Human Rights and the War Against International Terrorism: A War Without Rights?

by

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Abstract

The United States has justified targeted killing operations against suspected terrorists as a legitimate tool in the war against terrorism. In response to international criticism that a November 2002 targeted killing operation in Yemen violated human rights standards, the US asserted that the right to life was suspended during war. While this assertion is prima facie incorrect, many legal experts, scholars and authors agree in principle that a military response to international terrorism – along with the concomitant dilution of the right to life – is not only appropriate, but also complies with international law. However, the modern jus ad bellum limit the circumstances in which a state may lawfully resort to armed force. A fulsome understanding of international humanitarian law and the characteristics of groups such as Al Qaeda reveals that international law does not permit states to employ their military forces to respond to the international crime of international terrorism.
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Introduction

On 3 November 2002, a CIA-controlled Predator unmanned aerial vehicle (a “UAV”) fired a single Hellfire missile at a vehicle travelling in the province of Marib, Yemen. The vehicle belonged to one of the passengers, Mr. Ali Qaed Senyan al-Harithi, a Yemeni citizen and suspected member of the international terrorist organization Al Qaeda. Mr. al-Harithi had been linked to the terrorist attack against the U.S.S. Cole in October 2002 off the coast of Aden, a port city in Yemen. Five other people accompanied Mr. al-Harithi that day, one of whom, Ahmad Hijazi, was an American citizen. The targeted attack against Mr. al-Harithi and the five other individuals caused instant death. Although the United States government at first denied participating in the attack, White House Press Secretary Ari Fleischer eventually acknowledged the US-led operation, explaining that the United States was involved in “a different kind of war with a different kind of battlefield”. United States Deputy Defense Secretary Paul Wolfowitz praised the targeted strike against Mr. al-Harithi as “a very successful tactical operation”. Both officials justified the targeted attack against Mr. al-Harithi and his associates as a legitimate operation in the war against international terrorism. By contrast, Swedish Foreign Minister Anna Lindh called the attack “a summary execution that violates human rights”, and the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Asma Jahangir (the “Special Rapporteur”) described the attack as “truly disturbing”. Both Foreign Minister Lindh and the Special Rapporteur agreed that the attack against al-Harithi was not justifiable under the rules and customs of international human rights law (“IHRL”).

The type of attack against Mr. al-Harithi may be described as a “targeted killing” by a state authority. Other descriptors of the activity, including “assassination” and “extra-
judicial execution”, suggest an element of treachery or non-conformity with established rules and legal principles. Such an element colours the debate on the use of targeted killing as a potentially lawful and effective tool in the global war against terrorism. The term “targeted killing”, by contrast, offers a neutral term for a controversial state practise. Targeted killings that are relevant to international law have five cumulative elements in common: the application of lethal force; a deliberate and premeditated intent to kill; the targeting of a specific individual or group; the lack of physical custody over the targeted person or persons; and the attributability of the exercise of lethal force to a subject of international law, such as a state.5

The United States was not, of course, the first state to adopt targeted killing as a method of combating international terrorism. Israel, for example, “has openly pursued a policy of targeted killing since the second intifada of September 2000.”6 Russia and Pakistan have also engaged in the targeted killing of separatists, insurgents, et cetera, in their internal armed conflicts in Chechnya and the Northwest Frontier Region in Pakistan. Each of these states justifies its use of targeted killing as a necessary method of warfare in either an internal armed conflict (as in the cases of Russia and Pakistan), or as part of the global war on international terrorism. The Israeli High Court of Justice, for example, turned its mind to the international customary law of armed conflict when it considered the legality of Israel’s policy of targeted killing in the Palestinian Territories in the case The Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and Others.7 Today, many scholars and policy-makers have accepted that the global war against international terrorism and terrorist organizations is a de facto and de jure armed conflict, and that targeted killings are therefore justified operations against legitimate military targets.8 The difference in opinion between

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5 See, for example, N. Melzer, Targeted Killing in International Law (New York: Oxford University Press, 2008), at 3-4.
7 The Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and Others, [2006] HCJ 769/02
US officials Press Secretary Fleischer and Deputy Defense Secretary Wolfowitz, and Foreign Minister Lindh and the Special Rapporteur illustrates, however, that it is not entirely clear whether the apparent war against international terrorism is a true armed conflict recognized by international law.

The importance of concluding that the conflict with international terrorism is a war is reflected in the way in which states respond to terrorist acts, and also in how states address and target terrorist organizations. University of North Carolina Law Professor Mark Weisburd explains that “there is a significant difference between the treatment that the U.S. government would normally accord criminals and that permitted by the international law of war.” Intuitively, one can imagine the differences in approach that a state might take if it were at war, as opposed to the steps that same state might take in detecting, investigating and prosecuting an act of terrorism. Professor Weisburd observes that the characterization of hostile activities as warfare “determines, among other things, the circumstances in which deadly force may be used against [suspected terrorists] and in which they may be taken prisoner, the duration of any confinement to which they are subjected, and the rules which must be followed when such persons are interrogated.”

This paper explores the commonly-held position that the war against international terrorism and terrorist organizations – principally Al Qaeda and similar or affiliated groups – is a species of true warfare, which engages the rules and customs of the law of armed conflict, or international humanitarian law (“IHL”). Because the global war on terrorism is fought in many different theatres, the applicable law governing hostilities will depend on the intended target of an operation, and on other circumstances of the confrontation. It is therefore important to understand the differences that exist when discussing the war against international terrorism and other elements of the global war on terrorism, such as the international invasions of Afghanistan and Iraq, and the secessionist or insurgent conflicts in

10 For example, compare and contrast the American response to the 19 April 1995 Oklahoma bombing and the 11 September 2001 attacks.
areas such as Chechnya, Uzbekistan, Egypt, Pakistan, the Philippines and formerly in Sri Lanka. The domestic conflicts in Chechnya and Pakistan, for example, “seem to be straightforward jihads, like the former Afghan or Bosnian jihads as defined by [Shaikh Abdallah] Azzam. Likewise, many Muslims fighting in Central Asia seem to be fighting an internal insurgency, a simple domestic Salafi jihad rather than a global one.” By contrast, the ill-defined goals and practise of “target[ing] foreign governments and their populations, the ‘far enemy,’ in pursuit of Salafi objectives” by international terrorist organizations such as Al Qaeda, differ significantly from the secessionist or insurgent armed groups that seek to bring about a change in domestic politics. Moreover, international terrorist organizations differ from their secessionist or insurgent counterparts in terms of the degree of effective organization they possess, and the capacity to plan and execute sustained military operations. Because of these differences, which are explored in detail in this paper, a state of “armed conflict” within the meaning of IHL cannot exist between states and international terrorist organizations such as Al Qaeda.

In the absence of a state of armed conflict, the only applicable law to determine the legality of a state’s deprivation of an individual’s life is IHRL. IHRL operates to limit the behaviour of a state towards individuals. The paramount right to life, for example, restricts the use of lethal force to situations where an agent of the state has a reasonable belief in the likelihood of imminent harm. While this might seem to interfere with a state’s goal of addressing and eliminating terrorism, the failure to observe and respect IHRL exposes the absence of the rule of law. This is especially true in the case of targeted killing. The assertions by the United States and the Israeli High Court of Justice that IHL is the appropriate legal system by which to determine the legality of the use of lethal force therefore ignore and/or diminish the role and influence of IHRL.

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12 See, for example, M. Sagemen, Leaderless Jihad: Terror Networks in the Twenty-First Century (Philadelphia: University of Philadelphia Press, 2008), at 161-162, where the author observes that the “campaigns against dissidents” by states such as Russia, Uzbekistan and Egypt are “often perpetrated by putative allies [to the United States, et cetera] in the name of the ‘war against terror’”.

13 Shaikh Azzam (1941-1989) was a Mujahedin leader who fought against the Soviet occupation of Afghanistan. Shaikh Azzam’s interpretation of jihad focussed on reclaiming formerly Muslim land lost to non-Muslim governments.


15 M. Sageman, Understanding Terror Networks, supra, at 61.
Part I – Human Rights Law and Armed Conflict

The United States’ 22 April 2003 letter to the Special Rapporteur defended the practise of targeted killing as a legitimate tool in the war against terrorist organizations by explaining that a state of armed conflict exists between the United States of America and international terrorism. Describing Mr. al-Harithi, the principal target of the attack in Yemen in 2002, as a member of Al Qaeda and therefore an apparently legitimate military target, the United States asserted that the “conduct of a government in legitimate military operations, whether against Al Qaeda operatives or any other legitimate military target, would be governed by the international law of armed conflict.”

Moreover, the United States submitted that IHL was the only legal system applicable during armed conflict, denying the relevance of IHRL. “International humanitarian law,” asserted the United States, is the applicable law in armed conflict and governs the use of force against legitimate military targets. Accordingly, the law to be applied in the context of an armed conflict to determine whether an individual was arbitrarily deprived of his or her life is the law and customs of war.

...For the foregoing reasons, the Commission [on Human Rights] and Special Rapporteur lacks [Sic.] competence to address issues of this nature arising under the law of armed conflict.

The United States government therefore concluded that IHRL and the right to life were not applicable in its armed conflict with international terrorist organizations like Al Qaeda.

The Israeli High Court of Justice also viewed the war against terrorism through the lens of IHL. The Court’s 14 December 2006 decision on the legality of Israel’s targeted killing policy for suspected terrorists was in many ways groundbreaking. Dr. Nils Melzer,

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Legal Adviser to the International Committee of the Red Cross (the “ICRC”), explains that the case “represents the first case where a Court went beyond examining a concrete incident of State-sponsored targeted killing, and determined abstract conditions and modalities for the international lawfulness of such operations.”\(^\text{18}\) The Court characterized the armed confrontations between Israel and various terrorist groups operating in the Palestinian Territories as an international armed conflict.\(^\text{19}\) While the Court accepted that military necessity could sometimes justify the targeted killing of suspected terrorists, it also reaffirmed the importance of maintaining and promoting the rule of law: “Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with.”\(^\text{20}\) In this case, the law to which the High Court turned its attention was customary IHL. By applying the \textit{lex lata} of IHL, the Court determined that terrorists active within the Palestinian Territories were not combatants, but were instead civilians.\(^\text{21}\) As civilians, suspected terrorists were entitled to protection under IHL against direct attack from a state’s authorities, provided that they were not directly participating in terrorist acts or other hostilities.\(^\text{22}\) The Court found that customary IHL permitted the targeted killing of civilians who were suspected of terrorist activity, provided that several cumulative conditions were fulfilled: first, the identity of the targeted person(s) had to be verified; second, lethal force could not be applied against the target if a less harmful means, such as arrest, could be employed; third, a thorough investigation of the identity of the target and circumstances of the attack had to be conducted after the attack; and fourth, any collateral damage had to withstand IHL’s proportionality test, which prohibits the use of force “if the collateral damage caused... is not proportionate to the military advantage”.\(^\text{23}\) Ultimately, the Court concluded by neither banning nor affirming Israel’s policy of targeted killing, but instead ruled that the lawfulness of each operation depended on its unique circumstances.

\(^{18}\) N. Melzer, \textit{Targeted Killing in International Law}, supra, at 33.
\(^{21}\) \textit{Ibid.}, at para. 28.
\(^{22}\) \textit{Ibid.}, at para. 29.
\(^{23}\) \textit{Ibid.}, at para. 45. See also paras. 40, 41, 60.
While it “cannot be disputed that many of the Court’s findings represent a laudable reaffirmation, and at times progressive interpretation, of customary IHL”\textsuperscript{24}, it is noteworthy that the Israeli High Court of Justice’s analysis of the legality of targeted killing relies exclusively on IHL.\textsuperscript{25} Dr. Melzer writes that the “Court presumes without further explanation that targeted killings constitute a method of warfare and, consequently, limits its analysis to IHL regulating the conduct of hostilities.”\textsuperscript{26} Moreover, the Court’s conclusion that the Second Intifada is an international armed conflict “remains largely unsubstantiated and alternative approaches [such as the applicability of IHRL], though mentioned, are discarded without discussion.”\textsuperscript{27} Thus, Dr. Melzer writes: “many of the substantive conclusions, although based on academic literature and preceding case law, lack a proper assessment and discussion of the sources and applicable rules of international law and, therefore, remain unconvincing.”\textsuperscript{28}

\textit{The Interplay Between IHL and IHRL}

The United States’ 22 April 2003 letter to the Special Rapporteur and the Israeli High Court of Justice’s 14 December 2006 decision are similar, in that neither takes into account the rules and customs of IHRL. Indeed, the wholesale dismissal of the relevance of IHRL is illustrated by the United States’ assertion that neither the Special Rapporteur, nor the United Nations Commission on Human Rights, had jurisdiction to consider the legality of deprivations of life of apparent military targets during armed conflict by state authorities. The Israeli High Court of Justice’s silence on the applicability of IHRL in targeted killing operations strongly suggests that the Court either held a similar opinion, or that it failed to turn its mind to the issue of IHRL’s relevance and application. These oversights or denials expose a common misunderstanding of the interplay between IHL and IHRL during war.

\textsuperscript{24} N. Melzer, \textit{Targeted Killing in International Law}, supra, at 33.
\textsuperscript{26} N. Melzer, \textit{Targeted Killing in International Law}, supra, at 34.
\textsuperscript{27} Ibid., at 35.
\textsuperscript{28} Ibid.
In broad terms, IHRL operates to limit the power of states over individuals. Similar to IHL in its sources, IHRL is composed of both conventional treaties and customary law. The customs of IHRL place all states under an obligation to respect and ensure certain human rights – especially those that have reached the level of a peremptory norm, such as the right to life – regardless of whether a state has adopted a human rights treaty. The obligation is ongoing, and, subject to a few derogable rights found in international human rights treaties, demands compliance from all states, even during emergencies. Or, as the ICRC explains: “IHRL applies at all times, i.e. both in peacetime and in situations of armed conflict. However, some IHRL treaties permit governments to derogate from certain rights in situations of public emergency threatening the life of the nation.”

In addressing the role of IHRL during armed conflict, Professor Louise Doswald-Beck of the Graduate Institute for International Relations in Geneva explains that “It is now generally recognized, even by the most sceptical, that international human rights law continues to apply during all armed conflicts alongside international humanitarian law.”

In 1970, the United Nations General Assembly adopted Resolution 2675, which established basic principles for the protection of civilian populations during armed conflict. The resolution affirmed that “Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.”

In 1996, the International Court of Justice’s (the “ICJ”) Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, (the “Nuclear Weapons Opinion”) rejected the argument that IHRL’s right to life in the International Covenant on Civil and Political Rights

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29 See, for example, K. Parker & L.B. Neylon, “Jus Cogens: Compelling the Law of Human Rights” (1989) 12 Hastings International & Comparative Law Review, 411-463, in which the authors note at pages 413-414: “Most areas of great human rights concern – ... genocide, torture, violations of the right to life and the plight of refugees – are governed by jus cogens.” See also A.V. Ribeiro “Report on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief” (1987) U.N. Doc. E/CN.4/1987/35, where Special Rapporteur Ribeiro explains at paragraph 73 that the “right to life… is one of the rights universally recognized as forming part of jus cogens and entailing, on the part of States, obligations erga omnes towards the international community as a whole.”


(the “ICCPR”) “was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.”\textsuperscript{34} The ICJ concluded instead that:

The protection of the International Covenant of [Sic.] Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities.\textsuperscript{35}

The ICJ therefore concluded that the right to life under IHRL continues to operate during armed conflict. The ICJ recognized that states are under a continuing obligation to respect and ensure human rights, and that no state may ignore that duty with respect to non-derogable rights, such as the right to life. The ICJ therefore reaffirmed the universal and continuing applicability of IHRL during armed conflict.

The ICJ, however, qualified IHRL’s application by also explaining that “The test of what is an arbitrary deprivation of life... then falls to be determined by the applicable lex specialis, namely, the law applicable to armed conflict which is designed to regulate the conduct of hostilities.”\textsuperscript{36} This seemed to suggest that IHL could override a conflicting provision of IHRL during war, thus mitigating the application of certain human rights.

In 2006, the ICJ had an opportunity to revisit its comments from its Nuclear Weapons Opinion. In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory\textsuperscript{37} (the “Wall Opinion”), the ICJ explained that:

the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclu-

\textsuperscript{34} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, \textit{supra.}, at para. 24.\textsuperscript{35} \textit{Ibid.}, at para. 25.\textsuperscript{36} \textit{Ibid.}, at para. 25.\textsuperscript{37} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] I.C.J. Reports, 136-203.
sively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.\(^{38}\)

Thus, the ICJ clarified the complementary relationship between IHL and IHRL. As Mr. Noam Lubell, Senior Researcher at the University of Essex’s Human Rights Centre, writes:

> While the [ICJ], in its Nuclear Weapons advisory Opinion, did state the applicability of human rights law, the use of the term *lex specialis* might have been construed as support for a claim that whereas human rights law then does not disappear, it nevertheless is in effect displaced by [IHL].

> The more recent Advisory Opinion on the Wall, together with the views of UN human rights bodies, have clarified that human rights law is not entirely displaced and can at times be directly applied in situations of armed conflict. While there might still be pockets of resistance to this notion, it is suggested here that the resisters are fighting a losing battle and should lay down their arms and accept the applicability of human rights law in times of armed conflict.\(^{39}\)

Ms Cordula Droege, Legal Adviser to the Legal Division of the ICRC therefore concludes:

> In general, one can say that the expansion of the scope of application of human rights law, combined with the monitoring machinery and individual complaints procedures existing in the human rights system have lead [*Sic.*] to the recognition that human rights, by their nature, protect that person at all times and are therefore relevant to and apply in situations of armed conflict. Further, human rights and humanitarian law share a common ideal, protection of the dignity and integrity of the person, and many of their guarantees are identical....\(^{40}\)

> While it is apparent that IHRL continues to operate in regulating state behaviour during armed conflict, it is necessary to establish in the context of the war against international terrorism whether IHRL works in concert with IHL as a complementary legal system, or whether it enjoys exclusive application. In the case of targeted killing as a tool

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\(^{38}\) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra*, at para. 106.


against independent, international terrorist organizations, the lawfulness of an attack will 
depend upon which legal system – IHL or IHRL – operates to govern the circumstances.

**Part II – Hostile Confrontations Between States and Terrorist Organizations do not Amount to War**

Together, conventional and customary IHL provide a code of conduct that governs starting and prosecuting wars. The rules and customs that define the conditions that justify entering into a war are the *jus ad bellum*, or the laws of a just war. Once a state of war exists, IHL continues to operate by regulating the use of force, while at the same time protecting civilians and combatants rendered *hors de combat*. Collectively, the rules and customs that operate among belligerent parties to regulate acceptable conduct during armed conflict are known as the *jus in bello*. IHL therefore provides a complete legal code that defines the circumstances in which a party may lawfully resort to military force, and that also regulates acceptable conduct during armed conflict. The ICRC describes IHL as “a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. It protects persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice.”

Noteworthy is that the *jus in bello* apply to the conduct of parties in an armed conflict whether or not the conflict itself meets IHL’s *jus ad bellum* criteria. “International humanitarian law,” explains University of Salamanca Law Professor Hector Olasolo, “is binding on all parties to an armed conflict regardless of the lawfulness or unlawfulness of the resort to armed violence by the party which initiated the conflict. ...For international humanitarian law, the guilt or innocence of the parties to an armed conflict in the initiation of such conflict is irrelevant.”

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Since IHL addresses issues related to the commencement of, and conduct during, war, its application or relevance is limited to armed conflicts. The counterpoint to IHL is the legal system of international human rights. IHRL acts to govern the relationship between states and individuals. McGill University Law Professor René Provost explains that IHL “as a whole is coloured by the legality of killing enemy combatants and – at least collaterally – innocent civilians. Human rights law, to the contrary, is based on a model fostering a harmonious relationship between the state and individuals under its jurisdiction.” Unlike IHL, which operates only during times of armed conflict, IHRL applies at all times, subject to limited derogation under specific circumstances.

The war against terrorism is arguably unlike any conflict envisioned by the people who developed and later formalized IHL. In particular, the war against terrorism is characterized by hostilities between states and non-state actors who often: do not belong to a state’s military forces or a militia; do not possess or control any territory; do not employ a formal command structure; do not openly bear weapons; et cetera. Many scholars agree that the phenomenon of modern terrorism does not neatly fit into the model of armed hostilities contemplated at the time when IHL was developed. University of Virginia Law Professor Rosa Ehrenreich Brooks, for example, writes:

In almost every sphere, globalization has complicated once straightforward legal categories, but this is nowhere more apparent and more troubling than in the realms of armed conflict and national security law. Although the boundaries between "war" and "nonwar," and between "national security" and "domestic issues," have been eroding for some time, September 11 and its aftermath have highlighted the increasing incoherence and irrelevance of these traditional legal categories. Shifts in the nature of security threats have broken down once clear distinctions between armed conflict and "internal disturbances" that do not rise to the level of armed conflict; between states and nonstate actors; between combatants and noncombatants; between spatial zones in which conflict is occurring and zones in which conflict is not occurring; between temporal moments in which there is no conflict and temporal moments in which there is conflict; and between matters that clearly affect the security of the nation and matters that clearly do not.44

The question of whether or not acts of international terrorism, such as the 9/11 attacks, result in an armed conflict is more than academic. Indeed, a state’s response to terrorist activity will likely depend on how the state characterizes terrorism, as illustrated by US President George W. Bush’s State of the Union address on 20 January 2004:

I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.45

Similarly, as British Prime Minister Tony Blair explained: “we must affirm that in the face of... terrorism, there must be no holding back, no compromise, no hesitation in confronting this menace. In attacking it whenever we can and in defeating it utterly.” Professor Brooks observes that “The breakdown of these once reasonably straightforward distinctions [between armed conflict and international criminal law] gave the U.S. government an opening to argue, among other things, ... that the U.S. may kill any suspected terrorist in any state in the world at any time.” Yale University Law and Politics Professor Bruce Ackerman adds that “An embrace of the ‘war on terrorism’ can generate a dynamic that justifies the permanent and broad-scale destruction of fundamental rights.”

President Bush and Prime Minister Blair characterize the conflict with international terrorism as a military issue, and they explain that a state may respond legitimately with the tools of war. They are not alone in holding this position. For example, Professor Daniel Statman of the University of Haifa writes:

What entitles the U.S. to define its campaign against Al Qaeda as war, with the loosening of various moral prohibitions implied by such a definition, rather than as a police enforcement action aimed at bringing a group of criminals to justice? The answer here – as with conventional war – lies in: (a) the gravity of the threat posed by Al Qaeda and (b) the impracticality of coping with this threat by conventional law-enforcing institutions and methods.49

Professor David Kretzmer of the Hebrew University of Jerusalem also accepts that a state of war exists between states and terrorist organizations. He therefore concludes that adopting law enforcement measures to respond to global terrorism is inadequate. He explains:

The problem with the law-enforcement model in the context of transnational terror is that one of its fundamental premises is invalid: that the suspected perpetrator is within the jurisdiction of the law-enforcement authorities in the victim state, so that an arrest can be effected. What is the situation when, according to our premise, the terrorist is in the territory of another state? The victim state may not arrest or apprehend that person without the active assistance and support of that other state. But what if that state is either unwilling to arrest the suspected terrorist or incapable of doing so? Leaving aside issues of state sovereignty, and relying solely on the duty of the victim state under international human rights law to respect the right to life [of innocent victims of terrorism], could it not argue that it has no choice but to resort to force against the suspected terrorist? That force is absolutely necessary to protect its civilians against unlawful violence?50

By contrast, others view global terrorism as an international crime, to which a military response in the form of an armed conflict is unsuitable and/or unjustified. Ms Stella Rimington, the former Director General of the British Security Service (i.e., MI-5), explains, for example:

I’m afraid that terrorism didn’t begin on 9/11 and it will be around for a long time. I was very surprised by the announcement of a war on terrorism because terrorism has been around for thirty-five years... [and it] will be around while there are people with grievances. There are things we can do to improve the situation, but there will always be terrorism. One can be misled by talking

about a war, as though in some way you can defeat it.\textsuperscript{51}

University of Houston Law Professor Jordan Paust also argues that a state of war cannot exist between states and terrorist organizations, or other non-state actors. Professor Paust writes: “Contrary to the assertion of President Bush, the United States simply cannot be at war with bin Laden and al Qaeda....”\textsuperscript{52} He further explains:

Armed attacks by non-state, non-nation, non-belligerent, non-insurgent actors like bin Laden and members of al Qaeda can trigger the right of selective and proportionate self-defense under the United Nations Charter against those directly involved in an armed attack, but even the use of military force by the United States merely against bin Laden and al Qaeda in foreign territory would not create a state of war between the United States and al Qaeda.\textsuperscript{53}

Professor Paust therefore concludes that members of Al Qaeda cannot be “combatants”, because no state of war exists (nor can it exist) between the non-state entity Al Qaeda and a nation-state. Indeed, Mr. Jonathan Schanzer, Deputy Executive Director of the Jewish Policy Center in Washington, D.C. and former counterterrorism analyst with the US Department of the Treasury, has explained that “Al-Qaeda has become more of a phenomenon than an organization.”\textsuperscript{54} One could agree that, if Mr. Schanzer is correct, it would be impossible to wage a military campaign against the phenomenon of Al Qaeda.

At times, the controversy between whether international terrorism attracts a military or law enforcement-style response results in heightened emotions and acrimonious debate. For example, Professor Ackerman writes:

The Cold War. The War on Poverty. The War on Crime. The War on Drugs. The War on Terrorism. Apparently, it isn’t enough to call a high-priority policy initiative a High-Priority Initiative. If it’s really important, only a wimp refuses to call it war, almost without regard to its relationship to the real thing. ... Perhaps

\textsuperscript{53} \textit{Ibid.}, at 326.
\textsuperscript{54} J. Schanzer, \textit{Al-Qaeda’s Armies: Middle East Affiliate Groups & the Next Generation of Terror} (New York: Specialist Press International, 2005) at 16.
the clarion call to pseudo-war is just the thing the President needs to ram an ini-
tiative through a reluctant Congress. Perhaps it provides rhetorical cover for uni-
lateral actions of questionable legality.55

George Washington University School of Law Professor Paul Butler argues:

If you think the government should be allowed to kill or torture for the greater
good [i.e., efforts in the war against terrorism], you are a utilitarian. What you
have in common with terrorists is either a disregard for morality, or a construct
of it that allows the sacrifice of human lives or dignity for the greater good. If,
on the other hand, you believe that the state should not kill or torture – even
when the stakes are... high... – ask yourself whether utilitarianism is warranted
when its benefits are significantly lower.

Thus far, these real life examples of utilitarianism involve the law of war. War
is, famously, hell, and perhaps that explains the perceived necessity of sacrificing
the innocent. Yet, as demonstrated below, criminal law also authorizes the delib-
erate infliction of pain on some for the good of the whole.56

By contrast, Law Professor John C. Yoo and Chief Counsel to the United States Senate
Subcommittee on the Constitution, Civil Rights, and Property Rights James C. Ho explain
that “the head of al Qaeda, Osama bin Laden, declared war on the United States as early as
1996. ...[T]he scope and the intensity of the destruction is one that in the past could only
have been carried out by a nation-state, and should qualify the attacks as an act of war.”57

Other scholars believe that international terrorism fits into neither a pure war-model
nor a pure law enforcement-model, and that an entirely new international legal system is
required to address the threat of terrorism. Professor Provost, for example, writes:

The interaction of human rights and humanitarian law is multi-faceted, and
gives rise to a number of enquiries. ...In particular, it seems important to
determine whether gaps exist whereby neither set of norms applies. Many
studies have concluded that existing norms are deficient and that new ones
must be developed.58,59

55 B. Ackerman, “This is Not a War”, supra, at 1871-1872.
Criminal Law and Criminology, at 15-16.
The broad and ill-defined nature of the war against international terrorism contributes to the uncertainty that exists over which legal system is the most appropriate to deter, prevent and punish terrorist activity. From full-scale international armed conflicts between states, such as the war against Afghanistan’s Taliban government and the war against President Saddam Hussein’s Iraq, to long-standing insurgencies within a state’s territory, to sporadic terrorist acts by independent organizations such as Al Qaeda, the war on terrorism encompasses the entire spectrum between war and crimes committed during peacetime. Fortunately, IHL provides the means to determine whether a state of armed conflict exists. If a state of armed conflict exists, then IHL applies, complemented by the non-derogable rights found in IHRL, with one legal system prevailing over the other as the lex specialis, depending on the specific circumstances. In the absence of an armed conflict, however, only IHRL would apply.

The Geneva Conventions of 1949 and the Additional Protocols of 1977

The Geneva Conventions were adopted on 12 August 1949. Professor Leslie Green describes the Geneva Conventions as “Perhaps one of the most significant developments in the law of armed conflict”. Although the language in the Conventions addresses “The High Contracting Parties” to the treaties, the Conventions have been universally adopted by all Member States of the United Nations. The four Geneva Conventions describe the

59 See also Ms Feruza Djamalova, Targeted Killing Under International Sui Generis Framework (LL.M. Thesis, Faculty of Law, University of Toronto, 2008), who argues that a new, sui generis legal system is needed to govern the chaotic nature of the conflict with international terrorism. The new legal system envisioned would recognize the paramountcy of IHL in the war against terrorism, while adopting the Israeli High Court of Justice’s four cumulative elements of a lawful targeted killing operation. See Note 23, above.
62 With the addition of Montenegro to the United Nations on 26 June 2006, all 193 Member States observe the 1949 Geneva Conventions. The International Committee of the Red Cross explains that 194 states have
necessary conditions for an armed conflict to exist, which would activate the rules and customs of IHL. The Conventions recognize and define two types of armed conflicts: international armed conflicts, and non-international armed conflicts. Noteworthy is that the protections accorded to civilians (including land and cultural property) and military objects rendered *hors de combat* by the Geneva Conventions is broader and more robust in cases of international armed conflict than in non-international armed conflicts. Indeed, Common Article 3 is the only provision among the Geneva Conventions that protects civilians and other non-military targets from direct or indiscriminate attack in non-international armed conflicts. On 8 June 1977, however, two Additional Protocols were added to the Geneva Conventions. Among other things, the Additional Protocols gave clearer definitions of what conditions gave rise to a state of international and non-international armed conflict, and expanded the protections accorded to people in non-international armed conflicts. As of 6 January 2004, 162 states had joined the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (the “First Additional Protocol”), and 157 states had joined the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (the “Second Additional Protocol”).

The United States of America is one of the few western states to have signed, but not yet ratified, the Second Additional Protocol. However, as Professor Brooks explains, “the United States accepts most provisions of the Additional Protocols as binding norms of customary international law, and/or consistent with U.S. practice.” Indeed, in commenting on the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the

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Territory of the Former Yugoslavia Since 1991, Ambassador (as she was then) Madeleine Albright declared at the United Nations Security Council that the “laws or customs of war... include all obligations under humanitarian law agreements in force..., including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.” This was a clear statement of the United States’ acceptance of the relevance and applicability of the Additional Protocols as binding instruments of international law.

Israel has also not joined the Additional Protocols of 1977. Unlike the United States, Israel did not sign the Protocols. However, as the Israeli High Court of Justice explained, “Substantial parts of international law dealing with armed conflicts are of customary character. That customary law is part of Israeli law”. On the 20th anniversary of the Additional Protocols of 1977, the President of the ICRC, Cornelio Sommaruga, explained that “The 1977 texts represent a considerable advance in the codification of the principles of humanitarian law recognized by all peoples. Today a number of their articles already form a set of rules of customary law valid for every State, whether or not it is party to the Protocols.” Therefore, as instruments that reflect customary international law, Israel recognizes and accepts the validity of the Additional Protocols of 1977.

Because the Additional Protocols reflect customary international law, they operate together with the universally-adopted Geneva Conventions of 1949 to guide the behaviour of states, such as the United States and Israel, during international and non-international armed conflicts. Indeed, the practises of both the United States and Israel in international law has not been characterized by persistent objection to the Additional Protocols, and to the Second Additional Protocol in particular. One may therefore conclude that the United States and Israel accept the validity of the Additional Protocols of 1977, and that those states are

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compelled to comply with the Protocols’ provisions.\textsuperscript{68} By contrast, the United Kingdom, Russia and Saudi Arabia – all active participants in the global war against terrorism – have all formally ratified the Additional Protocols of 1977, and there is no question of the applicability of the Protocols to those states’ behaviour.

Common Article 2 of the Geneva Conventions and Article 1 of the First Additional Protocol address international armed conflicts. Both definitions speak to the obligations of High Contracting Parties that are involved in armed conflict with each other, “even if the state of war is not recognized by one of them.”\textsuperscript{69} Because Common Article 2 and the First Additional Protocol speak to the obligations of states only, an international armed conflict cannot exist between states and sub-state or other non-state collectivities. Thus, the conflict between states and international terrorist organizations is not recognized in international law as an international armed conflict. By contrast, the current international conflicts in Afghanistan and Iraq are recognized as international armed conflicts, within the meaning of IHL.\textsuperscript{70} The belligerent parties to these conflicts are therefore required to comply with the IHL of international armed conflict, supplemented by IHRL.

Non-international armed conflicts are defined and governed by Common Article 3 of the Geneva Conventions, and Article 1 of the Second Additional Protocol. Whereas Common Article 3 establishes the general rules that govern non-international armed conflicts, Article 1 of the Second Additional Protocol identifies when a confrontation reaches the level of a non-international armed conflict (\textit{i.e.}, the \textit{jus ad bellum} for non-international armed conflicts). Article 1 of the Second Additional Protocol explains that non-international armed conflicts are armed conflicts that are not between two or more states, “and which take place in the territory of a High Contracting Party between its armed forces and dissident

\textsuperscript{68} There has been much discussion on the binding nature of international law. For example, see A. Guzman, \textit{How International Law Works} (New York: Oxford University Press, 2008) for a rationalist explanation of how and why the United States and Israel are compelled to comply with international law, including the Additional Protocols of 1977, notwithstanding that neither the United States nor Israel has formally joined those treaties. See also J. Brunnee & S.J. Toope, “Persuasion and Enforcement: Explaining Compliance with International Law” (2002) XIII Finnish Yearbook of International Law 273-295 for a constructivist explanation of how and why international law promotes compliance.

\textsuperscript{69} First Geneva Convention, Article 2.

\textsuperscript{70} See, for example, R.E. Brooks, “War Everywhere”, \textit{supra}, at 713-714 and L.C. Green, “The Contemporary Law of Armed Conflict”, \textit{supra}, at 12.
armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”\textsuperscript{71} The Second Additional Protocol narrows the conditions that give rise to a non-international armed conflict by excluding “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”\textsuperscript{72} The sustained armed and military-like confrontations between government forces and organized rebel or other dissident groups in areas such as Chechnya, southern Lebanon, the Philippines, and the tribal regions of Pakistan fit into IHL’s definition of non-international armed conflicts. These conflicts all bear the semblance of civil wars or wars of independence or insurrections. In these cases, the IHL of non-international armed conflict would be supplemented by the rules and customs of IHRL, and also by domestic law.

The Second Intifada, or the ongoing conflict between Israel and terrorist organizations such as Hamas that operate from the Palestinian Territories since 2000, may meet the definition of either an international or a non-international armed conflict. This is because it is uncertain whether the Territories exercise statehood, and also whether Israel occupies the Territories\textsuperscript{73}. Common Article 2 of the Geneva Conventions extends the application of all four Conventions where a state’s territory is partly or wholly occupied, “even if the occupation meets with no armed resistance”\textsuperscript{74}. Article 1.3 of the First Additional Protocol incorporates Common Article 2 in the Protocol’s application to international armed conflicts. Therefore, if Palestine is a state whose territory is occupied by Israel, a state of international armed conflict between Israel and terrorist groups operating from the Palestinian Territories will likely exist. Alternatively, if Palestine does not exist as a \textit{de jure} state, the terrorist activities of well-organized groups operating from the Territories likely

\textsuperscript{71} Second Additional Protocol, Article 1.1.
\textsuperscript{72} Second Additional Protocol, Article 1.2.
\textsuperscript{73} Although the League of Arab States and several European states, such as the Czech Republic, recognize the State of Palestine, the United Nations accords Palestine non-member, observer status only, and authors such as Marc S. Kaliser explain that Palestine does not meet the international definition of statehood (\textit{e.g.}, the \textit{Montevideo Convention on the Rights and Duties of States}, (1936) 165 L.N.T.S. 19; (1934) 28 a.J.I.L. Supp. 75, Art.1), in M. Kaliser, “A Modern Day Exodus: International Human Rights Law and International Humanitarian Law Implications of Israel’s Withdrawal From the Gaza Strip” (2007) 17 Indiana International & Comparative Law Review, No. 1, at 189.
\textsuperscript{74} Common Article 2, Geneva Conventions.
reach the level of a non-international armed conflict. This is because attacks conducted by these groups amount to intense and ongoing hostilities beyond riots, sporadic acts of violence, *et cetera.*⁷⁵,⁷⁶ In either case, the rules and customs of IHRL would continue to apply to hostilities between belligerent parties, as either a complement to IHL, or as *lex specialis.*

The analysis so far has focused on sustained combat between highly organized armed groups. In the case of Afghanistan, “from the moment [hostilities] were initiated by the U.S. and U.K. air strikes on October 7, 2001, [this theatre in the global war on terrorism] clearly constituted an ‘armed attack’ within the meaning of the Conventions.”⁷⁷ Certainly, the same can be said for the war in Iraq. In these examples, it is clear that the rules and customs of IHL – particularly the elements of IHL that address international armed conflicts – are relevant.

For a non-state party to be involved in a non-international armed conflict, it must demonstrate that it is organized, and that it also exercises effective control over territory. This latter element is necessary for a potential belligerent party to organize and conduct

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⁷⁵ Note that the Israeli High Court of Justice did not advert its attention to this possibility in its *The Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and Others,* supra, decision. Ultimately, the final word on whether Palestine is a *de jure* state within the meaning of international relations and law (e.g., the *Montevideo Convention on the Rights and Duties of States,* supra, Art.1, and international state practise) is beyond the scope of this paper. Instead, this paper seeks only to illustrate that the issue is controversial. See, for example, Note 73, above.

⁷⁶ It is noteworthy that the Israeli High Court of Justice did not analyze the Second Intifada in these terms in its *The Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and Others,* supra, decision. Rather, the High Court relied on its own earlier jurisprudence to arrive at its conclusion that the Second Intifada is an international armed conflict, per IHL. The little analysis on this issue that exists in the Court’s decision is largely unsatisfactory. The Court explains at paragraph 18 that: “the international law regarding international armed conflict... applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation.” This statement of international law is incorrect, however, as a *de jure* international armed conflict may only exist between states (see discussion on Common Article 2 to the Geneva Conventions, *infra*). Since the Israeli High Court of Justice does not characterize the Palestinian Territories as a state, an international armed conflict cannot exist between Israel and terrorist armed forces operating from the “area”. The Court thus ignores the legal system of international criminal law, which addresses transnational acts of unlawful violence, subject to a state’s substantial interest in prosecuting the transnational crime, and the comity of states. See, for example, *Libman v. The Queen,* [1985] 2 S.C.R. 178 (Supreme Court of Canada), at paragraph 42.

military attacks that amount to more than sporadic acts of violence. These requirements therefore disqualify armed confrontations between states and disorganized or loosely-organized terrorist groups that operate infrequently and by way of independent cells as non-international armed conflicts within the meaning and scope of IHL. This conclusion is reinforced by the exclusion of “riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts.” In this sense, Mr. Schanzer’s assertion that Al Qaeda is more of a philosophy or touchstone for potential terrorists than an armed and well-organized military force gains resonance. In *Juan Carlos Abella v. Argentina*79, the Inter-American Commission on Human Rights explained that:

> the concept of armed conflict, in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other. ...Common Article 3 [to the Geneva Conventions] is generally understood to apply to ... open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State. ... Article 3 armed conflicts typically involve armed strife between governmental armed forces and organized armed insurgents.80

The implication of this is that an armed conflict cannot exist between a state and an international terrorist organization such as Al Qaeda, or any of its affiliated or similar groups.

The Commentary to the Second Additional Protocol (the “Commentary”) published by the ICRC, which played a material role in negotiating and drafting the Additional Protocols, supports the conclusion that an armed conflict usually cannot exist between a state and an international terrorist organization. The Commentary explains that the Second Additional Protocol was meant to regulate situations:

> where the armed forces of the government confront dissident armed forces, *i.e.*, where there is a rebellion by part of the government army or where the government’s armed forces fight against insurgents who are organized in armed groups, which is more often the case. This criterion illustrates the collective character of the confrontation; it can hardly consist of isolated

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78 Second Additional Protocol, Article 1.2.
individuals without co-ordination.\textsuperscript{81}

The objective criteria in Article 1 of the Second Additional Protocol that define a non-international armed conflict within the meaning of IHL were therefore designed to limit the \textit{jus ad bellum} to situations of sustained and intense confrontation between belligerent parties. The three elements that together form the \textit{sine qua non} of the existence of a non-international armed conflict to which the rules and customs of IHL apply are, “on the side of the insurgents ... responsible command, such control over part of the territory as to enable them to carry out sustained and concerted military operations, and the ability to implement the [Second Additional] Protocol”\textsuperscript{82}. It is worthwhile to consider each of the three criteria fully, as they determine whether terrorist organizations such as Al Qaeda can properly be classified as a belligerent party in an armed conflict, against which the full force of a state’s military force may lawfully be applied.

Responsible command over an armed group requires a relatively stable leadership, and an ability to communicate orders or instructions to execute sustained military operations, \textit{et cetera}. Dr. Marc Sageman, an expert on counter-terrorism and former United States Foreign Service Officer, observes that within weeks of the 9/11 attacks, “U.S. forces and their Afghan allies quickly toppled the Taliban regime and destroyed al Qaeda sanctuaries”.\textsuperscript{83} Dr. Sageman explains further that:

Al Qaeda Central in particular was neutralized operationally. But as long as some of its leaders were still at large, it was not eliminated. Osama bin Laden and Ayman al-Zawahiri still deliver speeches via video and through the Internet, exhorting their followers to continue the fight. ...In general, however, communications had degraded to the point that there was no meaningful command and control between the al Qaeda leadership and its followers.\textsuperscript{84}

Indeed, the absence of a well-defined command structure is reflected in the general uncertainty surrounding Al Qaeda’s objectives and motivation. Professor Weisburd explains:

\begin{itemize}
\item\textsuperscript{81} Commentary to the Second Additional Protocol, at para. 4460. Available at: http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument
\item\textsuperscript{82} Commentary to the Second Additional Protocol, \textit{supra}, at para. 4453.
\item\textsuperscript{83} M. Sageman, \textit{Leaderless Jihad} (Philadelphia: University of Pennsylvania Press, 2008), at 125.
\item\textsuperscript{84} \textit{Ibid.}, at 126.
\end{itemize}
First, [Al Qaeda’s] objectives are not limited to affecting any particular territory or very specific group. It does not exercise what could be called government-like control over any group or area, nor, apparently, does it seek to do so. Likewise, it does not rely on the approval of any such group to legitimate its actions. Of course, it purports to focus on all Muslims and all territory ever subject to a caliphate, but so broad a focus is no focus at all. These characteristics distinguish al-Qaeda from groups such as Hezbollah, Hamas, and the I.R.A. – all of which (i) are oriented to what they claim to be the interests of particular groups in particular places; (ii) seek to exercise power over those groups; and (iii) rely on the support of those groups.  

He also observes that Al Qaeda’s “decentralized structure raises doubts that leaders ... would necessarily be obeyed by their nominal subordinates.” Indeed, as Dr. Sageman notes: “Al Qaeda Central does not know who its followers are, and is reduced to accepting them after the adherents declare themselves in an act of terrorism. Their official acceptance into al Qaeda comes after the fact, as in [the terrorist attacks in Madrid, Spain on 11 March 2004].”

An objective review of Al Qaeda’s leadership therefore demonstrates that it lacks the responsible command characteristics necessary to participate as an armed group in a *de jure* non-international armed conflict.

Although Al Qaeda fails to satisfy the responsible command requirement to trigger the application of IHL in a non-international armed conflict, it is worthwhile to consider the further requirements that an armed group has effective control over territory allowing it to engage in sustained and concerted military operations, and that it has the capacity to observe IHL.

In order to qualify as a non-international armed conflict, a potential non-state belligerent party must exercise “such control over a part of [the High Contracting Party’s]

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territory as to enable them88 to organize and engage in sustained hostilities. The Commentary explains that “Control over part of the territory requires that the insurgent armed groups be organized.”89 Noteworthy, however, is that both the Second Additional Protocol and the Commentary are silent on what quantity or quality of land must be controlled to satisfy the territorial requirement. Instead, the Commentary explains that the Second Additional Protocol was left without a strict definition of sufficient territorial control in order to promote a functional approach to the *jus ad bellum*. The Commentary provides:

In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol.90

Al Qaeda and similar or affiliated international terrorist organizations do not meet the criterion of exercising control over territory to the extent required by the Second Additional Protocol. Professor Paust observes: “al Qaeda lacks even the semblance of a government and has not controlled significant portions of territory as its own.”91 Indeed, as Professor Weisburd notes, “Since [Al Qaeda] is not territorially limited, it cannot be defeated by seizing this or that territory.”92 Dr. Sageman agrees that Al Qaeda does not effectively control any territory on its own. He notes:

This virtual merger between al Qaeda and the Taliban has unleashed a local resurgence (yes, the term is correct in this context) of the Taliban in Afghanistan with increasing bombings and damages. However, Afghan peasants do not travel well to the West. They are a local threat because they mix well with their Afghan habitat, but they would be immediately detected in the West. I suspect the great increase in al Qaeda membership now comes from these local Afghans. But it is a marriage of convenience. The mutual dislike and distrust between Pushtun and foreigners prevents the Taliban from truly merging with al Qaeda. The Pushtun al Qaeda members have a dual loyalty, and if push comes to shove, they will again

88 Second Additional Protocol, Article 1.1.
89 Commentary to the Second Additional Protocol, *supra*, at para. 4465.
90 Ibid., at para. 4467.
betray the foreigners, as they did in the fall of 2001.93

A potential non-state belligerent in a non-international armed conflict must be able to engage in sustained hostilities. The Commentary recognizes that the ability to organize and conduct “sustained and concerted military operations” is a fundamental aspect of establishing control over territory, for the purposes of engaging the application of the IHL of non-international armed conflict.94 The Commentary explains that the word “sustained” “means that the operations are kept going or kept up continuously.”95 Several authors and scholars assert that Al Qaeda has been involved in continuous military operations against the United States (and Western culture in general) since the 1990s. Mr. Howard A. Wachtel, for example, writes: “The United States is entitled to kill Osama bin Laden to defend against a series of continuing threats.... ... The U.S. has been the subject of a series of attacks led by Osama bin Laden – all of these, from the bombings of the U.S. embassies in Kenya and Tanzania, to the attack on the USS Cole, to the September 11 attacks, have revealed a pattern of terrorist activity that is unlikely to cease.”96 Professor Yoo and Mr. Ho cite the same terrorist attacks, and add the Al Qaeda-led attack against an American military housing complex in Saudi Arabia in 1996, and the first attack against the World Trade Center in Manhattan in 1993.97 These authors agree that Al Qaeda’s attacks meet the level of sustained hostilities.

While it is undeniable that the level of violence of the above terrorist acts has been horrific, it is difficult to characterize these attacks – even when considered together – as “sustained and concerted military operations”. Indeed, as Professor Weisburd observes:

Although [Al Qaeda’s] members apparently took part in conventional fighting at the time of the American invasion of Afghanistan, as a general matter it lacks the capacity to engage in conventional combat or to organize military units

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93 M. Sageman, Leaderless Jihad, supra, at 132.
94 Commentary to the Second Additional Protocol, supra, at para. 4468.
95 Ibid., at para. 4469.
even of moderate size. Relatedly, the number of attacks it has carried out is relatively small. Al-Qaeda itself is credited with 32 attacks since its formation in the late 1980s, killing approximately 3,500 people and injuring approximately 8,900 more. Groups labelling themselves “al-Qaeda” have been responsible for an additional 34 attacks, excluding those carried out in Iraq; these attacks have killed 46 people and injured 85.98

Similarly, Dr. Sageman observes that Al Qaeda’s capability to carry out terrorist activities was effectively neutralized by the US and UK-led invasion of Afghanistan in November 2001. He explains: “The absence of a sanctuary to train new recruits prevents the dissemination of terrorist skills and tactics for the global jihad.”99 He therefore concludes: “Al Qaeda Central is of course not dead, but it is still contained operationally. It puts out inspirational guidance on the Internet, but does not have the means to exert command and control over the al Qaeda social movement.”100 The evidence therefore shows that Al Qaeda lacks the capacity to organize and execute sustained military operations.

Finally, in order to qualify as a de jure belligerent in a non-international armed conflict an armed group must possess the capacity to implement the Second Additional Protocol and the various other rules and customs of IHL. The Commentary explains that the ability to implement IHL includes “caring for the wounded and the sick, or detaining prisoners and treating them decently”.101 More generally, the capacity to implement the Second Additional Protocol will exist in cases when an insurgent group has “the minimum infrastructure required therefor.”102

Al Qaeda’s decentralized command structure makes it incapable as an organization of implementing any of the rules and customs of IHL, much less the Second Additional Protocol in particular. Professor Weisburd explains that it is “unclear whether the persons believed to make up the leadership of [Al Qaeda] would be obeyed if they ordered al-Qaeda’s members, for example, to treat any captured persons as required by international

99 M. Sageman, “Understanding Terror Networks”, supra, at 52.
101 Commentary to the Second Additional Protocol, supra, at para. 4466.
102 Ibid., at para. 4470.
humanitarian law.” The absence of a responsible command structure therefore makes Al Qaeda incapable of exercising effect control over individual terrorists/members to ensure compliance with the Second Additional Protocol and other IHL obligations.

Since Al Qaeda does not meet the criteria listed in the Second Additional Protocol to operate as a belligerent party in a non-international armed conflict, a state of war cannot exist between it and states. This result lies in contrast to the situation in the Palestinian Territory of Gaza, where Hamas, an internationally recognized terrorist organization, bears all the indicia of a non-state belligerent in an armed conflict. Unlike Al Qaeda, et cetera, Hamas demonstrates effective leadership and a sophisticated command structure, exercises control over territory, and has the capacity to observe IHL. The same may be said of Hezbollah operating from southern Lebanon. However, to repeat: a state of armed conflict recognized by IHL cannot exist between states and international terrorist organizations such as Al Qaeda.

The Commentary explains that the Second Additional Protocol’s objective criteria for determining the existence of a non-international armed conflict were developed in order to clearly define the circumstances under which a state could exercise its military force:

Thus we are talking about military operations conceived and planned by organized armed groups. The criteria of duration and intensity were not retained as such in the definition because they would have introduced a subjective element. The applicability of the rules of protection of the Protocol must not in fact depend on the subjective judgment of the parties. On the other hand, the criterion whether military operations are sustained and concerted, while implying the element of continuity and intensity, complies with an objective assessment of the situation. It is important to recognize the significance of the Second Additional Protocol’s efforts to eliminate the subjective assessment of whether a non-international armed conflict exists. A close examination of the arguments some scholars lead in order to assert the existence of a state of armed conflict between states and international terrorist organizations reveals a strong sense of insecurity and a demand for justice (or, perhaps revenge) for those

104 Commentary to the Second Additional Protocol, supra, at para. 4469.
responsible for terrorist acts such as the 9/11 attacks against the United States. Indeed, authors such as Professor Yoo & Mr. Ho, Professor Statman and Mr. Jonathan Ulrich agree that, under the domestic law of the United States, the President has the authority to declare or identify a state of war, and that deference is owed to any such conclusion by the other branches of the United States Government.\(^\text{105}\) In Israel, Professor David has explained that the use of targeted killing, and the war against terrorism in general, “serves Israel’s interests because it affords the Israeli public a sense of revenge. … Achieving revenge can bring about a sense of fulfillment and justice for people who believe they have been wronged. Failing to achieve revenge can lead to despair, frustration and anger.”\(^\text{106}\) Given the horror of modern international terrorism, it is not difficult to empathize with states that find themselves in a new world order of indiscriminate violence. Stanford Law Professor Abraham D. Sofaer, for example, explains that a state of war exists between the United States and international terrorist organizations because “Osama bin Laden and Al Qaeda had, prior to September 11, 2001, attacked the US and killed many Americans several times. They had also announced their intention to attack US nationals and targets until the US withdrew its forces from Saudi Arabia. Bin Laden issued a fatwa purporting to authorize (or even to mandate) the killing of Americans.”\(^\text{107}\) Professor Yoo & Mr. Ho explain that, following the 9/11 attacks, “President Bush has found that the attacks have placed the United States in a state of armed conflict. ...As a matter of ... law, the President’s finding settles the question whether the United States is at war.”\(^\text{108}\) These, and similar justifications for resorting to military force, flow from a sense of outrage at the violence and horror caused by international terrorist organizations. However, such a sense of loss is not a sufficient reason for a state to adopt a war footing. The modern \textit{jus ad bellum} eliminates a state’s ability to unilaterally declare war in situations that do not meet the conditions precedent listed in the Geneva Conventions and their Additional Protocols. Although a strong response to acts such as 9/11 may be unsurprising, the instinct to “take arms against a sea of troubles and by opposing end


\(^{108}\) J.C. Yoo & J.C. Ho, “The Status of Terrorists”, \textit{supra}, at 211.
them” only reinforces the importance of the aims and goals of the Second Additional Protocol and the *jus ad bellum* in general.

Professor Jinks offers a more nuanced approach to the application of IHL in the apparent war against international terrorism. Professor Jinks agrees that, under international law, an international armed conflict cannot exist between a state and a non-state actor acting independently. However, he maintains that confrontations with organizations such as Al Qaeda result in non-international armed conflicts. In rejecting the argument that non-international armed conflicts were meant to be limited to civil wars or similar organized insurrections, Professor Jinks asserts:

this understanding of Common Article 3 [to the Geneva Conventions] is difficult to square with the purposes of the provision. Indeed, it would create an inexplicable regulatory gap in the Conventions. On this reading, the Conventions would cover international armed conflicts proper and wholly internal civil wars, but would not cover armed conflicts between a state and a foreign-based (or transnational) armed group or an internal armed conflict that spills over an international border into the territory of another state. There is no apparent rationale for such a regulatory gap. ...Common Article 3 was revolutionary precisely because it purported to regulate *wholly internal matters* as a matter of international humanitarian law. If the provision governs wholly internal conflicts, then it would obviously apply to armed conflicts with transnational dimensions. [Emphasis in original.]

Professor Jinks’ concern over the existence of a regulatory gap that would govern state behaviour leads him to conclude that the “best reading of Common Article 3 is that it applies to all armed conflicts – even those that do not qualify as [international armed] conflicts.” His response, however, broadens the circumstances under which a state may resort to military force, and ignores the applicability of IHRL. Indeed, a fulsome understanding of IHL, IHRL and the interplay between the two legal systems reveals that no regulatory gap for state conduct exists in armed confrontations that do not reach the level of

civil wars and insurrections. This is because IHRL provides a complete code for state behaviour in the absence of an armed conflict through international criminal law.

It can be strongly argued that the Second Additional Protocol and IHL in general exist to prevent states from resorting to war. This interpretation both complements and resonates with Article 1 of the Charter of the United Nations, which explains that the first (and perhaps most important) purpose of the United Nations is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which lead to a breach of the peace.\textsuperscript{112}

The paramount rule in the post-Second World War age of the United Nations is to avoid to the fullest extent possible the resort to war. Put differently, modern international law makes it difficult for states to legitimately start wars. The reason for this is obvious:

... and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.\textsuperscript{113}

Similar sentiments are expressed in other universal instruments, such as the United Nations’ Universal Declaration of Human Rights.\textsuperscript{114}

Of course, one should not conclude from the above analysis that Al Qaeda and similar international terrorist organizations can never be involved in an armed conflict recognizable under IHL. For example, if a terrorist organization fights alongside a \textit{de jure} belligerent in an international or non-international armed conflict, that terrorist group will be subject to

\textsuperscript{112} Charter of the United Nations, Article 1(1).
\textsuperscript{113} \textit{Ibid.}, Preamble.
\textsuperscript{114} Universal Declaration of Human Rights, Preamble.
IHL as a militia or voluntary corps forming the armed forces of the belligerent party.\textsuperscript{115} However, even then, IHL would view individual terrorists fighting alongside government or insurgent forces as civilians actively participating in hostilities.\textsuperscript{116} States and other belligerents would therefore be restricted in their ability to use of lethal force against such civilians. But, in the absence of direct participation in a \textit{de jure} armed conflict, international law as it currently exists does not recognize a state of armed conflict between international terrorist groups and states.

\textit{The Inherent Right of Self Defence Against Armed Attack}

In addition to the \textit{jus ad bellum} in the Geneva Conventions and the Additional Protocols, states may also use military force when exercising their inherent right of self defence. The Charter of the United Nations permits states to exercise the right of individual or collective self defence in the event of an armed attack. Article 51 of the Charter explains: “Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”\textsuperscript{117} Noteworthy is that the capacity to perform an armed attack is not limited to states.

The right of self defence has been used to justify the war against international terrorism as a legitimate response to an armed attack. On 7 October 2001, the United States claimed its right of self defence in response to the 9/11 attacks. Indeed, on 12 September 2001, NATO’s governing North Atlantic Council adopted a resolution stating: “if it is determined that [the 9/11] attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an

\textsuperscript{115} See, for example, D. Jinks, “The Applicability of the Geneva Conventions to the Global war on Terrorism”, \textit{supra}, at 182. See also Article 4 of Convention (III) Relative to the Treatment of Prisoners of War – Geneva, 12 August 1949 (\textit{i.e.}, the Third Geneva Convention), which includes “members of militias or volunteer corps, including those of organized resistance movements” as a belligerent party’s armed forces for the purposes of IHL.


\textsuperscript{117} Charter of the United Nations, Article 51.
armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.” Professor Kirsten Schmalenbach notes that “A similar decision was reached by the signatories to the Inter-American Treaty of Reciprocal Assistance in accordance with its Article 3.”

In order to claim the lawful exercise of self defence in accordance with Article 51 of the United Nations Charter, a state must be the victim of an armed attack. In *Nicaragua v. United States of America*¹²⁰, the ICJ explained that not all apparent attacks against a state are “Armed attacks” for the purpose of exercising self defence. The ICJ observed: “There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks.”¹²¹ Hostile acts require some minimum level of scope and scale in terms of their effects to be considered an “Armed attack”. For example, Professor Yoo & Mr. Ho, who support the position that a state of war exists between states and international terrorist organizations, write: “There can be no doubt that, whatever the ‘level of intensity’ required to create an armed conflict, the gravity and scale of violence inflicted on the United States on September 11 crossed that threshold.”¹²² Indeed, when one reflects on the horror of the 9/11 attacks, it is difficult to disagree that they reached the level of an “Armed attack”. However, it does not necessarily flow from this conclusion that the military response to organized international terrorism complies with international law.

In the famous *Caroline*¹²³ incident of 1837, United States Secretary of State Daniel Webster exchanged correspondence with British Foreign Minister Henry Fox, discussing the British military’s destruction of an American steamship that transported sympathetic American citizens to Canada to aid and support Canadian secessionists. In his response to Britain’s assertion that the destruction of the Caroline was justified under the international law.

¹²² J.C. Yoo & J.C. Ho, “The Status of Terrorists”, *supra*, at 213.
¹²³ *The Caroline (United Kingdom v. United States)* (1837), 2 Moore 409.
legal doctrine of self defence, Secretary of State Webster wrote that the right of self defence could only be claimed when “necessity of self-defence [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

Mr. Ulrich explains that “The customary standard for lawful self-defense under the Caroline doctrine has come to require four conditions: an imminent threat, a necessary action, the exhaustion of peaceful means, and a proportionate response.”

Professor Judith Gardam of the University of Adelaide’s School of Law explains that “The formulation of necessity in the 1837 Caroline Incident is accepted as encapsulating the requirement of the right of self-defence under the United Nations Charter”.

If the four conditions of the Caroline doctrine are met, the principle of military necessity qua self defence will be satisfied, and the resort to military force in response to an armed attack will be justified. By contrast, where the four conditions of the Caroline doctrine are not satisfied, a potential belligerent party is prohibited under customary and conventional international law, including the jus ad bellum of IHL, from resorting to military force in response to an armed attack. For example, as Professor Gardam explains:

It is arguable that the only aspect of the Caroline “necessity” formulation that needs to be satisfied if an armed attack has occurred within the meaning of Article 51 [of the Charter of the United Nations] is that of “instancy”: “[t]hat is, when the act is accomplished, damage suffered, and the danger passed, then the incidents of self-defence cease”.

Professor Gardam cites the ICJ’s decision in the Nicaragua case, which explains the temporal element of military necessity. The ICJ determined that the measures taken by the United States in 1981 against Nicaragua did not satisfy the test of “military necessity”. The Court noted:

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124 From Caroline, supra, as cited in U. Ulrich, “The Gloves Were Never On: Defining the President’s Authority to Order Targeted Killing in the War Against Terrorism”, supra, at 1048.
125 U. Ulrich, “The Gloves Were Never On: Defining the President’s Authority to Order Targeted Killing in the War Against Terrorism”, supra, at 1048.
127 J. Gardam, Necessity, Proportionality and the Use of Force by States, supra, at 150.
On the question of necessity, the Court observes that the United States measures taken in December 1981 (or, at the earliest, March of that year...) cannot be said to correspond with “necessity” justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed... and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity.128

Similarly, Professor Gardam concludes that:

The requirement of immediacy is in fact inherent in the text of Article 51. What is contemplated by the Charter is that States have the right to respond to an armed attack only for the period that it takes for the Security Council to be notified and for the necessary action to be taken to restore international peace and security. With the failure of this scheme, States have been reluctant to accept this ‘instancy’ or ‘immediacy’ requirement of self-defence under the Charter, and support has developed for the legitimacy of ‘defensive reprisals’ and anticipatory self-defence129, particularly in the context of sustained insurgent activities. Nevertheless, State practice and the views of commentators confirm the relevance of instancy to a legitimate exercise of self-defence.130

It is noteworthy that the targeted killing operation against Mr. al-Harithi occurred more than one year after the 9/11 attacks. Mr. Downes writes: “Although psychologically and politically linked to the September 11 terrorist attacks, the Yemen incident can in no way

129 Anticipatory self-defence is highly controversial. Article 51 of the UN Charter permits a state to exercise the right of self defence only “if an armed attack occurs” [Emphasis added]. This suggests that conventional international law prohibits anticipatory self defence as a legitimate application of the jus ad bellum, since the right of self defence is only triggered following an armed attack. The Security Council, for example, condemned attacks by South Africa in the 1970s and 1980s against present-day Namibia, and also the 1981 Israeli attack against the Osirak nuclear facility in Iraq. Both South Africa and Israel had claimed the right of anticipatory self defence in these operations. Other scholars, however, suggest that the right of anticipatory self defence is available in situations where defensive action is necessary for self-preservation. See, for example, the Caroline doctrine, supra, A. Guiora, “Targeted Killing as Active Self-Defense” (2004) 36 Case W. Res. J. International Law, 319-334, and S. David, Fatal Choices: Israel’s Policy of Targeted Killing, supra, for discussions on the legitimacy of anticipatory self defence and targeted killing. Note that, if anticipatory self defence is available as a recognized legal doctrine, the exercise of force is still governed by the Caroline doctrine: C. Downes, “‘Targeted Killing’ in an age of Terror: The Legality of the Yemen Strike”, supra, at 288. For further discussion on anticipatory self defence, see J. Gardam, Necessity, Proportionality and the Use of Force by States, supra.
130 J. Gardam, Necessity, Proportionality and the Use of Force by States, supra, at 150.
be defended as self-defence. Taking place over a year after the original attack, the Predator attack would be considered punitive rather than defensive, an act of reprisal that is judged to be illegal by the vast majority of states.”

Although United Nations Security Council Resolution 1373, adopted shortly after the 9/11 attacks, gave states a broad mandate to “Take the necessary steps to prevent the commission of terrorist acts”, those “necessary steps” had to comply with international law. Resolution 1373 and international law, therefore, did not provide states with the right to indefinitely use military force to respond to an armed attack. Rather, for a use of military force to be legitimate, there must be an element of immediacy, as explained in the Caroline doctrine. Without it, a state may not claim the inherent right of self defence. Ms Brenda Godfrey, for example, writes:

Under the Caroline doctrine, a covert killing or assassination in self-defense might be considered lawful under narrow circumstances where it could be shown that the killing was necessary and proportional to the use of force from the attacking party.

...

Applying this strict interpretation of necessity under the Caroline doctrine, would the covert killing of suspected terrorist Osama bin Laden by the United States government be lawful? Using the Caroline doctrine’s standard of the necessity requirement would appear to yield an answer in the negative.”

In addition to the element of immediacy, the Caroline doctrine also requires that “no choice of means” other than military force is suitable for a state to defend itself. Mr. Roberto Ago, who at the time was the United Nations Special Rapporteur on State Responsibility, explains:

The reason for stressing that action taken in self-defence must be necessary is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force,

131 C. Downes, “‘Targeted Killing’ in an age of Terror: The Legality of the Yemen Strike”, supra, at 286.
133 Security Council Resolution 1373, supra, at para. 2(b).
it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognized; hence it requires no further discussion. It should merely be noted that this requirement would be particularly important if the idea of preventive self-defence were admitted. It would obviously be of lesser importance if only self-defence following the attack was regarded as lawful.\textsuperscript{135}

The requirement that military force be the last resort available to a state that suffers an armed attack reflects the doctrine of military proportionality. Legitimate proportionality exists where the overall benefit of an attack, in terms of advancing military objectives and preventing the future loss of life, exceeds the cost of executing the attack, in terms of civilian casualties. Mr. Noam Lubell, Senior Researcher at the University of Essex’s Human Rights Centre, explains that “Under IHRL, ... the proportionality principle focuses on the effect upon surrounding people and objects, rather than upon the targeted individual, against whom it might be lawful to use lethal force as a first recourse.”\textsuperscript{136} This definition is similar to the ICRC’s definition of proportionality in customary IHRL, which prohibits attacks that may be expected to result in “excessive” civilian casualties, relative “to the concrete and directly military advantage anticipated”\textsuperscript{137}. Mr. Lubell adds that, “under human rights law and the rules of law enforcement, when a State agent is using force against an individual, the proportionality principles measures that force in an assessment that includes the effect on the individual himself, leading to a need to use the smallest amount of force necessary and restricting the use of lethal force.”\textsuperscript{138} The Israeli High Court of Justice’s decision on targeted killing reached a similar conclusion, explaining that lethal force could not be applied against a suspected terrorist if the possibility of arresting the individual is available.\textsuperscript{139} In its 2003 Concluding Observations on the State of Israel, the United Nations Human Rights Committee stated:


\textsuperscript{136} N. Lubell, “Challenges in Applying Human Rights Law to Armed Conflict”, \textit{supra}, at 745-746.


\textsuperscript{138} N. Lubell, “Challenges in Applying Human Rights Law to Armed Conflict”, \textit{supra}, at 745.

The Committee is concerned by what the State party calls “targeted killings” of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6 [of the ICCPR]. ...The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body.140

The Israeli High Court of Justice explained that a military “attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it.”141 A legitimate military objective would certainly include preventing an imminent terrorist attack. If a targeted killing operation against a suspected terrorist was aimed at preventing immediate harm, the loss of civilian life might not render the operation disproportionate. However, in the absence of an imminent threat, the use of lethal force against a suspected terrorist or terrorist organization would not have any legitimate military purpose.

In the joint US-Yemeni targeted killing operation against Mr. al-Harithi, the authorities from both states had tracked the suspected Al Qaeda terrorist for months prior to the attack142. Indeed, the Yemeni “Government stated that it had made every effort to bring these accused persons to justice”, and “that the group had always managed to escape [from government authorities] until the date of the final manhunt which resulted in its members being killed.”143 Noteworthy, however, is that no detail describing an attempt to arrest Mr. al-Harithi was given by either Yemeni or American officials. Furthermore, the identities of the five other civilians who were killed along with Mr. al-Harithi were unknown at the time

142 C. Downes, “‘Targeted Killings’ in an age of Terror: The Legality of the Yemen Strike”, supra, at 291.
of the attack.\textsuperscript{144} The Government of Yemen’s assertions of its desire to arrest those men therefore lacks credibility. As Mr. Downes observes, “Alternative action, such as arrest, was certainly conceivable.”\textsuperscript{145, 146} Additionally, when Mr. al-Harithi’s vehicle was targeted, it was far from any civilian or military target, and arguably posed no immediate threat to anyone\textsuperscript{147}. In the absence of posing an immediate threat, a civilian who does not take an active part in hostilities cannot be considered a legitimate military objective.\textsuperscript{148} If one accepts that Mr. al-Harithi and the five other passengers in the targeted vehicle were not an immediate threat, the targeted killing operation led by the CIA in cooperation with the Government of Yemen fails to meet the strict requirement of military necessity, and was therefore unjustifiable. However, even if Mr. al-Harithi’s presence in the vehicle did represent a true threat to peace and security (\textit{i.e.}, if one concludes that he was directly involved in hostilities while traveling in his vehicle), the absence of any evidence demonstrating that less-, or non-lethal, options had been employed (or even considered) suggests the absence of appropriate proportionality. Thus, one may reasonably conclude that the targeted killing of Mr. al-Harithi and the five other passengers travelling in his vehicle violated the strict requirements of military necessity and proportionality, and was therefore not a legitimate exercise of the right of self defence pursuant to Article 51 of the UN Charter.

In considering the elements necessary to legitimately exercise the right of self-defence in the face of an armed attack, one may conclude that some elements of the global war against terrorism may be justified under Article 51 of the Charter of the United Nations. The international armed conflicts in Afghanistan and Iraq, and the non-international secessionist or insurgent armed conflicts in regions such as Chechnya, Pakistan, the Horn of Africa, \textit{et cetera}, appear to satisfy the conditions for the lawful exercise by a state of military

\textsuperscript{144} C. Downes, “Targeted Killings’ in an age of Terror: The Legality of the Yemen Strike”, \textit{supra}, at 285.
\textsuperscript{145} \textit{Ibid.}, at 291.
\textsuperscript{146} Consider also the Israeli High Court of Justice, which held in \textit{The Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment} \textit{v. The Government of Israel and Others, supra}, at para. 40: “a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed.”
\textsuperscript{147} C. Downes, “Targeted Killings’ in an age of Terror: The Legality of the Yemen Strike”, \textit{supra}, at 291.
force for the purpose of ongoing self defence. However, in the case of efforts to control and eventually eliminate individual terrorist organizations that act independently from any state, secessionist or insurrectionist armed group, the requisite criteria of military necessity (i.e., immediacy) and proportionality (i.e., no other choice of means; minimizing civilian casualties) remain unmet. This is especially true in the context of the targeted killing of suspected terrorists who are not actively engaged in terrorist activity. As Mr. Downes writes: “Any claim that the principles of proportionality, necessity and immediacy may be glibly set aside due to the pandemic terrorist threat is not credible in the case of a ‘targeted killing’ by a UAV.”¹⁴⁹ In the absence of an imminent or ongoing armed attack, or the exhaustion of other peaceful means to achieve a resolution, a resort to armed military force is not justified under the inherent right of self defence as described in the Charter of the United Nations. Therefore, any such exercise of military force would likely result in a war crime.¹⁵⁰

The significance of the above conclusion – that armed confrontations with a loosely organized international terrorist organization cannot be characterized as an “armed conflict” within the meaning of IHL – is that IHL has no application to such operations. Indeed, as the analysis demonstrates, not even the inherent right of self defence may be available to justify a state’s use of military force against an armed attack by a terrorist organization. Whereas in certain situations of armed conflict, IHL may act as *lex specialis*, the legal system that has priority in governing state behaviour in the absence of armed conflict is IHRL.¹⁵¹ As Dr. Melzer writes: “While targeted killings directed against legitimate military objectives in situations of armed conflict are governed by the normative paradigm of hostilities, all other targeted killings are – ‘by default’ – governed by the normative paradigm of law enforcement [and IHRL].”¹⁵² Therefore, in most situations, state behaviour in the global response to international terrorism is governed exclusively by the rules and customs of IHRL.

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¹⁴⁹ C. Downes, “‘Targeted Killing’ in an age of Terror: The Legality of the Yemen Strike”, *supra*, at 291.
¹⁵⁰ See, for example, Articles 5 and 8 of the Rome Statute of the International Criminal Court, which describe the terms of establishing a definition of the crime of aggression, and provide a definition of war crimes, respectively.
¹⁵¹ See, for example, N. Melzer, “Targeted Killing in International Law”, *supra*, at 122.
¹⁵² N. Melzer, “Targeted Killing in International Law”, *supra*, at 423.
Part III – International Human Rights Law and the Right to Life

Modern international human rights law can trace its origins to the post-Second World War era, culminating in the 1948 adoption by the United Nations of the Universal Declaration on Human Rights. Ms Droege explains that IHRL “deals with the inherent rights of the person to be protected at all times” from the power of the state. Professor Provost explains: “Human rights attach to individuals as against any state bound by the international norm. Narrow constructions of the applicability of human rights have been rejected to ensure that, in the words of the UN Secretary-General, they ‘apply always and everywhere’.”

Among the most important of human rights is the right to life. Dr. Melzer explains that, “In terms of hierarchy, the right to life is often described as the ‘cardinal’ or ‘supreme’ human right, from which the enjoyment of all other rights depend, and is considered by many to be part of jus cogens.”

International human rights law is composed of both conventional treaties and customary law. Both sources of law explain that human rights law is applicable to limit a state’s activities where an individual falls within that state’s jurisdiction. Dr. Melzer offers a succinct description of how jurisdiction is exercised in IHRL:

for the purposes of human rights law, the notion of “jurisdiction” has both a (primary) territorial, and a (secondary) personal dimension, and is subject to certain restrictions. First, in principle, all persons finding themselves inside the national territory of a State are presumed to come within the jurisdiction of the State. This uncontroversial presumption may be disproved in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory such as in situation of belligerent occupation or internal strife. Likewise, today, there can no longer be any doubt as to the fact that the jurisdiction of a State extends to territory other than its own over which it exercises – or has the exclusive ability to exercise – effective control, regardless of the circumstances under which such control was obtained or established.

Second, the [United Nations] Human Rights Committee, the European Court

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and the Inter-American Commission have emphasized that individual human rights are inherent in human nature. Beyond the special cases of personal jurisdiction which have been traditionally recognized in international law, human rights conventions cannot, therefore, be interpreted so as to allow contracting States to perpetrate human rights violations on the territory of another State, which they could not perpetrate on their own territory. Accordingly, States have also been considered to exercise their jurisdiction in the absence of territorial control, namely to the extent that State agents usually exercised “authority and control” over the concerned individuals.  

In the context of the targeted killing of a suspected member of an international terrorist organization, Dr. Melzer observes:

as far as the obligation to ‘respect’ the right to life is concerned, every case of targeted killing by State agents occurring outside the territorial jurisdiction of the operating State brings the targeted person within the ‘jurisdiction’ of that State within the meaning of the ICCPR, the ACHR and the ECHR. In other words, a State exercising sufficient factual control or power to carry out a targeted killing will also exercise sufficient factual control to assume legal responsibility for its failure to ‘respect’ the right to life of the targeted person under conventional human rights law.  

Similarly, Professor Manfred Nowak explains simply that “When states parties... take actions on foreign territory that violate the [international human] rights of persons subject to their sovereign authority, it would be contrary to the purposes of the Covenant [and other human rights treaties] if they could not be held responsible.”  

The right to life is not absolute. Rather, as three major international human rights treaties explain, the right to life extends to the right to not be arbitrarily deprived thereof by the state. Article 6(1) of the ICCPR provides: “Every human being has the inherent right to life. The right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 4(1) of the American Convention on Human Rights (the “ACHR”) states that “Every person has the right to have his life respected. This right shall be protected by law and, in

157 Ibid., at 138-139.
158 N. Nowak, CCPR Commentary (NP Engel: Kehl am Rhein, 2005), at 44.
159 ICCPR, Article 6(1).
general, from the moment of conception. No one shall be arbitrarily deprived of his life.”160 Similarly, Article 4 of the African Charter on Human and People’s Rights (the “ACHPR”) explains: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”161 Dr. Melzer explains that “These provisions make it abundantly clear that, as a matter of material scope, the protection of individuals against deprivation of life under the ICCPR, the ACHR and the ACHPR is not absolute.”162 Indeed, “since only arbitrary deprivations of life are prohibited, the lawfulness of the extra-judicial (i.e., non-judicial) killing of individuals by State agents depends entirely on the meaning of the term ‘arbitrary’.”163

None of the ICCPR, ACHR or ACHPR explains what an “arbitrary” deprivation of life is. Instead, the elements or qualities that define an arbitrary deprivation of life have been developed in the jurisprudence of the international judicial and quasi-judicial bodies that exercise jurisdiction over these treaties. Dr. Melzer explains that the practise of the international and regional tribunals responsible for administrating the ICCPR, ACHR and the ACHPR establishes that a deprivation of life may be “arbitrary” if it: (a), is “without legal basis, or based on a law which does not strictly control and limit the circumstances in which a person may be deprived of his life... in accordance with internationally binding standards”164; (b), is not “necessary to maintain, restore, or otherwise impose, law and order in the circumstances of the case”165; (c), is “disproportionate to the actual danger present”166; or (d), “could be avoided by taking reasonable precautionary measures”167, including attempts at arrest and detention, or of giving an opportunity for surrender. Professor Nowak explains that, when the United Nations negotiated the text of the ICCPR:

Several delegates took the opinion that arbitrarily was synonymous with the term “without due process of law” common in Anglo-American law. Others argued that it contained an ethical component, since national legislation could

160 ACHR, Article 4(1).
161 ACHPR, Article 4.
164 Ibid., at 100-101.
165 Ibid., at 101.
166 Ibid.
167 Ibid.
also be arbitrary. The Committee of Experts, which had taken up the interpretation of this term at the request of the Committee of Ministers of the Council of Europe, concurred with the view of the Chilean delegate in the HRComm that arbitrary deprivation of life contained elements of *unlawfulness* and *injustice*, as well as those of *capriciousness* and *unreasonableness.*\(^{168}\) [*Emphasis in original.*]

Professor Nowak therefore observes:

There have been occasional attempts in the literature to come up with an exhaustive list of all possible cases of arbitrary deprivation of life. Although these lists provide valuable references to such typical examples as genocide, death by torture or excessive use of force, etc., they fail to account sufficiently for the fact that the term “arbitrarily” aims at the specific circumstances of an individual case and their reasonableness (proportionality), making it difficult to comprehend in *abstracto.*\(^{169}\)

The United Nations’ Human Rights Committee has jurisdiction to receive, consider and comment upon (called “Concluding Observations”) reports submitted periodically by states that have joined the ICCPR. These reports detail “the measures [States Parties] have adopted which give effect to the rights recognized [by the ICCPR] and on the progress made in the enjoyment of those rights.”\(^{170}\) Thus, in its Concluding Observations of Israel’s 2001 report, which Israel submitted pursuant to Article 40 of the ICCPR, the Human Rights Committee explained:

The State party should not use “targeted killings” as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.\(^{171}\)

\(^{168}\) M. Nowak, *CCPR Commentary*, supra, at 128.
\(^{170}\) ICCPR, Article 40.
The Human Rights Committee also receives and considers complaints that arise under the ICCPR from individuals, provided that the complaint involves a State Party to the ICCPR’s Optional Protocol. Thus, in *Pedro Pablo Camargo v. Colombia* (also indexed as *Guerrero v. Colombia*), the Human Rights Committee considered a complaint against Colombian police forces in Bogota. Colombian police conducted a raid on a house in which a kidnapped person (Mr. Miguel de German Ribon, former Colombian ambassador to France) was thought to be held. When the police found nobody at the house, they decided to wait for the arrival of the suspected kidnappers, assuming ambush positions within the residence. Seven individuals (suspected kidnappers) who eventually entered the house were killed, one after the other, by the waiting police officers. Many of the deceased victims had been shot at point-blank range, some in the back the head. The Human Rights committee concluded that: “the action of the [Colombian] police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to article 6(1) of the International Covenant on Civil and Political Rights.” The Committee observed that “the requirements that the right [to life] shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.” The Committee therefore explained:

it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had

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172 Article 1 of the Optional Protocol provides that “A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.”


174 Ibid., at para. 13.1
occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the [ICCPR]. In the case of Mrs. Maria Fanny Suarez de Guerrero, the forensic report showed that she had been shot several times after she had already died from a heart attack. There can be no reasonable doubt that her death was caused by the police patrol.175

In its 2002 Report on Terrorism and Human Rights176, the Inter-American Commission on Human Rights, which together with the Inter-American Court of Human Rights exercises jurisdiction over the Organization of American States’ international human rights instruments, summarized the combined jurisprudence of human rights practise under the ACHR. The Commission observed that, generally, a state owes a duty to its citizens to protect them against violent threats:

in situations where a state’s population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate. The Court has explained that, in such circumstances, states have the right to use force, “even if this implies depriving people of their lives […] There is an abundance of reflections in philosophy and history as to how the death of individuals in these circumstances generates no responsibility whatsoever against the State or its officials.”177

However, the Commission qualified this, by explaining that, “Unless such exigencies exist... the use of lethal force may constitute an arbitrary deprivation of life or a summary execution”.178 The Commission therefore concluded: “the amount of force used must be justified by the circumstances, for the purpose of, for example, self-defense or neutralizing or disarming the individuals involved in a violent confrontation. Excessive force, or disproportionate force by law enforcement officials that result in the loss of life may

175 Pedro Pablo Camargo v. Colombia (Guerrero v. Colombia), supra, at para. 13.2.
177 Report on Terrorism and Human Rights, supra, at para. 87.
178 Ibid., at para.88.
therefore amount to arbitrary deprivations of life.”

The African Commission on Human and Peoples’ Rights similarly held in *Ouedraogo v. Burkina Faso* that the “recourse to violent means against protestors was deplorable... and that the State which had adequate means at its disposal to maintain order – was responsible for doing so with the minimum of harm to physical integrity and respect for human life”.

Unlike the ICCPR, ACHR and ACHPR, which all prohibit “arbitrary” deprivations of life, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “ECHR”) prohibits the “intentional” deprivation of life. The ECHR explains that an intentional deprivation of life may be authorized only if it is done in one of three discrete situations. Article 2 of the ECHR reads:

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

2. 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 escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

While the content of Article 2 of the ECHR reveals several apparent differences from the right-to-life provisions in the other international human rights instruments, its application and interpretation by Member States of the European Union and the European Commission of Human Rights and the European Court of Human Rights has been consistent with the principles that define an unlawful deprivation of life in the ICCPR, ACHR and ACHPR. As Dr. Melzer explains:

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179 *Report on Terrorism and Human Rights, supra*, at para. 92.
In both cases, the authorities have not only a negative obligation to abstain from arbitrarily interfering with the individual right to life, but also a positive obligation to adopt all appropriate measures to protect and preserve the right, and in both cases the exceptions to the right to life are to be interpreted narrowly. Thus, in their law enforcement activities, the authorities have to take all reasonably possible precautionary measures so as to minimize, to the greatest extent possible, recourse to lethal force. Any deprivation of life requires a sufficient basis in international and domestic law, and must fulfil the requirements of qualitative, quantitative and temporal necessity, as well as of proportionality. While deprivations of life occurring based on an honest and reasonable, but ultimately mistaken, belief in their absolute necessity for the achievement of a legitimate aim do not violate the right to life, lethal force may not be based on mere assumptions or suspicions that have not been sufficiently verified.\textsuperscript{182}

Put differently, the standards placed on state authorities to avoid and prevent the “arbitrary” deprivation of life are also relevant to avoiding and preventing the “intentional” deprivation of life. Or, as Dr. Melzer summarizes: “deprivations of life that would be permissible under Article 2 ECHR would not be viewed as ‘arbitrary’ within the meaning of Article 6 ICCPR, and... deprivations of life permitted by Article 6 ICCPR would not be contrary to Article 2(2) ECHR.”\textsuperscript{183} Indeed, as the European Court of Human Rights observed in \textit{Streletz, Kessler & Krenz v. Germany}\textsuperscript{184}: “The convergence of the above-mentioned instruments is significant: it indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.”\textsuperscript{185}

That the right to life is the supreme value is reflected in the fact that, unlike some other conventional and customary human rights, the right to life is non-derogable in times of emergency. An ICRC summary report on the XXVIIth Round Table on Current Problems of International Humanitarian Law explains:

Human rights are intended to protect the fundamental rights of the person against abuse by the State. They apply in all circumstances, even though it is true that certain treaty instruments, once ratified, authorise the contracting parties to

\textsuperscript{182} N. Melzer, “Targeted Killing in International Law”, \textit{supra}, at 118-119.
\textsuperscript{183} \textit{Ibid.}, at 120.
\textsuperscript{184} \textit{Streletz, Kessler & Krenz v. Germany} (Applications nos. 34044/96, 35532/97 and 44801/98), 22 March 2001 (European Court of Human Rights).
\textsuperscript{185} \textit{Streletz, Kessler & Krenz v. Germany, supra}, at para. 94.
suspend the application of a part of their obligations in a situation of exceptional emergency.\textsuperscript{186}

International human rights treaties such as the ICCPR allow states to temporarily suspend certain rights in times of national emergency. Article 4(1) of the ICCPR provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.\textsuperscript{187}

Similar provisions exist in Article 27(1) of the ACHR, and Article 15(1) of the ECHR.

Although conventional IHRL permits the suspension of some rights during times of emergency, it is noteworthy that all of the derogation clauses found in the ICCPR, ACHR and ECHR (the ACHPR does not include a derogation clause) explain that the right to life is non-derogable.\textsuperscript{188} Thus, in \textit{Myrna Mack Chang v. Guatemala}\textsuperscript{189}, the Inter-American Court of Human Rights considered the lawfulness of the targeted killing of Myrna Mack Chang by Guatemalan intelligence agents. The Court observed that, at the time of Ms Chang’s death (1990), Guatemala was involved in a non-international armed conflict\textsuperscript{190} within its territory, to which the rules and customs of IHL were applicable. Nevertheless, the Court relied on IHRL in its analysis of the lawfulness of the deprivation of Ms Chang’s life. The Court concluded that Ms Chang had been targeted by state authorities because of her research activities, which were considered to be a threat to national security.\textsuperscript{191} The Court held that the right to life in the ACHR:

\begin{itemize}
\item \textsuperscript{186} International Committee of the Red Cross, “International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence” (November 2003) presented at the XXVI\textsuperscript{th} Round Table on Current Problems of International Humanitarian Law, at 8. Available at: http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/SFile/Interplay_other_regimes_Nov_2003.pdf
\item \textsuperscript{187} ICCPR, Article 4(1).
\item \textsuperscript{188} ICCPR, Article 4(2); ACHR, Article 27(2); ECHR, Article 15(2).
\item \textsuperscript{190} \textit{Ibid.} at para. 134.8.
\item \textsuperscript{191} \textit{Ibid.}, at para. 134.7.
\end{itemize}
requires not only that no person be arbitrarily deprived of his or her life (negative obligation), but also that the States adopt all measures to protect and preserve the right to life (positive obligation).... This active protection of the right to life by the State involves not only its legislators, but all State institutions, and those who must protect security, be these its police forces or its armed forces.  

After concluding that “Myrna Mack Chang was placed under surveillance and extra-legally executed in a military intelligence operation developed by the high command of the Presidential General Staff”, the Court concluded unanimously “that the State violated the right to life enshrined in Article 4(1) of the American Convention on Human Rights, in combination with Article 1(1) of that same Convention, to the detriment of Myrna Mack Chang”.

Even in times of national emergency that reach the level of a sustained insurrection, or a non-international armed conflict recognized by IHL, the rules and customs of IHRL’s right to life continue to apply as a complement to IHL. In the absence of an armed conflict, the right to life operates as a cardinal rule. As Dr. Melzer explains:

As far as law enforcement operations not amounting to hostilities are concerned, the conventional right to life enshrined in the ICCPR, the ACHR, the ACHPR, and the ECHR excludes any derogation or suspension whatsoever, regardless of the surrounding situation and circumstances. This absolute non-derogability is part of positive international law and overrides, as lex specialis, any circumstances recognized in general international law as precluding the international wrongfulness of State conduct.

Since, according to the Geneva Conventions and the Optional Protocols of 1977, a state of armed conflict between the states and international terrorist groups cannot exist, the use of force in the war against international terrorism must be governed by the rules and customs of IHRL and the right to life. General Provision 9 of the United Nations’ Basic

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193 Ibid., at para. 134.6.
194 Ibid., at para. 301.1.
Principles on the Use of Force and Firearms by Law Enforcement Officials (the “Use of Force Principles”) gives guidance on when the application of lethal force is permissible:

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

The Use of Force Principles (and, more broadly, IHRL in general) therefore does not prohibit the exercise of lethal force. Rather, the Use of Force Principles establishes that lethal force may be applied in situations where a state agent has a reasonable belief in the risk of imminent harm, and where no other option but to exercise such force is available. For example, on 26 March 2000, a Cantonal police sniper in Chur, Switzerland fired a single shot at the head of Mr. Ewald K., killing him instantly. Mr. Ewald K. had spent the preceding nine hours in a stand-off with the police, repeatedly firing shots with a high-powered, automatic military rifle at a nearby hotel from his apartment balcony. Cantonal police services had attempted to subdue and arrest Mr. Ewald K., but the operation failed, leaving one officer severely wounded and one police dog killed. Sometime after the attempt at arresting him, Mr. Ewald K. again stepped onto his balcony with his rifle in hand. A police sniper then acted on a superior officer’s order to kill Mr. Ewald K. when an opportunity to do so presented itself, firing a single shot directly at Mr. Ewald K’s head.

On 14 September 2004 in Toronto, Canada, an Emergency Task Force sniper of the Toronto Police Services used lethal force against Mr. Sugston Anthony Brookes. Mr. Brookes was armed with a sawed-off .22 calibre rifle, and had taken a single, random hostage.

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198 For a discussion on this targeted killing, see N. Melzer, Targeted Killing in International Law, supra, at 437-438.
in front of Toronto’s busy Union train and subway station during the morning rush hour. Additionally, just before taking the hostage, he had entered a nearby public food court, where he fired two bullets at his estranged wife, who was eating her breakfast at the time with other innocent bystanders. When Toronto police officers arrived at Union Station, Mr. Brookes repeatedly pointed his weapon at them. At 8:50AM, after indicating that he had a clear, unobstructed view of the target, and upon receiving authorization from the commanding officer on scene – who was also a trained hostage negotiator – a police sniper fired a single shot at Mr. Brookes’ head, causing instant death.199

On 22 July 2005, just weeks after the 7 July 2005 suicide-bomb attacks against London’s underground public transportation system, Metropolitan Police officers used lethal force against Brazilian citizen Jean Charles de Menzes. Mr. de Menzes, who had mistakenly been identified as one of the perpetrators of a failed bombing attempt in London on 21 July 2005, fled towards an arriving train when police approached him. Mr. de Menzes reportedly disobeyed police orders to stop. Upon entering the train, Metropolitan Police agents intentionally shot between five and nine bullets directly at Mr. de Menzes’ head, killing him instantly. Tragically, it was later discovered that Mr. de Menzes was unarmed and had no connection whatsoever to terrorism. On 17 July 2006, the Independent Police Complaints Commission concluded that the 11 Metropolitan Police officers involved in the targeted killing had acted on a reasonable belief of imminent harm, and that insufficient evidence existed to commence a criminal prosecution against any of them.200

In each of the above examples, the appropriate authorities conducted post-operational investigations into the police services’ actions. All three investigations concluded that the resort to lethal force was justified. Because of the reasonably-held belief in the imminent threat posed by Messrs. Ewald K., Brookes and de Menzes, the deprivations of life were not unlawful. Although these examples may be distinguishable from the case of a targeted killing in territory not under a state’s effective control, they nevertheless illustrate that state

200 For further discussion, see N. Melzer, Targeted Killing in International Law, supra, at 442-443.
authorities may lawfully deprive a person of his or her life where a reasonable apprehension of imminent harm exists. The applicable standard by which to evaluate the lawfulness of the deprivation of life in these cases was clearly IHRL.

However, in situations where the strict requirements imposed on state authorities by the right to life – for example, as detailed in the Use of Force Principles – are not met, a deprivation of life will not be considered lawful. In Case of Gül v. Turkey,201 the European Court of Human Rights evaluated the use of lethal force by an anti-terrorism unit of the Turkish Police in 1993. The state authorities had planned a search and arrest operation against suspected members of Partiya Karkeren Kurdistan, a terrorist organization. An investigation led by the European Commission of Human Rights concluded that when the operation commenced,

there was no prolonged knocking on the [suspected terrorists’] door or any verbal warning given to those inside the flat. Mehmet Gül came to the door in answer to a light knocking. It was highly probable that the officers outside started firing through the door, as Mehmet Gül was in the process of opening the lock. It was possible that the click of the key turning sounded like a gun being cocked and that this triggered their reaction. The intensity of the firing destroyed fingers on Mehmet Gül’s right hand and inflicted numerous wounds. As he turned away from the door, a bullet struck him in the back inflicting a fatal injury.202

The Court accepted the Commission’s conclusions that “it is undisputed that Mehmet Gül died as the result of bullet wounds inflicted when three police officers of a special operations team opened fire on the door behind which he stood.”203 The Court took particular note of the fact that the police operation had been conducted in a residential complex, and that “the firing of at least 50-55 shots at the door was not justified by any reasonable belief of the officers that their lives were at risk from the occupants of the flat. Nor could the firing be justified by any consideration of the need to secure entry to the flat as it placed in danger the lives of anyone in close proximity to the door.”204 In speaking to efforts undertaken by states to address terrorism, the Court reaffirmed that “Anti-terrorist operations should be planned

201 Case of Gül v. Turkey (Application no. 22676/93, 14 December 2001, European Court of Human Rights)
202 Ibid., at para. 23.
203 Ibid., at para. 79.
204 Ibid., at para. 82.
and controlled by the authorities so as to minimise to the greatest extent possible recourse to lethal force”.

The Court ultimately concluded “that the use of force by the police officers cannot be regarded as ‘absolutely necessary’ for the purpose of defending life. It follows that there has been a violation of Article 2 [i.e., the right to life in the ECHR] in that respect.”

In Case of McCann and Others v. United Kingdom, the European Court of Human Rights considered the legality of the intentional killing of three suspected members of the Irish Republican Army by British Special Air Service military commandos in Gibraltar in 1988. The original aim of the operation in which the three suspected IRA members were killed was to arrest those individuals after they had arrived in Gibraltar from Northern Ireland. The soldiers had received intelligence that “there was a car bomb in place [i.e., at the site of the attempted arrest] which could be detonated by any of the three suspects by means of a radio-control device which might have been concealed on their persons.”

During the arrest, the suspects made hand movements which were interpreted by the British soldiers as an attempt to detonate the bomb. The soldiers responded with lethal force, hitting the suspects with eight, five and 16 bullets each.

The Court accepted “that the soldiers honestly believed, in light of the information that they had been given... that it was necessary to shoot the suspects in order to prevent them from detonating a bomb.” That is, the Court agreed that the soldiers’ belief of the risk of imminent harm was reasonable. However, the Court also considered “not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, recourse to lethal force.” The Court concluded that the British authorities’ decision to allow the suspected terrorists to travel to Gibraltar led to a dangerous situation in which the use of lethal force was

205 Case of Gül v. Turkey, supra, at para. 84.
206 Ibid., at para. 83.
207 Case of McCann and Others v. United Kingdom ([GC], no. 18984/91, European Court of Human Rights, 1995)
208 Ibid., at para. 195.
209 Ibid., at para 199.
210 Ibid., at para 200.
211 Ibid., at para. 194.
inevitable.\textsuperscript{212} The Court also challenged the level of training the British soldiers received: “it is not clear whether [the soldiers] had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.”\textsuperscript{213} The Court therefore concluded that it was “not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of”\textsuperscript{214} the right to life under the ECHR.

The right to life under conventional and customary IHRL therefore requires states to exercise restraint in their efforts to address international terrorism. While IHRL authorizes the intentional deprivation of life in situations of imminent or apparently imminent harm, the indiscriminate use of lethal force against suspected terrorists who are not actively engaged in a terrorist attack cannot be justified. In both Gül v. Turkey and McCann and Others v. United Kingdom, the state authorities were found to have violated the right to life by failing to take alternative measures to the use of lethal force. In applying these standards to the example of the United States’ 2002 targeted killing of Mr. al-Harithi in Yemen, one can reasonably conclude that the United States’ actions did not comply with the requirements of IHRL. Targeted strikes, of course, continue today in regions where the United States is not a direct belligerent.\textsuperscript{215} While a targeted killing will not always offend the rigorous standards protecting the right to life under IHRL, and indeed may sometimes be justifiable during an armed conflict recognizable under IHL, resorting to it in the conflict with international terrorism must comply with international law. Put differently, Roman Senator Marcus Tullius Cicero’s maxim, “Silent enim leges inter arma” is no longer relevant in the age of the United Nations and the universality of human rights.

\textsuperscript{212} Case of McCann and Others v. United Kingdom, supra, at para. 205.
\textsuperscript{213} Ibid., at para. 212.
\textsuperscript{214} Ibid., at para. 213.
Conclusion

Although it is apparent that non-state actors such as international terrorist organizations may conduct armed attacks against states, the response to such attacks must be grounded in law. Professors William Banks of the Syracuse University College of Law and Peter Raven-Hansen from George Washington University Law School remind us that “it is never sufficient under the rule of law that a government policy be merely wise.” Instead, the Professors explain that the “basic principles of the rule of law apply with special force to the extreme policy of intentional, premeditated killing by a government. Intuitively, such killing without legal authority is murder. Legal authority is what differentiates murder from lawful policy.” If one accepts the primacy and importance of the rule of law, then state behaviour must be seen to reflect the rules and conventions of international law, especially when a state employs its military forces to deprive a person of his or her life.

In the modern era, a state’s ability to lawfully resort to armed conflict is limited by such international sources of law as the United Nations Charter, the Geneva Conventions and their Additional Protocols of 1977, and by state custom and practise. However, as Dr. Sageman observes, after a serious terrorist attack, “the pressure in a democracy to ‘do something’ immediately would be overwhelming. The outraged public would demand instant retaliation against any enemy, even if it turned out to be the wrong one – as was the case with the false accusation against Iraq of involvement in the 9/11 plot.” In this vein, powerful states, including the United States of America, Israel, Russia and the United Kingdom, were quick to declare war against international terrorism and the organizations that plan and execute terrorist attacks. However, this response to international terrorism, while perhaps understandable, has been characterized by unlawful uses of military force, and a denial of international law, including IHRL and the right to life.

217 Ibid., at 668.
Dr. Sageman explains that the failure to observe international law in the global war against terrorism may in fact lead to an increase in terrorist recruitment and activity:

“Actions to ensure [security against terrorism] should be carried out according to the rule of law. If not, a double standard will inflame young Muslims and lead them to believe that the United States is conducting war against Islam and undermine the goal of keeping Americans safe.”

University of Toronto Law Professor Kent Roach similarly observes that “The bipartisan 9/11 Commission has called for the United States to adhere to the rule of law, including the Geneva Conventions, in large part because of the pressing need to respond to negative views of the United States and to help minimize the next generation of terrorists.”

Professor Steven David notes that Israel’s use of targeted killing as a tool in its war against terrorism “actually increases the number of Israelis killed, by provoking retaliation, than it saves lives by eliminating key terrorists.”

Compliance with the rule of law, therefore, will not only demonstrate a state’s respect for international law in an orderly world, but may also eliminate or diminish one of the causative factors related to the rise of international terrorism and terrorist organizations.

While it should be apparent “that there is no simple solution to fight global Islamist [and other forms of] terrorism”, it should also be apparent that “in many cases, the smartest and most effective security strategies may not violate rights in any serious manner.”

Professor Roach observes, for example, that “smart counter-terrorism strategies involve not the dramatic introduction of tough new laws criminalizing terrorism or speech related to terrorism, [or declaring war against terrorism,] but rather more mundane administrative regulation to help prevent terrorists from gaining access to substances and sites that can be used for terrorism.”

Dr. Sageman similar recommends a strategy “composed of multiple steps under an overarching idea of homeland security, defending the

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222 M. Sageman, Leaderless Jihad: Terror Networks in the Twenty-First Century, supra, at 177.
224 Ibid.
population,²²⁵ including eliminating the glorification of terrorism, protecting strategically sensitive locations and materials, and promoting effective domestic law enforcement.²²⁶

Whichever strategies are adopted to address international terrorism, states’ behaviour should be guided by the requirements of international law. While IHRL may make the task of fighting international terrorism more difficult, it is important to recall that the modern era of universal human rights and the United Nations is characterized by a rejection of war. If states are truly committed to the values espoused in the Universal Declaration of Human Rights and the United Nations Charter, their responses to international terrorism and terrorist organizations will reflect the rule of law, and will comply with the strict requirements of IHRL.

²²⁵ M. Sageman, Leaderless Jihad: Terror Networks in the Twenty-First Century, supra, at 177.
²²⁶ Ibid, at 147 – 176.
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