

# Legal and democratic dilemmas in the counter-terrorism struggle: The targeted killing policy

---

Dilemas legales y democráticos en la lucha contra  
el terrorismo: La política de asesinato selectivo

Janiel David Melamed Visbal\*

Universidad del Norte (Colombia)

---

\*Abogado especialista en Derecho Penal de la Universidad del Norte y Magister en Gobierno, Seguridad Nacional y Contra-Terrorismo de la Lauder School of Government, Diplomacy and Strategy, Interdisciplinary Center Herzliya (Israel). [janielmelamed@gmail.com](mailto:janielmelamed@gmail.com)

## Resumen

*The objective of the following article is to conduct an analysis of the policy of targeted killings applied by western countries, and to determine the main legal and democratic challenges that states face in the counterterrorism struggle against non-state actors. At the same time it will show how the phenomenon of terrorism has entered a more complex environment where the traditional boundaries of the Law Enforcement Model are no longer been used as the only method to combat terrorism. The application of laws of war has been included in the counterterrorism struggle, allowing several countries to conduct targeted killing operations against key terrorist leaders.*

*The analysis will address the American and Israeli approach of targeted killings, as these countries are both deeply involved in counterterrorism struggle against non-state actors acting among civilian population.*

**Keywords:** Targeted killing, legal and democratic dilemmas, non-state actor, armed conflict, laws of war.

## Abstract

*El objetivo de este artículo es analizar la política de asesinatos selectivos aplicada por países occidentales, y determinar los mayores desafíos legales y democráticos que debe enfrentar la lucha contra organizaciones terroristas de carácter no estatal. Al mismo tiempo, mostrar cómo el fenómeno del terrorismo ha entrado en un ambiente de mayor complejidad, en el que las fronteras tradicionales del modelo de aplicación de la ley no son usadas como el único método para combatir el terrorismo y las leyes de guerra han sido incluidas en la lucha contra este flagelo, lo cual permite la realización de operaciones de asesinato selectivo contra líderes terroristas.*

*El análisis aborda el enfoque americano e israelí de esta práctica, debido al profundo involucramiento de estos países en la lucha contra el terrorismo proveniente de actores no estatales que actúan entre la población civil.*

**Resumen:** Asesinato selectivo, dilemas legales y democráticos, actores no- estatales, conflicto armado, leyes de guerra.

Fecha de recepción: 25 de enero de 2010

Fecha de aceptación: 11 de marzo de 2011

*At times democracy fights with one hand behind her back,  
despite that Democracy has the upper hand*

**Aharon Barack**

Countering terrorism has never been an easy task and never will be. Terrorism is a changing phenomenon with new angles and behavioural paths, aiming always to create the maximum possible chaos within a civil society through the decisive use of violence as a tool for political pressure. Terrorism as a social and political phenomenon itself does not have a single, covenanted, binding or universally accepted definition and therefore it is understood differently among states. It is imperative to understand that terrorism can have different faces, levels of actions, impacts and motivations. It can be caused due to political, religious, economic or ideological reasons. It can be local, national or even transnational. It can be conducted through shootings, bombings, and kidnapping. Therefore counterterrorist measures can also vary from one country to another according to their needs to fight terrorism within each unique conflict.

One of the most controversial counterterrorism strategies is targeted killing. This operation is directed against specific individuals who are known to be directly involved with terror acts, in order to eliminate the immediate threat they pose. This particular method is one of the last resources in the struggle against terrorism. Many countries are reluctant to openly discuss, approach, or even acknowledge the practice of this strategy and will not accept responsibility for these kinds of actions.

Many issues of this practice are polemic and due to their controversial character, have come under a heavy and constant stream of criticism by its opponents, who consider it a flagrant violation of human rights international humanitarian law. The policy itself is considered by many opponents as illegal, immoral and ineffective. It is believed to be more of a punitive sanction rather than a preventive measure, and directs critics to the dilemma posed for modern democratic values, in which the roles of prosecutor, judge and executioner are all played by the targeting state.

Supporters of this practice, on the other hand, cite the effectiveness of the strategy as a reliable counterterrorism tool due to its deterrence capability. The question of the legality of targeted killings is based on the new reality posed by modern terrorism, which is very different from the traditional warfare laws and customs.

Offensive operations against a terrorist organization, and certainly strategic targeted assassinations such as these, raise the issue of the justice and wisdom of carrying them out. Regarding the ethical or normative side of the issue, it can be said that terrorism is a form of war and in war it is feasible to intentionally attack an enemy as long as that enemy is a combatant and not a civilian.

### **DEFINITION OF TARGETED KILLING**

There is no generally accepted definition of targeted killing, although some reasonable efforts have been made to come up with an agreeable classification. Targeted killing is usually referred to as the premeditated killing of an individual by a government or its agents (Banks & Raven-Hansen, 2003, p. 667). Others refer to it as the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, and who is taking a direct part in hostilities (Solis, 2010, p.538). And yet another definition describes the intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval (David, 2002, p.2). Numerous as the descriptions are, for the purpose of this paper the term "Targeted Killing" should be defined as 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 (Melzer, 2008, p.5).

Analyzing the prior definition is important to explain that by "lethal force", regardless of the means employed in these kinds of actions, it specifically means a force capable of causing the death of a human being. Therefore, targeted killing operations cannot be limited to a specific single method of attack, and can be used through a wide variety of actions such as shootings, bombings, drone strikes or even poisoning, as long as it results in the elimination of the objective.

“Intent”, “premeditation”, and “deliberation” mean the concrete desire and will to plan and perform an act, through a conscious choice, where the goal of the operation is none other than to produce the death of the target. These elements aim to eliminate the “selected/targeted individual”, meaning that the operation is conducted against a specific and identified person instead of collective, random or unspecified targets. The “lack of physical custody” of the target, is the great difference between targeted killings and extra-judicial killings, due to the fact that the targeted individual is not under the charge or protection of the targeting State. As a result, the target cannot be reasonably apprehended by the targeting State, which as the definition claims, has to be attributable to a subject of international law; in other words, a member of the international community.

The definition or lack of an agreed definition plays a vital role in international law, which ultimately determines the legality of this tactic. Those who strongly reject the use of targeted killings usually refer to it as extra-judicial killings, assassinations or executions—all terms which imply insidious and treacherous actions creating a sense of a forbidden and illegal activity. Conversely, those who support this practice prefer to use the term “pre-emptive killing” which conveys a worthy motivation and, far from revengeful, a necessary defensive action.

## **COUNTRIES CONDUCTING TARGETED KILLING OPERATIONS**

The present analysis will address the practice of targeted killing operations conducted by the United States and Israel, two countries that are deeply involved in the struggle against different types of terrorist organizations and share the same challenges of fighting an amorphous non-state actor.

Throughout most of its history of fighting terrorism, Israel has been criticised by the international community for carrying out a policy of collective punishment towards the Palestinians. One of its most controversial counterterrorism practices is the tactic of targeted killing, which aims to eliminate individuals who pose a serious national

security threat. Targeted killings were first openly acknowledged by Israeli authorities following the eruption of the second intifada in 2000.

Like Israel, the United States had also conducted targeted killings operations in order to protect its citizens and prevent them from being victims of terror acts. For the U.S. government, targeted killings are viewed as a legitimate means for countering terrorism through the use of pre-emptive strikes.

A dilemma is presented between counterterrorism and targeted killings, how hard are the governments allow combating terrorism while the enemy is presented thru a non-state actor, instead of a conventional State-State struggle. In this case a targeting country must locate a hostile nation, determine its borders, and know the identity or ambitions of its political leadership and its operational and fighting capacity. However, relating to non-state terrorist organizations, the task is not as simple. Terrorist organizations are spread throughout the globe, boast an immense network of supporters, affiliates and sympathizers. Some terrorist organizations do not possess a unique location or leadership, and they effectively take advantage of the broad freedoms offered by liberal and underdeveloped countries that allow them to move freely and infiltrate societies in which they will plan and oftentimes conduct a future attack.

While the counter-terror campaign conducted by the United States government is not directed at any particular country, religion or person, the struggle is conducted against an enemy of global proportions; an enemy that is willing to use unconventional violence in order to achieve its political goals. By acting preemptively against terror organizations, the United States hopes to stem future violence against its citizens and interests, within its territory and beyond its domestic borders.

## **UNITED STATES HISTORY OF TARGETED KILLINGS. DOMESTIC APPROACH**

In order to conduct a proper study of the policy of targeted killings within the United States it is important to mention that during crucial

decades of the Cold War, the American foreign policy included the covert assassinations and regime changes of various foreign leaders. These actions were undertaken with the assistance, funding and support of the American intelligence community and in some cases were aimed against democratically elected authorities, rather than authoritarian governments or military dictatorships.

In 1981, American President Ronald Reagan signed the executive order 12333 and its ban on assassinations in order to proscribe these actions from the US intelligence agencies. This executive order is the most recent in a series of three executive orders to have included presidential bans on assassinations (Machon, 2006, p.17). As well, for many critics of the American policy of targeted killings; executive order 12333 represents the main cornerstone of the illegality of this practice within the domestic body of laws of the United States.

The first of the series of executive order was Executive Order 11905. This was issued by President Ford (1976) in response to congressional criticism of alleged abuses committed by US intelligence agencies. The true effect of the executive order is neither to restrict in any legally meaningful way the President's ability to direct measures he determines necessary to national security, nor is it to create a legal impediment to United States action (Machon, 2006, p.17). The next Executive Order 12036 signed by President Carter (1978), raised the restrictions in the U.S intelligence community in order to avoid its involvement in assassinations; but all these restrictions were superseded and strengthened through President Reagan's Executive Order 12333.

In the 1970's the United States Senate established a committee in order to investigate the possible involvement of the American intelligence services in assassinations and destabilization of foreign leaders who were counterproductive to American interests. This committee was known as the "Church Committee" and it was not a court. Its primary role was not to determine individual guilt or innocence, rather to draw upon experiences of the past to better propose guidance for the future (Church Committee report, 1975, p. 256). The findings of the committee revealed the participation of American officials related to the

intelligence community in coups attempts as well as assassination plots and ultimately the committee condemned the use of assassinations as a tool of foreign policy (Church Committee report, 1975, p. 257).

Some of the most relevant cases regarding regime changes can be located in Iran with Mohammed Mossadegh and in Chile with Salvador Allende; and murder plots against Patrice Lumumba of the Congo, Rafael Trujillo of the Dominican Republic, and Fidel Castro in Cuba. The conclusions reached by the Church committee established the involvement of American intelligence means and resources in such activities, which contradicted international order, democratic values and the sense of legality under which the country was ruled.

The executive order 12333 implemented the notions of the Church Committee and established it in its part 2.11 and 2.12 as follows: "*Prohibition on Assassination*: No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in assassination", and "*Indirect Participation*: No agency of the intelligence community shall participate in or request any person to undertake activities forbidden by this order".

It is important to understand that the assassination ban stated by the executive order 12333 was intended and applies only to the intelligence community, meaning the executive branch. However, this ban cannot be applied for military force when it is used properly against a valid and legal objective. The difference between one scenario and the other remains in the non-politically motivated character of military operations against legitimate targets.

A proper example of this issue according to Machon (2006, p. 23) may be observed thru the "El Dorado Canyon" operation conducted in 1986 against the leading regime in Libya which was controlled by Colonel Muammar Al-Qaddafi. President Reagan stated that this operation was a legitimate self-defense operation, under the article 51 of the United Nations Charter and was taken by the American government against an orchestrated, worldwide, centrally directed campaign of terror directed through Libyan diplomatic channels and missions specifically targeting Americans.



## U.S TARGETED KILLING AND THE INTERNATIONAL LAW

According to the international committee of the Red Cross. The International Humanitarian Law (IHL), also known as the *Law of War* or *Law of Armed Conflict*, is the set of rules which seek for humanitarian reasons to limit the effects caused from armed conflicts. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare (ICRC Advisory Service, 2004, p.1). This Law recognizes two distinct categories of armed conflicts; one is the International Armed Conflict (IAC), referring to hostilities between two or more states, and the other is the Non-International Armed Conflict (NIAC), which refers to hostilities between the authorities of a state and insurgents within its territory.

The United States has justified some of its targeted killings operations against key terrorist figures by leveling them within the legal framework of armed conflict operations, while exercising its right of self-defense contained in article 51 of the United Nations charter. International Humanitarian law states that in order for a targeted killing to remain a legal act, it must be conducted during an international armed conflict or a non-international armed conflict. The right of self-defense embraces the right to conduct military operations in armed conflict outside the victim state's own territory.

The current struggle that the American government is facing is against transnational terrorist organizations. Transnational terrorism is fought through the war on terror, which is not conducted between states. Rather it is conducted against a non-governmental actor such as Al-Qaeda. Therefore, this war on terror would not match the international armed conflict definition traditionally accepted in article 2, common for the four Geneva convention, which is understood as [...] *all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognized by one of them. The convention shall also apply to all cases of partial or total occupation of the territory of a high contracting party, even if the said occupation meets with no armed resistance.*

In this scenario presented in the Geneva Conventions, there is no controversy regarding the legitimate targeted killing of the leader of one of the conflicting states. Its position as a leader of its country and its importance over the country's military capacity allows the assassination as a legal action within a state of war.

This particular issue presents a complex situation when it comes to the War on Terror and the struggle the United States is still conducting against transnational terrorist organizations like Al-Qaeda, whose leader, Osama Bin Laden, does not exercise any legal and sovereign control, and neither represents any state nor territory. Some academics have argued that for a targeted killing to be lawful, an international or non-international conflict must be in progress. Without an ongoing armed conflict the targeted killing of a civilian, terrorist or not, would be assassination –a homicide, and a domestic crime (Solis, 2007, p.135).

The introduction of terror attacks performed by non-state actors have drawn attention to a vacuum in international law, highlighting a gray area in which is not clear the possibility of an armed conflict between a state and a transnational terrorist organization. Although there is no clear consensus on the issue, the United States government through the U.S Supreme Court decision (*Hamdan Vs Rumsfeld*, 548 U.S. at 630.) clearly recognizes the existence of a Non-International Armed Conflict between itself and al-Qaeda. Through this acknowledgement the United States has been able to classify Al-Qaeda members as combatants and subject to legal and legitimate targeting (Machon, 2006, p.57).

Is important to mention that the American view of the right of self-defense established in the U.N Charter is that it can be used as a preemptive action against terrorism. This conceptualization is also supported within their national government by the resolution 1373 Part 2 (b), adopted by the United Nations Security Council at its 4358<sup>th</sup> meeting, on September 2001, in which the security council calls all states to take the necessary steps to prevent the commission of terrorist acts.

Targeted killings according to the American government are an effective way of defending democracy against terrorism. In this fight the

reactive posture of the United States is no longer an option due the greater risks and threats that are currently at stake, and which have shown the likelihood of acts of terrorism against American objectives, aiming especially to cause massive casualties, great impact and fear.

## **ISRAELI HISTORY OF TARGETED KILLINGS**

As a democracy, the issue of the legality of targeted killings has been of great importance within Israel. The reasoning for targeting killings to exist in Israel's security strategy is based on the fact that since its inception, the country has suffered sensitive security threats posed by individuals the State is unable to capture.

The necessity of punishment for those responsible of the terror attacks against Israel and its citizens, and the need to prevent future acts of terror was strongly reinforced by the murder of members of the Israeli Olympic team in the 1972 Munich Olympics games. This historical episode showed that some terrorists and intellectual authors behind this act were harboured in countries which simply were unwilling or incapable of pursuing them.

According to Ganor (2008, p. 117) after the massacre of 11 Israeli athletes by "Black September", the Israeli government, under the authority of former Prime Minister Golda Meir, formed what it was known as "Committee X". Through this committee, Israel authorized the killings of several Palestinian terrorist leaders that were involved in the planning, financing and perpetration of the Munich massacre, under what is was called operation Wrath of God.

However, it was only after the year 2000 during the second intifada, three decades after the Olympic massacre, that the Israeli government publicly acknowledged its use of targeted killing operations. The acceptance of the Israeli government of conducting these kinds of operations meant the recognition of this practice as a counterterrorism strategy against terrorist organizations that were related with initiating, coordinating or conducting terrorist attacks against Israel and the occupied territories.

The second intifada started after the Camp David negotiations failed. Until then, Israel saw and dealt with terrorism as a criminal behaviour and managed it through the law enforcement model. As any other criminal behaviour the government expended great efforts in order to catch those responsible for the commission of terror acts, and take them out of the streets. This outbreak presented a violence scenario like anything before, and it was completely different from the first intifada in many aspects. The main weapons during the uprising of the First Intifada were stones, which limited the scale of violence to a minor level. However, the warfare power used by Palestinian terrorists during the Second intifada included of all kinds of high level military hardware, and a much more terrifying strategy: suicide bombings.

Another great difference between these intifadas was based in the territorial aspect of the threat of violence, which in the second intifada covered the entire State of Israel, facing almost daily terror attacks in the different regions throughout the country. The amount of people under terrorist threat was without precedent for the Israeli government. Among 6300 Israelis were injured and almost 1000 were killed during the second intifada (Barber, 2009, p. 83).

This amount of casualties that resulted in injury or death represents nearly the 1% of the Israeli population, which may seem small. However, applying the same percentage to the United States population it would compromise around 310.000 U.S citizens being killed or wounded by terrorist attacks. As a result of this, the Israeli government drove its counterterrorism struggle in a war-like way rather than the ordinary criminal scope.

Until this period of time it was known that Israel killed some of its enemies from time to time, but the Israeli government never accepted nor denied any accusation regarding this subject. This position changed radically during the second intifada, and several high profile killings were made during this time, cases like the Hamas founder and leader Sheik Ahmed Yassin who was responsible for actions that were perpetrated by Hamas military wing in both the west bank and the Gaza strip, including the plot to kidnap and murder Israeli soldiers

with the plan of using their bodies to bargain for the release of Hamas prisoners in Israeli jails. (Levitt, 2006, p.35).

After the second intifada there was calm in the reported targeted killings operations by the Israeli Defense Forces (IDF). However this was publicly revitalized in 2009 as a direct consequence of the *Cast Lead Operation*. While this operation took place, several Hamas military senior officers were killed. This proved that targeted killings were not forgotten as a counterterrorism tool within the Israeli Government, used in order to disrupt terrorist organizations and provide an effective deterrence by striking the organization's morale through the elimination of high ranking members involved in terrorism activities.

The Condemnation and justification of the Israeli policy has been contrived from international law. The sources of international law are vast, and are derived from both formal treaties, which are also known as written law or thru non-written sources known as customary international law. International law outlines the limits of the several measures states may have when it come to the management of a possible threat originated from another state. However, international law does not deal properly with the problem states could face while struggling against a terrorist organization. One of the core problems to tackle terrorism is the lack of a universal definition of what is terrorism.

This, despite the fact of several U.N resolutions like 1368 and 1373 both deem terrorism as a threat to international peace and security. Moreover in order to combat the threat posed by terrorist organization the United Nations Security Council resolution 1373 allows states to take the necessary step to prevent the commission of terrorist attacks (Shaw, 2003, p.1136).

The conditions set by the Israeli Defense Forces complied with international law in order to carry out the attacks. Targeted killing operations would only take place in those specific areas that were not under the control of the Israeli government, making it impossible to arrest the suspected terrorist. The individual object of targeted killing operation would have to be a combatant within the conflict so the

strike remained legal according to the IHL. The senior cabinet members of the government would approve on a one on one basis each attack, judging if the individual poses a future threat for Israel. In this way the attack would not be taken as a form of punishment, but rather a pre-emptive action, which have to take the proper measures to reduce civilian casualties.

While the IDF set guidelines for the targeted killing operations of the Israeli Defence Forces, still there was no legal concept addressing this policy until the ruling of the Israeli Supreme Court in 2005. The court's decision refined the initial guidelines and created a global precedent of a legitimate judicial body of a government openly justifying the implementation and use of targeted killing operations against terrorist organizations.

#### **ISRAELI SUPREME COURT RULING. HCJ 769/02**

The legal dilemma created by the targeted killings operations got to the Israeli Supreme Court in the case of the Public Committee Against Torture in Israel vs. the Government of Israel in 2002. The petitioners claimed that Israel and the Palestinians were not in an international armed conflict, and therefore the actions that were allowed to be taken against suspects of terrorist activities were those allowed by the law enforcement model, that is, through the ordinary standards of arrest and a fair trial.

With no international guidelines on how this can be done within the accepted notions presented in International Law, Israel clarified the subject of targeted killings within its domestic legal framework. The Israeli Supreme Court ruling set major precedents regarding targeted killings, while admitting that the state conducted targeted killing operations and by setting a set of rules and legal principles in order to allow these kinds of operations only when specific circumstances were met.

Under the domestic scope, the Israeli Supreme Court ruling HCJ 769/02 established that the Israelis and the Palestinians were in an

international armed conflict; diverting from the traditional concept that International Armed Conflicts were only between recognized states. Despite recognizing the existence of an armed conflict, the ruling stated that Palestinian terrorists could not be considered as combatants based on the fact they fail to fit the legal status of combatants established in chapter 1 of the Hague convention, and which is repeated in article 13 of the *Geneva convention I and II*, as well in article 4 of *Geneva convention III*.

Principle of distinction in International Law seeks to differentiate individuals who are taking part in the hostilities and those who are not. Therefore, Palestinian militants without the legal status of combatants under international humanitarian law are entitled to be treated as civilians and enjoy the guarantees of a protected person who cannot be attacked.

Article 51(3) of *Additional Protocol I*, regarding the protection of the civilian population establishes that civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities. The Israeli Supreme Court decision embraced an extended interpretation of “direct part in hostilities”, and concluded that those who have sent the perpetrator of an attack, the person who has decided upon the act, and the person who planned it, are taking a direct part in it as well.

This broader interpretation of article 51(3) sets the main cornerstone for the legal practice of targeted killings in Israel, as well as the requirements established by the high court in order to allow these operations. The Court held that for a targeted killing to be legal, it must satisfy four conditions:(1) The State must have strong evidence that the potential target meets the conditions of having lost his protected status;(2) If less drastic measures can be used to stop the potential target posing a security threat, such as arrest, the State must use them, unless this alternative poses too great a risk to the lives of its soldiers;(3) An independent and thorough investigation must be conducted immediately after the operation to determine whether it was justified. In appropriate cases the State should compensate innocent civilians for

harm done;(4) The State must assess in advance whether the expected collateral damage to innocent civilians involved in a targeted killing is greater than the anticipated military advantage to be gained by the operation. If it is, the State must not carry out the operation.

Despite the fact the Israeli Supreme Court ruling 769/02 has not any direct or indirect influence over international law, it constitutes a vanguard legal precedent that has not taken place even in the American Supreme court, which in such cases as targeted killing operations has expressed its inability to deal with such sensitive subjects of national security. The Israeli Supreme court decision is the only modern case in which a judicial authority of the highest level within a democratic country, has taken the challenge to discuss and legalize the implementation of targeted killing operations.

## LEGAL AND DEMOCRATIC DILEMMAS

The most crucial and most difficult elements for western societies struggling against terrorism are the legal and democratic dilemmas. As stated by Ganor (2008, p.147) this dilemma derives, first and foremost, from the desire to reach the maximum effectiveness in the fight against terrorism while maintaining the nation's liberal-democratic character and without compromising on fundamental democratic values, human rights and civil liberties, respect for the right of minorities, and avoiding harm to innocents.

This premise certainly represents a major challenge in the counter-terrorism struggle and especially in the targeted killing operations. One of many controversial aspects of this strategy remains focused on the effectiveness of this measure which is believed to actually perpetuate the cycle of violence through what many call the "Boomerang effect", making the counterterrorism struggle even harder.

The main core of the legal and democratic dilemma relays on a very simple fact: Those who are been targeted, are been killed without any kind of legal procedure according to modern Civil rights, democratic values and liberal guarantees. The practice of this action is aiming



for a final outcome which is the death of an individual or groups of individuals, and death is a permanent punishment that cannot be reversed or appealed.

The targeted person is been denied basic principles of modern legal and democratic systems. The individual is unable to challenge any arbitrary state action, controvert evidence involving him in terror acts, challenge any possible witness incriminating him, and been denied of the presumption of innocence until being found guilty thru a fair and impartial trial in a court of law.

Modern history has presented a complex question regarding the status of terrorists, whether they are criminals or combatants. Criminals are those individuals who break domestic law and are no longer considered law abiding citizens. Despite this fact, they are not combatants and they enjoy the protection of civil liberties and guarantees under international law (Israeli Supreme Court, HCJ 769/02). These individuals, according to Ganor (2008, p. 8) must be arrested and judged in accordance with the provisions of the domestic penal law. Conversely, combatants are individuals who take a direct part in the hostilities in an armed conflict and are covered by the IHL protections but still are legitimate targets of military operations.

Depending on the unique characteristics of each conflict, the counter-terrorism struggle can be approached from two different fighting models which are those of law enforcement and the laws of war. The law enforcement model recognizes terrorists as civilians and requires terrorists to be captured and brought to trial under the criminal justice system, which is compiled to respect and protect every person's rights to life and due process. On the other hand, the law of war model sees terrorists as combatants and despite the fact that combatants are also entitled to some protections under international law, they are without any controversy legitimate targets of the use of deadly force due to their direct participation in the hostilities.

Under the law enforcement model, the use of deadly force can never be regarded as necessary unless it is clear that there is no feasible

possibility of protecting the prospective victim by apprehending the suspected perpetrator. The paradigmatic case in which use of force would be justifiable is where serious violence against the person to be protected is so imminent that trying to arrest the perpetrator would allow him to carry out his threat (Kretzmer, 2005, p.179).

A legal dilemma presented in this law enforcement model is based on the lack of legal jurisdiction of the State that has been suffering from terror attacks, and that the individuals planning and supporting such attacks are acting far away from the jurisdiction of their law enforcement authorities. This situation results in the complete dependency of the victim state on the help and support provided by those third countries harbouring terrorist involved in the attacks. In many cases those third countries have too\_poor or weak authorities to conduct a serious struggle against these terrorist organizations, or they are just simply unwilling to act against them.

Regarding the law of war model, Kretzmer (2005, p.187) claims that this model depends on the self-defense allegations of the state victim of terrorist attacks. The right of a state to use force in response to an armed attack by terrorists will depend on the degree of responsibility of the harbouring state from which the terrorists are safe-guarded, and possibly on its willingness or capability to apprehend the terrorists and prevent them from carrying out further attacks.

The law of war supposes a harsh but true reality; people get killed in the crossfire of an armed conflict. These casualties can be from combatants or civilians as well, due the fact that civilians can also be determined as legitimate targets according to article 51 (3) Protocol I additional to the Geneva Conventions(1977), which allows the targeting of civilians for the time they are taking a direct part in the hostilities.

During the time civilians are taking a direct part in the conflict, they lose their non-combatant status, which allows them to be safe from enemy fire. The inobservance to this consideration is able to be considered a remarkable violation of the laws of armed conflicts. According the 1998 Rome statute, article 8 (2)(b)(iv) clearly condemns launching an

attack with the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to property. Yet another dilemma is presented due to the fact that neither the United States nor Israel is a signatory of the Rome statute.

It is important to remember that during an armed conflict, taking human lives has been accepted under certain circumstances. Although, the right to life is an important advance in human liberties and civil rights, this right is not absolute *per se*, International covenant on civil and political rights clearly expresses in article 6 every human's inherent right to life and condemns arbitrarily deprivation.

Over this issue the Inter-American Commission on Human Rights *Report on Terrorism and Human Rights* (2002) has also allowed the use of deadly force against suspected terrorists. It notes that in situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in doing so may use lethal force in certain situations. It also establishes that states must not use force against individuals who no longer present a threat as described above, such as individuals who have been apprehended by authorities, have surrendered or who are wounded and abstain from hostile acts.

This duality makes the counterterrorism struggle a harder task, and place its objective in a gray zone regarding how far counterterrorism actions can go in order to disrupt terrorist organizations. The fact that there is no universally applicable counterterrorism policy for democracies means that every conflict has its own unique characteristics.

According to Wilkinson (2001, p. 230), in order to design an appropriate and effective response against terrorism, each national government and its security advisers will need to take into account the nature and severity of the threat and the nation's political, social, and economic context. At the same time it is important to consider the capabilities and preparedness of their intelligence, police and judicial systems, their anti-terrorism legislation, and, where necessary, the availability and potential value of their military forces.

## CONCLUSION

Terrorism does not have a general accepted definition. This violent ideological manifestation seems to be the predominant national security threat of the future, rather than the state to state struggle of the 20<sup>th</sup> Century which promoted the creation of current international laws.

It is likely that in the near future the practice of targeted killing operations remains for many countries, as an important strategic and operational tool against terrorist organizations in order to preserve their self-defense from future threats. Even when the issue of its legality has not met an universal consensus, targeted killing operations display more clearly than any other counterterrorism tactic the tension between treating terrorism as a crime or as an act of war.

The states involved in this practice claims that such killings are legitimate means of combating terrorism, and the legality of these killings must be judged also on the basis of the law of armed conflict instead of only approaching it from the traditional law enforcement model. Those who label these killings as extra-judicial executions rely on a law-enforcement model of legality, which rests primarily, though not exclusively, on standards of international human rights law.

If a terror attack is simply seen as a crime, authorities under the law enforcement model should deal with it as any other violation of the penal code; granting the suspected terrorist all the protections and guarantees they are entitled to in accordance with liberal democratic values (Blum & Haymann, 2010, p.167). If a terrorist attack is seen as an act of war by the organization supporting it, under the laws of war any member of such terrorist organization may be targeted anytime and anywhere plausibly considered "a battlefield", without prior warning or attempt to capture (Blum et al., 2010, p. 168).

Both Counterterrorism fighting models are unique; however at the same time each presents its own challenges in order to effectively fight terror. In fighting crime, the government's obligation to protects its

citizens applies to all citizens-criminals and innocents, while in fighting wars, the government's primary obligation is to its own citizens, with only limited concern for the well-being of its enemies (Blum et al., 2010, p. 168).

The law enforcement model limits the power of the victim state in order to act within the accepted scope of the law enforcement authorities, and relays deeply in the potential help and assistance that a third country most provide in order to hunt down the suspected terrorist, outside the victim's jurisdiction. The law of war model presents its unique dilemmas and interpretation problems as well, due the vacuum in international law regarding the possibility of having an armed conflict between a nation who belongs to the international community and a non-state actor. These non-state actors, like Al-Qaeda, can be located in more than one country, all around the globe, without a unique leadership and without exercising any legal sovereignty over the territory of those countries.

Besides the United States and Israel, countries like Russia and Great Britain had also used targeted killing to fight terrorism. However, Israel is the only one to do so overtly through the ruling issued by the Israeli Supreme Court. Regarding this issue it is important to mention Hunter (2009, p. 73), which claims that Israel, the most prolific and experienced practitioner of targeted killing, is the only state known to have made an official effort to set out the conditions in which its military may conduct such operations.

This Israeli Supreme court ruling 769/02 established a precedent that set standards of conduct, which have not been even proposed in the American legal system. The ruling embraced a broader interpretation of article 51(3) of *Additional Protocol I*. and extended the reach of the terms *for such time* and *direct participation* in order to serve as legal support of targeted killing operations. Over this issue, Statman (2004, p. 179,195) claims that an individual who commits a chain of hostilities, with short periods of rest between them, loses his immunity from the attack, as the rest between hostilities is nothing other than the preparation for the next hostility.

All the relevant issues that have been considered in this analysis, should be taken into consideration in order to create the proper legal tools to determine the best way to fight terrorist organization without implementing the same tools or tactic used by the enemies of freedom and democracy. The fact countries are representing a legal and recognized society obligates them to be better than terrorist organizations, which are aiming only to cause destruction and fear motivated by political, religious or ideological factors.

## REFERENCES

- Banks, W. C. & Raven-Hansen, P. (2003, March). Targeted killing and assassination: The U.S Legal framework. *University of Richmond. Law Review*, 37, 667.
- Barak, A., Beivlin, D. & Rivlin, E. (2005, December 11). The Public Committee against Torture in Israel Vs The Government of Israel. *The State of Israel. Judicial Authority*. Retrieved December 8, 2010, from [elyon1.court.gov.il/files\\_eng/02/690](http://elyon1.court.gov.il/files_eng/02/690)
- Barber, B. K. (2009). *Adolescents and war: how youth deal with political violence*. Oxford: Oxford University Press.
- Blum, G. & Heymann, P. (2010). Law and Policy of Targeted Killing. *Harvard National Security Journal*, 1, 167,169. Retrieved February 22, 2011, from <http://harvardnsj.com/2010/06/law-and-policy-of-targeted-killing/>
- David, S. R. (2002). Fatal Choices: Israel's Policy of targeted killing. *Mideast Security and Policy Studies*, 51, 2. Retrieved February 22, 2011, from <http://www.biu.ac.il/Besa/david>
- Ganor, B. (2007). *The counter-terrorism puzzle: a guide for decision makers* (4<sup>a</sup> print. ed.). New Brunswick, N.J.: Transaction Publishers.
- Hunter, T. B. (2009). *Targeted killing: Self-defense, preemption, and the War on Terrorism*. United States: Thomas B. Hunter.
- Interim Report Alleged Assassination Plots Involving Foreign Leaders (n.d.). *Assassination Archives and Research Center*. Retrieved November 11, 2010, from <http://www.aarclibrary.org/publib>
- International Covenant on Civil and Political Rights (n.d.). *OHCHR Homepage*. Retrieved February 22, 2011, from <http://www2.ohchr.org/english/law>
- Kreztmer, D. (2005). Targeted Killing of suspected terrorists: Extra-judicial executions or legitimate means of defense? *The European Journal of International Law*, 16, 179. Retrieved February 22, 2011, from <http://www.law.upenn.edu/academics>

- Levitt, M. (2006). *Hamas: politics, charity, and terrorism in the service of jihad*. Virginia: R.R Donnelley.
- Machon, M. J. (2006, May 25). Targeted Killing as an Element of U.S. Foreign Policy in the War on Terror. *Federation of American Scientist*. Retrieved January 17, 2011, from [www.fas.org/irp/eprint/machon](http://www.fas.org/irp/eprint/machon).
- Melzer, N. (2009). *Targeted killing in international law*. Oxford (N.Y.): Oxford University Press.
- Report on Terrorism and Human Rights - Executive Summary (2002, October 22). *IACHR Home*. Retrieved February 22, 2011, from <http://www.cidh.oas.org/Terrorism>
- Shaw, M. N. (2003). *International law* (5<sup>th</sup> ed.). Cambridge (U.K.): Cambridge University Press.
- Solis, G. D. (2010). *The law of armed conflict: international humanitarian law in war*. Cambridge [Eng.] ; New York: Cambridge University Press.
- Statman, D. (2004). Targeted Killing. *Theoretical Inquiries in Law*, 5 (1), 179,195. Retrieved February 21, 2011, from <http://www.bepress.com/til/default>
- Wilkinson, P. (2006). *Terrorism versus democracy: the liberal state response* (2<sup>a</sup> ed., new ed. [Rev. ed.]). London: Routledge.