled 'combatants'.... However, this designation is only used in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians" at 12).

124 *Targeted Killings*, *supra* note 4.

125 See e.g. *ibid*. ("In the oral and written arguments before us, the State [of Israel] asked us to recognize a third category of persons, that of unlawful combatants. These are people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war" at para. 11).

126 See *ibid*. at para. 28, citing Antonio Cassese, *International Law*, 2d (New York: Oxford University Press, 2005) at 408 and 470.

in a conflict with a State may be best understood as civilians directly participating in hostilities,¹²⁷ or, as the ICRC has recently recommended, members of the armed force of the non-State actor that is party to the conflict. Rather than being legally classified as an unprivileged combatant, only the person's status as a unlawful target of attack is lost for the duration of their participation: "[such a person] is a civilian who is not protected from attack as long as he [or she] is taking a direct part in hostilities."¹²⁸ Following similar reasoning, the ICRC rejects the claim that there is a legal gap resulting in "a third category of persons affected by or involved in international armed conflict who are outside of IHL protection."¹²⁹

2. The Limited Nature of Civilian Status

As noted above, civilians must refrain from directly participating in hostilities, or they will lose their protection from being targets of attack and cannot claim the privileges of combatancy.¹³⁰ The requirement of the Additional Protocols that "[c]ivilians shall enjoy the protection afforded by [the relevant provisions] **unless and for such time as they take a direct part in hostilities**,"¹³¹ is considered reflective of customary law.¹³² When direct participation in hostilities begins and ends is extremely important, as it will determine when States can lawfully target civilians—including non-State actors—who participate in an armed conflict.¹³³ However, "direct participation" and "for such time" remain undefined.¹³⁴ In light of the uncertainty, whether a person is a lawful target must be determined case-by-case;¹³⁵ however, as discussed below, some general principles may assist in making such determinations.¹³⁶

127 See *ibid.* (They may be considered "uncivilized civilians" at para. 2, Vice President Rivlin, concurring).

128 *Ibid.* at para. 26.

129 ICRC 2003 Report, *supra* note 11 at 9.

130 *Ibid.* at 9-10.

131 *API*, *supra* note 52, art. 51(3) and *APII*, *supra* note 52, art. 13(3) [emphasis added].

132 This applies to both international and non-international armed conflicts; see Henckaerts & Doswald-Beck, *supra* note 53 at 20; *Geneva Convention IV*, *supra* note 51 (the protections of Common Article 3 apply to "persons taking no active part in hostilities," art. 3); see Michael N. Schmitt, "'Direct Participation in Hostilities' and 21st Century Hostilities" in Horst Fisher *et al.*, eds., *Crisis Management and Humanitarian Protection* (Berlin: BWV, 2004) 505 at 523, online: Michael N. Schmitt <<http://www.michaelschmitt.org/images/Directparticipationpageproofs.pdf>> ("Although Common Article 3 and Protocol II employ different terminology... the International Criminal Tribunal for Rwanda has reasonably opined in the Akayesu judgment that the terms ["direct" and "active" participation] are so similar they should be treated synonymously" at 507).

133 Henckaerts & Doswald-Beck, *ibid.* at 21.

134 See Schmitt, "Direct Participation", *supra* note 132 ("the nature of the requisite direct participation in hostilities, whether in international or non-international armed conflict, is often uncertain when applied to specific cases" at 507); ICRC 2003 Report, *supra* note 11 ("the notion of direct participation is a legal issue that merits further reflection and study, as well as an effort to arrive at proposals for clarification of the concept" at 10).

135 See Schmitt, *ibid.* at 508.

136 For a summary and discussion of the ICRC's recommendations on the meaning of direct participation in hostilities following a five-year expert consultative process, see ICRC, "Direct Participation", *supra* note 115.

To determine when civilians may lose their immunity, it is necessary to identify what constitutes “hostilities.” As the Israel Supreme Court noted, “the accepted view is that ‘hostilities’ are acts which by nature and objective are intended to cause damage to the [opposing party].”¹³⁷ The ICRC Commentary to the *Additional Protocols* supports this finding: “Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”¹³⁸ Significantly, “hostilities” are not confined solely to harmful acts against the army or the State: “It also applies to hostilities against the civilian population of the state.”¹³⁹ Such activity is widely accepted to include using weapons, gathering intelligence, and preparing for hostilities;¹⁴⁰ the use of a weapon is not necessary.¹⁴¹

Requiring civilians to refrain from taking a direct part in hostilities indicates that civilians who indirectly participate are not lawful targets. As such, the meaning of direct participation is important, especially for determining the lawfulness of targeting the leadership of terrorist organizations who may be directing terrorist attacks, but not committing them personally. As noted above, there is no clear definition of what constitutes such direct participation.¹⁴² The ICRC Commentary to *API* discusses direct participation, and notes that it “implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs.”¹⁴³ This requirement is also found in the Commentary to *APII*, suggesting that a causal relationship is necessary in both international and non-international armed conflicts.¹⁴⁴ In *Targeted Killings*, the Court determined that, “a civilian bearing arms (openly or concealed)... on his way to the place where he will use them against the enemy, at such place, or on his way back from it, is a civilian taking an ‘active part’ in

137 *Targeted Killings*, *supra* note 4 at para. 33.

138 Yves Sandoz *et al.*, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC: Geneva, 1987) at para. 1348 at para. 1942 [Additional Protocols Commentary].

139 *Targeted Killings*, *supra* note 4 at para. 33.

140 *Ibid.* See also, ICRC 2003 Report, *supra* note 11 (In light of widespread uncertainty regarding direct participation, the ICRC organized a seminar with IHL experts in an effort to clarify the concept. There was a broad consensus among the attending experts that “civilians attacking or trying to capture members of the enemy’s armed forces or their weapons, equipment or positions, or laying down mines or sabotaging lines of military communication should be considered directly participating in hostilities,” Annex I at 28).

141 See e.g. Additional Protocols Commentary, *supra* note 138 (“It appears that the word ‘hostilities’ covers not only the time that the civilian actually makes use of the weapon, but also... the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon” at para. 1943).

142 See e.g. *Targeted Killings*, *supra* note 4 (“It seems accepted in the international literature that an agreed upon definition of the term ‘direct’ in the context under discussion does not exist” at para. 34); see Henckaerts & Doswald-Beck, *supra* note 53 (“It is fair to conclude... that a clear and uniform definition of direct participation has not been developed in state practice” at 23).

143 Additional Protocols Commentary, *supra* note 138 at para. 1679.

144 *Ibid.* (“The notion of direct participation in hostilities implies that there is a sufficient causal relationship between the act of participation and its immediate consequences” at para. 4787). See Schmitt, “Direct Participation”, *supra* note 132 (“Direct participation... seemingly requires a ‘but for’ causation and causal proximity to the foreseeable consequences of the act” at 508).

the hostilities,” while the same cannot be said of a civilian who only “generally supports the hostilities.”¹⁴⁵ Accordingly, a civilian who sells goods to, expresses sympathy for the cause of, or fails to act to prevent an attack by one of the armed parties to a conflict would be only indirectly participating because these acts do “not involve acts of violence which pose an immediate threat of actual harm to the adverse party.”¹⁴⁶ Between these extremes is a range of activity subject to competing interpretations. Michael N. Schmitt favours a liberal approach:

One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in the conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted.¹⁴⁷

Although such an interpretation may have persuasive value because it could encourage the maintenance of the distinction between civilians and combatants, care must be taken to not erode the protected status of civilians. In contrast, Antonio Cassese argues that a narrow interpretation is necessary because it “is linked to the *need to avoid killing innocent civilians*.”¹⁴⁸ Mindful of these divergent views, the Israel Supreme Court held that direct participation should include: collecting intelligence on the opposing party; transporting individuals who are taking a direct part in the hostilities; and operating, supervising or servicing weapons the parties use.¹⁴⁹ The Court also considered that a civilian driving a vehicle carrying ammunition should be seen as taking a direct part in hostilities, while indirect participation includes aiding a party by “general strategic analysis;” and supporting a party logistically, monetarily, or generally.¹⁵⁰ Significantly, the Court also held that leadership activities would constitute direct participation:

We have seen that a civilian causing harm to the army is taking ‘a direct part’ in hostilities. What says the law about those who enlist him to take a direct part in the hostilities, and

145 *Targeted Killings*, *supra* note 4 at para. 34.

146 *Ibid.*

147 Schmitt, “Direct Participation”, *supra* note 132 at 509.

148 Cited in *Targeted Killings*, *supra* note 4 at para. 34 (emphasis in original).

149 *Ibid.* para. 35.

150 *Ibid.* Although the Court’s holding was framed with respect to the activities of the non-State actors under consideration, it has implications for the armed forces of the State as well. The long-standing lack of consensus regarding direct participation is due in large part to civilian involvement in the war effort; in light of the Court’s willingness to interpret direct participation somewhat broadly, it would be prudent for State armed forces to ensure that civilians do not perform the functions noted above.

those who send him to commit hostilities? Is there a difference between his direct commanders and those responsible for them? Is the 'direct' part taken only by the last terrorist in the chain of command, or by the entire chain? In our opinion, the 'direct' character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take 'a direct part'. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active).¹⁵¹

In light of the causal relationship arguably required for direct participation, considering leading, commanding, planning, and enlisting as direct participation is supportable; in most cases, "but for" such actions, the hostile acts under question would not occur, while the harm arising from the acts is not only reasonably foreseeable, it is intended. Also supporting this interpretation is the fact that considering individuals engaged in leadership or planning activities to be lawful targets of attack could act as a disincentive for engaging in such activity.¹⁵² The above interpretation may also be consistent with the recent recommendations of the ICRC on the meaning of direct participation in hostilities, as it would satisfy its "cumulative criteria" of: (i) threshold of harm; (ii) direct causation; and, (iii) a belligerent nexus.¹⁵³

3. Duration of Participation and Avoiding the Revolving Door of Combatancy

According to both Additional Protocols, civilians lose their immunity from attack "for such time" as their direct participation lasts.¹⁵⁴ The duration of participation is a crucial issue because it is a key feature of a civilian's protection from attack. In contrast, combatants (i.e., members of a State's armed forces) remain lawful targets of attack for the duration of an armed conflict, regardless

151 *Ibid.* at para. 36.

152 This may also mirror the status of the military commanders in a State's armed forces, as they are lawful targets of attack during an armed conflict regardless of their location on the battlefield or outside of the field of conflict (it should be noted, however, that civilian political leaders who authorize the mission may not necessarily be considered lawful targets); see Green, *supra* note 57 at 169-70.

153 See ICRC, "Direct Participation," *supra* note 115 ("In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: 1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)" at 995-96).

154 This applies to both international and non-international armed conflicts; see *API*, *supra* note 52, art. 51(3) and *APII*, *supra* note 52, art. 13(3).

of whether they are directly participating in hostilities. In *Targeted Killings*, Israel argued that the temporal aspect of the loss of civilian immunity from attack was not part of customary international law and, as such, a third category of unlawful combatant exists and such persons could, as a party to the armed conflict, be lawfully targeted for the duration of the hostilities.¹⁵⁵ The Court rejected this argument, holding that the temporal condition forms part of customary international law that was binding despite the fact that Israel has not ratified *API*.¹⁵⁶ Given the fact that *API* has not been universally ratified, this finding is significant. Although it imposes greater restrictions on the targeting of suspected terrorists, it is argued that maintaining this temporal requirement is supportable because it would restrict the ability of States to target suspected terrorists only when they pose a continuing threat to the State, and is consistent with Common Article 3 to the *Geneva Conventions*, which protects “persons taking no active part in the hostilities.”¹⁵⁷ If suspected terrorists remained subject to lawful targeting even when their participation has definitively ceased, Common Article 3, which represents customary international law, may be undermined. It is also argued that relaxing the rules of targeting to the extent proposed by Israel in *Targeted Killings* would increase the threat to the innocent civilian population in which the suspected terrorist is based, which strengthens the argument for restricting lawful targeting.

Despite the customary status of the duration of participation requirement, there may be some flexibility within the meaning of “for such time.” A literal interpretation would require an individual’s direct participation in hostilities at the moment the State attacks. The ICRC Commentary could support this approach, as it provides that direct participation includes “preparations for combat and return from combat,” but notes that, “[o]nce he ceases to participate, the civilian regains his right to the protection.”¹⁵⁸ Many commentators are con-

155 *Targeted Killings*, *supra* note 4 at paras. 11-12.

156 *Ibid.* (The Court rejected Israel’s argument that the only customary provision of art. 51(3) was the requirement to take a direct part in hostilities and the “for such time” clause did not reflect customary IHL: “all of the parts of article 51(3) of the First Protocol express customary international law” at para. 30).

157 The ICJ has recognized that the provisions of Common Article 3 represent a “minimum yardstick” applicable to both international and non-international armed conflicts; see *Nicaragua*, *supra* note 21 (“[Common] Article 3... defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which also apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’ [and were held to form part of customary law applicable to international armed conflicts in *Corfu Channel*]” at para. 218).

158 Additional Protocols Commentary, *supra* note 138 at paras. 1943 and 1944; see Schmitt, “Direct Participation”, *supra* note 132 at 510. The ICRC has recently confirmed its continued recommendation of this interpretation of the duration of direct participation, see ICRC, “Direct Participation”, *supra* note 115 (“Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of the act” while “civilians lose protection against direct attack **for the duration of each specific act amounting to direct participation in hostilities**” at 996. [emphasis added]).

cerned that a narrow interpretation could create a “revolving door” of combatancy, whereby protected status is regained once a specific act of direct participation ends, despite the fact that the individual may be determined to commit future—and potentially already planned—attacks. In light of this possibility, Schmitt asks: “Can an individual be a guerrilla by night and a farmer by day? Do [civilians engaged in hostilities] regain their immunity from direct attack whenever they successfully return from an operation, only to reenter the fray at a later time?”¹⁵⁹

As noted above, the ICRC has recently refined its recommendations on the temporal scope of loss of protection, proposing that members of organized non-State armed groups would lose protection “for as long as they assume their continuous combat function.”¹⁶⁰ Although this recommendation may clarify the status of members of such armed groups, it does not resolve the existence of the “revolving door” for loosely organized non-State actors. Given, however, that such individuals would retain their civilian status, it may be that the revolving door is unavoidable. As the ICRC notes, this result may also be desirable:

The revolving door of civilian protection is an integral part, not a malfunction, of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat. In contrast to members of organized armed groups, whose continuous function it is to conduct hostilities on behalf of a party to the conflict, the behaviour of individual civilians depends on a multitude of constantly changing circumstances and, therefore, is very difficult to anticipate.¹⁶¹

The ICRC further notes that this difficulty is an acceptable price to pay to ensure the protection of the innocent civilian population:

Although the mechanism of the revolving door of protection may make it more difficult for the opposing armed forces or organized armed groups to respond effectively to the direct participation of civilians in hostilities, it remains necessary to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis.¹⁶²

In contrast, Schmitt argues that the underlying humanitarian purpose of IHL would not permit a revolving door because it would expose the entire civilian population to greater danger, as combatants faced with repeated attacks by civil-

159 Schmitt, *ibid.*

160 ICRC, “Direct Participation”, *supra* note 115 at 1034.

161 *Ibid* at 1034.

162 *Ibid.* at 1034-35.

ians who “opt in and opt out of hostilities” would “lose respect for the law.”¹⁶³ According to Schmitt, the only practical approach during an armed conflict is that, “[o]nce an individual has opted into the hostilities, he or she remains a valid military target until unambiguously opting out,” which could “occur through extended non-participation or an affirmative action of withdrawal.”¹⁶⁴ He argues that this would deter participation, as “the greater [a person’s] susceptibility to attack, the greater the incentive to stay out of the conflict.”¹⁶⁵ Schmitt’s position may be persuasive if it prevents the erosion of the principle of distinction and encourages civilians to not participate in hostilities. Normatively, it could be argued that non-State actors engaged in armed conflict should not be able to use the fact that the law does not provide a clear answer with respect to their status to enjoy more benefits than combatants. However, care must be taken to avoid eroding both the protections innocent civilians enjoy and the textual provisions of IHL treaties; Schmitt’s proposal would effectively substitute unambiguous renunciation of direct participation for the requirement of “for such time,” which would give States more freedom to target civilians who participate in hostilities. Since this would result in a greater risk of harm to innocent civilians, such a change in the law may be imprudent.

A key factor in resolving the meaning of “for such time” is the nature of a person’s participation in hostilities. Two extremes are possible. In one, a person takes a direct part during a single instance or only sporadically. In the other, a person joins an armed group and as a member of such a group commits a chain of hostilities with short periods of time between acts. In the former situation, the Israel Supreme Court held in *Targeted Killings* that such a person, “starting from the time he detached himself from that activity, is entitled to protection from attack”, while in the latter, the person “loses his immunity from attack **‘for such time’ as he is committing the chain of acts**... regarding such a civilian, the rest in between hostilities is nothing other than preparation for the next hostility.”¹⁶⁶ This conclusion largely mirrors the recent recommendation of the ICRC, as its interpretation of the law would permit targeting members of non-State armed groups who are continuously engaged in hostilities. It is argued that this approach is superior to requiring an individual to signal that he or she has opted out of hostilities to regain protection from attack, as it may be more compatible with the meaning of “for such time” by requiring a person to be committing a chain of attacks to remain a lawful target.

It has also been argued that membership in a non-State group that is party to an armed conflict could be sufficient participation for a person to lose immunity from attack—for such time as a person is a member in a group, this would constitute direct participation.¹⁶⁷ Kretzmer adopts this position, arguing

163 *Ibid.* at 1035.

164 *Ibid.*

165 *Ibid.*

166 *Targeted Killings*, *supra* note 4 at para. 39 (emphasis added).

167 ICRC 2003 Report, *supra* note 11 (This issue was discussed at the ICRC seminar, and the general consensus among experts was that, in international armed conflicts, “such an approach could not be justified either on the basis of the plain language of the Geneva Conventions or of Additional Protocol I, nor on the legislative history of the relevant provisions.” The situation

that membership in the military wing of such a group should determine combatancy, rather than individual actions.¹⁶⁸ Such an approach, however, creates a clear risk that civilians who are not directly participating in hostilities would lose their immunity from attack, contrary to IHL. In light of the potential for this to undermine the rights of innocent civilians, it is argued that requiring an individual to commit a chain of hostile acts while being a member of a non-State armed group is a more appropriate approach than basing lawful targeting on membership alone.¹⁶⁹ As Melzer argues, this “functional membership approach” is appropriate because it “seems to most accurately reflect the logic, intent and text of IHL.”¹⁷⁰ It also restricts the definition of civilians—and thereby those individuals to whom the revolving door is available—to “only armed actors whose direct participation in hostilities is unorganized, spontaneous or sporadic in nature.”¹⁷¹

When undertaking targeted attacks during an armed conflict, the State will remain bound by the fundamental principles of IHL that protect the rights of innocent civilians (e.g., distinction, proportionality, and the requirement to take precautions in their attacks). Targeted attacks are further constrained because civilian status is presumed where there is doubt regarding the person’s status; therefore, verification of status through reliable evidence is required before an attack.¹⁷² The Israel Supreme Court has noted that the law requires that the

was determined to be “less clear” during non-international armed conflicts, as “some experts underscored that there were additional legal arguments and practical justifications that could be used to sustain a collective approach in this context,” and “suggested that... membership in a military organization could result in loss of immunity from attack as long as the organization functioned like a military units” Appendix I at 33).

168 Kretzmer, *supra* note 29 (He argues that targeting could be based on four factors: (i) past practices of the group; (ii) if the group has articulated goals that suggest a long-term conflict with the State; (iii) if contemporary events have relaxed or exacerbated tensions; and (iv) if intelligence information suggesting that an operation is being planned at 193-94). Although these criteria may reflect an interpretation of what “armed forces” may mean in the context of non-international armed conflicts, this proposal has implications on the meaning of “direct participation” and “for such time,” as it would effectively remove these requirements for making civilians lawful targets of attack.

169 This position is also consistent with the recommendation of the ICRC that members or organized non-State armed groups be engaged in a “continuous combat function” to be a lawful target; see ICRC, “Direct Participation,” *supra* note 115. For a detailed discussion of the “functional membership” approach, see Melzer, *supra* note 10 at 350-53.

170 Melzer, *ibid.* at 352.

171 *Ibid.* at 353.

172 See *API*, *supra* note 52 (“In case of doubt whether a person is a civilian, that person shall be considered to be a civilian”, art. 50(1)); Henckaerts & Doswald-Beck, *supra* note 53, “rule 6” (“when there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious” at 24). Identifying a requisite standard of proof is difficult, as it would likely depend upon the circumstances; however, the Court in *Targeted Killings* noted that the burden is “heavy”; see *Targeted Killings*, *supra* note 4 at para. 40; see also Kretzmer, *supra* note 29 (“As there is always a risk that the persons attacked are not in fact terrorists, even in such a case lethal force may be used against the terrorists only when a high probability exists that if immediate action is not taken another opportunity will not be available to frustrate the planned terrorist attacks” at 203).

State target a civilian only where there is credible evidence of active participation: "Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities."¹⁷³ As Cassese notes, this requirement is necessary to ensure the fundamental protection civilians enjoy from attack:

[I]f a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into question and the whole body of law relating to armed conflict would eventually be eroded.¹⁷⁴

Significantly, the Court also held that, even during an armed conflict, a State may only use lethal force against a civilian suspected of participating in hostilities if there are no less harmful means available.¹⁷⁵ Since Israel is an occupying power exercising control over the territory in which it engages in the targeted attacks at issue in *Targeted Killings*,¹⁷⁶ this requirement (ie. to pursue available less harmful means) may be more easily satisfied in that case. It may be less likely, however, that a State targeting suspected terrorists in the territory of another State would be able to detain, arrest, and try suspected terrorists. As such, without the assistance or co-operation of the territorial State, the State using force against a suspected terrorist based in another State could argue that it had no choice of means. Where the State has targeted a civilian, it may also be required to undertake or submit to an independent investigation, and pay compensation when it unlawfully harms an innocent civilian or its actions amount to a serious violation of IHL.¹⁷⁷ Although the requirements outlined above would limit the ability of States to use lethal force against suspected terrorists, it is argued that these requirements are not only consistent with the customary understandings of IHL, but reflect the continued applicability of IHRL during times of armed conflicts and respect for the right to life.

173 *Targeted Killings*, *ibid.*, citing *Ergi v. Turkey*, 32 EHRR 388 (2001).

174 Cited in *Targeted Killings*, *ibid.*

175 *Ibid.* ("Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed... Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force" at para. 40).

176 *Ibid.* at paras. 18 and 40.

177 See *Basic Principles and Guidelines*, *supra* note 114; see also *ibid.* ("after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the identification of the target and the circumstances of the attack upon him is to be performed (retrospectively). That investigation must be independent.... In appropriate cases it is appropriate to pay compensation as a result of harm caused to an innocent civilian" at para. 40); see also, Helen Duffy, *The "War on Terror" and the Framework of International Law* (New York: Cambridge University Press, 2005) at 310.

VI. CONCLUSION

Targeted killings of suspected terrorists will remain controversial outside of and during armed conflicts. In order to ensure the adequate protection of civilians, it is argued that the stringent requirements of IHRL for the use of lethal force outside of armed conflicts must be maintained. In the context of armed conflicts, the revolving door of combatancy should be avoided in a manner that attempts to ensure that only persons directly participating in hostilities are lawful targets of attack. It is recognized that, to some extent, the revolving door cannot be avoided because an individual who has ceased to directly participate could decide to re-engage in hostilities. It is undeniable that accepting the literal meaning of “for such time” as the basis for targeting civilians who take a direct part in hostilities would ensure the maximum protection for innocent civilians because there can be no doubt about such a person’s status and it would severely limit a State’s ability to undertake such targeted attacks. When, however, a non-State armed group is sufficiently organized to be identifiable as a party to an armed conflict, it may be justified to adopt a somewhat more liberal interpretation in order to avoid the revolving door of combatancy. Membership and ongoing direct participation in the activities of the military wing of an organized non-State group that is party to a conflict may be useful for determining a person’s status and represent a balance between military necessity and the rights of innocent civilians.

It must be stressed that, in all circumstances, the State cannot act on suspicion alone: outside of armed conflicts, its use of lethal force must be absolutely necessary and meet the stringent requirements of IHRL, while it cannot target a person during an armed conflict where the person’s status as a lawful target is in doubt. Unless the requirements outlined above are met when a State targets suspected terrorists, the legal protections innocent civilians enjoy could be severely undermined. In the end, a person’s status must be determined on a case-by-case basis; in all cases, the law requires the State to have reasonable grounds—based on reliable evidence—to believe that an individual is a lawful target and to make this determination in good faith.

It is apparent that international law provides substantial protection for the rights and lives of innocent civilians. This protection, however, is only as strong as the adherence of States—and non-State actors—to their legal obligations. The International Commission of Jurists’ assessment of the reaction of States to the threat of transnational terrorism is blunt:

Terrorism sows terror, and many States have fallen into a trap set by the terrorists. Ignoring lessons from the past, some States have allowed themselves to be rushed into hasty responses, introducing an array of measures which are undermining cherished values as well as the international legal framework carefully evolved over at least the last half-century.¹⁷⁸

178 International Commission of Jurists, Report, *supra* note 8 at 159.

In light of the fact that customary international law is developed by State practice, violations of IHL and IHRL should attract international condemnation. States should not tolerate breaches of IHL or IHRL simply because it is difficult to “fight” terrorism. As the Commission notes, “[t]he damage done [since September 11, 2001] to the rule of law must be repaired and the importance and value of upholding international humanitarian law and human rights law during all armed conflicts [and presumably outside of armed conflicts as well] must be re-affirmed.”¹⁷⁹ If States endorse or acquiesce to tactics that do not respect the rule of law and the rights of individuals, the risk of harm to innocent civilians may be grave. Maintaining stringent restraints on the use of lethal force by States against suspected terrorists could also increase the incentive for States to explore other means to combat the threat of terrorism, while they retain the right to use lethal force when the requirements of the law are met. At a minimum, States should protest breaches of IHRL and IHL that occur during the fight against transnational terrorism. Ideally, States would be held accountable for their breaches of the law.¹⁸⁰ If States prevent and react to the threat of transnational terrorism in ways that respect international law and the rights of individuals, it is hoped that the destabilizing effects of terrorism may be minimized. The importance of ensuring the protection of innocent civilians and respect for the rule of law may be underscored by the words of Sergio Vieira de Mello, the late UN High Commissioner for Human Rights who died in a terrorist attack: “I am convinced that the best—the only—strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law.”¹⁸¹

179 *Ibid.* at 160.

180 See *Right for a Remedy and Reparation*, *supra* note 114.

181 Qtd. in Schmid, *supra* note 72.