

# Targeted killing of suspected terrorists during armed conflicts: compatibility with the rights to life and to a due process?

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1. Introduction; 2. Defining “suspected terrorists” and the principle of distinction of combatants and civilians; 3. Considerations on the relationship between the IHL and HRL regimes; 4. Scope of application of the right to life during an armed conflict; 5. The right to a fair trial during an armed conflict; 6. Conclusions

## 1. Introduction

International humanitarian law (‘IHL’) and human rights law (‘HRL’) share a common basis, which is “the recognition of the dignity of the person”.<sup>1</sup> Such a statement, notwithstanding all that has been written about the interplay between these two bodies of law,<sup>2</sup> seems at odds with the fact that the law of armed conflict contains rules on situations and circumstances in which fighters may be lawfully targeted, and in which collateral damage in the form of civilian casualties is an acceptable consequence of military action guided by considerations of necessity and proportionality.

It is clear that IHL is the result of a compromise. Obviously, its protective character does not stem from the implied authorisation to kill in wartime, or from the right to detain enemies until the end of the hostilities, which is customarily inherent to the very concept of warfare. The humane face of IHL derives from the regulation of means and methods of warfare, as well as the protection of people who are not or are no longer taking direct part in the hostilities, including the definition of categories of persons that may be lawfully targeted and the situation in which this is allowed.<sup>3</sup> This is the essence of the *jus in bello*. To affirm the dignity – unchanged in times of belligerency – of all persons, civilians and combatants of the different parties to a conflict, contributes to the clarification of both legal regimes’ protective character, and to the legal inadmissibility of loopholes of legal protection.

Let aside the lack of broad agreement over a definition of terrorism, an important assumption to be made preliminarily refers to the application of IHL to terrorism, which shall

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<sup>1</sup> Rodríguez-Villasante, *Terrorist acts, armed conflicts and international humanitarian law*, in Fernández-Sánchez (ed.), *THE NEW CHALLENGES OF HUMANITARIAN LAW IN ARMED CONFLICTS: IN HONOUR OF PROFESSOR JUAN ANTONIO CARRILLO-SALCEDO* (2005), at 44-5.

<sup>2</sup> See, e.g., Meron, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* (1987), at 3-70; Cançado Trindade, *TRATADO DE DIREITO INTERNACIONAL DOS DIREITOS HUMANOS: VOL I* (1997), at 269-349; Heintze, *On the relationship between human rights law protection and international humanitarian law*, 86:856 *INTERNATIONAL REVIEW OF THE RED CROSS* 789 (2004); Lubell, *Challenges in applying human rights law to armed conflict*, 87:860 *INTERNATIONAL REVIEW OF THE RED CROSS* 737 (2005), at 737-8.

<sup>3</sup> See Rona, *Interesting times for international humanitarian law: Challenges from the “war on terror”*, 27:2 *THE FLETCHER FORUM OF WORLD AFFAIRS* 55 (2003), at 57.

be demystified and examined on legal grounds. First, not every terrorist act is committed in the context of an armed conflict, and therefore humanitarian law shall not be presumed to apply to every alleged situation of terrorism. Furthermore, it shall not be taken for granted that every military action amounts to an armed conflict triggering the application of IHL, even if it is often the case.<sup>4</sup> Finally, military action, whether or not in the context of an armed conflict, is neither necessarily a lawful nor an adequate response to the commission of acts of terrorism, which most often are adequately dealt with by law enforcement agents.<sup>5</sup>

There is, undoubtedly, a factual background for the discussion about the lawfulness of targeted killings. It is reported that “[s]ince 9 November 2000 the Israeli Defence Force (IDF) has actively pursued a policy of deliberately targeting those alleged to have carried out, or to have planned to carry out, violent attacks against Israelis”.<sup>6</sup> In the United States, Executive Order n. 12333, drafted in the mid-1970s, prohibits the act of state-sponsored killing,<sup>7</sup> but many voices since the attacks of 11 September 2001 “contend that the ability to eliminate key targets will be a necessary tool [... for the USA] to prosecute its new war against terrorism”.<sup>8</sup> The mentioned Executive Order has not prevented the unlawful practice of targeted killing,

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<sup>4</sup> See Kretzmer, *Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence?*, 16:2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171 (2005), at 171-2, on the November 2002 destruction by a US missile of a car in Yemen, killing six suspected members of Al Qaeda. This is a typical example of military action occurred outside the context of an armed conflict. The absence of resistance or even dissent by the Yemeni government not only prevented the triggering of IHL, but it meant that the prohibition on the use of force was not violated. However, under applicable HRL, Yemen and USA are both responsible for human rights violations in the context of that action, in grades that vary depending on the degree of control of each state over the procedural aspects and results of the operation.

<sup>5</sup> Furthermore, it should be recalled that terrorist acts shall be considered as criminal, disregard of whether they were committed during an armed conflict of an international character (as war crimes) or of an internal character (rebels would normally respond for common crimes within the domestic legislation; but it is noteworthy that the 1998 Statute of the International Criminal Court has for the first time recognized a wide range of war crimes committed in conflicts not of an international character, in Art. 8(2)(c) and 8(2)(e)), and notably also during peacetime.

<sup>6</sup> Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index: MDE 13/005/2001, February 2001, at 1 (available at [http://web.amnesty.org/library/pdf/MDE150052001ENGLISH/\\$File/MDE1500501.pdf](http://web.amnesty.org/library/pdf/MDE150052001ENGLISH/$File/MDE1500501.pdf); last visited 23 July 2007). See also Kretzmer, *supra* note 4, at 172-173; Ben-Naftali and Michaeli, ‘*We must not make a scarecrow of the law*’: A legal analysis of the Israeli policy of targeted killings, 38 CORNELL INTERNATIONAL LAW JOURNAL 233 (2003), at 239-41; Amnesty International, *Israel and the Occupied Territories: Israel must end its policy of assassinations*, AI Index: MDE 15/056/2003, 4 July 2003 (available at: [http://web.amnesty.org/library/pdf/MDE150562003ENGLISH/\\$File/MDE1505603.pdf](http://web.amnesty.org/library/pdf/MDE150562003ENGLISH/$File/MDE1505603.pdf); last visited 23 July 2007).

<sup>7</sup> Canestaro, *American law and policy on assassinations of foreign leaders: The practicality of maintaining the status quo*, 26 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 1 (2005), at 2. See also Ulrich, *The gloves were never on: Defining the President’s authority to order targeted killing in the war against terrorism*, 45 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1029 (2005).

<sup>8</sup> *Ibid.* But see Godfrey, *Authorization to kill terrorist leaders and those who harbor them: An international analysis of defensive assassination*, 4 SAN DIEGO INTERNATIONAL LAW JOURNAL 491 (2003), at 491-2, on the explicit October 2001 authorization of President Bush for the CIA “to carry out covert missions to assassinate Osama Bin Laden and his supporters around the globe, which in effect has lifted the United States’ twenty-five-years ban on such activities”.

which, however, has not always been acknowledged as such by the government.<sup>9</sup> Nonetheless, this paper will as much as possible not discuss specific country situations, and even less the targeting of specific persons, but focus on the discussion of the legal framework in which targeted killings take place, and its compatibility with rights enshrined in applicable IHL and HRL norms.

The neutral term “targeted killing” will be preferred to the expression “targeted assassination”, because assassination is generally understood as the killing of a particular individual for political reasons.<sup>10</sup> The more general expression “targeted killing” includes assassinations, but may also refer to the unlawful killing of protected persons, no matter their political position. It is “a lethal attack on a person that is not undertaken on the basis that the person concerned is a ‘combatant’, but rather where a state considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that person, even at a time when the individual is not engaged in hostile activities”.<sup>11</sup> The objective of this paper is to evaluate in which circumstances killing is unlawful during an armed conflict.

For this purpose, the paper will first examine general criteria for determining the IHL categories of persons under which *suspected terrorists* may fall. Then, the relationship between the regimes of human rights law and of humanitarian law will be briefly discussed, with a view to asserting the applicable legal regime during an armed conflict. The paper will subsequently focus on the situations in which so called *terrorists* may be legitimate targets, and thus killed in the context of military operations, in an attempt to define the scope of the right to life in times of armed conflict. Finally, the matter of targeted killings will be analysed through the lenses of the right to a fair trial, taking into account the different standards of protection made available by IHL.

## **2. Defining “suspected terrorists” and the principle of distinction of combatants and civilians**

The basic customary rule of distinction obliges combatants to distinguish themselves

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<sup>9</sup> See *supra* note 4; Rona, *supra* note 3, at 62; Duffy, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW (2005), at 336-7 and 340-4.

<sup>10</sup> See Canestaro, *supra* note 7, at 11 *et seq.* See also Kretzmer, *supra* note 4, at 173, arguing that “the term ‘assassinations’ should be reserved for deliberate killing of political figures, rather than killing of suspected terrorists” (*ibid.*), and noting that the Israeli authorities do not release evidence regarding the activities of the persons targeted. On the customary prohibition of assassinations, see Doswald-Beck, *The right to life in armed conflict: does international humanitarian law provide all the answers?*, 88:864 INTERNATIONAL REVIEW OF THE RED CROSS 881 (2006), at 900-2.

<sup>11</sup> The definition, used by the experts of the meeting of the University Centre for International Humanitarian Law, Geneva, 1-2 September 2005, is brought about by Doswald-Beck (*supra* note 10, at 894).

from civilians, who should not be targets of military attacks. The same rule obliges the parties to a conflict to distinguish between military and civilian objects. In this context, whereas attacks against civilian objects are forbidden, the use of violence against military objectives would need to be commensurate with the purpose of obtaining military advantage.<sup>12</sup>

Most importantly, this does not mean that the treatment of persons is similar to that of objects. There should not be an identification of combatants with the notion of military objects, to which attacks shall be limited (Art. 52(2) AP I).<sup>13</sup> Doswald-Beck very consistently elaborates on the risks that the confusion of these intrinsically distinct concepts would entail, recalling that the attack of an *object* “does not require that the object uses, or is on the point of using, force, but only whether it effectively *contributes* to the military action of the enemy and attacking it gives one a direct military advantage”.<sup>14</sup> The attack on persons, in particular those that do not classify as combatants, is only justified when they directly participate in hostilities. This has to be seen against the general prohibition on attacks against the civilian population (Article 51 AP I and Art. 13 AP II<sup>15</sup>).

The designation of “suspected terrorist” poses a troubling initial problem, which arises less from the rather vague expression “terrorist” than from the qualification as “suspected” of being a terrorist. Even without an internationally agreed definition of terrorist acts,<sup>16</sup> which may be prosecuted and punished on the national level under various criminal designations, such as murder, taking of hostages, crimes against humanity and, in the context of an armed conflict, war crimes,<sup>17</sup> one may concede that it involves “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” (Articles 51(2) AP I, and

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<sup>12</sup> Art. 48 AP I: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”. See Cassese, *Expert opinion on whether Israel's targeted killings of Palestinian terrorists is consonant with international humanitarian law*, available at [www.stoptorture.org.il/eng/images/uploaded/publications/64.pdf](http://www.stoptorture.org.il/eng/images/uploaded/publications/64.pdf) (last visited 23 July 2007), at 2 *et seq.* See Sassòli, *Targeting: The scope and utility of the concept of “military objectives” for the protection of civilians in contemporary armed conflicts*, in Wippman and Evangelista (eds.), *NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN TWENTY-FIRST CENTURY CONFLICTS* (2005), 181-210.

<sup>13</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, UN Doc. A/32/144 Annex I (‘AP I’). See also Oeter, *Methods and means of combat*, in Fleck (ed.) *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (1995), at 153 *et seq.*

<sup>14</sup> Doswald-Beck, *supra* note 10, at 891.

<sup>15</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, UN Doc. A/32/144 Annex II (‘AP II’).

<sup>16</sup> Gasser, *Acts of terror, “terrorism” and international humanitarian law*, 84:847 *INTERNATIONAL REVIEW OF THE RED CROSS* 547 (2002), at 550-4.

<sup>17</sup> See Cassese, *INTERNATIONAL CRIMINAL LAW* (2003), at 125-31. See *supra* note 5.

13(2) AP II).<sup>18</sup> In this sense, it is useful to bear in mind that terrorists are usually seen as persons who do not abide by rules on conflict situations, and do not accept any kind of constraint on their methods: they “do not spare ‘civilians’, but apply violence indiscriminately and without any concern whatsoever for persons who are foreign to the motives behind the act of terrorism”.<sup>19</sup>

The difficulty raised by the term “suspected terrorist” lies in the assumption of an uncertified criminal charge, not based on disclosed evidence, which cannot and is not meant to be challenged before a competent tribunal, unless the alleged terrorist is brought before court. All that can be known *a priori* about a suspected terrorist, in the context of targeted killings during an armed conflict, is that he or she may be either a person falling under the category of a combatant (a legitimate target as long as he is not *hors de combat*),<sup>20</sup> or of a civilian.<sup>21</sup> In most cases involving targeted killings by state authorities, the victims are civilians, most of whom may have taken part in hostilities, or combatants who fail to meet the requirements necessary to be entitled to the prisoners-of-war status (Art. 44(4) AP I).

The distinction is somehow blurred in situations of internal armed conflicts, in which IHL does not attribute a formal status to rebels, in order to prevent any kind of international recognition to the fighters.<sup>22</sup> In this case, most of the rules on the use of lethal force and the treatment afforded to captured rebels would have to be filtered through the applicable human rights framework, taking into account Article 3 common to the four 1949 Geneva Conventions and AP II, where applicable.

In armed conflicts of an international character, however, it must be kept in mind that “civilians shall be protected from any acts of violence (Arts. 13 and 27 GC IV; Art. 46 HagueReg<sup>23</sup>)”,<sup>24</sup> and that in case of doubt as to whether a person is a civilian or a combatant,

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<sup>18</sup> Sandoz, *L'applicabilité du droit international humanitaire aux actions terroristes*, in Flauss (ed.), *LES NOUVELLES FRONTIÈRES DU DROIT INTERNATIONAL HUMANITAIRE* (2003), at 51-2, on the fact that the word ‘terrorism’ is not largely used in the Geneva Conventions and its Protocols; the author lists the occurrences of the prohibition of its practice and explains its limitations (*e.g.* IHL often refers only to spreading terror among the *civilian* population). See, in particular, Art. 33, GC IV (Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949): “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited”.

<sup>19</sup> Stein, *How much humanity do terrorists deserve?*, in Delissen and Tanja (eds.) *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN* (1991), at 568.

<sup>20</sup> Art. 41(1) AP I.

<sup>21</sup> Civilians are defined as those who do not fall under the category of combatants. See Art. 50(1), AP I.

<sup>22</sup> Doswald-Beck, *supra* note 10, at 889; Meron, *Internal strife: applicable norms and a proposed instrument*, in: Delissen and Tanja (eds.), *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN* 249-66 (1991).

<sup>23</sup> Regulations annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, 18

he or she shall be treated as a civilian (Art. 50(1), *in fine* AP I). References to *suspected* terrorists are often based on missing reliable and public evidence of the commission or preparation of terrorist acts (making it impossible to challenge the validity of this presumption in a court of law). This categorisation also indicates that those persons are civilians or that at least there are doubts about their status. Therefore, they are entitled to be treated as civilians.

Civilians shall refrain from taking direct part in hostilities.<sup>25</sup> It is extremely relevant to note that civilians who actually engage in hostilities do not lose their status as civilians. “However for factual reasons they may not be able to claim the protection guaranteed to civilians, since anyone performing hostile acts may also be opposed, but in the case of civilians, only for so long as they take direct part in hostilities (Art. 51(3) AP I).”<sup>26</sup> Moreover, contrary to combatants, civilians that do engage in hostilities may be criminally prosecuted and punished for acts practiced during the conflict and for the simple participation in the hostilities.

Pursuant to the law of international armed conflict, all persons who are not combatants are civilians, and enjoy the protection of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 1949, which applies also in the event of occupation. It is said of civilians who engage in the conflict, that they forfeit some of their rights under this Convention and “become lawful targets for the duration of their engagement in hostilities. These civilians retain the same protection as combatants during the conduct of hostilities (e.g. protection from attack if *hors de combat*) except for immunity from prosecution”.<sup>27</sup> Furthermore, according to Article 45(3) AP I, a person who falls in the hands of the enemy, and “has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol”, which sets forth fundamental guarantees applicable to international armed conflicts. AP II, on its turn, applies to non-international armed conflicts that qualify as such according to its Article 1. Even in non-international armed conflicts that do not reach the threshold of AP II, a minimum set of rights

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October 1907.

<sup>24</sup> Gasser, *Protection of the civilian population*, in Fleck, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (1995), at 248.

<sup>25</sup> Except in cases of *levée en masse* (Art. 4A, para. 6 GC III [*Convention relative to the Treatment of Prisoners of War, 12 August 1949*]). On the lack of clarity of the expression “direct” participation in hostilities”, and on the fact that civilians may provide support, to some extent, to combatants, see Watkin, *Humans in the cross-hairs: Targeting and assassination in contemporary armed conflict*, in Wippman and Evangelista (eds.), *NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN TWENTY-FIRST CENTURY CONFLICTS* (2005), at 154-7. See Gasser, *supra* note 24, at 211.

<sup>26</sup> *Ibid.*

<sup>27</sup> Cassese, *supra* note 12, at 5.

contained in common Article 3 to the four Geneva Conventions applies.

On the other hand, a fighter is required to fulfil a certain number of conditions<sup>28</sup> in order to be considered as a combatant. As an integral feature of his status, a combatant is a lawful target at all times, except when he or she is *hors de combat*. Moreover, when a combatant falls into the power of the enemy he is entitled to the protection of Geneva Convention (III) relative to the Treatment of Prisoners of War and the respective provisions of 1977 AP I. Furthermore, if a combatant kills, respecting the law of armed conflict, other combatants, or civilians taking direct part in hostilities, he or she is not criminally liable for those acts. A combatant may be punished only for violating the laws of war.

### 3. Considerations on the relationship between the IHL and HRL regimes

The fact that IHL is the body of rules designed for application during armed conflict does not mean that HRL is only applicable in peacetime. Even if the “humane” component of both HRL and IHL do not have common roots, the consideration of their relationship has proved to be useful insofar as they may apply at the same time and under extreme circumstances, *i.e.* during an international armed conflict in which a state exercises jurisdiction or control over the territory in which the conflict takes place; in most situations of occupation, also categorised as an international armed conflict; and in times of non-international armed conflicts.<sup>29</sup> It has also been said that IHL contains many norms granting rights to states, and to individuals on account of their nationality, while HRL attributes rights to individuals as such. However, it is undeniable that IHL also contains norms protecting human rights,<sup>30</sup> in a direct or indirect manner, and its role in human rights monitoring and human rights decision-making, in particular by UN bodies,<sup>31</sup> is an evidence of this interface.

The interplay of IHL and HRL derives from three undisputed assumptions: i. HRL does not cease to apply in time of public emergency that threatens the life of the nation, such as armed conflict, notwithstanding the possibility left open to each state to derogate from certain rights, following a prescribed procedure;<sup>32</sup> ii. IHL is the *lex specialis* in time of armed conflict,

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<sup>28</sup> See Art. 4, GC III, in conjunction with Arts. 43 and 44 AP I; see also Arts. 1, 2 and 3 HagueReg.

<sup>29</sup> See Doswald-Beck, *supra* note 10.

<sup>30</sup> Dinstein, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (2004), at 20.

<sup>31</sup> Van Boven, *Reliance on norms of humanitarian law by United Nations' organs*, in Delissen and Tanja (eds.) *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN* (1991), at 495-513.

<sup>32</sup> See Art. 4 International Covenant on Civil and Political Rights ('ICCPR', UN General Assembly Res. 2200A (XXI), 16 December 1966), Art. 15 European Convention on Human Rights ('ECHR', Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950), Art. 27 American Convention on

whatever its causes or nature are.<sup>33</sup> It provides guidance for the interpretation of applicable HRL in armed conflict, or borrows concepts from HRL that are not defined in IHL, with an interpretation that takes into account the context;<sup>34</sup> iii. The context of armed conflict in which the state finds itself, as well as its capacity to maintain a structure towards the realization of human rights, are often taken into account for the setting and evaluation of human rights standards.

With few exceptions, based for example on “imperative military reasons, or military necessity, or reasons of security (...), as well as specific derogations with regard to particular persons (...), derogations rather similar to limitation clauses under the Political Covenant”,<sup>35</sup> IHL admits no derogations based on emergency, for it is meant to be applicable precisely in situations of extreme emergency.<sup>36</sup>

However, even the consideration of the context of armed conflict, implying a certain adjustment of the meaning of rules governing human rights, depends on a previous declaration and notification of public emergency, which might or not provide information about permissible derogations under the ICCPR.<sup>37</sup> Accordingly, if a state has not strictly followed the required procedure,<sup>38</sup> it would mean that the conflict, from the government’s perspective, has not achieved proportions that would preclude the state from ensuring the observation of human rights rules applicable in peacetime.<sup>39</sup>

On the other hand, it cannot be denied that the *jus in bello* has evolved so as to apply in

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Human Rights (‘ACHR’, San José, 22 November 1969). The African Charter on Human and Peoples’ Rights (‘AfCHPR’, Nairobi, 27 June 1981) does not contain a derogation clause, meaning that its provisions bind the parties at all times. See Henckaerts and Doswald, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES*, VOL. 1 (2005), at 299 *et seq.* On the derogatory clause, see Fitzpatrick, *HUMAN RIGHTS IN CRISIS: THE INTERVENTIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY* (1994). See also Inter-American Court of Human Rights’ Advisory Opinions No. 8 of 30 January 1987 (*Habeas Corpus in Emergency Situations*) and No. 9 of 6 October 1987 (*Judicial Guarantees in States of Emergency*), on the need to assure that certain procedural safeguards (not explicitly non-derogable) are not suspended in order to protect substantial rights non subject to derogation.

<sup>33</sup> Rodríguez-Villasante, *supra* note 1, at 14.

<sup>34</sup> See Doswald-Beck, *supra* note 10, at 898-900.

<sup>35</sup> Meron, *The humanization of humanitarian law*, 94 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 239 (2000), at 267.

<sup>36</sup> *Ibid.*

<sup>37</sup> Pocar, *Human rights under the International Covenant of Civil and Political Rights and armed conflicts*, in Vohrah *et al.* (eds.), *MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE* (2003), at 729-40.

<sup>38</sup> *I.e.* Art. 4(1) and (3) ICCPR require an official proclamation of public emergency which threatens the life of the nation as pre-condition to the adoption of derogatory measures, which would imply the necessary notification of the other Parties, through the UN Secretary-General.

<sup>39</sup> Pocar, *supra* note 37.

*de facto* situations, with no need for a declaration of war.<sup>40</sup> Therefore, IHL may apply notwithstanding the absence of notification to the other Parties (of the ICCPR) about permissible derogations of HRL. The fact that IHL entails a more restrictive approach to the scope of application of human rights norms might create difficulties of interpretation, which would require a case-by-case analysis.

As already mentioned, in a situation of non-international armed conflict, governed by a limited set of rules (*i.e.* Article 3 common to the four Geneva Conventions of 1949, and in some cases Additional Protocol II of 1977), human rights norms remain particularly important with regard to the way the government is authorised to repress the opponent forces, and to the protection of the civilian population affected by the conflict.

#### **4. The scope of application of the right to life during an armed conflict**

Protection against arbitrary deprivation of life is a fundamental feature of international law, at all times. The right to life and not to be arbitrarily deprived of one's life, under human rights instruments<sup>41</sup> and customary international law, is not derogable.<sup>42</sup> The very limited possibilities of permissible deprivations must be subjected to the most stringent controls.<sup>43</sup> The ICCPR brings about a limitation clause allowing countries that have not yet abolished capital punishment to maintain the death penalty as a consequence of a trial that respects all guarantees of the defence.<sup>44</sup>

It is also clear that the right to life aims to protect the individual from arbitrary deprivation of life by the state, and that it is not meant to protect unreservedly life itself.<sup>45</sup> In the example of a person possessing a bomb ready to be detonated, state authorities are allowed to shoot this person in order to protect the life of other persons in the area.<sup>46</sup> Considerations of necessity (related to the perception of a concrete threat) and proportionality, apply to such

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<sup>40</sup> Greenwood, *Scope of application of humanitarian law*, in Fleck (ed.), *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (1995), at 39-44.

<sup>41</sup> See Art. 6(1) ICCPR, Art. 2 ECHR, Art. 4 ACHR, Art. 4, AfCHPR. On the distinct facets and manifestations of the right to life, see Ramcharan, *The concept and dimensions of the right to life*, in Ramcharan (ed.), *THE RIGHT TO LIFE IN INTERNATIONAL LAW* (1985), at 1-32.

<sup>42</sup> See Gormley, *The right to life and the rule of non-derogability: Peremptory norms of jus cogens*, in Ramcharan (ed.) *THE RIGHT TO LIFE IN INTERNATIONAL LAW* (1985), at 120-59. It is also noteworthy that "[i]n their statements before the International Court of Justice in the Nuclear Weapons case and Nuclear Weapons (WHO) case, several States which were not at the time party to the main human rights treaties stressed the elementary and non-derogable character of the right to life" (Henckaerts and Doswald, *supra* note 31, at 313).

<sup>43</sup> Ramcharan, *supra* note 41, at 21.

<sup>44</sup> See Art. 6.(2), (4), (5) and (6) ICCPR.

<sup>45</sup> Gomien, *SHORT GUIDE ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1998), at 9.

<sup>46</sup> This problem was examined in *McCann and Others v. the United Kingdom*, European Court of Human Rights, Judgment (5 September 1995).

cases, composing the main criteria that indicate whether an *arbitrary* deprivation of life has taken place.

The same is valid with regard to armed conflict situations in which HRL remains applicable, such as non-international armed conflicts, situations of calm occupation within an international armed conflict, and even international armed conflicts in which a state is able to exercise jurisdiction. There is a strong point in conditioning the use of lethal force against enemies to the factual impossibility of arresting the “suspected terrorists” due to unreasonable risk to the lives of the state authorities performing the arrest or of other civilians nearby, for instance if the persons to arrest are armed or detain explosive material.<sup>47</sup> This comprises the duty for state authorities to plan the operation so as to minimize the need to use force against individuals.<sup>48</sup> HRL also obliges states to undertake independent investigations in case of suspicion of unlawful use of violence against protected persons with a view to punish those responsible.<sup>49</sup>

During an international armed conflict, “as far as the right to life is concerned, [...] a person would be arbitrarily deprived of his right to life only if the death is inflicted in violation of the principles and rules of humanitarian law”,<sup>50</sup> which then plays the role of *lex specialis*. The International Court of Justice (‘ICJ’), in its Advisory Opinion on the Use of Nuclear Weapons, reached a similar conclusion.<sup>51</sup>

Under IHL, “unlawful killings can result, for example, from a direct attack against a civilian (see Rule 1), from an indiscriminate attack (see Rule 11) or from an attack against military objectives causing excessive loss of civilian life (see Rule 14), all of which are prohibited by the rules on the conduct of hostilities”.<sup>52</sup>

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<sup>47</sup> Doswald-Beck, *supra* note 10 (exposing a rich analysis and bringing up a number of decisions by international and regional human rights bodies in support of her thesis). The same conclusion was reached by Dworkin, *Military necessity and due process: The place of human rights in the war on terror*, in: Wippman and Evangelista (eds.), *NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN TWENTY-FIRST CENTURY CONFLICTS* (2005), at 69-70. This viewpoint is compatible with the only human rights treaty norm that expressly addresses the issue, *i.e.* Art. 2(2) ECHR: “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection”.

<sup>48</sup> Doswald-Beck, *supra* note 10, at 883-7.

<sup>49</sup> Doswald-Beck, *supra* note 10, at 887-9.

<sup>50</sup> Pocar, *supra* note 37, at 743.

<sup>51</sup> *Legality of the threat or use of nuclear weapons*, Advisory Opinion, 1996 ICJ REP. 226 (8 July 1996), par. 25. See also Henckaerts and Doswald, *supra* note 32, at 300; Watkin, *Controlling the use of force: A role for human rights norms in contemporary armed conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2004), at 2.

<sup>52</sup> Henckaerts and Doswald, *supra* note 32, at 314. “Rules” refer to the customary rules elaborated by the International Committee of the Red Cross.

Therefore, targeted killings are prohibited not only when the victims are “suspected terrorists”, but as a consequence of the general rules on the lawfulness of killings. Firstly, killings are unlawful when the targeted victim, disregard of his or her qualification as a terrorist, is a civilian who is not directly participating in hostilities, or a combatant when *hors de combat*.<sup>53</sup> Secondly, targeted killings are also prohibited depending on the means and methods of warfare employed, considering that attacks shall never be indiscriminate (Art. 51(4) and (5) AP I) or undertaken with perfidy (see Art. 37 AP I).<sup>54</sup> Thirdly, taking into account the context, targeted killings are also unlawful when they take place within residential areas or with high chances of civilian casualties, or out of a situation of real conflict presenting concrete danger to the life of state authorities or other persons. Even the killing of a combatant or a civilian directly participating in hostilities shall be planned so as not to pose a threat to the life of a disproportionate number of civilians. Those are all examples of grave breaches of IHL (Art. 85(3), AP I).<sup>55</sup>

Some may argue that the use of human shields is prohibited, and there should be a way to counter fighters who engage in this practice.<sup>56</sup> This is a true statement that does not, however, lead to the conclusion that adversaries who use this strategy may be targeted by *any* means. Military operations may take place even in areas where protected persons are present, if stringently necessary, but there would still be the duty to engage in all possible efforts to prevent excessive civilian losses previously to the attacks.

Finally, some authors raise the need of states to conduct targeted killings as a means of “self-defence”, invoking Article 51 of the UN Charter.<sup>57</sup> This arguments is misplaced, bearing in mind that absolutely no provision of the UN Charter deals with the use of force against individuals, and even if the use of force in “pre-emptive” self defence against non-state actors

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<sup>53</sup> See Watkin, *Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 281 (2005), at 309-313, well framing the discussion but concluding with an excessively restrictive interpretation of the scope of the expression “unless and for such time” in Art. 51(3) AP I.

<sup>54</sup> See Gasser, *supra* note 16, at 557.

<sup>55</sup> See Casey, *Breaking the chain of violence in Israel and Palestine: Suicide bombings and targeted killings under international humanitarian law*, 32 SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 311 (2005), at 324-6.

<sup>56</sup> Arts. 23(2) GC III; 28, GC IV; 51(7) AP I. See Arzt, *Can law halt the violence? Palestinian suicide bombings and Israeli “targeted assassinations” under international humanitarian law*, 11 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 357 (2005), at 361.

<sup>57</sup> Godfrey, *supra* note 8, at 495-512; Canestaro, *supra* note 7, at 14-8; Kendall, *Israeli counter-terrorism: “targeted killings” under international law*, 80 NORTH CAROLINA LAW REVIEW 1069 (2002); Guiora, *Targeted killing as active self-defense*, 37 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 319 (2005).

would find a way through the UN system, which is far from being accepted,<sup>58</sup> the Charter certainly does not suggest in any way that the use of force may be performed in disregard of conventional and customary rules of IHL and HRL.

## 5. The right to fair trial during an armed conflict

Terrorist acts committed in the context of an armed conflict may constitute war crimes.<sup>59</sup> It should be borne in mind that the prosecution and punishment of such acts is of utmost importance for the enforcement of international humanitarian law,<sup>60</sup> no matter how questionable it is whether persons charged with terrorism could receive a fair trial at all, due to the hostile ambiance that surrounds this sort of trials.<sup>61</sup>

The right to a fair trial<sup>62</sup> is one of the rights that may be partially suspended in a situation of emergency under HRL, though it cannot be eliminated. A well-established norm of conventional<sup>63</sup> and customary international humanitarian law states that “[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees”.<sup>64</sup> References to fair trial in the context of IHL are often in connection with war crimes charges, or the charge of unlawful participation in hostilities.

It must be remembered that civilians may face criminal procedures as a legal consequence of directly participating in hostilities, as long as it is determined that they are not combatants and are not entitled to the prisoner-of-war status. Even in this case, the minimum rules applicable to non-international armed conflict contain the prohibition, “at any time and any place” of “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples” (Article 3(1)(d), common to the

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<sup>58</sup> Gazzini, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* (2005), at 149-53. To be sure, the current framework on state responsibility “allows to attribute the terrorist activities to the State that supports, encourages or merely tolerates them” (*Ibid.*, at 203). See also Gray, *INTERNATIONAL LAW AND THE USE OF FORCE* (2004), at 159-94 (on the non subsistence of the argument of a change in the regime prohibiting intervention without clear authorisation of the UN Security Council).

<sup>59</sup> See *supra* note 5.

<sup>60</sup> Sandoz, *supra* note 18, at 67-8.

<sup>61</sup> Robertson, *Fair trial for terrorists?*, in Wilson (ed.), *HUMAN RIGHTS IN THE ‘WAR ON TERROR’* (2005), 169-83.

<sup>62</sup> See Art. 14 ICCPR; Art. 6 ECHR; Art. 8 ACHR; Art. 7 AfCHPR.

<sup>63</sup> Arts. 49(4) GC I (*Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949*); 50(4) GC II (*Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949*); 102-108 GC III; 5 and 66-75 GC IV; 71(1) and 75(4) AP I; 6(2) AP II.

<sup>64</sup> Henckaerts and Doswald, *supra* note 32, at 352 *et seq.*

four Geneva Conventions).<sup>65</sup> Regarding armed conflicts of an international character, “civilians whose rights under the Fourth Geneva Convention are restricted or denied, including nationals of States who are not parties to a conflict and persons who are denied the status of prisoners of war, enjoy the fundamental guarantees set out in Article 75 of the First Additional Protocol of 1977”.<sup>66</sup> Therefore, persons who do not benefit from a more favourable treatment (prisoner-of-war status)<sup>67</sup> are entitled to the right not to be found “guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure” (Article 75(4) AP I), comprising the right to be presumed innocent until proved guilty according to the law.

Furthermore, the argument according to which the application of IHL would prevent authorities from obtaining information of persons to whom “prisoner-of-war” status has been granted, because Article 17 GC III indicates that such a person shall not be further questioned in the beginning of his captivity, is misplaced. This rule certainly does not prevent an interrogation in conformity with applicable rules of criminal procedure from taking place, on any person accused of having committed a war crime (including a terrorist act).<sup>68</sup>

It seems rather evident that targeted killings of “suspected terrorists” not only represent a deviation from IHL norms, which entitle any non-combatant deemed to be in breach of the rules of warfare to a fair trial, but it also potentially constitutes itself a war crime. No one dares to challenge that in peacetime the authorities of a state are not allowed to order the killing of dangerous criminals (even if this may take place in the course of a confrontation); their duty is to “bring them to justice”, to use a very disseminated expression. During an armed conflict, combatants may be targeted as long as they are not *hors de combat*, but civilians shall not be killed “unless and for such time as they take a direct part in hostilities” (Article 51(3) AP I). It is clear that if the killing were unavoidable because of a confrontation or the imminence thereof, the killing would not happen *because* the persons targeted committed or would be

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<sup>65</sup> See Van Boven, *supra* note 31, at 502-3, on the conclusion taken by the ICJ (case of Nicaragua v. the United States of America) that common Article 3, as part of customary law, constitutes a ‘minimum yardstick’ applicable to all armed conflicts.

<sup>66</sup> Rodríguez-Villasante, *supra* note 1, at 43, on the residual protection offered by IHL. By the same token, Gasser affirms that “Article 75, Protocol I clearly ‘borrows’ universally accepted standards from the body of international rules on human rights” (*supra* note 16, at 559).

<sup>67</sup> Ipsen, *Combatants and non-combatants*, in Fleck, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (1995), at 68.

<sup>68</sup> Sandoz, *supra* note 18, at 69. The author further affirms: “Le sens de cette règle est de ne pas mettre le prisonnier dans une situation qui l’obligerait à trahir la partie au conflit pour laquelle il s’est battu en livrant des secrets militaires et qui, de ce fait, rendrait son retour et sa réinsertion à la fin du conflit extrêmement difficiles” (*ibid.*).

suspected to have committed terrorist acts or war crimes. Their death would occur in the context of the armed conflict, and as long as this would happen in respect of norms of IHL, and of HRL where applicable, it would not constitute an unlawful targeted killing. Therefore, the targeted killing of suspected terrorists amount to unlawful executions, or an “instant death penalty”,<sup>69</sup> which arbitrarily deprives victims from their right to life and to have their guilt determined according to the law.

It should be kept in mind that, despite how convinced one might be of somebody’s responsibility for terrorist acts, to guarantee the right to a fair trial matters as much during armed conflicts as it does in peacetime. The plain elimination of terrorists when these persons are not combatants and do not offer an immediate and concrete threat, *i.e.* they are not *directly* participating in hostilities, is also a denial and violation of their fundamental guarantees, and constitutes extra-judicial killings, in violation of both IHL and HRL regimes.

## 6. Conclusion

The targeted killing of persons suspected of performing terrorist activities is not compatible with the right to life and to a due process, neither in peacetime nor within the context of armed conflicts, may they be of an international character or of a non-international character. In order to promote the dignity of the person, IHL protects combatants and civilians taking part in hostilities from *arbitrary* and *unlawful* deprivation of life. It determines that these persons shall be punished only after adequate judicial procedures, put in place to assess violations of IHL or criminal responsibility, for engaging in hostilities without being entitled to do so, for war crimes, or for common crimes. Moreover, the civilian population in general is also protected from indiscriminate attacks and from acts of war estimated to cause an excessive number of civilian casualties. Therefore, it can only be concluded that no person affected by an armed conflict is deprived from a certain protection under IHL,<sup>70</sup> and that to argue in favour of legal loopholes of protection is definitely against the object and purpose of both bodies of IHL and HRL norms.<sup>71</sup>

Notwithstanding the limits of this paper, the legal analysis of targeted killing, as a state policy, could not lead to different conclusions. Terrorists are individuals who happen to be criminally liable for their acts, in times of armed conflict as well as in peacetime. Evidence

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<sup>69</sup> Doswald-Beck, *supra* note 10, at 891.

<sup>70</sup> Sandoz, *supra* note 18, at 68.

<sup>71</sup> Art. 31(1) Vienna Convention on the Law of Treaties (22 May 1969): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

should be brought against them to support criminal charges, and they should be punished as a consequence of proceedings that respect basic standards of fair trial. No theoretical construction whatsoever, attempting to enlarge the number of hypothesis of admissible killings of “suspected terrorists” under IHL and HRL, leads to the respect and enforcement of binding international law. The choice not to uphold the rule of law cannot be deemed to bring any benefits for the prevention of new terrorist acts.

Moreover, even with – not necessarily new – challenges to humanitarian law offered by persons who do not abide by IHL in the preparation and performance of terrorist acts, the urgent need to revise IHL is not envisaged. On the contrary, states shall more than ever feel the pressing need to preserve and enforce the existing rules,<sup>72</sup> for “it is one, if not the strength of a State governed by the rule of law, to stick to these rules even under extreme circumstances”.<sup>73</sup>

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<sup>72</sup> See Sandoz, *supra* note 18, at 70-1. Also Gasser, *supra* note 16, at 566-70.

<sup>73</sup> Stein, *supra* note 19, at 579.