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Right to Life, Traditional Framework of Targeted Assassination and New Challenges in Implementing Human Rights

Dr. Sartipi Hossein

PhD in International Law, Faculty member and Assistant Professor, Payame Noor University (PNU), Iran

Mohsen Ghasemi

Master in international law & Legal Advisor, Iran

Abstract

Targeted assassinations whether it is legal or not, it has become one of the modern issues in the International community and has been discussed in relation to International humanitarian law and international armed conflicts. In this regard the main question is whether applying the targeted assassination is in compliance with the principles and rules of the International humanitarian law or not? And if there is not any contradiction in this regard, then this theory has been justified on what logical concept? This paper attempts to answer the mentioned questions with regard to the current legal literature and take any possible workable framework for this theory under consideration. The paper is divided into three general parts, first, it presents the basic definition and history of "the targeted assassination" and deals with its legal framework, then it looks into this theory from the three main principles of the International human Rights perspective and analyzes the requirements necessary for committing the targeted assassination.

Keywords: *Assassination, Armed conflicts, international conflict, targeted, International Court of Justice, Human Rights, Armed Mission*

I. Introduction: In general, the killing or murder of an opposition or a famous character is the ancient tool for power and its history goes to the ancient civilizations and tribal life around the world. These actions were accepted in the ancient civilizations. The first prohibition on this practices returns in Europe in 1550 and the emergence of the concept of Nation-state which was expanded under the Influence of mass media inventions and removal of the information boundaries.¹ But historically, targeted operations can be found in the three periods: ancient history, history of civilization and postmodern history.

Modern History; this period has begun with the Nation-State concept and can be surveyed in two section, before the Second World War and then the cold war. Following the developments in the concept of sovereignty, political conflicts in the world were unprecedented growth. Before World

¹ . See prof. Mark Amstutz, "Targeted Killings History", (A Radial Dialogue) in Chicago public Radio (mp3File)3 available at: (<http://www.chicagopublicradio.org/pragram-WV.aspx>) (2009/8/25).
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War I, only in Russia over 200 years, five emperors were assassinated.² In the United States of America besides the Abraham Lincoln, three presidents were assassinated. In Europe, the assassination of Archduke Franz Ferdinand by a Serbian nationalism was the reason that kindled the fire of the First World War. After the First World War, there are the first examples of the states that try to assassinate enemies. For instance, during the World War II, the SS General Reinhard Heydrich was killed by Czechoslovakia workers whose were trained by Great Britain's foreign intelligence service. The father of Indian independence "Mahatma Gandhi" was assassinated by a Hindu extremist "Nathuram Godse", because of his efforts to make peace between Hindus and Muslims. During the Cold War, the assassinations were significantly increased. For instance, Fidel Castro survived from numerous attempts on his life that were made by the CIA. Despite the lack of proof, some argue that the murder of Salvador Allende was initiated by the CIA. Number of terrors also were made by the KGB of the Soviet Union against the high-level fugitives such as Georgi Markov and there some similar cases that were made by Israel's Mossad against the Palestinian fighters. It seems that in this period, the intelligence agencies of countries have trained and experienced the assassins.

In Post Modern History; this period mostly begins from the first decade of the 21st century. However the states in the period before, explicitly and openly to didn't assassinate and left this mission to the terrorist organizations, but in this period (mainly from 2000) states are obvious to such practices. In this case, the Israel, the United States and the Russia are more history makers than any state. In the event of Israel-Palestinian combat, Israeli military forces have assassinated the political and military Palestinian activists under a program known as "The Focused Foiling". From their point of view, these assassinations could neutralize any possible attacks from the Palestinian.³ In 1943, United States military forces had traced the Japanese Admiral Isoroku Yamamoto whereabouts and assassinate him. In 1986, American airplanes bombed the resting place of the Muammar Gaddafi to kill him.⁴ The targeted assassination has entered into the new phase after the appearance of Talibanism and Al-Qaeda. or not.⁵ In Chechen-Russian conflict, the Russia also resorted to the policy of targeted assassinations. Dzhokhar Dudayev, Aslan Maskhadov and Shamil Basayev are some leaders and highrank figures who had been killed by those operation.

The paper re-evaluates the theory and In the shock of the September 11, the United States gave itself every right to take action whether it is legal conclude. It should be noted that the targeted assassinations in this paper are examined in the form of war and armed conflict. Although using this

² . The empire were assassinated: Ivan VI, Peter III, Paul I, Alexander II and Nicholas II (along with his wife and four daughters and his only son).

³ . Most of these attacks has been made by the Israeli air force using helicopters and guided missiles. The Israeli targeted assassinations is not limited to 2000 forward. Here are some cases that the Palestinian important figures have been assassinated by Israel from 2000; Sheikh Ahmed Yassin (March 2004), Adnan al ghoul (October 2004), Abdulaziz Rantisi (April 2004) and salah shehadeh (July 2002).

⁴ . At that time it was claimed that the little girl had died in bombardment was Gaddafi's daughter, But the reporter of USA Today's Barbara Slavin claimed that the girl had died had no relative relationship with Gaddafi and she was adopted after her death by Gaddafi.

⁵ . Here are some examples: assassination of the Mullah Mohammed Omar, the Taliban leader in Afghanistan, Salim Sinan (2002), a senior leader of al-Qaeda, Abu Musab al-Zarqawi leader of al Qaeda in Iraq (2006).

theory in the non-combat situations is a separate subject itself. In this paper, targeted assassinations is examined as a tool of the war from a state of armed conflict.

III. The Legal Definition of Targeted Assassinations: There are several legal definition of the “targeted assassinations”⁶. Perhaps the most accurate definition is “the use of military force which is provided by a subject of international law with the intention or preplanning to kill a person who is chosen and is not in physical custody of those who intend to kill him”. According to this definition, there are five conditions:

1. The targeted assassinations requires the use of military force, the coercive measures should lead to death disregard what type of tool that is used;
2. Targeted assassinations carried out fairly with the intention and preplanning: which means this action should not be any case that refers to negligent or accident or non-use of force and the main objective is to kill the target;
3. Targeted assassinations must be clearly against the target that has already been determined and not for public and uncertain objectives;
4. Targeted assassinations does not include the killing of the confined and imprisoned individuals; with this clause, the extrajudicial executions automatically will eliminate of the given case. Because the extrajudicial executions often occurs after the physical confinement.
5. Targeted assassinations should be attributed to a subject of international law. Subjects of international law are mainly states and under certain circumstances, non-state actors.

According to the above definition, it is necessary to explain two points. Firstly, it appears that the goal of targeted assassinations must be genuine and determined which is the killing of the people who accused of terrorism. Secondly, there should be a distinction between acts of terrorism and acts of self-determination and those who act under the national liberation movements and fight for their freedom and against the foreign occupation.

IV. Legal framework for the Targeted assassination

A. Suggested Models: However, at the time of war legal rules are not the priority in public concerns,⁷ but recognizing and embedding a set of rules to this event would more reduce the human suffering. Targeted assassination is sort of considered with the armed forces of the war, because the both have “the use of force” in common. This issue can be examined from legal perspective and non-legal which includes moral philosophy, sociology and psychology.⁸ In the sociology and psychology, the effectiveness of this action and public interest towards it can be examined through survey or questionnaire among the population and analyzing the data. But from a legal perspective, this issue can be studied in both domestic law and international law; in domestic Law, targeted assassinations can be examined as a branch of the Human Rights and Criminal Law and Procedure

⁶ . This is one of definition, *an attack on the person or people accused of terrorism, with the publicly or privately permission and ordered by the government to kill them, whenever possible*. See: Djamalove F., “Targeted Killing under International Sui Generis Framework”, a Master (LL.M) Thesis, University of Toronto (Canada) (2008), p. 2.

⁷ . See Grotius H., “On Laws of War and Peace”, Paris: 1625, para. 28

⁸ . For more explanation on Ethical aspects of targeted assassinations see: Statman D., “Targeted Killing”, and Theoretical Inquiries in Law, Vol.5 (2004), pp. 179-198 & See David S.R., “Israel’s Policy of Targeted Killing”, Ethics and International Affairs, Vol. 17, No.1 (2003), p. 111.

or less (the competency). In the field of international law, it mainly studied under the law of war which is divided into the three sections: right to war on the basis of self-defense (Jus ad bellum), International humanitarian law which regulates the conduct of armed conflict (jus in bello) and International responsibility of the any subjects in international law (law of war). The new framework also known as “The Sui Generis” has been suggested and entered into the International literature. According to this system, specific provisions on the targeted assassinations in armed conflict states and terrorist groups, should design and set. Because the armed conflict between the states and terrorism groups has specific and unique nature and therefore legal regime governing it should also be unique and special. The main question here is whether the armed conflict between the states and terrorism groups, in terms of humanitarian law is considered an armed conflict or not? What is the basic principles of targeted assassinations in this system? In other words, this model seeks to make peace between models in humanitarian law, human rights and the laws of state responsibility. But creating a balance between elements of these system is one of the major problems to the advocates of this system.

B. Prioritization: According to the above mentioned subject, each of the views expressed in this regard will be examined in following (Except for the Sui Generis system which is still not very clear in theoretical aspects) as a legal framework of the targeted assassinations.

B.1. Prioritization from the domestic law perspective (Law-enforcement Model): The advocates of this theory believes that the relevant domestic law and criminal law can be helpful in this area and adhering to the international law is contradictory and does not have the competence to solve the problem. It is also rational to consider the country that damaged by terrorist activities has the right to punish them in accordance with its domestic law or a country that the targeted operation has been carried out in its territory, would be competent to properly investigate. In this case, the key rule that should invoke is in domestic law. Because the war on terror is not extensive as an armed conflict, it's merely an internal conflict between a state and a terrorist group in the territory of given state. In any case, this is a domestic issue and the governments can investigate by resorting to their civil and criminal law standards.⁹ However, the frequent case and issues in the domestic law could decrease the possibility to reach an unified approach and also it may take some legal issues under consideration such as extradition and jurisdiction in case and cause the political dead ends which could threatens the international peace and security. For instance, the assassin contrary to the laws of the country of that the operation has been carried out in its territory, returned to his homeland which certainly won't be surrendered by the homeland's authorities to the requesting state. This will extends the violations of human rights or humanitarian law by the states. The Israeli targeted operations in the Palestinian Authority and about the West Bank and the Gaza Strip is another example in this regard, Israel's assassin in these areas safely returns to their territory and therefore, there won't be a promising possibility of the prosecution for such acts by the Palestinian police. On the other hand by the United States uses the aircraft without a human pilot aboard in this type of operations.¹⁰

⁹ . See plow A., “Targeting Terrorists: A License to kill? Ethics and global politics”, Ash gate publishing Ltd., (2008), p. 124.

¹⁰ . See Downes C., Ibid, p. 280

B.2. Prioritization from the Human Rights perspective¹¹: There are other researchers who believe that the targeted assassinations in any form violates the human rights. This argument is presented by Philip Alston the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions. According to him, even if the war on terror is considered as an armed conflict it would still remain a subject to human rights. He believes that the targeted assassinations generally violate the right to life¹² and the proper requirements of law¹³. Because it involves the killing of an accused person without a full and fair trial that is prohibited by the human rights instruments. (Article 3 of the Universal Declaration of Human Rights and article 6 of the Covenant on Civil and Political Rights). On the contrary, the advocates of the targeted assassinations believe that such actions targeting terrorists generally occur where there is no other choice but to assassinate them. Therefore, it cannot be in contradiction with the human rights standards. In addition, this operation is not executed based on political purposes or to punish the criminals who commit crimes, but also the main objective is to prevent the future violence that they will commit.¹⁴

International Court of Justice (the ICJ) in the Nuclear Weapons case with the special emphasis on the fundamental nature of the right to life, stated that in situations where humanitarian law is applicable, murder in violation of those rights can be a violation of human rights. The American Commission on Human Rights in the Argentina, La Tablada case remarks that it considers the International humanitarian law as a method to interpret the right to life in armed conflicts.¹⁵ Although the Human Rights Model has also been involved in studies of the concept of targeted assassinations and attention should be paid to it as a firm legal framework, but the outbreak of an armed conflict and the possible violations of human rights are more concerned with International humanitarian law.

B.3. Prioritization based on the rights to use of force (the theory of self-defense)¹⁶: The theory supports the concept of targeted operations. According to this view, any terrorist can be legally described as an "armed attack" and consider it as a justification to execute the inherent right of self-defense as it mentioned under the article 51 of the UN Charter. Even if the offender is not a state, but a non-state actors such as terrorist groups and if there were already doubts, with the events of September 11, 2001, these uncertainties have been resolved.¹⁷ From this point of view, after September 11, at least three international response was brought which unanimously confirmed the right to self-defense of the United States. Under the Charter of the United Nations, the right to self-

¹¹ . Human Rights Model.

¹² . See plaw A., *Ibid*, P. 126.

¹³ . See Murphy R. and Radsan A.J., "Due Process and Targeted Killing of Terrorists", working paper No. 114 (2009), SSRN, available at: [<http://ssrn.com/abstract=1349357>].

¹⁴ . See Guiora A., "Targeted Killing as Active Self-Defense", *Case W. Res.J. Int'L.*, No.36 (2004), pp. 319-323.

¹⁵ .Henckaerts, Jean-Marie & Doswald-Beck, Louise, "customary international humanitarian law," Volume I, Translated by the Office of International Affairs of the Islamic Republic of Iran's judiciary and the ICRC, Majd Publications, First Edition: 2009, p. 466; See also; Zegveld L., "The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada case", *International Review of the Red Cross*, No. 324 (2008), pp. 505-511.

¹⁶ . Use of Force Law Model / self-Defense Theory.

¹⁷ . See Dinstein y., "War, Aggression and Self-Defense", Cambridge University Press (3th ed.), 2003, pp. 329, at (206-7).

defense is only allowed in the event of an "armed attack" and the permissibility of the use of force is in accordance with International humanitarian law.¹⁸ Firstly, Security Council resolution 1386 (2001) and 1373 (2001) on the events of 11 September, both confirmed the individual and collective right to self-defense in accordance with the Charter regarding the "terrible terrorist attacks".¹⁹ Secondly, NATO for the first time after the 9/11 incidents invoked to the article 5 of the North Atlantic Treaty (1949) Treaty which recognized the right to self-defense for all allies in the case of armed attack in any member states territory. Thirdly, the members of the Organization of American States emphasize that: the terrorist attacks against the United States, shall be considered an attack against all American States. Therefore, all the member states recognized the Rio Treaty Article 3 (Self-defense) and article 51 of the UN Charter.²⁰ Therefore, practices of the states and international organizations explicitly confirm that the armed attack 9/11 terrorist attacks is included in an armed attack and the United States enjoys the right to self-defense under the International humanitarian law. But self-defense is an exception to the fundamental principle of non-use of force it should meet the two distinct requirements: necessity and proportionality. One of the scholars of international law who is strongly opposed to the use of force against the terrorism and the existence of an armed conflict between states and terrorists, believes that a state's armed forces can take measure against terrorists only in self-defense situation.²¹ He believes in the broad sense of Article 51 of the Charter of the United Nations and reinforces the use of force in self-defense case due to the terrorist attacks or in order to prevent the possible attacks in the future. For instance, if the targeted state noticed that a group of terrorists are planning a terrorist attack against its territory, then it would be legitimate to seek to preventive defense. It should be noted that self-defense (whether broad or narrow) is an immediate action which means where the threat has dispelled there won't be a self-defense case to invoke anymore. On the contrary of the status in an armed conflict and war which is ongoing and "binding rules of international humanitarian law" is the only restriction on it. For instance, the principle of necessity in self-defense after being attacked by armed terrorist requires least two following conditions:

- 1) Continuance of the terrorist attacks by individuals or terrorist group should be expected in such a way that the killing of the people or person who is responsible for the terrorist attacks considered to be a defensive measures, not punitive;
- 2) It should be the last resort which means that there wasn't any other alternative such as the detention of terrorists with aim of stopping the operation.²²

The principle of proportionality requires that the operations should be exclusively effective on the targeted individual or group and doesn't violate the terms of self-defense. Some authors have also added the principle of "Immediacy" to the terms of self-defense which means that targeted defense in the form of the targeted operations against the terrorist attack shouldn't goes beyond the reasonable time. But it seems that this requirement of the assassination is not practical, because the

¹⁸ . Ibid.

¹⁹ . UN SC Doc. 2001a, 2001b in: Ibid.

²⁰ . See Dinstein Y., Ibid.

²¹ . See O' Connell M.E., "When is a War not a War? The Myth of The Global War on Terror", *ILSA Journal of International and comparative law*, Vol. 12, No.2 (2005), pp. 535-540; and see also: Lee J., "Terrorism Prevention and the Right of Preemptive Self-Defense", *JEAIL*, No.2 (2008), P. 291.

²² . See Dinstein Y., Ibid, p. 208.

state should spend sufficient time to gather data information in order to arrest the terrorists.²³ Other scholars rather than the principle of "Immediacy" focus on the principle of "immanency". This means that the risk of a terrorist attack by the terrorist group or an individual is so close that if the given state doesn't take necessary measures to stop them, there will be heavy casualties.²⁴ The standard criterion for evaluating the terms of the "immanency", is not based on a valid time or a specific timeline, similar to the immediacy, but it implies to the last chance meaning there is no other choice of means or no moment left for the given state, other than the assassination of the terrorist leader or leaders to prevent the future attack.

B.4. International Humanitarian Law Model (Armed conflict Theory): There are some scholars who believe that the major terrorist attacks such as al-Qaeda attacks go beyond the definition of the "armed attack" under Article 51 of the UN Charter and the argument of self-defense to prevent future terrorist attacks is very conservative, then they conclude that this case is a new type of armed conflict, in general.²⁵ Accordingly, the United States after the September 11 attacks has a legitimate right to militate against al-Qaeda. Consequently, a situation has emerged with al-Qaeda in the form of war or public conflict. From this point of view, the law of armed conflict should be a general framework to evaluate, not the law applies in the case of peacetime. Therefore, there is no doubt the war that the United States has been entered against the terrorism is the same as the past wars.²⁶ Consequently, based on this theory, the United States could use aggressively (not merely defensive, but with intent to destroy) its armed forces against al-Qaeda enter the war. And because in a war or armed conflict, it is legitimate to attack all the enemy warriors. Therefore, the targeted assassinations of the militants and their leaders in an armed conflict could takes place with no legal restrictions. The only significant priority that should be noted is the given operation should be arranged in accordance with the rules of international humanitarian law. According to this theory, Israel's use of helicopters, tanks and infantry units or forces commandos to target Palestinian militants is not in any violation with the law of armed conflict.²⁷ The Israeli Supreme Court's judgment 519 on December 2006 is in this case.²⁸ The Court's decision not only confirmed that in the armed conflict that is existing between Israel and Palestinian organizations, international humanitarian law applies, It also emphasizes on the fact that humanitarian law applies specifically on the Israeli operation of the targeted assassination. Although in the United States Supreme Court there hasn't been heard the specific targeted assassinations case yet, but it seems that the court has generally considered the war on terror as an armed conflict which is governed by international humanitarian law.²⁹ Some scholars believe that the International Criminal Tribunal for the former

²³ . See Dinstein Y., Ibid.

²⁴ . See Schmitt, M.N., Pejic J., "International Law and Armed Conflict: Exploring the Faultlines", Martinus Nijhoff Publishers (Leiden. Boston), 2007, p. 67.

²⁵ . See Dinstein, Ibid, p. 235.

²⁶ . See Schondorf R., "Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?", International Law and Politics, Vol. 37:1 (2004), pp. 1-78, at 1-10 .

²⁷ . See Dinstein, y., Ibid, p. 94-5.

²⁸ . See the public committee Against Torture in Israel et al V. The Government of Israel et al, HCJ 7015/02.

²⁹ . This was implicitly confirmed in 29, June 2006 in a case. See: Milanovic Marko, "Lessons For Human Rights and Humanitarian Law in the War on Terror: Comparing Humdan and Israeli Volume-II, Issue-V

Yugoslavia (ICTY) has approved this practice in Tadić case, which was pointed out “ *any use of armed force by one State against the territory of another, considered to be an armed conflict and triggers the applicability of the Geneva Conventions between the two States, international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached, or in the case of internal conflicts, a peaceful settlement is achieved, Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party; whether or not actual combat takes place their*”.³⁰

Some of the American scholars believes that the 9/11 terrorist attacks cannot be considered random, because the Al Qaeda had long-term strategic plans which started from the 1992 Yemen Hotel Bombings 1993(Somalia), the 1993 World Trade Center bombing, the 1998 United States embassy bombings Kenya and Tanzania and the USS Cole bombing 12 October 2000. Then, this violence can be considered as an armed conflict.³¹

V. Targeted Assassinations and International Humanitarian Law: The main issue is whether the targeted assassinations violate the principles and rules of the international humanitarian law or not? If there is no conflict with those rules, what are the required conditions to do so, under the international humanitarian law? It should be noted that other questions can be asked here. Is the international humanitarian law applicable both in the international armed conflicts and internal armed conflicts? When would be the beginning of an armed conflict between a state and a terrorist group in the territory of the state? If the military base of the given terrorist group located in the territory of another state, the international humanitarian law is applicable in the use of force against that group? Each of the mentioned situation is discussable in the case of international humanitarian law. Therefore, evaluation of the legitimacy of targeted assassinations depends on the conditions that stated in humanitarian law and when, where and how had been operated this type of actions?

A. Targeted Assassinations From the Perspective of Principles and Rules of International Humanitarian Law: Many of the principles of international law have become international customary rules, despite their conventional characteristics.³² The most important principles that can be associated with the targeted assassinations are: separation, necessity, proportionality and the prohibition of treachery.

A.1. The Principle of Separation

This principle is one of the strongest reason for the lack of legitimacy of targeted assassinations which was first set forth in the declaration of St. Petersburg. The declaration has grounded two distinction: first between civilians and combatants and second between civilian objects and military objectives. The principle of separation contains rules relating to the victims of international armed conflicts and non-international armed conflicts. Under the rules of international humanitarian law, the term “the combatant's privilege” grants to kill or

Targeted killings case”, International Review of the Red Cross, Vol. 89, No. 866 (2007), pp. 373-393.

³⁰ . See International criminal Tribunal For the former Yugoslavia, Prosecutor V. Dusko Tadic (a/k/a Dule), and decision on the defense Motion for Interlocutory Appeal on Jurisdiction of & October 1995, No. IT-94-1-AR72, para.70.

³¹ . See Plow A., Ibid, p. 136-8.

³² . See Henckaerts, Jean-Marie & Doswald-Beck, pp. (33-50).

wound enemy combatants and destroy other enemy military objectives.³³ Therefore, they cannot be punished or executed for participation in the war, however they are obliged to respect international humanitarian law and the distinction between combatants and civilians is one of these duties. From this point of view, International humanitarian law allows deadly attack only against enemy combatants, but generally attack against civilians is prohibited. The targeting of civilians, could be systematically violates the law of armed conflict and in fact violates the principle of separation.³⁴ In general, the difference between opponents and proponents of targeted assassinations is the exercise of the principle of separation. Concept of "combatants and civilians" (US model) and the concept of "direct participation of civilians in conflict" (Israeli model). Debate and questions and answers from both defenders and dissident views in this field is very interesting to read. But the defenders has always used interpretation in "broad sense" (US - Israel) and the opposite views have interpreted in "strict sense".

A.1.1.The Interpretation of Combatants & Civilians

The ICRC and the TMC Asser Institute presented an interpretive guidance with the aim of clarifying the notion of direct participation in hostilities under international humanitarian law.³⁵ It defines civilians as *all persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse*³⁶. In this case, they have immunity from attack unless they directly participate in hostilities which they lose their immunity in that period of time. Therefore, in an international armed conflict, the armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a responsible commander who is in charge.³⁷

Opponents of targeted assassinations remark that according to the above definition, terrorists are not combatants but civilians. But advocates of targeted assassinations believe that the mentioned point is incompatible with what the terrorists proclaim, because they don't see themselves as civilians who do not get involved in the conflict and they are even proud of this representation.³⁸ Opponents responded to this issue as: the determining factor should be noted that for making a distinction between civilians and combatants, is not how they claim or represent themselves, but the specific rules of international humanitarian law and related the conventions are the main criterion to consider.³⁹ Therefore, targeting under the humanitarian law, terrorists are civilians and targeting them is illegal. Defenders also expressed, this definition of combatant, is only one of the several definitions in the

³³ . See Inter-American commission on Human Rights (IACHR), Report on Terrorism and Human Rights, OEA/Ser. L/V/II.116, and Doc 5. rev. 1 corr., para.68.

³⁴ . See Dinstein Y., Ibid, p.129; Amnesty International, Ibid, p. 20; and UNCHR (2004), Ibid, paras. 41-4.

³⁵ . See Melzer N., "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law", ICRC (May 2009), pp. (1-99), at: 20.

³⁶ . See: Ferris, Dieter, "The Humanitarian Law in Armed Conflicts", the National Committee humanitarian law, by considering Dr. Seyed Qasem Zamani and Dr. Nader Saed, Legal Studies and Research Institute of Science, Tehran 2009, first edition, pp. 732.

³⁷ . See Melzer N., Ibid, pp. 25-36.

³⁸ . See Plaw A., Ibid, p. 149-56.

³⁹ . See Dinstein Y., Ibid, p. 128-9.

international conventions and instruments. Why broader definition in the present context is not applicable? Moreover Opponents criteria for determining the status of combatants is almost idealistic. The full enjoyment of combatant rights is restricted to definition of the prisoner-of-war which does not contain “unlawful combatant” or “unprivileged combatant”. Therefore once captured, such an unlawful combatant is not entitled to prisoner-of-war status. Then the supporters conclude that “The real intention of the authors of the rules (opponents) is creating more incentive to follow the law of armed conflict, not to encourage the terrorists. On the other hand, opponents argue that considering the assumption that there are several legal definitions of "combatant" and some of them may include the people who accused of terrorist, but still this does not resolve a claimed ambiguity (Due to the multiplicity of definitions to the same subject). Because there are definitions that does not recognize the terrorists as combatants. According to the Article 5 of the Third Geneva Convention of 1949 (relating to the treatment of prisoners of war) in case of any doubt arise to the status of the person, with regard to the principle of precaution and to protect civilians under the principle of separation of humanitarian law, such persons shall enjoy the protection of the Geneva Convention of 1949 until such time as their status has been determined by a competent tribunal. International instruments and conventions refuse to recognize the unlawful combatant because it causes more harm to civilians.⁴⁰ Therefore the terrorists cannot be considered combatants under international humanitarian law.

A.1.2. The Interpretation of the “Direct Participation by Civilians in Hostilities”

According to paragraph 3 of Article 51 of Additional Protocol I and Paragraph 3 of Article 13 of Additional Protocol II, civilians are protected against attack unless and for such time as they take a direct part in hostilities. There's not much clarity about this idea in state practice and judicial decisions. Therefore, it should be the subject of the principles of treaty interpretation which provided “A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”.⁴¹ In the above passage, some questions can be raised. What is the meaning of direct or indirect participation? What criteria define direct participation in terrorist activities? These are questions that have been raised in this context. There has not been provided any definition for direct participation in any international documents. There is a sharp disagreement In this regard, between supporters and opponents of targeted assassinations. Advocates believe that terrorists should be considered as civilians but those who participate in hostilities will lose their immunity. Therefore, whenever and wherever they can be found and killed and this is not an examples of attacks on civilians.⁴² The

⁴⁰ . For example, during World War II, the strategic urban centers were bombed several times, under the pretext of the "quasi-combatants". See Watkin K., “Warriors without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy”, Occasional Paper Series, Harvard University (winter 2005), pp. 82, at: 10; available at: <http://www.hpcrresearch.org/pds/occasionalpapers.pdf>. Antonio Cassese expressed his opposition to the concept of "quasi-combatants", because nobody should be left illegally in the hands of the enemy. See Cassese A., Ibid.

⁴¹ . See Melzer N., Ibid, pp. 41-48.

⁴² . This idea has been supported by Israeli jurists.

theoretical debate over criteria relating to direct participation in hostilities between supporters and opponents has led to the emergence of two theories.

The Person-based Theory or The Membership Theory: This theory is presented by the supporters of targeted assassinations with assuming that person's membership in a militant group or even civilian branch of a hostile group is enough to qualify him for direct participation in the conflict. Due to his membership he is no longer civilian, as long as his membership sustains, he shall be considered as a legitimate target for attack at any time. Israel's Supreme Court with adopting a broad interpretation of the approach has authorized such actions. The court in targeted terrors case December 2006 assessed the status of Palestinians under humanitarian law did not consider them as civilians enjoying protection of their lives, liberty and property under international humanitarian law, because they take part in hostilities and are therefore "unlawful combatants", who forfeit the right to protection a regular civilian would enjoy. Therefore they took a direct part in hostilities.⁴³ Accordingly, distinguishing between direct and indirect participation in hostilities and the legitimacy of targeting such person should be decided case by case. The Court also stated that Article 51(3) of Additional Protocol 1 is too ambiguous to apply in this case.⁴⁴

The Act-based Theory / The Revolving Door Theory: Proponents of this theory, rely on provisions of the Additional Protocol, believe that this old and primitive approach (civilians who directly participate in hostilities lose their protection against direct attack) is indeed a correct rule. But the supporters of targeted assassinations have gone far beyond the scope of this exception. They believe that in accordance with Article 51(3) of Additional Protocol 1, civilians who participated in hostilities lose their immunity only for the time that they take a direct part in such actions, but if they choose to leave the conflict they are qualified to gain their immunity from attack. The fact that a few moments earlier they participated in an armed attack is not notable enough as a justification for targeting and killing them.⁴⁵ Even some advocates of this theory believe the targeted assassinations of people who participated in hostilities in periods are war crime. Although such people can be detained and prosecuted in compliance with human rights standards.⁴⁶ On the contrary, the opponents argue that If this interpretation be accepted it offers the easiest way to terrorists to benefit from the advantages of both status, because their status changes frequently and finally the right to self-defense may be hindered.⁴⁷

A.1.The Principle of Proportionality: This principle is one of the most important rules in the law of the use of force and more often applies in the context of right to use of force (right to self-defense). Although this principle is mentioned as "military necessity" in the literature of the law of armed conflict (In practice, this principle has been generally accepted as law by States)⁴⁸. It was also confirmed and emphasized in the ICJ's 1996 advisory opinion on the legality of the threat or use of Nuclear Weapons.⁴⁹ This principle has restricted the methods of war which was confirmed by Israel's Supreme Court in the

⁴³ . See Lesh M., Ibid.

⁴⁴ . Ibid.

⁴⁵ . See Amnesty International, Ibid, p. 29.

⁴⁶ . See Cassesse A., Ibid, p. 12-14.

⁴⁷ . See Solis G., Ibid, p. 136.

⁴⁸ . See Henckaerts, Jean-Marie & Doswald-Beck, p. 247.

⁴⁹ . See Ibid.

targeted assassinations case. The judge Barak stated that: *the proper balance must be designed between two contradictory considerations which are civilian objectives and military necessity.*⁵⁰ *A meticulous examination of every case is required; it is required that the military advantage be direct and anticipated.* Performing that balance is difficult in practice. The committee established to review the NATO bombing against the former Yugoslavia remarks in its report: *The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.*⁵¹ But in such cases it is so clear that requires no proof. An obvious example is the case of Salah Shehade which was targeted by Israeli defense forces on 22 July 2002. One ton bomb dropped by a F-16 plane in a neighborhood of Gaza City with targeting the house in which Shahade was hiding. Fifteen people were killed, including Shehade, his wife and daughter and between 50 and 150 were injured as a result of the attack. Even Israeli juristics and military activists admitted this action is contrary to the principle of proportionality. Ben-Naftali stated: *Anticipated damages in military operations clearly violates the principle of proportionality. This fact was already confirmed by Israeli Supreme Court.*⁵² Following these statements, an official complaint has been filed against the Israeli prominent figures before the Spanish Supreme Court. Firstly the Court upheld its jurisdiction based on the "principle of universal jurisdiction", Article 8 of the Statute of the International Criminal Court, European Convention on Mutual Assistance in Criminal Matters on 20th April 1959 and Articles 608 and 611 of the Spain Criminal Code.⁵³ One of the legal reasons for this complaint is the violation of the principle of proportionality in attack when there is strong possibility to anticipate such casualties. According to the order of the Spanish Supreme Court, Israel should bring the accused people including the commander of its air force before the court and it should provide a visa Tribunal research staff to travel to the Gaza Strip and meet victims of these case.⁵⁴ Despite its obligations under the convention, Israel did not respond to this request. While the Israeli Supreme Court and its prosecutor general has been agreed to the establishment of the independent commission to provide preliminary criminal trial the perpetrators of the bombing, no effective measures have been reached yet.⁵⁵ Therefore we can say that there are two views about the principle of proportionality:

⁵⁰ . See PCATI (2006) HCJ, 769/02, paras. 42-3.

⁵¹ . See Final Report to the prosecutor by the committee Established to Review the NATO Bombing campaign Against the Federal Republic of Yugoslavia, available at: <http://www.un.org/icty/pressreal/nato061300.htm>.

⁵² . See Naftali B., "A Judgment in the Shadow of International Criminal Law", Vol. 5 (2007), p. 330.

⁵³ . See Judge Andreu F., "preliminary Report No. 157/2. 008-G.A, Central Magistrates' court No. 4", Audiencia Nacional (Madrid), 29 July 2009, available at: <http://www.pchrgaza.org/Files/pressR/English/2008/admission-order-property.pdf>.

⁵⁴ . See Judge Andreu F., Ibid.

⁵⁵ . See Lesh M., Ibid.

One believes that such targeted assassinations is most likely illegal and ignore the principle of proportionality, but the latter believes that such targeted assassinations could in some cases adhere to the principle of proportionality in accordance with international humanitarian law, then they are legitimate in those cases⁵⁶.

A.2.Prohibition of Treachery: Killing, injuring or capturing an adversary by resort to perfidy is prohibited under the international humanitarian law. Article 37(1) of Additional Protocol I defines treachery *Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.*⁵⁷ The abovementioned article and The Article 23(3) of Hague Convention of 1907 prohibits belligerents from targeting and killing enemy combatants, who are no longer on the battlefield, but are resting at home or with their families.⁵⁸ Therefore, we can consider two types of targeted assassinations: targeted assassinations of enemy combatants in wartime and peacetime. Assassination in peacetime is often motivated by political beliefs, but during the war there is not political element and often takes place by treacherous means. Targeting the persons who are combatants in war is legal, but the killing or wounding of persons who are behind the line of battle (*hors de combat*) is treacherous. Because all the enemy personnel are not necessarily combatants. Some of them are not fighting at the time or dwelling and some other are in the battle. Then, the killing of those who are not making contribution to military action offers no military advantage which is prohibited by Article 52(3) of Additional Protocol I. The use of chemical and biological weapons and poison may be referred to treacherous act. It is obvious that the concept of treachery and deceptive tactics such as camouflage, artificial aiming and tabloid must be distinguished. Therefore, every targeted assassination case must be examined under its circumstances and with regard to the possibility whether the operation is referred to be a treacherous case or not? How can the failed Assassination of Khaled Mashal_ leader of Palestinian organization Hamas_ by the Israeli Mossad on 25 September 1997 in Amman not to be a treacherous case, while the agents of the Mossad who wore civilian clothes attempted to poison him?

VI. Conditions that Justify the Targeted Assassination: Assuming this theory is legitimate, the question before us is whether this operation is absolute or conditional? Which means the states have complete freedom to do so or not? In particular the Geneva Conventions of 1949 are silent on the matter where leads us to the jurisprudence and doctrine. Since there is no relevant international judicial precedent, therefore we are forced to consider domestic judicial cases, state practice and scholar's teachings. These conditions listed below, some of these conditions are relevant to the victim, and some are relevant to attacking state and relationship between the hostiles.

A.1.An international or non-international armed conflict: In order to qualify the operation as a case for targeted assassination, there must be an ongoing international or non-international armed conflict. Assassination of a civilian without an armed conflict considered to be as a domestic crime. In addition, international humanitarian law or the law

⁵⁶ . See Bader M., "The Israel policy: Targeted killing for preventive self-defense or Extra-Judicial Execution", *ILSP Law Journal*, Vol.1, Issue 1 (2009) pp. 1-11.

⁵⁷ . See Henckaerts, Jean-Marie & Doswald-Beck, p. 367.

⁵⁸ . See Cassesse A., *Ibid*, p. 8.

of armed conflict applies only when there is internal or international armed conflict. But armed clash between a state and terrorist group within its territory should reach to a minimum level of an armed conflict. In fact the right to kill the enemy depends on the existence of a continuous armed conflict.⁵⁹

A.2.purposely act against civilians: Victim of targeted assassination must be a "specific civilian", because obviously no civilian were targeted accidentally, but he should be chosen in terms of activities in the given armed conflict. If the victim was the combatant who wore uniforms and carried weapons openly, then it would be legitimate to target such person, but it is clear that killing non-combatants is not legally specified under the Article 3 of the 1977 Additional Protocol. Therefore, Civilians who have been targeted and killed are those who have taken direct part in hostilities, moreover no individual can be both combatant and civilian at the same time, then they lose their immunity from direct attack and become a legitimate target only for such time as they were directly participating in the hostilities. In this case, the victim is neither combatant nor civilian, but his status qualify as a non-combatant. It seems that all non-combatants are not considered to be legitimate target for assassinations. For instance, the contestants who escaped from their occupied or colony countries (so-called freedom fighters) are not similar to armed terrorists who are willingly in the battle. This expected distinction (the national liberation movements and terrorist organizations) was made in the case of Abu Yahya ibn Abd by the Appeal Court of Milan, Italy on 11 October 2006.⁶⁰ Western countries often make no distinction between the guerrilla warfare and voluntarily war of national liberation. Liberation war are conflicts fought by national combatants against foreign powers to gain independence but guerrilla warfare is a form of irregular warfare which is often used by militants. When group of combatants fight to bring freedom or independence or to set a country free from foreign powers and when their actions are against the military objectives which conforms to the rules of international humanitarian law, Then their combat is legitimate and therefore they cannot be killed outside or behind the battlefield, but they can only be detained in compliance with human rights standards. But if mentioned combatants attempt to create panic among people or use discriminatory attacks and violate rules of the war, then they will be considered as terrorists. For instance, Hamas as a liberation organization is engaged in a war to set the occupied territories free (at least for that part of territory that has been occupied by is Israel after the Six-Day Arab–Israeli war in 1967), then as a non-state actor it

⁵⁹ . See Solis G., *Ibid*, p. 132.

⁶⁰ . Aleni L., "Distinguishing Terrorism from Wars of National Liberation in the light of International Law: a View from Italian Courts", *Journal of International Criminal Justice*, No. 6 (2008), pp. 525-539.

Semo foreigner were arrested and charged with "contributions to international terrorism in Italy and abroad" and "illegal immigration" (Article 270-bis of the Italian Criminal Code) by the Italian prosecutor. This group was active in Italy as form of an institution, and also aligned itself with Ansar al-Islam which was located in Iraq. They recruited and sent volunteers as the "Islamic warriors" to Iraq and other war zones. Prosecutor stated that the case is an assistance and participation in violence that occurs against US forces in Iraq. Following this case, the courts of Milan and Cremona announced their jurisdiction. Finally the decision of Milan court was approved by the Appeal Court. (*Ibid*)

should respect the rules of international humanitarian law. Consequently, actions such as bomb explosion in a civilian bus is not legal because it violates the principle of separation. Similarly, Israel is under intense pressure from world public opinion because of its operation in Gaza and UN Report on Human Rights in Palestine and Other Occupied Arab Territories on September 15, 2009 is an example for this case.⁶¹ The idea that freedom fighters shall not be considered terrorists in accordance with the principle of self-determination, the whole argument of the occupying countries become questionable. Therefore, several in-depth investigation need to be considered to establish every person's status before operating the assassination.

A.3.As a measure of last resort: If there are non-violent means (such as arrest, detention and trial) to stop the terrorists attack, the given state should apply those instead of targeted assassinations and this is a human right clause. Because one of the main criticism over there targeted assassination is deprivation of the right to a fair trial. In this regard, Israel's Supreme Court stated: *Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.*⁶²

A.4.determined by competent authority: Under the rules of war commander in chief which in this case (targeted assassination) could be president or secretary of defense or intelligence or other high-ranking government official can give the order to attack. The assassination order must comply with the military hierarchy in order to qualify for an assassination, otherwise it would not be a case for targeted assassination.

A.5.Proportionality: Losses and damages are real part of every war and conflict, but under the key principle of proportionality in international humanitarian law, there must be a balance between the military damages of both hostiles. For instance, bombardment of the entire city in order to destroy a military base (near the city) is not permissible. Assassination of the Salah Shehadeh is one of these case which was discussed in previous pages. Therefore, there must be a certain proportionality and balance in casualties and damages that have been caused by military attack as a result of assassination which grounded in the military necessity and humanity. If the destructive effects as a result of the attack is predictable in any case, that attack will not be permissible in terms of distinction and proportionality.

A.6.Obligation to Compensate: Operating state after each targeted operation should examines the precise results and specific circumstances of the case in a context of armed conflict. Examination shall be performed impartial and independent. This clause establishes the responsibility of the occupying power for crime it or its staff may commit. The obligation to compensate for violations of international humanitarian law was originally recognized as a norm in the customary international law, even if such obligations are part of customary international law, interpretation of this notion should not be ambiguous, because such enforceable norm is grounded in spirit of international humanitarian law regardless of

⁶¹ . See A/HRC/12/48 Doc (Human Rights Council), "Human Rights in Palestine and other occupied Arab Territories", 15 September 2009.

⁶² . Ibid.

the practice or judicial decisions in one or two states.⁶³ In the case of Salah Shehadeh Israeli Supreme court asked the Israeli State for establishing an independent commission to investigate the circumstances surrounding this attack. Deputy prosecutor stated that: *Despite the fact that the provisions cited by the Supreme Court regarding the targeted terror are not applicable in this case.... But the state accepts the fact that innocent civilians were injured or killed in the attack, then an independent and impartial committee which is appointed by the competent authorities should investigate the circumstances of such attack.*⁶⁴ The problem is how can such committee that is established by Israeli authorities be impartial or independent in the investigation process?

VII. Conclusion: For a long time, targeted assassinations have been used as a tool of war between hostiles in the armed conflicts. Many of traditional concepts in the international law have developed and changed specially after the September 11. In such atmosphere, development of targeted assassinations in the law of armed conflict have taken place. The use of targeted terror policies as a tool of war have become more compelling for legality of such practice compared to justify the use of targeted terror as a global measure to combat terrorism or maintenance of international peace and security. Disputes begin over the notion of war on terror. Many states around the world have not recognized that there is an ongoing war on terrorism. Accordingly, any counter terrorism operations should not conduct a combat with the similar techniques and methods that have been used by terrorists. Otherwise it brings the discussion back to the global war against terrorism which has been discussed in depth on the previous pages. The second situation concerns with the assumption of self-defense as a justification for killing terrorists which allows for limited war. In this case attacks against terrorist groups such as al Qaeda are justified as a form of self-defense. But such practice should meet the international humanitarian law and human rights standards as a legal framework. Although the literature of international law has not been able yet to provide a lawful justification for this policy. In conclusion, the use of targeted terror must be considered to be illegal under the current international legal framework.

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