The Israeli Policy of Extrajudicial Assassinations and International Law

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I INTRODUCTION

Before addressing the issue of Israel's policy of extrajudicial or targeted assassinations, it is important to place Palestine in context. Palestine has been recognised by the United Nations as a territory with an international status. This was confirmed by the International Court of Justice in its quasi-unanimous 2004 Advisory Opinion on the *Wall*[1] which determined that this status, and therefore the law applicable to the Territory, resulted from the following:

1) Palestine is a former Class A Mandate over which Great Britain as the Mandatory Power had a special responsibility. The Mandate could not impair or destroy the rights of the original inhabitants. It was based on the fundamental principles of non-annexation and "sacred trust of civilization"[2].

2) The right of the Palestinian people to self-determination has been confirmed through a process of collective recognition by the international community expressed through the General Assembly in countless resolutions. This right has several legal consequences, which include: confirmation of the self-determination borders which have been recognized by both the General Assembly and Security Council as corresponding to the territory occupied by Israel since 1967, i.e. the West Bank, including East Jerusalem, and Gaza,[3] the right to use force in self-defence within the limits of International Humanitarian Law, the right to respect for the territorial integrity and unity of the whole Territory under occupation, and the duty of every State "to refrain from any forcible action which deprives peoples . . . of their right to self-determination."[4]

3) Palestine's status as Occupied Territory under international law has meant the illegality under international law and UN resolutions of Israel's occupation of Palestinian territories since l967, including Jerusalem, considered to be contrary to Article 2(4) of the UN Charter and the well-established principle of the inadmissibility of the acquisition of territory by force, the prohibition to alter the character and status of the OPT, and hence the nullity of all legislative and administrative measures taken by Israel which purported to do so, including in

[1] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 (available at http://www.icj-cij.org).
[2] *International Status of South West Africa*, Advisory Opinion, ICJ Reports 1950, p. 131.
[3] See e.g. UNGA Res. 43/177 which legitimises the unilateral declaration of independence of a Palestinian State in 1988.
[4] *Wall* Opinion, para. 88, citing GA Res. 2625 (XXV).

Jerusalem, [5] and the applicability of the Fourth Geneva Convention and customary law under the Hague Regulations of 1907.[6] The latter contain norms which have been referred to by the ICJ as "cardinal" or "intransgressible" principles of international law. It also means that international human rights law continues to be applicable in time of armed conflict save through the application of its derogability provisions – again this has been confirmed by the ICJ.[7] Finally, the continuing status of Gaza as occupied territory after the disengagement of Israel in September 2005 has been confirmed.[8]

However, as well documented in the reports of Professor John Dugard, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Israel, in particular after the events of 11 September 2001, has tried to shift the perspective of the conflict from one of illegal occupation to one which is part of the greater "war on terror." This has allowed it to view its military actions as having no limitations, with attacks by Palestinians, even if directed against official targets such as IDF soldiers, as terrorism. Professor Dugard wrote in one of his reports[9]:

> "In the present international climate it is easy for a State to justify its repressive measures as a response to terrorism - and to expect a sympathetic hearing. But this will not solve the Palestinian problem. Israel must address the occupation and the violation of human rights and international humanitarian law it engenders, and not invoke the justification of terrorism as a distraction, as a pretext for failure to confront the root cause of Palestinian violence - the occupation".

Furthermore, he drew a distinction between acts of mindless terror, such as acts committed by Al Qaeda, and acts committed in the course of a war of national liberation against colonialism, apartheid or military occupation which, while some acts such as suicide bombings were unjustifiable, constitute a painful but inevitable consequence of such situations. He pointed out that history is replete with examples of military occupation that have been resisted by violence and acts of terror, such as resistance to the German occupation during the Second World War, or the resistance of the South West Africa People's Organization (SWAPO) against South Africa's occupation of Namibia; and Jewish groups had resisted British occupation of Palestine, inter alia, by the blowing up of the King David Hotel in 1946 with heavy loss of life, by a group masterminded by Menachem Begin, who later became Prime Minister of Israel.[10]

In keeping with the view it has tried to promote of the Palestinian conflict, Israel has, since 2000 and the second intifida, launched into a deliberate long-term policy of selected assassinations or targeted killings of Palestinian activists which it has openly pursued. The

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[5] UNSC Res. 298(1971), 446(1979), 476, 478(1980), 1322(2000).

[6] SC Res. 237(1967), 271(1969), 681(1990), 799(1992) and 904(1994))

[7] *Wall Opinion*, para. 106, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005 (available on http://www.icj-cij.org/), paras. 216-217. See also Human Rights Committee, Concluding Observations on Israel (UN Doc. CCPR/C/79/Add.93), para.10; and *ibid.*, Second Periodic Report of Israel (CCPR/C/ISR/2001/2).

[8] See Report of the Human Rights Council Fact-finding mission on Beit Hanoun (A/HRC/4/17). The preamble to SC Res. 1860 calling for a cease-fire stresses : " that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state…"

[9] Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard (Doc.A/HRC/7/17), 21 January 2008, para.5.

[10] *Ibid.*, para.4

State has argued before the Israeli Supreme Court that such "terrorists" are neither combatants nor civilians, but belong to a third category known as "unlawful combatants".[11] As such they are legitimate targets for attack as long as the armed conflict continues.

The intifada was not the first time Israel had employed assassinations as a policy instrument, for these go as far back as the assassination in 1948 of the UN Swedish mediator for the United Nations, Count Folke Bernadotte, in Jerusalem by Jewish militants. In the past, they have included, in addition to targets other than Palestinians, such as Egyptian and German, 13 members of the Palestinian group Black September, following on the killings of 11 Israeli athletes at the 1972 Olympics in Munich; senior Palestinian leaders such as Khalil al-Wazir (Abu Jihad), the deputy chairman of the Palestinian Liberation Organization, targeted in Tunisia in 1988; Abas Musawi, the secretary general of Hizbullah, in Lebanon in 1992; Fathi Shkaki, the head of Palestinian Islamic Jihad in Malta in 1995; and the attempted assassination of Khaled Mashaal, a senior Hamas leader in Jordan in 1997.[12] However, these were rare events. In contrast, since 2000, assassinations have escalated and have resulted in ever more widespread innocent civilian deaths. For example, from 2000-2007, according to the report of the Special Rapporteur[13], over 500 persons were killed in targeted assassinations. Some were particularly dramatic events, provoking an international public outcry and legal pursuits. In 2002 there was the killing in Gaza of Hamas leader Salah Shehadeh in which a one-ton bomb was dropped on a crowded Gaza apartment building in the middle of the night, killing eight children and seven adults and injuring well over 150 other people – apparently the Government of Israel was "fully aware" that Shehada's wife and daughter "were close to him during the implementation of the assassination ... and there was no way out of conducting the operation despite their presence."[14] In March 2004, Sheik Yassin, the founder and spiritual leader of Hamas, who was paraplegic, was assassinated along with nine other bystanders; this was followed the following month by the killing in Gaza of Hamas leader Abdel Aziz Rantisi.

"Targeted" assassination is a misnomer giving the impression of a clean surgical strike. But this is refuted by such incidents as the killing in 2006 of 11 Palestinians sitting on a beach in Gaza, of which 7 were members of a single family, survived only by a 12 year old Huda Ghalya, if indeed it was intended as a targeted strike rather than a random shooting.

Such killings of alleged Palestinian terrorists have been carried out by all kinds of means after identifying and locating them: helicopter gunships, fighter aircraft, tanks, car bombs, booby traps, and bullets. One research study on such tactics quotes former Shin Bet head Ami Ayalon: "The annihilation of whole neighborhoods is not a targeted war. Razing dozens of acres of groves is not a targeted war. Killing one terrorist along with half a neighborhood definitely isn't. Words create behavior patterns and behavior patterns expand the hatred and

[11] See *Public Committee against Torture in Israel* v. *The Government of Israel*, Decision of December 14, 2006. (http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf).
[12] See Nils Melzer, *Targeted Killing in International Law*,Oxford University Press, 2008, pp.27-28; Asaf Zussman and Noam Zussman, "Targeted Killings:Evaluating the Effectiveness of a Counterterrorism Policy", 2 January 2005 (http://www.bankisrael.gov.il/deptdata/mehkar/papers/dp0502e.pdf)
[13] Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard (A/HRC/4/17), 29 January 2007, p.2.
[14] See Palestine Centre for Human Rights, Press Release 57/2008, 25 June 2008 (http://www.pchrgaza.org/files/PressR/English/2008/60-2008.html); and Israeli Ministry of Foreign Affairs, Findings of the Inquiry into the death of Salah Shehadeh, August 2, 2002,

nourish terrorism. One can't talk about a 'targeted thwarting' when innocent children are killed too."[15]

Understandably such a policy has raised a huge international outcry and debate over its moral and political justifications, and widely condemned as unlawful under international law.[16] In contrast, the United States has claimed, in conformity with its own policies, that Israel has a right to self- defense that could be used in some circumstances to target leaders of terrorist groups.

I turn therefore to the international law regulation of such policies bearing in mind the distinction between members of the political and military wings of combating organizations. The following explores the policy of extra-judicial assassinations under three fields of law: the law of self-defence, international humanitarian law (IHL) and international human rights law (IHRL).

II EXTRA-JUDICIAL OR TARGETED ASSASSINATIONS UNDER THE LAW OF SELF-DEFENCE

By situating their military action in the framework of the "war on terrorism", States like Israel and the United States, have claimed to re-interpret the rules constraining the freedom of States to use military force in international relations (Article 2(4) and 51 of the UN Charter) as well as the rules regulating an armed conflict under International Humanitarian Law (IHL), and it is primarily the Middle East that has borne the brunt of this.

Such interpretations have sought in particular to widen the permissible rules relating to self-defence. There is a claim today for a broad reading of Article 51 of the Charter based on Security Council Resolutions 1368 (2001) and 1373 (2001) on the prevention and suppression of the financing of terrorist acts which refer ambiguously in their preambles to the inherent right of individual or collective self-defence "in accordance with the Charter". These resolutions were in direct response to the attacks of September 11.

Israel situated its construction of a wall in the OPT and its military operations against Lebanon in 2006 and Gaza in December/January 2008/9 on the basis of its inherent right of self-defence under Article 51 of the Charter against terrorism in the face of the series of suicide bombings in Israel, of the incursions by Hezbollah into Israel and the firing of rockets into Israel by Hamas militants, respectively. But targeted assassinations have also been justified as preventive self-defence against terrorist acts, as well as in order to meet Israel's security concerns. This has been called "the policy of targeted frustration" of terrorism. Under this policy, the security forces claim to act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel. Israel has endorsed the claim that Article 51 can no longer be read narrowly, but must take into account armed attacks by non-State actors.

In the *Wall* case the Court while seriously considering Israel's security claims, pointed out that Article 51 recognizes the existence of this right only in the case of an armed attack by one

[15] Cited on http://www.ynetnews.com/articles/0,7340,L-3225497,00.html

[16] For a list of such condemnations by human rights organizations, the European Commission, and the United Nations, including its human rights organs, among others, see Melzer, *Targeted Killing*, pp.29-30.

State against another State. Consequently, it concluded that Article 51 has no relevance in this case. Moreover, the Court noted that since Israel exercises control in the Occupied Palestinian Territory, the threat which it regarded as justifying the construction of the wall originated within, and not outside, that territory.[17] While the Court has been criticized for a lack of reasoning, its dismissal of self-defence is nevertheless perfectly logical. In view of the status of the Territory, it has been convincingly argued that the right of self-defence was irrelevant in view, *inter alia*, of the *lex specialis* of humanitarian law. Moreover, a State in continuing violation of international law through a prolonged occupation could not then plead a circumstance precluding wrongfulness of its acts.

In addition, as the Court stated in the Wall case with reference to Israel's additional claim of necessity, "the construction of the wall along the route chosen" was not "the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction".[18] Israel's legitimate security concerns could certainly be met by means other than targeted assassinations, if only by terminating its 42-year-old occupation.

All the Judges without exception recognised that while Israel had the right and even the duty to protect the lives of its citizens, to use the words of the dissenting Judge Buergenthal:

> "the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits."[19]

The Court confirmed its stand in the case brought by the Democratic Republic of the Congo against Uganda which, having to justify its incursion into and occupation of parts of the Congo, pleaded self-defence in response to the acts of one of the rebel movements operating on Congolese territory. The Court rejected this plea of self-defence, on the grounds that there was no involvement of the Government of the DRC in the acts of the rebels, thus intimating that there was no right of self-defence against the acts of non-state actors not attributable to the State itself. The Court also noted that even if Uganda's use of force were in support of its perceived security needs (as also claimed by Uganda), it necessarily still violated the principles of international law. [20]

Moreover, the targeted individuals, such as Sheikh Yassin or innocent bystanders were not killed while in the process of carrying out an armed attack. Thus even while not taking a position on whether Article 51 applies to the acts of non-State actors, it is particularly irrelevant in the case of the assassination of political leaders.

It should be noted that Security Council Resolution 611 (1988), confirming a previous resolution 573 (1985), condemned the Israeli assassination of Khalil El Wazir (Abu Jihad) as an "aggression". It reads in part:

> "Having noted with concern that the aggression perpetrated on 16 April 1988 in the locality of Sidi Bou Said has caused loss of human life, particularly the assassination of Mr. Khalil El Wazir,

[17] *Wall Advisory* Opinion, para. 139
[18] *Ibid.*
[19] *Ibid.*, Declaration of Judge Buergenthal, para. 2.
[20] *DRC v. Uganda*, para.147 and 143, respectively.

> Gravely concerned by the act of aggression which constitutes a serious and renewed threat to peace, security and stability in the Mediterranean region,
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> 1. Condemns vigorously the aggression perpetrated on 16 April 1988 against the sovereignty and territorial integrity of Tunisia in flagrant violation of the Charter of the United Nations, international law and norms of conduct;

III EXTRA-JUDICIAL OR TARGETED ASSASSINATIONS UNDER INTERNATIONAL HUMANITARIAN LAW

A targeted assassination has been defined as

> "a lethal attack on a person that is not undertaken on the basis that the person concerned is a 'combatant', but rather where a state considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that person, even at a time when the individual is not engaging in hostile activities."[21]

Again,

> "the term 'targeted killing' denotes the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them"[22]

But the terminology is very wide-ranging – "extrajudicial executions", "extrajudicial killings" or "assassinations" - depending on context and use.

In the context of terrorism, the question of extraterritorial targeted assassinations has led to an intense debate in regard to the applicability of International Humanitarian Law to such killings. Civilians under IHL, i.e. non-combatants, are protected persons and their right to life is to be respected. First, there exists a set of rules protecting those who find themselves directly in the power of a Party to the conflict, from murder or extermination (Article 32 of the Fourth Geneva Convention; Article 75 (2) of Additional Protocol I, and Common Article 3 of the Geneva Conventions, a provision which has been said to constitute "fundamental general principles of humanitarian law" applicable in all circumstances[23]). Second, the right to life is also protected under the Fourth Geneva Convention and Additional Protocol I by the well-known series of "cardinal principles": in particular, the principle of distinction which prohibits attacks on civilians (and civilian objects), the prohibition of weapons which cause unnecessary suffering, and the principle of proportionality, all aimed at minimizing the loss of life during military operations. A final set of rules relates to the grave breaches provisions which includes, *inter alia*, wilful killing of protected persons (Articles I47 of the Fourth Geneva Convention and 85 of Additional Protocol I); grave breaches give rise to individual criminal responsibility.

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[21] Louise Doswald-Beck, "The right to life in armed conflict: does international humanitarian law provide all the answers?", 88 *International Review of the Red Cross* no.864 (2006), pp. 881-904, at p. 894.
[22] Melzer, *Targeted Killing*, p.5.
[23] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Rep. (1986), para 218.

Under IHL the question has revolved around whether suspected "terrorists" are legitimate targets, or as civilians, are protected persons "unless and for such time as they take a direct part in hostilities" (art.51(3) of Additional Protocol I) (Article 3 common the four 1949 Geneva Conventions refers to "persons taking active part in the hostilities….[who] shall in all circumstances be treated humanely"). Additional Protocol I is binding on Israel to the extent that it has become international customary law.

The Israeli Supreme Court has ruled[24], that suspected terrorists were not combatants but civilians, thus rejecting the Israel Government's claim of a third category that of "illegal combatants". Moreover, the Court considered that the rules applicable in international armed conflicts applied. However, the Court did not rule out the legality of targeted assassinations, pointing out that the protection afforded by IHL did not exist regarding civilians "for such time as they take part in hostilities", but these had to conform to certain conditions which the Court laid out. As former Supreme Court President Aharon Barak wrote, it is not "that such strikes are always permissible or that they are always forbidden".[25]

The debate in the context of IHL has therefore focussed on the problem of distinguishing between those civilians who do and those who do not directly participate in hostilities, the former continuing to be civilians but losing their protection under the Conventions as a result and therefore laying themselves open to attack like combatants.

The ICRC has clarified its views on the notion of direct participation in hostilities under IHL in a document which was the outcome of expert consultations held between 2003-2008.[26] As underlined by the ICRC Guidelines, civilians are all persons who are neither members of State armed forces nor members of organized armed groups belonging to a party to the conflict. Members of a non-State party to an armed conflict can be regarded as a member of an organized armed group *only* if they assume a continuous combat function.

A further distinction must be made between direct and indirect participation in hostilities. As Nils Melzer has put it:

> "While direct participation refers to specific hostile acts carried out as part of the conduct of hostilities between parties to an armed conflict and leads to loss of protection against direct attack, indirect participation may contribute to the general war effort, but does not directly harm the enemy and therefore, does not entail loss of protection against direct attacks." [27]

According to the ICRC's Interpretive Guidance the notion of direct participation in hostilities is reserved to specific acts which either cause military harm or directly inflict death, injury or destruction on persons or objects protected against direct attack. Moreover, the harm to be caused must be severe, for example the use of weapons against the armed forces or against their supplies, the bombardment of civilian areas, sniping, etc. The harm must also be directly

[24] *Public Committee against Torture in Israel* v. *The Government of Israel*, Decision of December 14, 2006.
[25] For a commentary on the Court's decision, see Antonio Cassese, "On Some Merits of the Israel Judgment on Targeted Killings", 5 *Journal of International Criminal Justice* (2007) 339-345; Roy S. Schondorf, "The Targeted Killings Judgment. A Preliminary Assessment", *Ibid.*, at 301-309.
[26] ICRC, "Interpretive Guidance on the Notion of Direct Participation in Hostilites under IHL," 2009. For an overview, see Nils Melzer, "The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law", in Christian Tomuschat, Evelyne Lagrante and Stefan Oeter (Eds), *The Right to Life* , Martinus Nihoff, 2010, pp.151-166.
[27] *Ibid.*, p. 157; and Melzer, *Targeted Killing*, Chapter XI..

caused by the acts in question – acts that are merely in support of one of the party's capacity to wage the conflict in the future, such as the production of weapons or general recruiting and training of personnel *does not* amount to direct participation in hostilities. In short, the target of military operations can never be the political command and control system, for there needs to be a close nexus between the target and on-going military operations. On the other hand measures preparatory to carrying out a specific act of direct participation in hostilities as well as the deployment to and the return from the location of its execution constitute an integral part of that act.

Even where a person has lost his or her protected status, there are certain conditions and limitations which must be observed. First, unlike combatants, these civilians only suffer a temporary loss of protection. Second, all feasible precautions are to be taken in determining whether a person is a civilian, and if so, whether directly participating in hostilities. Third, even if justified, the attacks against that person must comply with the provisions of IHL – i.e. the measures taken must be strictly necessary for the accomplishment of a legitimate military purpose in the particular circumstances and must be proportional, balancing the potential military advantage to be gained with the potential loss of life. Hence one does not kill an adversary without giving him an opportunity to surrender. One thing is certain – that the excessive collateral damage inflicted on civilians may be tantamount to attempts to terrorize civilians and therefore can never be legitimate methods of warfare.

The Israeli Supreme Court decision while recognising that civilians enjoyed protection until taking a direct part in hostilities, nevertheless attempted to widen this notion, including within it for example a person who transported "terrorists" or serviced their weapons. Regarding the words "for such time" former President Barak considered that "the rest between hostilities is nothing other than preparation for the next hostility". Each potential targeted killing therefore had to be considered on its own merits to determine whether the specific "terrorist" had lost his protected civilian status or not. This widened notion of direct participation has been strongly rejected in the literature.

The Supreme Court laid down four conditions which interestingly were more in keeping with human rights law to which I will turn next. The petitioner, The Public Committee against Torture in Israel, warned however that these rules and tests were vague and did not clearly define what was permissible and what was not for the security forces and would only encourage Israeli policies in that respect.

IV EXTRAJUDICIAL OR TARGETED ASSASSINATIONS UNDER HUMAN RIGHTS LAW

The right to life has been said to constitute the irreducible core of human rights. This is evidenced by the convergence of the various human rights instruments[28] It is also a non-derogable right in all the instruments, that is one that cannot be suspended even in time of

28 See on the right to life, Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights, Article 2 of the European Convention on Human Rights and Articles 4 of the Inter-American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

public emergency, as well as considered to be a norm of *jus cogens*, or peremptory norm of international law.

It used to be usual to point out that IHRL and IHL have separate historical origins and different underlying philosophies and objectives, and that they have pursued different trajectories. Nevertheless, it has become evident that one can no longer have strict compartmentalization. On the one hand, human rights law has penetrated into IHL as the humanitarian character of both the Geneva Conventions of 1949 and the Additional Protocols of 1977 has been largely influenced by human rights law. The right to life is to be found among a hard core of rights protecting persons due to the specific circumstances prevailing in an armed conflict, as pointed out above. Conversely, International Human Rights Law has also incorporated IHL. In both the International Covenant on Civil and Political Rights and the European Convention on Human Rights, the provisions prohibiting the arbitrary taking of life in both instruments are qualified by IHL. Article 15(2) of the ECHR makes an exception in relation to the non-derogability of the provisions of Article 2 guaranteeing the right to life, for "deaths resulting from lawful acts of war". It is also generally accepted that killings as a result of lawful acts of war constitute one of the exceptions to Article 6 of the Covenant. In short, assessing the conformity of an act with human rights law at times involves also determining whether it has breached international humanitarian law.

IHRL now also overlaps with IHL due to the recognition of its extraterritorial scope of application in certain circumstances. First, the extraterritorial scope of the application of human rights obligations has become widely recognized by human rights courts, thus extending States' obligations to persons beyond their borders, but subject to their jurisdiction. A second development has been the proliferation of intra-state conflicts of various intensities such as those in Cyprus, Chechnya, Kurdistan or Kosovo and the increasingly fuzzy borders between internal and international armed conflicts, as well as so-called "transnational internal armed conflicts", i.e. armed conflict between a state acting on another State's territory and a non-state actor.

In the *Nuclear Weapons* case, the Court had accepted the continuing applicability of the Covenant in time of armed conflict, to the extent its provisions had not been derogated from, although this had to be interpreted in the light of the *lex specialis* of humanitarian law.[29] In the *Wall* case, moreover, it affirmed the application in time of armed conflict not only of the International Covenant on Civil and Political Rights but also of all human rights instruments, including the Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.[30] The Court also stated: "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law" .[31] This was further confirmed by the ICJ in the *DRC v. Uganda* case.[32]

The convergence of human rights and humanitarian law has also been demonstrated by the complementary use of both human rights law and humanitarian law by the political organs of the United Nations, including the former Human Rights Commission and now Human Rights

[29] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, para. 25.
[30] *Wall Advisory Opinion*, para. 106.
[31] *Ibid.*
[32] *DRC* vs. *Uganda*, pp. 168 *et seq.*

Council. The mandate of the Human Rights Council's Special Rapporteur on Extrajudicial Executions has been extended in connection with the so-called "war on terror" to cover armed conflicts.[33] The Human Rights Council's resolutions on Israel cover its breaches of both human rights and IHL in Lebanon and the Occupied Palestinian Territory, and emphasize that "human rights law and international humanitarian law are complementary and mutually reinforcing".

The recent ECtHR jurisprudence on the right to life, particularly in relation to the cases relating to terrorism or the conflict in Chechnya, has directly applied the provisions of Article 2 of the Convention on the right to life, rather than turn to humanitarian law as *lex specialis.*[34] This approach may give victims better protection, but should not obscure the fact that the situation in Palestine is one of occupation and hence regulated by the international law of armed conflict.

In human rights law there is no principle of distinction, since the protection is extended to both civilians and combatants alike. Human rights law addresses the question of the legitimacy of the use of force, by assessing the means used for the use of lethal force. The condition of proportionality is also very differently assessed in IHRL, permitting no more use of force "than absolutely necessary" to achieve the permitted aim of protecting lives from unlawful violence. This means also that there is a positive obligation on States to take all feasible precautions in the choice of means and methods of a military operation, including such matters as the planning and control of the actions under examination and the obligation to conduct an effective investigation.

As seen above, the Israeli Supreme Court itself has applied the conditions that human rights sets to such extrajudicial killings in regard to the right to life. The Court, although adopting an expansive view of the IHL condition of "a civilian taking a direct part in hostilities", nevertheless also affirmed the conditions laid down by human rights law to the deprivation of life: i.e. the consideration of less harmful means to be employed, such as arrest, interrogation, and trial, as well as a thorough retroactive investigation should lethal force be employed, and even the compensation of innocent civilians that were harmed, referring in its conclusions to the European Court of Human Rights in the case of *McCann v. United Kingdom*. As Louise Doswald-Beck points out, "(i)n effect it therefore used human rights law, although it did not refer to the UN Human Rights Committee". [35]

The Human Rights Committee in its 2003 Concluding Observations on Israel's report under the ICCPR, clearly rejected targeted killings. It considered that "(b)efore resorting to the use of deadly force, measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted".[36] The Committee stated:

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[33] Philip Alston, Jason Morgan-Foster, and William Abresch, "The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror '", 19 *EJIL* (2008), 183–209.

[34] See e.g. *Isayaeva v. Russia, Isayeva, Yusupova and Bazayeva v. Russia*, ECHR, Application nos. 57947/00, 57948/00 and 57949/00, Judgment of 24 February 2005. See William Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya", 16 *European Journal of International Law* (2005), pp. 741–767, at p.746.

[35] Doswald-Beck, *op.cit.*, p. 896.

[36] Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, UN Doc. CCPR/CO/78/ISR, §15.

15. The Committee is concerned by what the State party calls "targeted killings" of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6. While noting the delegation's observations about respect for the principle of proportionality in any response to terrorist activities against civilians and its affirmation that only persons taking direct part in hostilities have been targeted, the Committee remains concerned about the nature and extent of the responses by the Israeli Defence Force (IDF) to Palestinian terrorist attacks.

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

V REMEDIES

Targeted assassinations by Israel have unfortunately continued to be met with impunity; the case of *Matar et al v. Dichter* is an illustration of this regrettable lack of remedies. It was brought in the United States by the Centre for Constitutional Rights, as a federal class action lawsuit against Avi Dichter, former Director of Israel's General Security Service (GSS), on behalf of Palestinians who were killed or injured in the 2002 assassination of Salah Shehadeh, his family and others, on the basis of war crimes, extrajudicial killing and other gross human rights violations. The case was rejected by the United States Court of Appeal for the Second Circuit which declined jurisdiction, deferring to the Executive.[37] A previous court had dismissed the case finding that Dichter possessed immunity under the Foreign Sovereign Immunity Act (FSIA) because he had acted in the course of his official duties.

In addition, a case brought against seven senior Israeli defense officials, named as defendants also in relation to the 2002 extrajudicial killing, has been stalled by the Spanish parliament's legislative reform of the principle of universal jurisdiction enshrined in Spanish law, limiting it to cases involving Spanish victims or suspects present on Spanish soil, although in principle this cannot be applied retroactively.

The International Criminal Court would of course have jurisdiction over such crimes. Israel however is not a party to the Statute. The Goldstone report recommending that the Security Council in due course refer Israel to the ICC for the crimes it has committed in its military operation in Gaza is to be welcomed, however improbable that this recommendation will be carried out. It does however mark a milestone in efforts to bring justice for Palestinian victims.

[37] United States Court of Appeals for the Second Circuit, *Matar v. Dichter* (Docket no. 07-2579-cv), Decision of April 16, 2009.

VI CONCLUDING REMARKS

From the above survey of the potentially applicable law – self-defence, IHL and international human rights law – one can conclude that the practice of targeted assassinations conducted by Israel violates many of the rules of international law. Article 51 of the Charter does not, according to the ICJ, have any relevance in the context of the OPT and does not apply to the targeting of political leaders involved in Palestinian resistance movements. Moreover those who have been targeted so far cannot be proven to have taken a "direct participation in hostilities", in accordance with the latest interpretation of this notion by the ICRC, so that IHL should apply to them only as protected persons. International human rights law which is acknowledged to apply in time of armed conflict, particularly its non-derogable right to life, appears to be the most protective regime. Clearly by all the conditions set under human rights law, the policy of targeted assassinations by Israel cannot fail to be seen as an arbitrary deprivation of life of both targeted persons and innocent bystanders.

As Professor John Dugard has stated clearly[38]:

> "Israel's freely acknowledged practice of selected assassination or targeted killings of Palestinian activists cannot be reconciled with provisions of the Fourth Geneva Convention, such as articles 27 and 32, which seek to protect the lives of protected persons not taking a direct part in hostilities. They also violate human rights norms that affirm the right to life and the prohibition on execution of civilians without trial and a fair judicial process. There is no basis for killing protected persons on the basis of suspicion that they have engaged or will engage in terroristic activities. In addition, many civilians not suspected of any unlawful activity have been killed in these targeted killings, in the bombing of villages or in gunfire exchanges, in circumstances indicating an indiscriminate and disproportionate use of force."

He also pointed out in a subsequent report that Israel's reputation as an abolitionist society that has had only two executions in its history, has been tarnished by the practice of extrajudicial assassinations.

As for Judge Cassese, one-time president of the International Criminal Tribunal for the former Yugoslavia (ICTY), he states the following in a declaration to the United States Southern District Court of New York in the case of *Matar v. Dichter*:

> "Clearly, if a belligerent were allowed to fire at any enemy civilians *simply suspected* of in some sort planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of IHL would be undermined. The *fundamental distinction between civilians and combatants* would be called into question and the whole body of IHL would eventually be eroded."[39]

Most important, finally, is to combat the perception of targeted killings as carried out in the context of a "war against terror." As stated above, it is essential to replace the situation of Palestine in its rightful context, namely as an occupied territory the people of which have a right to self-determination and statehood, and as such a right to self-defence in resistance against the illegal use of force by the occupier, so long as the means used is in conformity with international law.

[38] UN Doc. A/56/440 (2001), para.14.
[39] http://ccrjustice.org/files/Professor%20Cassese%20declaration.pdf