

## TARGETED KILLING AS ACTIVE SELF-DEFENSE\*

*Amos Guiora*<sup>†</sup>

### *I. Introduction*

Since June 1967 Israel has implemented a wide variety of measures to combat Palestinian terrorism in the West Bank and the Gaza Strip. Examples of such measures include the sealing and demolition of terrorist homes, imposition of a curfew and other movement restricting measures, administrative detention in those instances when criminal evidence was unavailable or when the only basis of detention was security information which could not be introduced in Court, deportation, and, recently, the introduction of three new policies: assigned residence (as distinguished from deportation), the erection of a security fence, and targeted killings.<sup>1</sup>

The focus of this paper will be a legal and policy examination of the decision to implement targeted killings within the context of the right to active self-defense as interpreted by the State of Israel. I should add that while the majority of my comments refer to the legal arguments behind targeted killing, I will also analyze its effectiveness as Professor Michael Scharf has done in a Washington Post article<sup>2</sup> and Professor Ed Kaplan of Yale University has done in empirically based research challenging the effectiveness of targeted killing.

Furthermore, an important question which will not be discussed deals with the type of court in which terrorists should be tried. This is an issue that we at Case are examining in a course I am teaching based in large part on conversations I have had with Associate Dean Hiram Chodosh, Professor Michael Scharf and Mr. Andrew McCarthy, from whom we shall have the pleasure of hearing later.

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<sup>†</sup> Visiting Professor of Law and designated Professor of Law and Director of the Institute for Global Security, Law and Policy at Case Western Reserve University School of Law effective July 2005; served for nineteen years in the Israel Defense Forces, Judge Advocate General Corps (Lt. Col.). The opinions expressed are the authors alone. Special thanks to research assistant Niki Dorsky and colleagues Jon Leiken and Marc Stern for their significant contributions to this work.

<sup>1</sup> Benjamin A. Gorelick, *The Israeli Response to Palestinian Breach of the Oslo Agreements*, 9 NEW ENG. J. INT'L & COMP. L. 651 (2003).

<sup>2</sup> Michael Scharf, *In the Cross Hairs of a Scary Idea*, WASH. POST, Apr. 25, 2004, at B1.

However, before we begin, a short historical survey is necessary to help understand both the context and the significance of the present armed conflict between the State of Israel and Palestinian terrorist organizations.

In addition, to appreciate the considerations involved in implementing a policy of targeted killing, it is critical to understand the fundamental difference between the armed conflict of the past four years and the nature of the Palestinian opposition to the occupation from 1967 to 2000.

## *II. Historical Background*

The years 1967-1987 were characterized by the Palestinian population's general acceptance of the post 1967 Six-Day War occupation. Such acceptance may have been based on fear or weariness after years of living under Jordanian rule in the West Bank and under Egyptian rule in the Gaza Strip. The overwhelming majority of the population was not engaged in terror activity. The IDF responses to the terrorist attacks that did occur included incarceration, deportation, and, in the Gaza Strip (in the late 1960's-early 1970's), undercover units which operatively engaged known terrorists.

The Intifada (1987-1993), literally a "throwing-off" or "ridding," which was characterized by mass demonstrations, stone-throwing, and Molotov cocktails, more closely resembled a civil uprising on the part of the Palestinian population against the occupation than an organized movement or response. It is important to note for purposes of historical accuracy that the Intifada began in the Gaza Strip (December 1987) as a spontaneous reaction to a car accident in which an Israeli truck driver accidentally killed a number of Palestinians. The reaction clearly reflected building frustration felt by Palestinians. Though the accident triggered the incident, it was not an uprising that had been planned in advance.<sup>3</sup>

Since 2000, over 1000 Israelis have been killed in over 20,000 terror attacks that range from shootings to suicide bombers intent on killing the maximum number of innocent civilians. Palestinian terror organizations use weapons appropriate to armed conflict such as guns and missiles. This should be compared to the Intifada, where the weapons of choice were rocks, Molotov cocktails and knives.<sup>4</sup> In addition, according to intelligence reports based on seized Palestinian documents, the current armed conflict

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<sup>3</sup> Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killing*, 36 CORNELL INT'L L.J. 233, 246 (2003).

<sup>4</sup> See Brigadier General Uri Shoham, *The Principle of Legality and the Israeli Military Government in the Territories*, 153 MIL L. REV. 245, 263 (1996).

<sup>5</sup> Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, Feb. 21, 2002, available at <http://www.web.amnesty.org/ai/nsf/index/ENGMDE150872004>.

was carefully planned in advance (this paper will not address Arafat's direct or indirect role in the preparations but there is little doubt that such an armed conflict could not have been so planned without his participation and approval) and was not a spontaneous response either to the failed Camp David talks or to Ariel Sharon's visit to the Temple Mount.

In light of the fact that Israel is under armed attack as evidenced by both the nature and quantity of the attacks, its response has been fundamentally different than its response to the Intifada. During the Intifada, thousands of Palestinians were administratively detained, while others were brought to trial or deported. The present conflict has been characterized by a more aggressive operational response, required in large part by the Palestinian terrorist groups' decisions to attack innocent civilians with suicide bombers.

### *III. Suicide Bombers*

In order to understand this change in policy it is important to explain the character of the suicide bomber infrastructure and how it has led to the implementation of the targeted killing policy. A suicide bomb attack, an attack which kills dozens of innocent civilians on their way to work, relaxing at a coffee house or walking with their children, has been described by Amnesty International as a "deliberate and systematic targeting of civilians" and condemned by the organization as "a crime against humanity."<sup>5</sup> The suicide bomber—he or she, father or mother—who actually performs this "crime against humanity" has been described as the "foot soldier" in a sophisticated and organized infrastructure.

The actual attack has been planned by terrorists who were responsible for the recruiting of the actual bomber, the preparation of the bombs, the identification of the target and the complicated logistics required to ensure that the suicide bomber is actually transported from the West Bank or Gaza Strip into Israel where the act will occur. Given the extraordinarily strict security measures implemented by the IDF designed to prevent such unlawful infiltration of terrorists into Israel, the logistical aspect of the suicide bomber from an operational perspective is impressive.

It is crucial to comprehend that a successful suicide bombing is the working of a well-orchestrated, difficult to penetrate, highly disciplined, financially solvent terror organization and not an act of a lone individual. This fact must be kept in mind when discussing and debating Israel's counter-terrorism policy in the context of the right to self-defense.

#### *IV. What is Targeted Killing?*

Targeted killing reflects a deliberate decision to order the death of a Palestinian terrorist.<sup>6</sup> It is important to emphasize that an individual will only be targeted if he presents a serious threat to public order and safety based on criminal evidence and/or reliable, corroborated intelligence information clearly implicating him. Intelligence information is corroborated when it is confirmed by at least two separate, unrelated sources. There also must be no reasonable alternative to the targeted killing, meaning that the international law requirement of seeking another reasonable method of incapacitating the terrorist has proved fruitless.<sup>7</sup>

According to the Agreements signed with the Palestinians, the Palestinian Authority and Israel are to be partners in fighting terrorism. The practical significance of this obligation undertaken by the PA is that they are supposed to arrest those who endanger the public order. Given that the PA does not arrest Palestinian terrorists, the burden of arresting them falls solely on the IDF.<sup>8</sup> However, if arresting a Palestinian terrorist unnecessarily endangers an IDF unit and there are no other operational alternatives to keep the terrorist from carrying out his plan (about which the IDF has sound and reliable corroborated intelligence information), a decision may well be made to target both that particular terrorist and others, as will be discussed, who are involved in the planning of suicide bombings.

According to international law, it is imperative that every effort be made to ensure that collateral damage is limited to an absolute minimum. This principal is incorporated into the IDF'S moral code and is taught to soldiers in an interactive video my former unit developed in conjunction with senior commanders.

According to the Jerusalem Post, the IDF has recently expanded the scope of targeted killing to include the targeting of terrorists training for an attack (recently an IAF helicopter attacked Hamas members in a field who were involved in training).<sup>9</sup>

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<sup>6</sup> See Arie O'Sullivan, *IDF Kills two Key Hamas Terrorists*, THE JERUSALEM POST, Nov. 1, 2001, at 1, available at LEXIS, News Library, Jerusalem Post File.

<sup>7</sup> Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 Cornell Int'l L.J. 569, 610-613 (1995).

<sup>8</sup> See Gorelick, *supra* note 1, at 667.

<sup>9</sup> See Arie O'Sullivan, *The Army Redefines the 'Ticking Bomb'*, THE JERUSALEM POST, Sept. 13, 2004, at 2, available at LEXIS, News Library, Jerusalem Post File.

### V. Self-Defense

The issue of self-defense and the breadth of its definition is under extensive debate amongst international law experts and policy-makers. The post 9/11 world has been confronted with this issue on a regular basis in determining how best to combat terrorism under the umbrella of self-defense.

In 1837, U.S. Secretary of State Daniel Webster articulated a definition of self-defense that eventually evolved into customary international law. Webster's definition followed what has come to be known as the *Caroline* incident. The *Caroline* was a U.S. steamboat attempting to transport supplies to Canadian insurgents. A British force interrupted the *Caroline's* voyage, shot at it, set it on fire and let it wash over Niagara Falls. Webster said that Britain's act did not qualify as self-defense because self-defense is only justified "if the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." According to Webster, Britain could have dealt with the *Caroline* in a more diplomatic manner. He limited the right to self-defense to situations where there is a real threat, the response is essential and proportional, and all peaceful means of resolving the dispute have been exhausted. His idea is now known as the *Caroline* doctrine, and was considered customary international law until a competing definition arose in Article 51 of the UN Charter.<sup>10</sup>

Article 51 authorizes self-defense only if armed attack "occurs."<sup>11</sup> This is a narrowing of the *Caroline* doctrine which provided for anticipatory self-defense as long as the threat to national security is reasonably believed to be imminent.<sup>12</sup> Article 51's concept of pre-emption has been significantly reduced from the *Caroline* doctrine. The significance of this narrowing cannot be underestimated—from a customary international law principle enabling pre-emption to a treaty-based definition of self-defense dependent upon the occurrence of an armed attack.

International law was originally intended to apply to war and peace between recognized States; the concept of non-State actors was not contemplated. Thus, in studying responses to terrorism according to international law, one of the issues that must be examined is the relevance and applicability of international law to this "new form of warfare." Many experts have called for a "new regime of international law" that specifically

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<sup>10</sup> Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-defense: Human Rights versus the State's Duty to Protect its Citizens*, 15 TEMPLE INT'L & COMP L.J. 195, 211 (2001).

<sup>11</sup> U.N. Charter art. 51 available at <http://www.un.org/aboutun/charter/>.

<sup>12</sup> Davis Brown, *Use of Force Against Terrorism After September 11<sup>th</sup>: State Responsibility, Self-Defense, and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 37 (2003).

addresses circumstances unique to terrorism. Though international law as it currently exists appears to be ill-equipped to deal with terrorism, the concept of active self-defense could be a natural starting point for developing this “new regime.”

A thorough review of international law demonstrates that terrorism as a subject of international law has only been considered in the past few years. Clearly, the tragic events of 9/11 significantly contributed to this development. The question that must be addressed given the narrowing of the definition of self-defense from the *Caroline* doctrine to the UN Charter is: Does the right to active self-defense according to modern international law allow States to effectively combat both State-sponsored and non-State-sponsored terrorism?

Because the fight against terrorism takes place in what has been referred to as the “back alleys and dark shadows against an unseen enemy,” the State, in order to adequately defend itself, must be able to take the fight to the terrorist before the terrorist takes the fight to it. From experience gained over the years, it has become clear that the State must be able to act preemptively in order to either deter terrorists or, at the very least, prevent the terrorist act from taking place. By now, we have learned the price society pays if it is unable to prevent terrorist acts. The question that must be answered—both from a legal and policy perspective—is what tools should be given to the State to combat terrorism? What I term active self-defense would appear to be the most effective tool; that is, rather than wait for the actual armed attack to “occur” (Article 51), the State must be able to act anticipatorily (*Caroline*) against the non-State actor (not considered in *Caroline*).

The development of a new body of international law providing legal justification for such actions (active self defense against a non-State actor) must be consistent with existing principles and obligations such as proportionality, military necessity, collateral damage and exhaustion or unavailability of peaceful alternatives. I am of the belief that the two concepts—active self-defense and the four fundamental principles listed above are not in conflict; rather, they must be considered in formulating international law’s response to modern “warfare” which is clearly a very different “war” than all previous ones.

Active self-defense (in the form of targeted killing), if properly executed, not only enables the State to more effectively protect itself within a legal context but also leads to minimizing the loss of innocent civilians caught between the terrorists (who regularly violate international law by using innocents as human shields) and the State. “[I]n time of war or armed conflict innocents always become casualties. It is precisely because targeted killing, when carried out correctly, minimizes such casualties that

it is a preferable option to bombing or large-scale military sweeps that do far more harm to genuine noncombatants.”<sup>13</sup>

Active self-defense aimed at the terrorist contains an element of “pin-pointing”: the State will only attack those terrorists who are directly threatening society. The fundamental advantage of active self-defense subject to recognized restraints of fundamental international law principles is that the State will be authorized to act against terrorists who present a real threat *prior* to the threat materializing (based on sound, reliable and corroborated intelligence information or sufficient criminal evidence) rather than reacting to an attack that has already occurred.

The fundamental difference between the *Caroline* doctrine and the theory espoused here is the extension of *Caroline* to non-State actors involved not in traditional warfare but in terrorism. If properly executed (as suggested by David), this policy would reflect the appropriate response by international law in adjusting itself to the new dangers facing society today. In many ways, the doctrine espoused in this paper is one of pre-emption. That is, the State’s right to act preemptively against terrorists planning to attack. While there is much disagreement amongst legal scholars as to the meaning (and subsequently, timing) of words such as “planning to attack,” the doctrine of active self-defense would enable the State to undertake all operational measures required to protect itself. The concept of how a state implements pre-emption against a non-State actor is one that international lawyers will have to address in the coming years as States will be increasingly engaged in conflict against non-State actors rather than against States.

An example of this sort of preemption took place in the 1967 Six-Day War when Israel attacked the Egyptian air force before Egypt had fired a single shot against Israel, but after President Nassar had closed the Straits of Tiran and had made his intentions regarding the destruction of Israel very clear. Another example of preemption is Israel’s successful attack on the Iraqi nuclear reactor in 1981, though it was heavily criticized by international lawyers. There are also examples of preemptive action in American history aside from the current war in Iraq. The bombing of five Libyan military targets April 1986, though justified as a response to the December 1985 bombings in airports in Rome and Vienna and the 1986 bombing of a West Berlin nightclub, were also supposed to be “designed to disrupt Libya’s ability to carry out terrorist acts and to deter future terrorist acts by Libya.”<sup>14</sup> After the embassy bombings in Kenya and Tanzania in 1998, the U.S. fired seventy-nine tomahawk missiles on the alleged terrorist outposts of bin Laden in Sudan and Afghanistan. President Clinton mainly

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<sup>13</sup> Steven R. David, *Reply to Yael Stein: If Not Combatants, Certainly Not Civilians*, 17 ETHICS & INT’L AFF. 138, 139 (2003).

<sup>14</sup> Lucy Martinez, *September 11<sup>th</sup>, Iraq, and the Doctrine of Anticipatory Self-Defense*, 72 U. MO. KAN. CITY L. REV. 123, 140 (2003) (quoting U.N. Ambassador Vernon Walters).

relied on traditional Article 51 self-defense in justifying the act, but did add that the strikes “were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities.”<sup>15</sup>

It is the ultimate thesis of this paper that the policy of targeted killings can be fully supported by international law (as active self-defense); what is lacking is a re-working of international law to reflect this reality.

### *VI. Israel's Legal Arguments for Targeted Killing*

The best way to understand Israel's policy is through its response to a petition filed to the Israel Supreme Court sitting as the High Court of Justice against the practice of targeted killings.<sup>16</sup>

However, before analyzing the petition, an explanation as to how Palestinians can file petitions against the executive (in this case, the IDF) is in order. According to a 1968 legal opinion issued by the then-Attorney General, Meir Shamgar, Palestinians who feel aggrieved by an action of the Executive—in reality the IDF—may seek redress by petitioning the Israel Supreme Court sitting as the High Court of Justice. Under President Aharon Barak, the “doors” of the High Court of Justice have been significantly opened in that a petition claiming that a Palestinian has been or will be aggrieved by the executive need not be filed by the aggrieved party. This is significant because, as a result, judicial activism or review is an inherent part of the present armed conflict and petitions are heard and restraining orders issued pertaining to command operational decisions in “real time.”

The concept of “standing” and its remarkable expansion over the past few years must be examined to truly understand judicial activism in Israel. According to the theory developed and implemented by President Barak, there is practically no limit on what petitions can be filed to the Court and by whom. The Supreme Court when sitting as the High Court of Justice is in essence the only review available not only to the aggrieved but to *anyone* who feels *another* has been aggrieved by the executive. The result is remarkable—Palestinians who live in the West Bank and Gaza Strip under Israeli occupation (under the command of the military commander as Israel has never annexed the territories) petition the Israeli Supreme Court sitting as the High Court of Justice against actions taken by the military commander. To demonstrate this extraordinary development—during the month of April 2002, when the IDF was involved in intensive fighting in Jenin, over forty petitions were filed against the IDF in the High Court of Justice.

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<sup>15</sup> *Id.* at 143.

<sup>16</sup> Committee for Clean Environment and Human Rights v. The State of Israel, HCJ 769/02 (decision pending).



Beyond the actual submitting of the petitions (either by Palestinians residing in Jenin or on their behalf, primarily by Israeli human rights organizations) is the fact that the High Court hears these petitions in “real-time” and often issues decisions in “real time.” The issues raised in the petitions range from the potential demolition of a terrorist’s home to alleged firing on ambulances to the need to enable the local population to have a normal water supply to the burial of terrorists.

The decisions are rooted in both Israeli law and international humanitarian law. Generally, the Court writes that while military matters are not its area of expertise, issues of humanitarian law are and intervention will occur if the Court determines that the IDF has violated such law. This means that when planning operations, IDF commanders must take into account not only the possibility that petitions will be filed, but also the possibility that a restraining order will be issued preventing the commander from carrying out the operation (even for a short period of time). In addition, the commander and the executive must be prepared for actual intervention by the Court as demonstrated by the Court’s decisions in previous cases involving the interrogation of Palestinian detainees and the location of the security fence.

In the original petition filed against the policy of targeted killings, the Court determined that the issue was not judicable and dismissed the case. However, when an additional petition was filed, the Court decided to hear the parties’ (the petitioner and the State) arguments. As this paper is being written, the Court has yet to issue its ruling. While there are those who suggest that the delay in the decision is deliberate (perhaps, according to some, a reflection of the Courts understanding that it has crossed into truly operational matters), the reality is that oral arguments were heard and the parties submitted lengthy written briefs. While it is unclear when the decision will be issued or what the Court will rule, the State’s claims in its response to the petition shed great light on its position regarding the armed conflict in general and targeted killing in particular.

The State, in arguing that the petition should be denied, made a number of points.

First, the present conflict between the State of Israel and Palestinian terror organizations is defined as “Armed Conflict” (this definition had been previously accepted and adopted by the Israel Supreme Court in a number of decisions). On this matter, it is appropriate to note that there are at least three different schools of thought regarding how to classify the fight against terrorism (what has been referred to as the new form of warfare): 1) As an international armed conflict; 2) As not an international armed conflict; 3) As a unique form of armed conflict between a State and non-State actor that has not been addressed in international conventions but requires separate, distinct international law agreements.

Second, according to the law of armed conflict, terrorists taking part in attacks against civilian or public targets are illegal combatants and not

civilians and are therefore legitimate targets. “[A]cts of terrorism against a country by non-state sponsored organizations or individuals need to be considered more than just criminal acts. Instead, they should be considered acts of war against the victim nation.”<sup>17</sup> In *State of Israel v. Marwan Barghouti*, the Court ruled that “terrorists who attack civilians are not ‘lawful combatants’ entitled to POW status in light of their unlawful activities . . . unlawful combatants who attack civilians are not entitled to this status.”<sup>18</sup>

Third, the principle of proportionality must be respected when implementing targeted killing. Fourth, targeted killing is used only when the targeted terrorist cannot be arrested using reasonable means, which is in accordance with international principles requiring exhaustion of all reasonable alternatives. Fifth, the State cited the following:

[I]Legal scholars who have examined the *jus ad bellum* dimensions of the terrorism question would appear to agree on at least four basic principles. Virtually all recognize that (1) if it has suffered an armed attack by terrorist actors, a state is entitled to defend itself forcibly; (2) a victim state’s forcible self-defense measures should be timely; (3) a victim state’s forcible self-defense measures should be proportionate; and (4) a victim state’s forcible self-defense measures should be discriminate and taken against targets responsible in some way for the armed attack.<sup>19</sup>

### VII. *Who are Legitimate Targets?*

One of the critical questions that must be answered is whether suicide bombers and those involved in terrorist infrastructure are legitimate targets. If the answer is yes, then we must examine how they can be fought, given that they are not soldiers in the traditional sense of the word. In the present conflict, terrorists who take a direct role are viewed as combatants, albeit illegal combatants not entitled *inter alia* to POW status, but indeed legitimate targets. Furthermore, the legitimate target is not limited to the potential suicide bomber who, according to corroborated and reliable intelligence is “on his way” to carrying out a suicide bombing. Rather, the legitimate target is identified as a Palestinian that plays a significant role in the suicide bomber infrastructure; that is, “doers” and “senders” alike.

Having said that, tragic mistakes do occur and innocent women and children have died during the course of a targeted killing. In all fairness,

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<sup>17</sup> Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT’L L. 1, 4 (2002).

<sup>18</sup> Cr.C. (T.A.) 092134/02, *State of Israel v. Marwan Barghouti*, (2002) available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud).

<sup>19</sup> Robert J. Beck and Anthony Clark Arend, “Don’t Tread on Us”: *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT’L L. J. 153, 213 (1994).

there are two explanations for this occurrence: 1) Wanted terrorists are more than aware of their status and calculate (sometimes mistakenly so) that the IDF will not target them when they deliberately surround themselves with women and children (one should add in clear violation of international law forbidding “human shielding”); 2) Operational mistakes, while highly regrettable, are a reality of armed conflict. While Kofi Annan has recently been quoted as remarking that the loss of one innocent life makes any response to terrorism disproportionate, this statement is not consistent with the laws of armed conflict, which allow for collateral damage, or unintended harm, that is proportionate to the harm prevented. Moreover, a terrorist should not be granted immunity simply because he can surround himself with non-terrorists (human shielding).

The criticism of targeted killing is primarily based on the premise that it constitutes either extra-judicial killing or assassination. It should be added that targeted killings have been carried out by various governments including the U.S. and the UK. The United States implemented targeted killing both in response to the attack on the *U.S.S. Cole*, despite the fact that one of its targets was evidently a United States citizen,<sup>20</sup> and most recently the Islamic cleric who has sanctioned the beheadings in Iraq was reported to have been the target of a targeted killing. While it is true that the targeted individual is not afforded a hearing or granted the right to appeal the decision to target him (to date women have not been targeted), he is not an innocent civilian according to the Geneva Conventions. Rather, the individual is an illegal combatant who has either participated in terror attacks or ordered them to be carried out.

Extra-judicial killing, according to Amnesty International, is an unlawful and deliberate killing carried out by order of a government or with its acquiescence reflecting a policy to eliminate individuals even though arrest is an option.<sup>21</sup> Unlike extra-judicial killing, the IDF resorts to targeted killing only when arrest is not an option. Furthermore, targeted killing is neither punishment nor reprisal (which is illegal under international law) for an act committed. Its primary objective is the prevention of a terrorist act intended to kill innocent Israeli civilians and therefore does not fall under the definition of extra-judicial killings. Extra-judicial killing reflects a governments policy to kill the enemies of the State not for operational or self-defense purposes, but as a means to punish opponents of the State. In examining instances of extra-judicial killings the overwhelming trend is that the victims are domestic political opponents by whom regimes feel threatened. Rather than arresting them, regimes prefer to eliminate them.

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<sup>20</sup> Biggio, *supra* note 17, at 2 & 14.

<sup>21</sup> J. Nicholas Kendall, *Israeli Counter-Terrorism: “Targeted Killings” Under International Law*, 80 N.C. L. REV. 1069, 1073 (2001-2002).

It is critical to distinguish the concepts of targeted and extra-judicial killing. Targeted killing occurs when arrest of the individual poses an extraordinary operational risk and extra-judicial killing occurs when the incapacitation of political opponents through arrest is clearly operationally possible. Furthermore, extra-judicial killings are domestic in orientation, and while they violate civil rights, they are not part of counter-terrorism, where the State must take all measures to protect itself against terrorists whose modus vivendi is killing and not political dissent. Targeted killing is a form of preemption and is not punitive in its purpose. Thus, the connotations of extra-judicial killing are inappropriate in the context of targeted killing.

Targeted killing is also not an assassination. An assassination is the killing of a political leader or a statesman and, according to international law, involves treachery or perfidy.<sup>22</sup> Terrorists are not political leaders or statesmen and should never be considered as such. The difference between a terrorist and a political leader is important to targeted killing. For example, Arafat, though he supports terrorism, would not be an appropriate object of a targeted killing because of his current status.

The responsibility of a State is to protect the public and only if all other measures have failed, should a targeted killing be ordered. It is important to understand that the "rules of the game" are clear (though they may well be harsh) and that ultimately combatants—even if they are illegal combatants not part of a regular armed force—die on the "battlefield."

### *VIII. International Law*

Traditional or conventional international law based on the assumption that war is an armed conflict between two States is obviously inapplicable to what has been deemed a new form of armed conflict.<sup>23</sup> This new form of armed conflict involves States and non-State actors, sometimes supported by States but not necessarily so. It would be illogical to expect the victim State not to respond. In light of the fact that a response is to be reasonably expected, if not demanded (terrorists themselves expect a response as shown by their seeking shelter in an area distant from where they generally reside), the question becomes "against whom is the State to act" (how broadly is the terrorist network to be expanded?) and in what fashion?

This naturally concerns the important principle of proportionality. Targeted killing cannot be implemented against a Palestinian whose involvement in terrorism is minor and whose actions do not endanger

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<sup>22</sup> Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 *MERCER L. REV.* 615, 629-631 (1991-1992).

<sup>23</sup> Liam G.B. Murphy, *A Proposal on International Legal Responses to Terrorism*, 2 *TOURO J. TRANSNAT'L L.*, 67, 70-75 (1991).

public safety. Targeted killing can only be implemented against those terrorists who either directly or indirectly participate in terrorism in a fashion that is equivalent to involvement in armed conflict. The IDF has no intention (implicit or explicit) of using this “ultimate” weapon at will and with impunity. It is more appropriate to consider targeted killing as a “weapon of last resort” to be implemented, as previously mentioned, only when all other reasonable alternatives have been ruled out as operationally unfeasible and the terrorist in question presents a significant enough threat that the State has determined that there is no other option.

The international law principle of military necessity is also relevant to an analysis of targeted killing; that is, that the terrorist targeted presents a serious threat to the public order. It is important to add as a caveat that terrorism does not threaten the existence of a State. Neither a particular attack undertaken by a terrorist nor a series of attacks will bring about the destruction of a State. As horrible as 9/11 was, the government of the U.S. was never at risk of collapsing. As horrific as the attacks Israel has suffered, the continued existence of the State has never been an issue. The bombing in Madrid, while clearly contributing to the defeat of the ruling Spanish government, did not and could not endanger the very existence of Spain. Such is the case with terrorist attacks throughout the world over the years. Nevertheless, terrorism does exact significant social, economic and political costs to which the State must respond. The issue is therefore to whom and how the State responds. The terrorists involved in suicide bombings undoubtedly present the most serious disturbance to public order (economy, daily life, public safety). Therefore, once these individuals are defined as legitimate targets and there are no alternatives, the military necessity test, which requires a need to protect or ensure public order, is clearly met.

It is important to remember that, in terms of the international law principle of distinction, terrorists who either are actually attacking civilians or are sending others to commit horrific attacks are not civilians according to international law in the traditional context. Rather, they are full-fledged combatants minus any insignia, a recognized chain of command and the carrying weapons openly.<sup>24</sup> In addition, unlike soldiers who, as part of a regular army, are obligated to honor international law conventions regulating the conduct of war, the terrorist is not bound by such agreements.

If the terrorist believes that he is not obligated to honor any set of rules (and conducts himself accordingly), then the State must indeed be able to target those that are threatening it. Provided, of course, as has been discussed, that no alternatives exist and that all issues of proportionality, military necessity and collateral damage have been thoroughly scrutinized in order to minimize the harm to innocent civilians and to ensure that this

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<sup>24</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4. (A)(2), 6 U.S.T. 3316.

measure is only implemented in those cases when the target presents a genuine threat.

If the State were to not respond-in-kind it would, in essence, be granting terrorists a form of immunity—you can attack us but we cannot or will not attack you. It is important to understand that terrorism is clearly a form of warfare--the questions that stand before us are how do we define this war, who are we fighting, and how do we fight them.

While there has been much written regarding asymmetrical warfare which claims that the State “holds the decided advantage,” the reality is more similar to what the President of the Israel Supreme Court, Aharon Barak has written time and time again: that the State combats terrorism “with one hand tied behind its back.” This is so because States (at least, modern liberal democracies) combat terrorism while maintaining democratic principles and standards, thereby raising the question in whose favor does asymmetry really work if terrorists do not feel bound by the law?

### *IX. Policy Concerns*

While Israel’s policy of targeted killings has been highly criticized, I shall address two commentaries in particular. Professor Michael Scharf, my friend and colleague, argued that while Israel can plausibly argue that its acts are permissible, it “may still be misguided, creating new legions of foes rather than diminishing them.” Professor Scharf’s criticism of what he calls “assassination” (as argued above a term that I reject) is based on four arguments: 1) instances of collateral damage; 2) instances of mistaken identity; 3) “cascading threats to the world order”; and 4) strengthening enemy morale via martyrdom. Professor Scharf does state that the war on terrorism is a “gray area in international law” and quotes the U.S. National Security Advisor, Condoleeza Rice, “that it is very important that this new kind of war be fought on different battlefields.” Against the policy of targeted killings, Professor Scharf argues that other courses of action are possible such as the “criminal approach of apprehending terrorists for trial” (referring to the Pan Am 103 case).<sup>25</sup> With regard to the possibility of arresting Palestinian terrorists, I refer back to the section in which I discuss the international law principle of alternatives.

With respect to the four criticisms outlined above, while instances of unfortunate collateral damage have occurred and there is a valid argument that the implementation of targeted killing serves to increase the number of Israel’s enemies, Israel has balanced its options and concluded that the battle (in particular) against suicide bombers requires measures consistent with what the NSA describes as a “different battlefield.” It would appear that from Professor Scharf’s perspective, targeted killing while legally justifiable is a poor policy choice.

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<sup>25</sup> See Scharf, *supra* note 2.

To examine counter-terrorism is not only to argue the law (particularly in an area which is considered “gray” by most international law experts), but also to consider the policy aspects involved in the decision-making process. Accordingly, what needs to be addressed is the policy in the context of active self-defense as defined earlier in this paper.

From my previous detailed discussion regarding self-defense, it is apparent that Israel practices what I term “active self-defense”; that is taking the fight to the Palestinian suicide bomber infrastructure. While Professor Scharf’s arguments have undoubtedly been considered and weighed by the State, the response has been a resounding “we shall continue.” Having said that, it behooves us to note that the policy is not implemented blindly, but on a proportional basis in harmony with international legal principles.

The question, in the context of policy considerations, is how effective is targeted killing. A thought-provoking analysis regarding the effectiveness of suicide bombers has been written by Professor Edward Kaplan of Yale University.<sup>26</sup> In this detailed, empirically-based study, Professor Kaplan found strong statistical evidence that hits (defined as targeted killings) are associated with an *increase* in suicide bombing attempts.<sup>27</sup> This study would seem to support Professor Scharf’s fourth point regarding the strengthening of terrorist morale. However, though there may be an increase in suicide bombing attempts, this increase may be of little significance considering the fact that targeted killing has succeeded in removing the most effective terrorists. Currently, Palestinian terrorists are simply not as effective as evidenced by the relative lack of success of many recent attempted suicide bombings and the long lulls between attacks. Moreover, targeted killing has forced terrorists to be constantly on the run. Therefore, the long-term effects of targeted killing may be more promising than Professor Kaplan’s numbers imply.

### *X. Conclusion*

On the eve of the summit between Prime Minister Sharon and newly elected Palestinian Authority President Mahmud Abbas in February 2005, the Government of Israel made the decision to freeze the practice of targeted killings. According to reports, the decision was in response to a request by Abbas to allow him to demonstrate to the Hamas and Jihad Islamic terrorist organizations that a renewed peace process has concrete benefits. While Israel has clearly stated that the policy will be reinstated should the Palestinian Authority prove itself unwilling or unable to curtail

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<sup>26</sup> Edward H. Kaplan, *What Happened to Suicide Bombings in Israel? Insights from a Terror Stock Model*, 28 *STUDIES IN CONFLICT AND TERRORISM* 225 (forthcoming May/June 2005).

<sup>27</sup> *Id.* at 230.

Palestinian terrorism, the decision nevertheless reflects a desire to open a "window of opportunity" in the post-Arafat era.

According to reports both in the Israeli and foreign media the cumulative effect of Israel's prior targeted killing policy, is significant. Terrorists have been forced to live a constant "life on the run" which, even for the most committed and determined terrorists, is difficult. The policy contributed to a sowing of distrust and confusion amongst terrorist organizations regarding the identity of informants without whom the policy could not be implemented. Targeted killing eliminated a significant number of key operatives, thereby disrupting the terrorist organizations, and it seemingly discouraged potential terrorists from taking part in the suicide bomber infrastructure.

The IDF clearly believes, as a matter of policy, that targeted killing is indeed an effective counter-terrorism measure in combating suicide-bombers; this in spite of the current freeze on the policy. In fact, the use of targeted killing as a counter-terrorism measure can be justified by the principles upon which international law regarding self-defense is based—military necessity, proportionality, collateral damage and the exhaustion of reasonable alternatives.

Unfortunately, international law in its current codified state is ill-equipped to deal with today's terrorists. The International Court of Justice, in its recent advisory opinion on the legality of Israel's security fence, went as far as saying that Article 51 does not apply to a State's right to defend itself against terrorists on its occupied territory.

If Article 51 is inapplicable to a situation where a State wishes to defend itself against non-State actors, what should guide a State in its response to terrorism? The answer is the fundamental principles behind the laws of war regarding military necessity, proportionality, collateral damage and alternatives. With these principles as a compass, it is time for a new direction in international law that allows States to effectively defend themselves against non-State actors. Just as the Geneva Conventions were formed out of what was learned from the experience of World War II, international laws explicitly providing for active self-defense should be formed out of what has been learned from Israel's struggle with terrorism. Israel's experience instructs us that targeted killing is a legitimate and effective form of active self-defense that has helped Israel protect its people. Protecting citizens is the ultimate duty of every State. Preventing terrorists from achieving their aims enables a State to fulfill this ultimate duty. The Government's recent decision to freeze the policy must be understood in a political context and not impacting either on the legality of the policy, nor the fact that ultimately States will indeed adopt policy that best protect its citizenry.