

# STRATEGIC PERSPECTIVES

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## Targeted Killings and Double Standards

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## Executive Summary

Nils Melzer, Legal Advisor for the International Committee of the Red Cross (ICRC), defines targeted killing (henceforth, TK) 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.”<sup>2</sup> One of the most recent internationally reported examples is that of Pakistan’s Taliban chief, Baitullah Mehsud. The U.S. government believes that Mehsud was killed following a TK directed against the home of Mehsud’s father-in-law in South Waziristan, Pakistan, where Mehsud sought refuge.<sup>3</sup> Some reports suggest that fourteen people were killed along with Mehsud. According to local officials, of the fourteen, approximately ten were Taliban militants. (The Taliban dispute this figure, and claim that only eight of the fourteen were Taliban militants, while the rest were civilians.)<sup>4</sup> According to other media reports, only two people were killed, including Mehsud’s second wife.<sup>5</sup>

While the reports on the TK of Mehsud (euphemistically referred to in the international press as a “strike”)<sup>6</sup> appear rather neutral in nature, and while Melzer asserts that the concept and term “targeted killing” have been adopted by a large part of the legal fraternity, the media, and international organizations,<sup>7</sup> the legality and morality of TKs remain controversial.

In particular, TKs have been subjected to significant scrutiny by several human rights groups in a manner that has both contributed to the lack of a genuine, honest, public debate surrounding the issue, and created an atmosphere in which different countries’ TK policies are subject to different standards of evaluation and critique.

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This monograph stresses that any such differentiation can have no basis, since all TKs are directed against terrorists operating outside the norms and framework of international humanitarian law (IHL), and are part of an internationally acknowledged campaign. As such they must be evaluated uniformly and consistently.

This monograph looks closely at the work of both Human Rights Watch (HRW) and Amnesty International (AI), with respect to the Israel Defense Forces (IDF) and several Western armies (the U.S., the U.K., the Netherlands, Canada and Australia) that have implemented TK policies since November 2000 (collectively labeled “Western TKs”). A product of a year and a half of detailed research, the monograph identifies substantial .and systemic failings in the work of HRW and AI

Ostensibly, HRW’s reports regarding the use of TKs aim to protect the rights of innocent civilians liable to be injured or even killed in a TK, as well as the right to a fair trial for those individuals who are targeted. In fact, this monograph suggests that HRW’s coverage functions as yet another means to tarnish Israel’s reputation and to undermine Israel’s national security choices (and possibly even to fundraise in Saudi Arabia).<sup>8</sup>

Section A of Part II of this monograph opens with a discussion of HRW’s history, its mission statement, and its purpose. The section then measures the organization against

standards HRW has established for itself, and those set by larger umbrella organizations to which HRW belongs.

Bearing these standards in mind, Section B examines a three-part test designed by HRW to assess the legality of a particular TK. This examination reveals significant factual, legal, and methodological flaws in HRW's analysis of IDF TKs, as compared with TKs by other countries. Further analysis highlights significant, unexplained, and unjustified differences in the treatment of comparable Western TKs, many of which fail HRW's own test.

Section C suggests that the flaws identified in HRW's application of its own three-part test also pepper its interpretation and application of international humanitarian law, also known as the Laws of War. Once again, the monograph identifies worrying factual and legal questions in HRW's application of IHL with respect to Israeli TKs and significant disparities in the treatment of Western TKs.

After reaching these troubling findings, the author began to examine the individuals behind HRW's statements and reports. Section D of Part II reveals, for example, that in addition to being an avid Nazi memorabilia collector,<sup>9</sup> HRW's Senior Military Analyst, Marc Garlasco, was himself responsible for TKs employed during Operation Iraqi Freedom. These TKs resulted in significant civilian fatalities, and appear to have utterly failed both HRW's three-part test and the most fundamental norms of IHL.

Part III offers a similar treatment of AI. Section A explores the organization itself – who are they, what do they stand for, and what standards are they prescribed to uphold? With an understanding of the organization, Sections B and C analyze AI's approach to TKs, in particular Israeli and Western TKs.

This detailed analysis revealed that much like HRW, AI's work, while appearing above-board and devoted to the protection of universal human rights, in fact unjustifiably condemns Israeli TK policy as "unlawful," while at the same time practically excusing the Western TK policy that resulted in far more civilian fatalities. AI has not only issued a disproportionate number of reports regarding Israeli TKs; it also appears to apply different standards to the Israeli TK policy and the Western TK policy. AI barely addresses Western TKs, while lambasting the Israeli TK policy as "extreme...unlawful action."<sup>10</sup> Such double standards, much as with HRW, extend to the terminology itself.<sup>11</sup> These findings raise significant questions about an agency considered one of the world's leading human rights NGOs.

A diverse array of media outlets – print, internet, television, radio, etc. – have addressed TKs. Politicians, as well, have entered into the fray. Oftentimes these critiques demonstrate a weak grasp of the factual and legal issues at hand. This monograph, however, is devoted solely to an analysis of the positions of HRW and AI on the controversy concerning TKs. Its author may address in depth the journalistic and political dimensions in a subsequent publication.



In sum, the above analyses and the discrepancies that they reveal raise questions regarding HRW, AI, and various international media outlets – questions regarding their methodology, accuracy, fact-finding methods, and supposed impartiality. The author calls on these organizations to revise their methodology, and to publicly retract their publications, reports and statements addressing TKs.<sup>12</sup>

# I. Introduction

Nils Melzer, Legal Advisor for the International Committee of the Red Cross (ICRC), defines targeted killing (TK) 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.”<sup>13</sup>

A recent much-reported example of a TK is that of Pakistan’s Taliban chief, Baitullah Mehsud, in August 2009. The U.S. government believes that Mehsud was killed following a TK directed against the home of Mehsud’s father-in-law in South Waziristan, Pakistan, where Mehsud sought refuge.<sup>14</sup> Some reports suggested that fourteen people were killed in the TK. According to local officials, of the fourteen, approximately ten were Taliban militants. (The Taliban dispute this figure, and claim that only eight of the fourteen were Taliban militants, while the rest were civilians).<sup>15</sup> According to other media reports, only two people were killed in the TK, including Mehsud’s second wife.<sup>16</sup>

While the reports on the TK of Mehsud (euphemistically referred to in the international press as a “strike”)<sup>17</sup> [although the author gets to it below on page 18, perhaps address here the commonly heard claim that TK is itself a euphemism for “assassination”] appear rather neutral in nature, and while Melzer asserts that the concept and term “targeted killing” have been adopted by a large part of the legal fraternity, the media and international organizations,<sup>18</sup> TKs remain controversial.

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Since the year 2000, TKs have become a common tactic. Indeed, targeted killings have been employed for centuries, but the terrorist attacks of September 11, 2001 underscored the new challenges of asymmetric warfare and counterinsurgency. Conflict between states is no longer the only mode of armed conflict; today countries must defend their citizens against non-state terrorist organizations which target innocent civilians around the world while hiding amid their own native populations. Israel and other western countries, the primary subjects of the following discussion, must deal with the reality of defending their respective populations against groups such as Hamas and Al-Qaeda. Harold Koh, Legal Adviser to the Obama administration, explained the necessity of a TK policy in combatting terrorist threats:

In this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level Al-Qaeda leaders who are planning attacks... this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians.

Koh’s remarks highlight the essential place of a TK policy as a defense against the continued threats of terrorist attacks against ordinary citizens, while also emphasizing the necessity to enact such a policy in accordance with international law. The present

monograph evaluates the TK policies of Israel and Western armies (U.S. Armed Forces, the Armed Forces of the U.K., the Netherlands, Canada and Australia) who seek to defend their respective populations while maintaining a commitment to international law concerning armed conflict.<sup>19</sup> Questions of media bias and ill-informed political criticisms of TK are beyond this monograph's scope.

Compared to conventional military operations, TKs aim to reduce human suffering by introducing greater discrimination in targeting so as to minimize collateral damage.<sup>20</sup> Given this moral incentive, TKs portend to become a predominant military tactic employed in the course of future asymmetric warfare.<sup>21</sup> Indeed, according to former U.S. Secretary of Defense Robert Gates it may even be the case that un-manned aerial vehicles (UAVs), which are often used in TKs, will replace manned fighter aircraft.<sup>22</sup> Explaining this new reality on the battlefield, Lt. Gen. David Deptula, U.S. Air Force, has stated that "the future of how you use these un-manned systems or remotely piloted systems is really unlimited...we need to open our minds and think more about capability and impact we are going to achieve as opposed to how we've done business in the past."<sup>23</sup> Attorney General Eric Holder delivered a strong speech on terrorism in which he approved the use of lethal force in the targeted killing of U.S.-born Al-Qaeda cleric Anwar al-Awlaki. President Obama ordered a U.S. citizen to be killed, far away from the battlefield, without any kind of judicial process. The general theme of Holder's address at Northwestern University Law School was that deadly force is legal per a joint Congressional resolution enacted one week after the September 11<sup>th</sup> attack. Holder called for the use of lethal force when necessary in order to prevent future acts of international terrorism against the U.S.<sup>24</sup>

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Even some academics appear to agree. Peter Singer, advisor to President Obama's 2008 presidential campaign and author of the book "Wired for War," says that remote warfare is changing mankind's monopoly on how conflict is fought for the first time in 5,000 years.<sup>25</sup>

In practical terms, UAVs have become so indispensable in Iraq and Afghanistan that missions are cancelled if they are not available.<sup>26</sup> Given this reality, an examination of the justifiability of TKs takes on critical importance.

The varied uses of TKs in diverse theatres of conflict share a common denominator: each constitutes part and parcel of a single general struggle against modern-day terror. This struggle and possible modes of overcoming it have not yet been crystallized into clear-cut norms of international law and practice. Yet the central components of TKs are identical in all situations, and thus merit uniform evaluation according to a single, consistent criterion. Thus there ought to be no difference in evaluating the manner in which Western powers have used TK in such places as Iraq, Afghanistan, Pakistan or Yemen, on the one hand, and the TKs used by Israel against Hamas or Hizbullah, on the other. Any attempt to claim a distinction amounts to establishing an artificial double standard.

Indeed, the expanding usage of TKs – with the U.S. now relying on TKs in the fight against Afghani drug lords,<sup>27</sup> and employing private companies, such as Blackwater, to target senior Al-Qaeda operatives<sup>28</sup> – demonstrates the pressing need for a discussion of the type this monograph opens.

In response to this need, and as part of a comprehensive review of ethics in asymmetric warfare, this monograph aspires to provide a comprehensive discussion of the use of TKs by asking whether, on a case by case basis, this usage was justified. In so doing, this eighteen-month study focuses on the Israel Defense Forces (IDF) and several Western armies that have implemented TK policies since November 2000, and on reports about those policies published by Human Rights Watch (HRW) and Amnesty International (AI).<sup>29</sup>

Part II of this monograph addresses the work of HRW. In order to assess the work of HRW in this field, the author compared the reports and statements released by HRW regarding IDF TKs and Western TKs with facts presented by other human rights groups, government agencies, and media reports. Such an examination indicates a series of significant and systemic flaws – factual, legal, and methodological – in HRW's statements and reports pertaining to the usage of TKs.

First, certain material factual claims of HRW appear to be groundless. For example, in its *World Report 2004*,<sup>30</sup> HRW asserted that at some point the IDF ceased to release statements regarding the identity of targeted individuals, and that when the IDF did release statements, they were “practically meaningless.”<sup>31</sup> In fact, this monograph has failed to identify a single TK from fall 2000 to December 2003<sup>32</sup> with respect to which the IDF did not release a statement containing, at the very least, essential information as to the targeted individual's identity.<sup>33</sup> Similar findings were reached with respect to the years following 2003, and until May 2008.<sup>34</sup>

In addition, there are sometimes discrepancies between the verifiable facts and those presented by HRW. For example, HRW's *World Report 2004* claimed that the IDF has consistently failed to demonstrate that targeted individuals were active members of the opposing armed force or active participants in the violence.<sup>35</sup> In almost all of the 88 TKs which occurred during the relevant period, however,<sup>36</sup> the IDF took pains to release detailed information both regarding the targeted individual's active membership in the opposing armed force and their active participation in violence.<sup>37</sup> Once again, the same is true of the period from 2003 to May 2008.<sup>38</sup> In fact, in response to Israeli TKs from December 2000 and onwards, Palestinian armed groups routinely confirmed the target's involvement in armed attacks.<sup>39</sup>

Second, some of HRW's legal claims appear to be groundless. For instance, HRW strongly implied that dropping a one-ton bomb in a residential area during a TK is *per se* illegal.<sup>40</sup> But this novel “prohibition” is without legal foundation. Indeed, as with any other weapon, the legality of the usage of a one-ton bomb will depend on several parameters, as is discussed in Section III.<sup>41</sup> During a Western TK carried out on March 20, 2003 against a farm in Al-Dura in Baghdad, four 2000-pound penetrator bombs were deployed. Yet while HRW noted the incident in a report entitled *Off Target*, it expressed no criticism of the choice of weaponry.<sup>42</sup>

Third, there is a pattern of inconsistency in the application of HRW's terminology. Its use of international legal and human rights terminology to single out and condemn Israel has often been a point of contention leveled against HRW by NGO Monitor.<sup>43</sup> For example, in a 2006 report that examined HRW's work in 2004, NGO Monitor compared the language

used by HRW in its reports on Israel and the language used in reports on other Middle Eastern countries.<sup>44</sup> The figures were startling: NGO Monitor found 38 instances in which HRW alleged violations of IHL or human rights law with respect to Israel; in comparison to the far fewer instances of terror acts in which such allegations were made with respect to the Palestinian Authority (PA), 2; Egypt, 4; Syria, 3; and Morocco, 1.<sup>45</sup> Similarly, Israel was charged with grave and/or serious human rights violations and/or abuses 32 times compared with Egypt's 22, and all other countries examined fewer than 10.<sup>46</sup> On the basis of these and other figures, NGO Monitor concluded that, "HRW's use of language to condemn Israel is highly politicized, especially when compared to reports on other countries in the Middle East."<sup>47</sup> A similar NGO Monitor report from January 2009 demonstrated little, if any, improvement in the language employed by HRW in its statements on Israel.<sup>48</sup> With respect to IDF TKs, moreover, terms such as "assassination" and "liquidation" pepper HRW reports, while no such disparaging terms are applied to Western TKs.<sup>49</sup> Such significant and systemic irregularities raise fundamental questions regarding HRW's methodology and political orientation.

Part III of this monograph addresses Amnesty International's treatment of TKs. Here too, this analysis reveals systemic and significant flaws.

Firstly, AI's work is replete with legal and factual inaccuracies, which appear to stem from both serious methodological problems and a utopian view of warfare. For example, AI has consistently rejected the legal stance adopted by Israel justifying the use of Israeli TKs – namely that Israel finds itself in a non-international armed conflict between a state and non-state parties, much like the conflict in Afghanistan between the U.S. and Al-Qaeda. Inexplicably, AI rejects this legal position. This despite the fact that the position is supported by the application of ICRC guidelines which help distinguish hostilities that do not constitute an armed conflict from those that do. Additionally, that Israel is engaged in an armed conflict is accepted by both the general legal fraternity, and a large number of other international NGOs, including even HRW.<sup>50</sup> Furthermore, AI itself has documented Palestinian armed attacks against Israel and Israeli citizens over the course of decades.<sup>51</sup>

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AI fares no better in the factual arena. For example, the organization has persistently questioned, both implicitly and explicitly, Israel's choice of targeted individuals. AI questions the involvement of the targeted individual in the armed conflict, often describing them as "those *alleged* to have carried out, or to have planned to carry out, violent attacks against Israel"<sup>52</sup> (emphasis added) and sometimes going so far as labeling them as mere "political opponents."<sup>53</sup> To make matters worse, AI also suggests that Israel has no basis of proof on which to target these individuals and fails to provide proof of guilt in the aftermath of any Israeli TK.<sup>54</sup>

However, in over 95 percent of Israeli TKs neither the identity of the targeted militant nor his involvement in hostilities was subject to dispute.<sup>55</sup> In fact, disputes arose with respect to less than two percent of Israeli TKs.<sup>56</sup> Moreover, in the rare instance where a dispute arose it concerned the exact armed role of the individual targeted, rather than their membership in an armed group, or involvement in hostilities.<sup>57</sup>

Similarly, following virtually every Israeli TK, either the Israeli army or government released detailed statements as to the membership of the targeted individual in an armed Palestinian group, or the targeted individual's involvement in hostilities. More often than not, the statements released included lists enumerating the specific terror attacks in which the targeted individual had been involved.<sup>58</sup>

In addition to these factual and legal concerns, AI's work reveals marked discrepancies between its treatment of Western TKs and its analysis of Israeli TKs. Not only does AI release a disproportionate number of critical reports regarding the Israeli TK policy, but it appears to apply different standards, severely criticizing Israel while at the same time excusing the same or similar Western behavior. These double standards even extend to the terminology used: AI reports on Israel almost always refer to Israeli TKs as "state assassinations"<sup>59</sup> and "liquidations,"<sup>60</sup> while even reports which are critical of the Western TK policy employ far more neutral terminology, describing Western TKs as "air raids"<sup>61</sup> or "missile strikes."<sup>62</sup>

These results, as with HRW, raise significant concern regarding AI's methodology and the accuracy and reliability of its reports.

Due to space constraints, several appendices summarizing the extensive research and its findings do not appear in the print version of this study but are available on the website of the Jerusalem Center for Public Affairs, [www.jcpa.org](http://www.jcpa.org).

## II. Human Rights Watch

### A. Who Are They?

Helsinki Watch was a private American NGO created in 1978 to monitor the Soviet bloc's compliance with the Helsinki Accords (signed in 1975). The organization subsequently developed various committees known as "The Watch Committees": Americas Watch, established in 1981, Asia Watch, established in 1985, Africa Watch, established in 1988 and Middle East Watch, established in 1989. In 1988, the organization formally adopted the all-inclusive name Human Rights Watch.<sup>63</sup>

In time, HRW evolved into one of the world's most influential human rights NGOs. It describes itself as follows:

Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. By focusing international attention where human rights are violated, we give voice to the oppressed and hold oppressors accountable for their crimes. Our rigorous, objective investigations and strategic, targeted advocacy build intense pressure for action and raise the cost of human rights abuse. For 30 years, Human Rights Watch has worked tenaciously to lay the legal and moral groundwork for deep-rooted change and has fought to bring greater justice and security to people around the world.<sup>64</sup>

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HRW's website further claims that the organization is "known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy."<sup>65</sup> This monograph strongly suggests that HRW fails to live up to its own, self-declared principles. Specifically, HRW fails to meet its own standards of transparency, independence, impartiality, and accurate fact-finding. This study details several instances of factual inaccuracy and presents extensive evidence of bias.

Not only does HRW fail to meet its own standards; it also violates the standards set by CONGO – The Conference of NGOs in Consultative Relationship with the United Nations. Article 71 of the UN Charter enables the UN's Economic and Social Council to consult with various NGOs.<sup>66</sup> There are three categories of consultative status: general, special, and roster status.<sup>67</sup> The UN website stipulates:

To be eligible for consultative status, an NGO must have been in existence (officially registered with the appropriate government authorities as an NGO/non-profit) for at least two years, must have an established headquarters, a democratically adopted constitution, authority to speak for its members, a representative structure, *appropriate mechanisms of accountability and democratic and transparent decision-making processes*. The basic resources of the organization must be derived in the main part

from contributions of the national affiliates or other components or from individual members (emphasis added).<sup>68</sup>

HRW has enjoyed special consultative status since 1993.<sup>69</sup> HRW's listed areas of expertise and fields of activity include Human Rights, Humanitarian Affairs, International Law, International Security, and Peace and Security.<sup>70</sup>

All NGOs in consultative status with ECOSOC<sup>71</sup> (as is HRW) are entitled to full membership in CONGO, an independent, international, non-profit membership association of non-governmental organizations (NGOs). CONGO facilitates the participation of NGOs in United Nations debates and decision-making.<sup>72</sup> HRW is a full member of CONGO.<sup>73</sup>

Members of CONGO are bound by the Rules of the Conference of NGOs (CONGO's rules),<sup>74</sup> rules which have been supplemented by a Voluntary Code of Conduct for NGOs in consultative status with ECOSOC. This code of conduct imposes several responsibilities on organizations and their representatives, including to be "independent," to be "truthful," and to be "co-operative and self-critical."<sup>75</sup> While this code of conduct is voluntary, it would be shameful if HRW, one of the world's leading NGOs, did not satisfy minimal standards of conduct. This monograph demonstrates that indeed HRW fails to do so.

## **B. HRW: Three-Part Test**

In a report entitled *Justice and the "War" Against Terrorism*, Kenneth Roth, HRW's Executive Director, examined the use of TKs in the fight against terrorism. Roth discusses whether the description of the war against Al-Qaeda and the Taliban as the "War on Terror" was mere rallying rhetoric, or legally significant terminology:

If a person is a criminal suspect, he can be arrested and prosecuted. International human rights law permits the use of lethal force against a criminal suspect only if necessary to stop an imminent threat of death or serious bodily injury. But *if a person is an enemy combatant, the law of war permits him to be killed summarily, so long as he is not in custody, incapacitated, or surrendering. There is no duty to attempt to arrest or subdue him.* If an enemy combatant is detained, the law of war permits him to be held until the end of the armed conflict, without the need to charge or try him (emphasis added).<sup>76</sup>

Although Roth accepts that in many cases war rules would apply in the fight against terror, he nonetheless insists that "war rules should not apply when there is a reasonable option of arresting and prosecuting a suspect."<sup>77</sup> Should there be "no reasonable law enforcement alternative," then, according to Roth, war rules would apply and a TK would be legitimate.<sup>78</sup>



Pursuant to this approach, in its *World Report 2004* HRW formulated a three-part test to assess whether a government was justified in resorting to a TK rather than to ordinary law enforcement tactics and methods routinely employed in apprehending an individual.<sup>79</sup> The test does not create a legal requirement or standard which a government must meet; it only constitutes a tool employed by HRW in assessing the legitimacy of a particular TK. HRW's criteria are as follows:

- “first, that an organized group is directing repeated acts of violence against it [a government], its citizens or interests with sufficient intensity that it constitutes an armed conflict;
- second, that the suspect [killed by the TK] is an active member of the opposing armed force or an active participant in the violence; and
- third, that law enforcement means are unavailable.”<sup>80</sup>

### **1. Part One of the Three-Part Test**

In applying this three-part test, Roth concluded that the IDF's TK policy did, in some instances, meet the first criterion. Roth stated that, “although the level of violence between Israeli and Palestinian forces has varied considerably over time, the violence in certain cases has been intense and sustained enough for the Israeli government reasonably to make the case that in those instances an armed conflict exists.”<sup>81</sup> But HRW found that the IDF TK policy failed the other two parts of the test.<sup>82</sup> This monograph will focus on the second and third parts of the test, and will demonstrate that, in this regard, HRW's analysis of IDF TKs appears to be fatally flawed.

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### **2. Part Two of the Three-Part Test**

With respect to the second part of the test, HRW claimed that the Israeli government would have to demonstrate that the targeted individual was an active member of the opposing armed force or an active participant in hostilities. Roth asserted that, “given that these assassinations are planned well in advance, Israel should provide evidence of direct involvement in plotting or directing violence before overcoming the legal presumption [sic]<sup>83</sup> that all residents of occupied territories are protected civilians.”<sup>84</sup> Roth went on to say that, “moreover, because unilateral allegations are easy to make falsely or mistakenly... these claims should be tested before an independent review mechanism.”<sup>85</sup>

Roth's blatantly biased statements are not only utterly baseless and impossible to implement in the real world (where the targeted individual is typically on the move and providing such information would reveal intelligence sources), but also demand of Israel standards that are neither stipulated in HRW's three-part test nor are expected of any other sovereign nation.<sup>86</sup>

Roth further stated that the Israeli authorities initially claimed that the targets of the IDF's TKs were involved in hostilities.<sup>87</sup> Later, however, the Israeli authorities largely stopped making such claims,<sup>88</sup> Roth said. He insisted that even in those cases they made such claims, they were so summary as to be "practically meaningless."<sup>89</sup> Roth then concluded that the IDF failed so conclusively with regard to the second condition that there was no limit to Israel's "declaring virtually any Palestinian an accomplice in the violent attacks" and thus, according to Roth's speculative and legally incorrect phrase, "subject to assassination."<sup>90</sup>

While HRW has adopted a policy which accepts the basic legality of TKs in asymmetrical warfare, it nonetheless chooses to refer to Israeli TKs as "liquidations" and "assassinations." By employing this hyperbolic vocabulary, HRW creates a facade of illegality. The implications of the word "assassination," in particular, and the distinction between targeted killings and assassinations, were in fact explicitly addressed by HRW itself in its Report entitled *Off Target*, which analyzed the conduct of coalition forces during Operation Iraqi Freedom. HRW writes that:

*Under international humanitarian law, the targeting of military leadership is permissible, even if it results in civilian casualties, so long as the anticipated concrete and direct military advantage outweighs the civilian cost. Aerial strikes targeting the leadership of a party to the conflict ("decapitation strikes" in U.S. military parlance) are governed by the same rules of IHL that apply to other military actions... If they respect the criteria, attacks on enemy leaders who take a direct part in hostilities are not prohibited and are different from assassinations committed outside the context of an armed conflict, which are extrajudicial executions prohibited by international human rights law (emphasis added).<sup>91</sup>*

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As is very clearly demonstrated by this monograph, Israeli TKs satisfy these criteria. It is therefore unclear why HRW nonetheless insists on referring to Israeli TKs – but never to Western TKs – as "assassinations."

Roth's statements regarding Israeli TKs and the second part of HRW's three-part test, quoted in the above paragraphs, are factually incorrect and misleading. First, it is erroneous to claim that the Israeli authorities ceased to provide information regarding the status of those targeted by the IDF. In fact, the author failed to find a single TK, during the period in question or thereafter, after which the IDF did not provide the relevant information regarding targets' involvement in hostilities.<sup>92</sup>

Second, the assertion that the IDF's statements were "practically meaningless" is blatantly false. Indeed, in the majority of TKs, the IDF not only released information pertaining to the targeted individual's active membership in the opposing armed groups, but also included reference to specific terrorist attacks in which the targeted individual was involved, or for which the targeted individual was responsible.<sup>93</sup> The information released by the IDF verifies the threat and danger certain individuals pose to the lives of Israeli citizens, ensuring that a TK is "strictly and directly necessary to save life."<sup>94</sup> The author would challenge HRW to find an example of another country's armed

forces, anywhere in the world, that habitually release TK data comparable to that which Israel routinely makes public.

In fact, in the vast majority of Israeli TKs which occurred during the relevant period, no dispute arose regarding the active participation of the targeted individual in hostilities. On the contrary, their participation was explicitly acknowledged and even praised by the Palestinian armed groups.<sup>95</sup> In only several TKs did Palestinian sources dispute Israeli statements regarding the targeted individual's involvement in violence or membership in an armed group.<sup>96</sup> Moreover, HRW asserts that "virtually any Palestinian" could be declared "an accomplice in the violent attacks and thus subject to assassination."<sup>97</sup> For this allegation to have any substance, HRW would have to point to incidents in which ordinary Palestinians were targeted and then were arbitrarily and retroactively labeled by the Israeli authorities as "militants." Not a single such incident has occurred.

On the contrary, Israel's TK policy has been entirely transparent; it has been characterized by official acknowledgements of TKs, detailed media reports, and legal appeals all the way to the Israeli Supreme Court, not to mention a vibrant public debate. This was very far from the picture painted by HRW in which ordinary Palestinians would be wrongly, even maliciously targeted.

In 2009, Robert Bernstein, Chairman of HRW from 1978 to 1998, took his former organization to task for its obsession with Israel:

Israel, with a population of 7.4 million, is home to at least 80 human right organizations, a vibrant free press, a democratically elected government, a judiciary that frequently rules against the government, a politically active academia, multiple political parties and, judging by the amount of news coverage, probably more journalists per capita than any other country in the world.<sup>98</sup>

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Bernstein noted that:

[T]he Arab and Iranian regimes rule over some 350 million people, and most remain brutal, closed and autocratic, permitting little or no internal dissent. The plight of their citizens who would most benefit from the kind of attention a large and well-financed international human rights organization can provide is being ignored as Human Rights Watch's Middle East division prepares report after report on Israel. Human Rights Watch has lost critical perspective on a conflict in which Israel has been repeatedly attacked by Hamas and Hizbullah, organizations that go after Israeli citizens and use their own people as human shields. . . . Yet Israel, the repeated victim of aggression, faces the brunt of Human Rights Watch's criticism.

Let us return to the second part of HRW's three-part test. HRW's approach to Western TKs is noticeably mild. Since the end of 2001, the U.S. has practiced TK in Afghanistan, Yemen, Iraq, Pakistan, and Somalia. In Iraq and Afghanistan, several other Western governments, most notably the U.K., were directly involved in the use of TKs.<sup>99</sup> As a

result of the deliberate opacity of this practice, only limited information regarding these Western TKs is available and it is not possible to examine the policy (if any) of each individual state involved. These TKs, as mentioned in the Introduction to this monograph, will therefore be referred to generically as “Western TKs.” Reported Western TKs number more than one hundred. Many remain unreported, and it is reasonable to estimate that the actual number of Western TKs is significantly higher (possibly even in the hundreds).

HRW's application of its three-part test to Western TKs appears to be extremely lax, albeit demonstrating a similar detachment from the facts. Thus, in scores of cases of Western TKs security officials responsible for the TKs failed to release even the most rudimentary information regarding the intended target.<sup>100</sup> Indeed, HRW's report, *Off Target*, released approximately a month prior to its *World Report 2004*, states that:

The dismal record in targeting leadership is not unique to the war in Iraq. Apparently, in both Yugoslavia and Afghanistan, not one of the intended leadership targets was killed in an air strike. *In fact, the United States in the past has admitted it did not even know at whom it was shooting.* Following a November 2001 attack on a suspected leadership target in Afghanistan, Pentagon spokesperson Victoria Clarke stated, “This was a good target. They had a confluence of intelligence which led us to believe there was senior leadership in the building. *We don't have names. We don't have a sense of exactly who was in there*”<sup>101</sup> (emphasis added).

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Although the intended target was not necessarily an active member of the opposing armed group or an active participant in the violence, HRW does not demand that Western armed forces release such information. With respect to Israel, however, belligerent activity must be proven to HRW's satisfaction, and HRW insists that such claims be subjected to independent review. The dearth of information is such that in many cases it is simply impossible, even for American officials, to ascertain the identity and role of the targeted person. In other cases the information provided included only the claim that the target was an Al-Qaeda or Taliban “operative.”<sup>102</sup> Yet none of these facts raised the same level of concern with HRW as did Israeli TKs, where detailed statements were more often than not released.

HRW has even unreservedly endorsed some Western TKs. In an interview, HRW former senior Military Analyst Marc Garlasco said, “I don't think people really appreciate the gymnastics that the U.S. military goes through in order to make sure that they're not killing civilians.”<sup>103</sup> Even more surprisingly, in *Off Target*, HRW noted: “U.S.-led Coalition forces took precautions to spare civilians and, for the most part, made efforts to uphold their legal obligations.”<sup>104</sup> Given the many failings that *Off Target* itself identified in the Western TK policy (some of which have already been mentioned *supra*, and others of which are mentioned *infra*) it is unclear how HRW reached this conclusion.

### 3. Part Three of the Three-Part Test

With respect to the third part of the test, HRW claimed:

Israel has made no effort to explain why these suspected participants in violent attacks on Israelis could not be arrested and prosecuted rather than summarily killed. Theoretically Israel might claim that its forces are unable to enter an area under occupation without triggering armed conflict, but in fact the Israeli military has shown itself capable of operating throughout the West Bank and Gaza with few impediments.<sup>105</sup>

This assertion relies on two unambiguously false factual claims. First is the question why law enforcement means are not employed in place of TKs. Israeli authorities have consistently and repeatedly stated that TKs were carried out only in areas in which the IDF does not have effective control and where, as a result, law enforcement means are unavailable. Thus, for example, then Israeli Attorney General, Elyakim Rubenstein stated that every effort must be made to arrest individuals actively involved in the planning and execution of terrorist attacks. Only in the absence of every other option, he said, and only when based on very clear evidence of the individual's activities and whereabouts, will resort be made to TKs.<sup>106</sup>

Israel's policy was addressed by the Supreme Court in *The Public Committee Against Torture in Israel v the Government of Israel*.<sup>107</sup> In this case, which concerned the general legality of TKs, then President of the Court, Justice Aharon Barak, cited the state's policy (which was detailed in the state's submission to the Court) to resort to TKs only in the event that no other less dangerous options, including arrest, were open to the state.<sup>108</sup> Moreover, the state's policy as cited by Justice Barak was that even once a TK has been decided upon, should a realistic alternative become available, then that option should be pursued.<sup>109</sup> Accordingly, the State stipulated that there had been operations aimed at the arrest of dangerous terrorists, which were effected, even in Area A, where there was a significant risk to the lives of the Israeli soldiers involved.<sup>110</sup> The state, however, clarified that such perilous operations cannot always be considered "realistic alternatives" and are therefore not always employed.<sup>111</sup>

Now one may inspect the second claim that Israel may be able, theoretically, to maintain that its forces are unable to enter an area without triggering an armed conflict. The vast majority of the IDF's TKs were conducted in Area A,<sup>112</sup> namely areas turned over to the governance and security control of the PA under the Oslo interim peace accords some fifteen years ago and which have generally remained under PA control ever since.<sup>113</sup> Two factors contributed to the inability of the Israeli army to enter these areas. The first was (and continues to be) enormous international pressure. Thus, for example, in HRW's *World Report 2006*, Israel was criticized for its attempts to arrest wanted Palestinians in "Palestinian areas."<sup>114</sup> HRW not only criticized Israel for entering those areas in order to conduct the arrests in question, but also for the violence that ensued.

HRW stated that:

*The Israeli army and security forces continued to carry out daily arrest raids and military operations in Palestinian areas during 2005. There have been over two thousand IDF incursions into Palestinian population centers this year. The IDF often carried out the operations in a manner that failed to demonstrate that it had used all feasible measures to avoid or minimize harm to civilians and their property. In one such incident, an August 24 arrest raid in the Tulkarem refugee camp, the IDF shot and killed five unarmed Palestinians, including three seventeen-year-olds. This incident reflects a growing pattern of IDF "arrest operations" in which security forces kill the target of arrest or bystanders rather than seeking to apprehend the target (emphasis added).<sup>115</sup>*

In addition to this enormous international pressure on Israel against entering Area A, to which HRW is a significant contributor, official government policy bars the IDF from entering these areas.<sup>116</sup> IDF Major-General Ya'akov Amidror (ret.) confirmed in an interview held on July 1, 2009 that this self-imposed prohibition was abolished in the West Bank during operation Defensive Shield (March-April 2002), when the IDF temporarily ceased to distinguish between Areas, A, B, and C.<sup>117</sup> Despite this marked change in policy, these self-imposed limitations were never removed in the relevant areas of the Gaza Strip, where today the Israeli has no presence on the ground. In addition, Major-General Amidror explained, even in areas where the IDF is allowed to operate, it does so under careful constraints. For example, Israeli military maps forbid TKs and other attacks targeting schools, hospitals, known children's facilities, and mosques.<sup>118</sup> In fact, it was only during the most recent fighting in Gaza that this practice changed and it became permissible to target these areas in certain circumstances. This change was effected because such places were used to harbor terrorists, weapons, and Hamas leaders.<sup>119</sup>

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When, with special authorization from Prime Minister Ariel Sharon, the IDF did enter Area A in an attempt to arrest armed terrorists, significant armed conflict ensued and both civilian and military casualties were sustained. For example, in June 2003, Abdullah Al-Qussama – at the time considered one of the most dangerous terrorists in the West Bank, head of the military wing of Hamas, and responsible for the deaths of upwards of 50 Israelis – was killed during an attempt to arrest him. Al-Qussama was armed at the time of the attempted arrest and was killed when, while trying to escape, he attempted to fire his weapon at Israeli special security unit members.<sup>120</sup> This continues to be the risk. For example, in May 2009, a special Israeli police unit entered the village of Dura in the West Bank in order to arrest Abdel Majid Dudin, head of Hamas' military wing in the South Mount Hebron region. Dudin, who was responsible for a series of deadly terror attacks in Israel, including bus bombings in Jerusalem and Ramat Gan, had evaded arrest for some fourteen years. A gunfight erupted and Dudin was killed, and several local residents were arrested.<sup>121</sup>

In several other cases, the IDF made every effort to avoid implementing a TK, sometimes calling on the PA to arrest wanted men.<sup>122</sup> However, as documented by HRW itself, the PA often "failed to take adequate action against those responsible for killings of

Israeli civilians.”<sup>123</sup> Yet even among those arrested by the PA, some have been able to continue their terrorist activities from within Palestinian prisons. For example, Iyad Hardan managed to orchestrate four separate shootings against Israeli civilians from his Palestinian prison cell. Upon his release, he continued his terrorist pursuits. His “career” ended only when he was eliminated in an Israeli TK in 2001.<sup>124</sup>

In 2005, at a meeting held in Geneva under the auspices of the ICRC at the University Center for International Humanitarian Law on the “right to life in armed conflicts” and situations of occupation, a group of international law experts discussed the legality of TKs in Area A.<sup>125</sup> Part of the meeting report deals specifically with the lawfulness of TKs in occupation situations, and in particular in what is referred to as the “Area A situation.” After some debate the experts concluded:

Targeted Killings are not necessarily unlawful in occupied territory, (1) where they are carried out by the occupying power in an area where the occupying power does not exercise effective control such that the occupying power cannot reasonably effect an arrest of the individual, (2) where the occupying power has sought to effect the transfer of the individual from whatever authority is in effective control of the area, assuming that there is such an authority, (3) where the individual has engaged in serious, life-threatening, hostile acts, acts which threaten the lives of persons the occupying power is under an obligation to protect, and (4) where other measures would be insufficient to address this threat.<sup>126</sup>

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HRW evidently failed to attend this meeting, or to take notice of its conclusions.

The disparity between HRW’s treatment of Western TKs and its treatment of IDF TKs is also evident with respect to the third part of its test. HRW sweepingly implies that in nearly all IDF TKs an arrest option was available.<sup>127</sup> However, as detailed above, at least 40 percent of the 88 TKs carried out during the relevant period were carried out in Area A, in which the IDF lacked “effective control.” At the same time, many Western TKs were carried out in areas and circumstances in which an arrest option was available. For example, as reported on CBS’ “Sixty Minutes,” a TK was carried out on March 4, 2007 in a village in the hills above Kapisa Province in Afghanistan. The target was a Taliban militant whose house was believed to be a Taliban hiding place. According to a relative of the wanted man, U.S. forces had searched the house the day before. A source in the Air Force confirmed that U.S. troops searched the house the day before.<sup>128</sup> In this case, American forces could have arrested the Taliban militant, instead of resorting to a TK, in which nine civilians from the same family were killed. HRW has never spoken out against this incident.

Of even greater concern, the declared position of the U.S. government was that it did not consider itself bound by this part of the test. No Western government challenged that position. Again, these facts did not raise concerns for HRW.

## C. HRW and International Humanitarian Law: The Principles of Distinction and Proportionality

In HRW's 2004 *World Report*, Roth emphasized that even if a TK satisfies the three-part test, it may nonetheless fall foul of IHL. "Even if these attacks [Israeli TKs] might otherwise have been justified, some would violate the international prohibition on attacks that are indiscriminate or cause disproportionate harm to civilians."<sup>129</sup> Roth left this claim unsubstantiated. Doing so expressly violates CONGO's basic Code of Conduct, which, among other requirements, stipulates that "generalizations and blanket condemnations (or exonerations) should be avoided as well as sweeping moral judgments which neglect the complexity of issues related to peace and justice."<sup>130</sup>

Not only is Roth's statement a *prima facie* violation of this provision of the Code of Conduct, but, had Roth actually analyzed Israeli TKs case by case (as is done in Appendix A *infra*), he would have discovered that the vast majority of Israeli TKs do not violate IHL. In fact, it is the Western TKs, to which HRW pays scant attention, that appear to violate the relevant norms of IHL.

By means of two basic principles, the principles of distinction and proportionality, IHL regulates the use of force once military action is under way.<sup>131</sup>

The principle of distinction (also known as the principle of discrimination) requires belligerents to distinguish between combatants and civilians and requires combatants to aim all their attacks at legitimate targets – enemy combatants or objects that contribute to enemy military actions.<sup>132</sup> The rule includes elements of intent and expected result: so long as one aims at legitimate targets, the rule of distinction permits attack, even if the attack is expected to cause collateral damage (injury or death of civilians) and, even if, in retrospect, the attack was mistakenly based on faulty intelligence.<sup>133</sup>

The principle of proportionality operates in conjunction with the principle of distinction to limit collateral damage. The principle of proportionality forbids collateral damage that is expected to be excessive in relation to the military objective.<sup>134</sup> As with distinction, the principle of proportionality relies upon intent.<sup>135</sup> Thus, if the IDF plans a strike without expected excessive collateral damage, the principle of proportionality justifies it, even if, in retrospect, the IDF erred in its damage estimates.

### 1. The Principle of Distinction: The Strange Case of the One-Ton Bomb and the Use of Drones

HRW, and Roth, appear to have misunderstood the concept of distinction. One of the means of distinguishing between civilians and combatants is through the employment of more or less discriminate weaponry. This consideration goes to the expected damage of an attack. If expected damage is clearly excessive then it will outweigh the expected



armed advantage. Once again, however, the issue is one of weighing; and more often than not, no *a priori* conclusions can be reached with respect to the kind of weapon employed in an attack.

However, HRW did just this in a section of its *2003 World Report* devoted to Israel's TK of Salah Shehadeh in July 2002. "Israeli political and military authorities had approved...the dropping of a one-ton bomb in a crowded civilian residential area, in violation of Israel's obligation under international humanitarian law to minimize civilian casualties."<sup>136</sup>

By implying that the use of a one-ton bomb in a residential area is *per se* illegal, HRW introduced a novel and legally groundless "prohibition." There is no reference made to the acceptable weight of a bomb in any known IHL text.

Indeed, as with any other weapon, the legality of using a one-ton bomb will depend on several parameters, including the anticipated military utility, the nature of the weapon, the density of the civilian population in the targeted area, and the avoidance of unnecessary suffering. Examining the parameters individually, the use of a quarter-ton bomb might be unlawful in one case, and in another, the use of two one-ton bombs or a two-ton bomb (as is often used by the U.S. Armed Forces<sup>137</sup>) might be acceptable and even required for the mission.<sup>138</sup>

This was clearly affirmed by U.S. Air Force Col. Gary Crowder, Deputy Director of the Combined Air Operations Center, which ran the air wars over Afghanistan and Iraq. In an interview with CBS, Crowder stated that reliance was placed on commanders on the ground to assess the proportionality of any TK. "[W]e rely on those commanders to make the assessment at the time of what the requirement is. He assesses proportionality. He assesses the validity of the military target." Asked what he meant by proportionality, Crowder explained, "[I]f we know that there is a sniper on a roof and the roof is in the middle of a mosque which is a protected site or in the middle of a very populated area, then dropping a 2,000 pound weapon on that would not be proportional to going after the sniper." The interviewer asked what if "two men with AK-47s run into a house. Do you bomb the house?" Crowder said, "In some circumstances, we will bomb the house."<sup>139</sup> Crowder added that, "it is entirely dependent upon the circumstances on the ground, and the ground commander's assessment of that particular situation."<sup>140</sup>

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In certain cases, the use of a one-ton bomb is not only legally appropriate, but practically required. Take, for instance, the IDF's failed TK of September 6, 2003, as reported in an article in the *Washington Post*. According to the article, the IDF had obtained intelligence on September 5, 2003, indicating that senior Hamas bomb-makers, strategists, and developers of Qassam rockets would meet the following day in a three-story, single-family home in Gaza belonging to Marwan Abu Ras. "It was the 'Who's Who' of Hamas," said then IDF Deputy Chief of the General Staff Gabi Ashkenazi; "People we'd been hunting for years."<sup>141</sup> Senior IDF officers debated the size of the bomb to be used; they knew that dropping a one-ton bomb would likely result in significant civilian casualties in the neighboring apartment building.

The next day, Israeli intelligence reported that the curtains of the house were closed on the third floor, leading the Israelis to believe that the meeting was taking place there. Wary of accusations of disproportionality, on the basis of this presumption, and with the intention of minimizing civilian casualties, the order was given to direct a quarter-ton bomb at the third floor. As it turned out, it was simply not big enough. The quarter-ton bomb destroyed only the third floor. Abu Ras's wife and four children, on the second floor, survived with minor injuries. And the Hamas leadership, which had been gathered on the ground floor, was barely scratched.<sup>142</sup>

HRW has never condemned TKs in which Western forces used one-ton bombs or bigger in "crowded residential areas." During Operation Iraqi Freedom, approximately fifty TKs were carried out by American forces, in the course of which many one-ton bombs and larger were dropped on "crowded residential areas," and hundreds of civilians were killed.<sup>143</sup> Although HRW did criticize the methods used in this campaign, HRW at no point referred to them as illegal under IHL.

Even more peculiar is HRW's June 2009 report entitled *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles*. While the report does not directly address the issue of TKs, it does severely criticize Israel's use of "one of the most precise weapons in its arsenal: missiles launched from an unmanned combat aerial vehicle... more commonly known as a drone."<sup>144</sup> As stated by HRW, "military experts around the world have extolled drone-launched missiles as weapons with pinpoint accuracy, which can minimize civilian casualties. Their use is rapidly expanding, for example by the United States in Afghanistan and Pakistan, in part because the use of drones places no friendly military personnel directly at risk."<sup>145</sup> Ironically, having recognized the pinpoint accuracy of drone-launched missiles, HRW then browbeats Israel for its use of drones during the fighting in Gaza:

...drones, much like sniper rifles, are only as good at sparing civilians as the care taken by the people who operate them. *The accuracy and concentrated blast radius of the missile can reduce civilian casualties, but in Gaza, Israel's targeting choices led to the loss of many civilian lives.*

The total number of Gazan civilians killed by drone-launched missiles remains unclear. Israeli and Palestinian human rights organizations – B'tselem, the Palestinian Centre for Human Rights, and the Al-Mezan Center for Human Rights – together reported 42 drone attacks that killed 87 civilians. Amnesty International told the media that it documented 48 civilian deaths from drones, and this does not represent the full number.

This report focuses on six Israeli drone strikes, which in total killed 29 civilians, eight of them children. It is based on interviews with victims and witnesses, investigations of the attack sites, IDF and media reports on the fighting, and in one case IDF video footage of the attack. *Human Rights Watch determined that in all of these attacks the Israeli military directed their strikes on individuals who were all found to be civilians.* In none of the cases did Human Rights Watch find evidence that Palestinian fighters

were present in the immediate area of the attack at the time. None of the targets were moving quickly or leaving the area, so the drone operators would have had time to determine whether they were observing civilians or combatants, and to hold fire if they were not able to tell the difference. *In the incidents investigated by Human Rights Watch, Israeli forces either failed to take all feasible precautions to verify that the targets were combatants, apparently setting an unacceptably low threshold for conducting attacks, or they failed to distinguish between combatants and civilians and to target only the former. As a result, these attacks violated international humanitarian law (the laws of war) (emphasis added).*<sup>146</sup> The report goes on to claim that “the technological capabilities of drones and drone-launched missiles make the violations even more egregious.”<sup>147</sup>

In fact, even if one were to accept the “facts” cited by HRW (although both this author and the IDF cast doubt on their credibility<sup>148</sup>), by examining even one of the incidents detailed by HRW, the claims prove unjustifiable. Take, for example, the drone attack on a flat-bed truck outside a metal shop in Gaza on December 29, 2008. The IDF stated that it had “struck a Hamas vehicle loaded with dozens of Grad type missiles.”<sup>149</sup> According to IDF assessments, “the missiles were being transferred by Hamas to a hiding location, fearing that the previous location was being targeted by the IDF, or were en route to missile launching sites.”<sup>150</sup> Following the incident, the IDF released video of the attack on YouTube (YouTube management later removed the video).<sup>151</sup> The video showed a group of men loading cylindrical objects onto the back of a truck.

An internal IDF investigation found that:

Its forces had not fired on Grad rockets: The truck was targeted after the accumulation of information which indicated convincingly that it was carrying rockets between a known Hamas rocket manufacturing facility to a known rocket launching site. The attack was carried out near a known Hamas rocket manufacturing site and after a launch. It was only later discovered that the truck was carrying oxygen tanks (similar in appearance to Grad missiles) and not rockets. The strike killed four Hamas operatives and four uninvolved civilians. It is important to note that the oxygen tanks being carried in the truck were likely to be used by Hamas for rocket manufacturing.<sup>152</sup>

Clearly something went wrong in this attack; but to assert that the attack constituted an egregious violation of the law of war, akin to killing prisoners, torturing civilians, and the like, is quite obviously erroneous.

In a familiar pattern, the drones used by the IDF have been used, and continue to be used, by other armies in Afghanistan, Pakistan, Bosnia, Serbia, Iraq, and Yemen; but have generally been employed with far less accuracy than by the IDF. It is estimated that at least 300 people have been killed in at least 30 drone strikes by Western forces since August 2008.<sup>153</sup> Indeed, “drones have become an important weapon against the Taliban in the remote mountainous borderlands of Afghanistan and Pakistan.”<sup>154</sup> According to

one source, drones have become so indispensable that missions in Iraq and Afghanistan have been cancelled when they are not available.<sup>155</sup>

But their use is far from perfect. “[T]he U.S. admitted to 26 civilian deaths in a series of drone attacks that took place in May [2009]. In those attacks Afghan officials put the death toll at 140, significantly higher than the U.S. claims.”<sup>156</sup> According to the article from which the aforementioned figures are cited, “sometimes drones and their remote operators make mistakes and kill innocent civilians. Two years ago, a Predator (a drone used by Western forces) fired a missile into a wedding party in Afghanistan killing at least 30 civilians, including children.”<sup>157</sup>

It is unclear why HRW has not released any report on these “mistakes.” Perhaps they are comforted by the high-level targets that drones have succeeded in eliminating – including Mohamed Atef, reputedly Al-Qaeda’s chief of military operations and several of the group’s most experienced explosives and biological-weapons specialists.<sup>158</sup>

## 2. The Principle of Proportionality: Collateral Damage

HRW and Roth have also misunderstood and/or misapplied the principle of proportionality.

In the controversial decision mentioned *supra*,<sup>159</sup> the Israeli Supreme Court held that IHL applies in the West Bank and the Gaza Strip (the areas where Israeli TKs are carried out).<sup>160</sup> Given this finding, the Court turned its attention to an analysis of the legality of TKs under IHL. In rendering its decision, the Court relied on the general principles of IHL and specifically on Article 51(3) of Additional Protocol I to the Geneva Conventions (“Additional Protocol I”). This states that “Civilians shall enjoy the protection afforded by this Section, *unless and for such time as they take a direct part in hostilities*” (emphasis added).<sup>161</sup> Based on Article 51(3), the Court formulated a set of procedural standards to be followed by the IDF when it employs TKs.<sup>162</sup> These standards are more onerous than those formulated by HRW in its three-part test. The Court further held that when following these standards, the Israeli army is also required to comply with applicable IHL, and specifically the principle of proportionality.<sup>163</sup>

As enunciated by the Supreme Court, this principle (as briefly discussed *supra*) stipulates that collateral damage during combat operations must be proportional to the military objective.<sup>164</sup> The test is a normative, values-based test. Thus, while the legality of extreme examples may be relatively easy to assess, it is far more complex to evaluate the status of the cases that fall in between the extremes. Each such case needs to be adjudicated on its own merits.

The concept is well explained by Professor Michael Walzer in his piece entitled *On Proportionality*:

Proportionality doesn’t mean “tit for tat,” as in the family feud. The Hatfields kill three McCoys, so the McCoys must kill three Hatfields. More than three, and they are breaking the rules of the feud, where proportionality means

symmetry. The use of the term is different with regard to war, because war isn't an act of retribution; it isn't a backward-looking activity, and the law of even-Steven doesn't apply....

Like it or not, war is always purposive in character; it has a goal, an end-in-view...Proportionality implies a measure, and the measure here is the value of the end-in-view. How many civilian deaths are "not disproportionate to" the value of defeating the Nazis? Answer that question, put that way, and you are likely to justify too much – and that is the way proportionality arguments have worked over most of their history.

The case is the same with arguments focused on particular acts of war. Consider the example of an American air raid on a German tank factory in World War Two that kills a number of civilians living nearby. The justification goes like this: The number of civilians killed is "not disproportionate to" the damage those tanks would do in days and months to come if they continued to roll off the assembly line. This is a good argument, and it does indeed justify some number of the unintended civilian deaths. But what number? How do you set an upper limit, given that there could be many tanks and much damage?

Because proportionality arguments are forward-looking, and because we don't have positive, but only speculative, knowledge about the future, we need to be very cautious in using this justification.<sup>165</sup>

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In order to be so cautious, Walzer lists several of the IHL considerations (some of which are discussed above) that any armed force should consider before taking action; and which any organization should examine before declaring that an action, which has resulted in collateral damage, is unlawful.<sup>166</sup>

Given the many factors that need to be considered in determining whether an action is proportionate, a case-by-case assessment of TKs is imperative. In light of this requirement, HRW's sweeping statement alleging that all Israeli TKs are disproportionate, as quoted from HRW's *2004 World Report*, is *prima facie* incorrect. Indeed, as Walzer states, it appears that HRW is "not making any kind of measured judgment, not even a speculative kind. 'Disproportionate' violence for them is simply violence they don't like, or it is violence committed by people they don't like."<sup>167</sup>

This conclusion is only strengthened when one notes that the actual collateral damage resulting from Israeli TKs is significantly less than that resulting from Western TKs. (Compare the numbers in the Israeli TK section in Appendix A with the numbers in the Western TK section located in Appendix B.) Roth's statement was made with reference to TKs that resulted in more than "little or no harm to others [civilians]."<sup>168</sup> While Roth's assertion regarding these Israeli TKs may appear reasonable to an uninformed reader, it has no legal basis. The assertion implies that TKs that cause more than "little" harm to civilians automatically violate the central prescripts of IHL – discrimination and proportionality. As we have seen, such a claim is legally unsound.

As briefly set out above, according to IHL, several factors must be examined before such serious allegations can be made. These include a consideration of the expected damage, and the expected military advantage; and a balancing of the two expectations such that the damage expected is not clearly excessive when weighed against the expected military gain.<sup>169</sup> As further detailed above, there is also an element of intent that is to be considered in assessing the proportionality of an attack.<sup>170</sup> If Israel plans a strike without expecting excessive collateral damage, the rule of proportionality justifies it, even if in retrospect Israel erred in its damage estimates. The details of every incident must be examined in order to conduct such an assessment. Clearly, in the light of IHL, the assertion by HRW is unfounded.

In addition to its lack of a legal basis, the statement regarding Israeli TKs which cause little or no harm to others is startling in light of HRW's silence when it comes to Western TKs which result in significantly greater collateral damage. During the relevant period (in which 88 Israeli TKs occurred), the four most deadly Israeli TKs each resulted in the deaths of upwards of five civilians (13, 8, 6 and 6 respectively).<sup>171</sup> Implicitly, given that these were the most deadly TKs during the relevant period, and given HRW's claim that "some" Israeli TKs violated IHL by causing disproportionate harm to civilians, a TK resulting in 6 or more civilian fatalities is, by HRW's lights, categorically disproportionate and hence unlawful.

Yet during the same period, dozens of Western TKs resulted in 6 or more civilian fatalities; many even resulted in double-figure collateral damage. According to Marc Garlasco, then the Pentagon analyst who was Chief of High-Value Targeting at the beginning of Operation Iraqi Freedom, "our number was 30. So, for example, Saddam Hussein. If you're gonna kill up to 29 people in a strike against Saddam Hussein, that's not a problem." Garlasco continued, "But once you hit that number 30, we actually had to go to either President Bush, or Secretary of Defense Rumsfeld."<sup>172</sup> Garlasco remarked that before the invasion of Iraq, he recommended 50 air strikes aimed at high-value targets – Iraqi officials. But he says none of the targets on the list were actually killed. Instead, he says, "a couple of hundred civilians at least" were killed.<sup>173</sup>

Indeed, even if the "the number" had been less, as was once reported by HRW itself,<sup>174</sup> it is unlikely that the U.S. would have been able to reduce the collateral damage resulting from TKs in Iraq. As in prior conflicts in which the U.S. was involved, American forces used unsound targeting methodology that relied upon intercepts of satellite phones and inadequate corroborating evidence.<sup>175</sup> The resulting geo-coordinates are only accurate to within a one-hundred-meter (328 foot) radius.<sup>176</sup> Therefore, the U.S. could not, according to HRW itself, determine the origin of a call (on which it based its targeting) to a degree of accuracy greater than a 31,400-square-meter area.<sup>177</sup> As a result, all of the fifty acknowledged attacks (those recommended by Marc Garlasco) targeting the Iraqi leadership failed;<sup>178</sup> and instead, as Garlasco admitted, the strikes killed hundreds of civilians.<sup>179</sup> Despite this extensive collateral damage, HRW issued no statements condemning the disproportionate nature of these Western TKs.

Of even greater concern than the extensive collateral damage resulting from certain Western TKs is the failure on the part of Western forces to improve their targeting methods. This is noted by HRW in its report *Off Target*:

The U.S. military's targeting methodology includes assessing the effectiveness of an attack after it is completed. Battle damage assessment (BDA) is considered necessary to evaluate the success or failure of an attack so that lessons learned can be applied and improvements made to future missions. BDA is carried out during a conflict as well as at the cessation of hostilities. Effective BDA can reduce the danger to civilians in war by allowing corrective actions to be taken.

*Although air strikes on Iraqi leadership repeatedly failed to hit their target and caused many civilian casualties, no decision was made during major combat operations to stop this practice. This was due at least in part to ineffective battle damage assessment. A senior CENTCOM official told Human Rights Watch that the BDA process is "broken." "The process cannot keep up with the pace of operations on the battlefield. The battlefield is moving and BDA can't keep up" (emphasis added).<sup>180</sup> This is the first and only time that this significant failing is even mentioned by HRW; let alone criticized.*

### **3. How Palestinians Add to the Death Toll: Perfidy and Civilian Shields**

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It is widely known that Palestinian terrorists conduct armed operations, and seek shelter from Israeli strikes from within built-up civilian areas. This was acknowledged in a report released by HRW on the fighting in Gaza.<sup>181</sup> HRW fell short of calling this a war crime, even though, as discussed immediately below, this practice increases civilian casualties, and in fact, very clearly constitutes a war crime. As Article 28 of the Fourth Geneva Convention makes clear, the presence of protected persons (civilians) "may not be used to render certain points or areas immune from military operations."<sup>182</sup> It is important to note that Israel is not legally required to refrain from attacking Palestinian combatants simply because they have chosen to hide behind civilians.

Additionally, Palestinian terrorists often dress as civilians when carrying out attacks. This does not render them immune from attack; it simply renders them lawful targets that are also violating IHL's injunctions against perfidy. Among other things, this forbids combatants to feign civilian status.<sup>183</sup> By dressing as, and pretending to be, civilians, Palestinian terrorists not only violate IHL, but also increase the likelihood that innocent Palestinian civilians will be accidentally killed. Thus the war crimes in such circumstances are perpetrated by Palestinian terrorists, not Israeli soldiers.

## **D. Interesting Facts about HRW's Senior Military Analyst: Marc Garlasco**

Before he resigned from HRW in February 2010, Marc Garlasco, the above-mentioned Senior Pentagon Analyst who authorized many of the Western TKs that were employed in Iraq during Operation Iraqi Freedom, was under the employ of HRW for six years as Senior Military Analyst.<sup>184</sup> Garlasco was one of the authors of the *Off Target* report, and was in the employ of HRW since at least December 11, 2003. Garlasco was also one of the authors of HRW's report *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles*.<sup>185</sup>

On the one hand, HRW is quick to criticize Israel's use of TKs; on the other, they employ a man who authorized many TKs in which one-ton bombs were used. As a result, significant numbers of civilians should have been expected to be killed and in fact, given the poor intelligence – many were killed.

in light of this experience, and in light of Garlasco's penchant for collecting Nazi memorabilia, the Author of this monograph finds it difficult to understand the trust that HRW placed in this most unlikely of human rights experts.<sup>186</sup>



### III. Amnesty International

#### A. Who Are They?

Amnesty International describes itself as a “worldwide movement of people who campaign for internationally recognized human rights for all.”<sup>187</sup> The group began campaigning for human rights in 1961, and today, it boasts of more than 2.2 million members, supporters and subscribers in over 150 countries and territories, in every region of the world.<sup>188</sup> Like HRW, AI has released various reports and statements regarding Israeli TKs. As with HRW, in these statements and reports AI fails to live up to its own principles, including those specifically established by AI's Statute, and those formulated by umbrella groups of which AI is a part.

On AI's website, the organization states:

Amnesty International, as a membership-based organization, *observes a formal system of accountability as set out in our Statute. We are also committed to meeting best practice standards in operational excellence, confidentiality, public reporting and transparency. We seek to comply fully, for example, with public standards for financial reporting and with the International Non-Governmental Organizations' (INGO) Accountability Charter.* However, it is work for and with individuals whose rights are at risk that lays at the heart of our mission and so it is to them that we owe our deepest accountability. Methodologies such as impact assessment and stakeholders analysis enable us to ensure Amnesty International is delivering real and positive change for those people for whom we work (emphasis added).<sup>189</sup>

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Article 1 of AI's Statute establishes AI's vision – “a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments.”<sup>190</sup> In pursuit of this vision, Article 1 stipulates that AI's mission “is to undertake research and action focused on preventing and ending grave abuses of these rights.”<sup>191</sup> In pursuing its vision, AI is required to adhere to a set of “core values” established by its Statute, and set out in Article 2 thereof. According to these values, AI “forms a global community of human rights defenders with the principles of international solidarity, effective action for the individual victim, global coverage, the universality and indivisibility of human rights, *impartiality and independence*, and democracy and mutual respect”<sup>192</sup> (emphasis added). Further, AI and its employees are expected in their work to comply with certain methods, established by Article 3 of the Statute:

Amnesty International addresses governments, intergovernmental organizations, armed political groups, companies and other non-state actors. Amnesty International *seeks to disclose human rights abuses accurately, quickly and persistently. It systematically and impartially researches the facts of individual cases and patterns of human rights abuses.* These findings are publicized, and members, supporters and staff mobilize public pressure on governments and others to stop the abuses (emphasis added).<sup>193</sup>

Yet this monograph suggests that when it comes to Israeli TKs, AI and its staff fail to follow even these simple values and methods.

Furthermore, AI also fails to adhere to the international standards applicable to NGOs which it has voluntarily adopted or chosen to abide by. For example, AI is a signatory to an NGO by the name of International Non-Governmental Organizations Commitment to Accountability (INGO). INGO is an umbrella group, whose membership is comprised of several international NGO's, one of which is AI. Its purpose is to "uphold our [the various NGO members'] legitimacy by responding to inter-generational considerations, public and scientific concerns, and through accountability for our work and achievements" (emphasis added).<sup>194</sup> NGO's who sign the INGO Charter, "seek to promote further the values of transparency and accountability,"<sup>195</sup> and commit themselves to certain principles listed in INGO's Charter, including, "responsible advocacy," "non-discrimination," "transparency," and "accuracy of information."<sup>196</sup> As this monograph will demonstrate, AI even fails to meet these minimal standards.

Like HRW, AI has enjoyed special consultative status with ECOSOC since 1964. Its areas of activity include Human Rights, International Law, International Security, and Peace and Security. Given this status, AI, like HRW, is bound by the rules relating to NGO's, as set out on the U.N. website, including, specifically, the need to have "appropriate mechanisms of accountability and democratic and transparent decision-making processes."<sup>197</sup> Once again, this monograph suggests that AI fails to satisfy this requirement.

## **B. AI's Reporting on TKs**

As with HRW, AI's treatment of TKs reveals flaws that are both legal and factual, resulting from serious methodological problems and from a utopian view of warfare. In addition, as with HRW, AI's work reveals marked discrepancies between its treatment of Western TKs and its analysis of Israeli TKs.

While at first glance, AI's reporting on TKs, and on Israeli TKs in particular, may appear to be directed purely at the protection of civilians, a closer examination reveals that AI in fact unjustifiably targets the Israeli TK policy. This is evident not only in the substance of AI's reporting, but in the very number of reports it has issued on the subject.

Since November 2000, AI has criticized Israeli TKs in every annual report that AI has released for Israel and the Occupied Territories. Each annual report includes not only brief mention of the allegedly "unlawful" Israeli TK policy, but also a specific section addressing the issue. These sections are always emotively titled – "Unlawful Killings" (AI's *Annual Report of 2002*<sup>198</sup>), "Killings by the Israeli Army" (AI's *Annual Reports of 2003*<sup>199</sup>, *2004*<sup>200</sup> and *2005*<sup>201</sup>), "Killings and Attacks by the Army" (AI's *Annual Report of 2006*<sup>202</sup>), "Killings of Palestinians" (AI's *Annual Reports of 2007*<sup>203</sup> and *2008*<sup>204</sup>) and "Killings of Unarmed Palestinian Civilians" (AI's *Annual Report of 2009*<sup>205</sup>).

Since November 2000, AI has also released a series of other reports and publications regarding the Israeli TK policy, including a February 2001 report entitled *Israel and the*

*Occupied Territories: State Assassinations and Other Unlawful Killings*;<sup>206</sup> a July 2003 report entitled *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*;<sup>207</sup> a 2004 press release issued after the TK of Sheik Yassin, the head of Hamas, entitled *Israel/ Occupied Territories: Amnesty International Strongly Condemns the Assassination [sic] of Sheikh Yassin*;<sup>208</sup> AI's 2004 Open Letter to President George W. Bush;<sup>209</sup> a December 2006 report entitled *Israel and the Occupied Territories, Road to Nowhere*;<sup>210</sup> and AI's December 2008 submission to the UN Universal Periodic Review regarding Israel and the Occupied Territories, which contained a section dedicated to "Unlawful Killings,"<sup>211</sup> among others. In total, the author has identified 14 AI documents denouncing the Israeli TK policy.

AI has released precisely the same number of reports regarding Western TKs. In other words, AI has released the same number of reports criticizing a single country's policy, as the number it has released concerning the same policy employed by several countries – the U.S. and its allies – in numerous theaters since 9/11 (including Iraq, Afghanistan, Somalia, Syria, Yemen and Pakistan). Although the Israeli TK policy and the Western TK policy have been implemented for approximately the same period of time, the Western TK policy is used far more frequently, in at least five countries, with a far greater incidence of collateral damage. In contrast, the Israeli TK policy is used only in the Gaza Strip and the West Bank with a very low rate of collateral damage. Therefore, the number of AI's critical reports targeting Israel appears unbalanced, verging on biased – a clear violation of the principles to which AI is supposedly committed.

AI's material is characterized, moreover, by inaccurate and disparate terminology. In every document released by AI which mentions Israeli TKs, Israeli TK policy was branded as categorically "unlawful"<sup>212</sup> and Israeli TKs were consistently referred to as "assassinations"<sup>213</sup> and/or "liquidations."<sup>214</sup> As discussed in detail in Part II, Section B, *supra*, killing militants during an armed conflict cannot, under the laws of war, be considered "assassination," or "liquidation," nor be "unlawful." Moreover, at the time that AI made these statements there was no consensus that Israeli TKs – or Western TKs, for that matter – were unlawful.

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In fact quite the opposite is true. During the early stages of the Israeli TK policy and the Western TK policy, legal controversy regarding TKs did exist; and certain experts even objected to both policies categorically. Yet there was no consensus rejection of TKs; and there was therefore no justification for AI's branding of IDF TKs as clearly unlawful. In fact, with time, near consensus was established that TKs, and in particular Israeli TKs, were legal. This consensus comprised not only a majority within the legal fraternity, but also the consensus of a series of expert meetings held under the auspices of the ICRC in Geneva between 2003 and 2008. As quoted in Part II above, at the 2005 meeting held in Geneva, when dealing specifically with TKs in Area A type situations, the experts concluded that:

Targeted Killings are not necessarily unlawful in occupied territory, (1) where they are carried out by the occupying power in an area where the occupying power does not exercise effective control such that the occupying power cannot reasonably effect an arrest of the individual, (2) where the occupying

power has sought to effect the transfer of the individual from whatever authority is in effective control of the area, assuming that there is such an authority, (3) where the individual has engaged in serious, life-threatening, hostile acts, acts which threaten the lives of persons the occupying power is under an obligation to protect, and (4) where other measures would be insufficient to address this threat.<sup>215</sup>

Given this, AI's repeated presentation of Israeli TKs as "unlawful"<sup>216</sup> and as "assassinations,"<sup>217</sup> and/or "liquidations"<sup>218</sup> was not merely unjustified, but in fact false.

Meanwhile, AI has never used this terminology, which in and of itself implies illegality and culpability, concerning Western TKs. AI has never clearly and irrevocably condemned Western TKs, choosing instead to neutrally refer to them as "air raids,"<sup>219</sup> "air strikes,"<sup>220</sup> and "missile strikes."<sup>221</sup> In fact, AI has rarely, if ever, expressed clear reservations regarding the Western TK policy – other than perhaps when referring to the TK in Yemen in 2002.<sup>222</sup>

Even more disturbing is AI's critique of the transparency of the Israeli TK policy. Israel's TK policy has been markedly transparent – characterized by stringent public debate and even, as detailed above, review by the Israeli Supreme Court. The Western TK policy, on the other hand, has been markedly opaque – blanketed in secrecy and not openly acknowledged or debated. Oddly, AI has criticized Israel for the very transparency of its TK policy, as in a February 2001 report entitled *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*:

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Most governments who have carried out extrajudicial executions deny it; the Israeli government, however, states that the liquidation of those alleged to be a threat to Israelis is government policy and is legal.<sup>223</sup>

In the same report, AI further stated:

Israel has for years carried out a policy of carrying out assassinations of political opponents. *Because extrajudicial killings are universally condemned most governments surround such political assassinations in secrecy and deny carrying out the killings they may have ordered. However, although the Israeli government does not use the term "extrajudicial execution," it does not deny that such deliberate killings are carried out under its orders (emphasis added).*<sup>224</sup>

AI's statements, in addition to being peppered with inaccuracies (such as the claim, addressed *infra*, that Israeli TKs are directed against Israel's political opponents), reveal that AI was aware of TKs carried out by nation states other than Israel as early as February 2001 (some time before 9/11) and highlight AI's disturbing critique of the transparency of the Israeli TK policy. Thus an organization which in its very mission statement commits itself to the principle of transparency criticizes the transparency of the Israeli TK policy. One might have expected AI to applaud this transparency, rather than use it as another basis on which to lambaste Israel.

## C. AI and International Humanitarian Law: The Principles of Distinction and Proportionality

AI's biased approach to Israeli TKs does not end here.

As discussed in Part II, because TKs can offer the most effective means of fighting and winning an asymmetric conflict when the option of an arrest is not available, while at the same time minimizing civilian casualties, TKs can well be legal under IHL. The study found that TKs should be authorized only when high-quality intelligence is available such that only legitimate targets are attacked, and one is able to minimize – if not rule out entirely – targeting error. High-quality intelligence should also be used in order to pinpoint the targeted area and to enable the use of minimal firepower (for example, if available, one should use bullets rather than bombs). In the absence of such intelligence, or if a TK would cause extensive civilian casualties not justified by the military advantage it promised, or should an arrest option become available, then the TK should be aborted.

Analyzing the Israeli TK policy against these standards revealed that although several Israeli TKs raised some concern, and a few even raised significant misgivings, the overwhelming majority of Israeli TKs (over 95 percent of those listed by B'tselem)<sup>225</sup> were in strict compliance with IHL and its core principles.

In virtually all of the Israeli TKs, the IDF correctly identified the targeted individual (based on his involvement in the armed conflict or his membership in an armed group involved in the conflict) and had accurate information as to his location.<sup>226</sup> Indeed, a serious dispute over the identity of a targeted individual, and whether that individual was in fact involved in the armed conflict, arose with respect to only one Israeli TK.<sup>227</sup> The IDF's high-quality intelligence translated into a TK policy that prevented erroneous or failed TKs.<sup>228</sup> Moreover, the precision as to the targeted individual's location, and the restrained nature of the policy (reflected in the weaponry used, the development of limited impact missiles and the frequent choice to use bombs with lower payloads) contributed to an exceptionally low number of civilian fatalities – a ratio of almost two militants to every civilian fatality.<sup>229</sup> In more than 80 percent of TKs there were no civilian fatalities. In five attacks there were more than four civilian fatalities per attack; and double-figured collateral damage occurred in only one incident.<sup>230</sup> Finally, Israeli authorities consistently chose the option of arrest over TK when arrest was regarded as a feasible, realistic alternative.<sup>231</sup> These figures are particularly significant considering that the vast majority of IDF TKs were carried out in densely populated residential areas, where Palestinian militants more often than not seek shelter.

An analysis of Western TK policy reveals a starkly different picture. While Western TKs are used in countries with significant open, largely empty spaces, where civilian collateral damage could easily be minimized, Western TK policy was characterized by a large number of both erroneous and failed TKs.<sup>232</sup> In addition, many Western TKs were anything but "pinpointed," as evidenced by the very high number of civilian casualties – a significant number of TKs with double-figure collateral damage.<sup>233</sup> In the approximately 160 Western TKs the author has been able to identify from the previous decade, only several dozen of the militants targeted were in fact killed, while at least one thousand

civilian fatalities resulted. This is a ratio of at least ten civilians killed per targeted militant killed.<sup>234</sup> Western TKs that were never reported or acknowledged, and which were therefore unable to be included in this database, likely resulted in lesser civilian collateral damage. (Presumably, significant collateral damage would put a Western TK on the radar of the international media.) But it is unlikely that this study's main conclusions would be significantly altered as a result of their inclusion.

In over eighteen months of research, the author was struck by the disparity between the results of this monograph and the manner in which AI dealt with the issue of TKs. First, AI has consistently rejected the legal stance adopted by Israel justifying the use of TKs; namely, that Israel finds itself in a non-international armed conflict against non-state parties, much like the conflict in Afghanistan between the U.S. and Al-Qaeda. This is not merely rhetoric. Whether Israel finds itself in an armed conflict determines whether war rules, as against mere law enforcement rules, apply to its fight against Palestinian combatants. In a report addressing the question of whether Bush's "war on terror" was mere rhetoric, or real armed conflict, HRW's Kenneth Roth, who accepts the fact that Israel finds itself in an armed conflict, stated:

Where should we draw the line between war and law enforcement in the fight against terrorism? When is it appropriate to track down and kill terrorist suspects or detain them summarily, and when must they be brought before the criminal justice system? Three American actions over the last year prompt those questions: the killing of an Al-Qaeda suspect in Yemen, the detention without charge or trial of an alleged enemy combatant in Chicago, and the flouting of a judicial order against removing terrorist suspects from Bosnia.

The questions arise because the geographic scope of the campaign against terrorism is potentially so expansive. Traditional armed conflict occurs on a reasonably circumscribed battlefield. But US President George Bush has said that the "war" against terrorism might extend to some sixty countries. Are terrorist suspects in all of these enemy combatants?

*The designation matters because it affects the tools that can be used to counter terrorism. If a person is a criminal suspect, he can be arrested and prosecuted. International human rights law permits the use of lethal force against a criminal suspect only if necessary to stop an imminent threat of death or serious bodily injury. But if a person is an enemy combatant, the law of war permits him to be killed summarily, so long as he is not in custody, incapacitated, or surrendering. There is no duty to attempt to arrest or subdue him. If an enemy combatant is detained, the law of war permits him to be held until the end of the armed conflict, without the need to charge or try him (emphasis added).*<sup>235</sup>

Inexplicably, AI has consistently rejected the position that Israel finds itself in an armed conflict. Take, for example, its 2001 report *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*:

Amnesty International rejects the argument used by the Israeli Government and the IDF that the government has a right to order the deliberate killing of those it believes have planned or may be planning the death of Israelis... *Amnesty International rejects Israel's suggestion that the present intifada constitutes an armed conflict...* (emphasis added).<sup>236</sup>

AI has adhered to this erroneous view ever since, though it is unclear why it has persisted in espousing it after years of accumulating evidence to the contrary. The fact that Israel found itself in an armed conflict was a fact that was accepted by both the general legal fraternity, and a large number of other international NGOs, including HRW.<sup>237</sup>

After all, AI itself documented Palestinian armed group's attacks against Israeli citizens throughout the years. Thus for example, in its 2002 *Annual Report for Israel and the Occupied Territories*, in a section dedicated to Palestinian attacks against Israelis, AI stated:

*A total of 187 Israelis, including 154 civilians, were deliberately killed by Palestinian armed groups. At least 36 of those killed were children. The main armed groups involved in attacks were Fatah, the dominant political force in the PA, Hamas, Islamic Jihad and the PFLP. Others were killed by new groups whose organization and affiliation remained vague. Hamas and Islamic Jihad frequently carried out attacks in crowded places, apparently to target the maximum number of Israeli civilians (emphasis added).*<sup>238</sup>

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Similarly, in its 2003 *Annual Report for Israel and the Occupied Territories*, in a section called "Killings by Palestinian Armed Groups," AI stated that:

Palestinian armed groups killed at least 265 Israeli civilians, including 47 children, and some 20 foreign nationals. Of these, some 180 were killed in suicide bombings, often in crowded areas such as cafés, and in other attacks inside Israel. More than 80 were killed in shootings and other attacks in the Occupied Territories. Also killed were over 150 soldiers, more than 100 of them in the Occupied Territories and 47 inside Israel.<sup>239</sup>

Again, in its 2004 *Annual Report for Israel and the Occupied Territories*, in a section headed "Killings and Other Attacks by Palestinian Armed Groups," AI stated that:

At least 130 Israeli civilians, including 21 children, were killed by Palestinian armed groups. Almost half of the victims were killed in suicide bombings and the others were killed in shooting attacks. Some 70 Israeli soldiers were also killed in similar attacks by Palestinian armed groups. Most of the Israeli civilians were killed inside Israel whereas most of the soldiers were killed in the Occupied Territories.<sup>240</sup>

The pattern continues in AI's later annual reports.<sup>241</sup>

Unfortunately for AI, if one were to rely solely on the information AI itself has published and analyze it under the test developed by the ICRC to assist in determining whether hostilities amount to an armed conflict, one would arrive at the conclusion reached by legal experts and NGOs: that Israel did indeed find itself in an armed conflict. The ICRC, in its commentary on the Geneva Conventions, has listed several considerations to distinguish between situations of armed conflict, where IHL would apply, and normal hostilities, where law enforcement rules would apply.

One test that the ICRC suggests can help determine whether wartime or peacetime rules apply is to examine the intensity of hostilities in a given situation....

In addition to the intensity of hostilities, the ICRC suggests considering factors such as the regularity of armed clashes and the degree to which opposing forces are organized. Whether a conflict is politically motivated also seems to play an unacknowledged role in deciding whether it is a “war” or not. Thus organized crime or drug trafficking, although methodical and bloody, are generally understood to fall under law-enforcement rules, whereas armed rebellions, once sufficiently organized and violent, are usually seen as “wars.”<sup>242</sup>

Applying this test to the facts and figures cited by AI, and quoted above, strongly suggests that Israel finds itself in an armed conflict with the Palestinians. AI nevertheless heedlessly continues to deny that Israel found itself in an armed conflict.

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AI also repeatedly insisted that Palestinians involved in the armed conflict were civilians who should be afforded the protection guaranteed to civilians during a time of armed conflict, unless and for such time as they take a direct part in hostilities. For example, in its 2003 report *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, AI stated:

Palestinians who directly participate in hostilities – by carrying out attacks against Israeli soldiers or civilians – lose their protected status for the duration of the attack. Article 51 (3) of Protocol I Additional to the Geneva Conventions of 12 August 1949 explains how civilian status can be temporarily lost: “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take direct part in hostilities.”<sup>243</sup> Palestinians engaged in armed attacks against civilians or in clashes with Israeli forces are not combatants. They are civilians who lose their protected status for the duration of the armed engagement. They cannot be killed at any time other than while they are posing an imminent threat to lives. Proof or suspicion that a person participated in an armed attack at an earlier point does not justify, under international law, targeting them for death later on. Those who are not posing an imminent threat to lives may not be assassinated as punishment or as a preventive measure.<sup>244</sup>



Yet it is legally incorrect to claim that members of terrorist groups are to be considered civilians liable to be targeted only for so long as they take a direct part in hostilities. In a regular armed conflict between states, IHL requires that a clear distinction be drawn between combatants and civilians, so as to ensure the protection of the civilian population.<sup>245</sup> In a non-international armed conflict, it is often if not always difficult to draw this line; as the non-state parties involved in the conflict, made up of terrorist groups and their members, simultaneously wear two caps: that of a civilian and that of a soldier.<sup>246</sup> However, a person who engages in military raids by cover of night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant.<sup>247</sup> He is an unlawful combatant who can be lawfully targeted by the enemy but cannot claim the privileges pertaining to lawful combatants.<sup>248</sup> On this basis, Israeli TKs which target unlawful combatants are legal under IHL.

The very question of unlawful combatancy was the subject of review by the ICRC in its expert meetings from 2003-2008 (mentioned several times above). During this period the ICRC convened several meetings of experts on the matter, and after much debate finally decided against the position of AI:

For the purposes of the principle of distinction in non-international armed conflict [conflict between a state and non-state actors, as is the case between Israel and Palestinian terror groups] all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians.... In non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities.<sup>249</sup>

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AI was therefore unjustified in presenting its position as a conclusive legal stance when the matter was under review by the ICRC and leading legal and military experts.

Then there is AI's insistence that those Palestinian militants (civilians according to AI) involved in the conflict must pose an imminent danger to Israel or her citizens before they can be justifiably targeted. This insistence appears to be based on one of two factors: the first is the law of occupation, under which Israel could only employ force in the West Bank and Gaza Strip either to restore and maintain public order, or to provide for its own security or that of Israeli citizens.<sup>250</sup> With respect to the latter, the threat posed to the security of Israel or its citizens would generally be required to be imminent – as insisted upon by AI.

The second way in which this position can be explained is if AI insisted that those individuals targeted were civilians, who should be subject to ordinary law enforcement measures, rather than TKs. On this basis, resort to lethal force could only be used if, during an attempted arrest, the individual posed an imminent danger.

Accordingly, in its 2001 report *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI wrote:

Amnesty International rejects the argument used by the Israeli Government and the IDF that the government has a right to order the deliberate killing of those it believes have planned or may be planning the death of Israelis. *International standards make it clear that such killings are not justified if lives are not in imminent danger....*

In this report *Amnesty International is calling on the Israeli government to repeal its policy of targeting for liquidation and not to use lethal force except against those posing an imminent danger to life.* In order to ensure respect for human life, each individual killing should be fully investigated....

*In fact the Israeli army has not offered evidence that the Palestinians whom it has assassinated were about to, or on their way to, carry out attacks.* Those who have been assassinated were in areas of the Occupied Territories removed from potential Israeli targets (such as settlements, settlers' roads or army positions) (emphasis added).<sup>251</sup>

Similarly, in its 2003 report *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, AI stated:

This document clarifies that the Israeli authorities' justifications for the policy of assassinations are neither born out by the facts nor supported by international law. Amnesty International considers that respect for the rule of law and the protection of the right to life require that the policy of assassinating those who do not pose an imminent threat to lives be ruled unlawful and be stopped....

*Amnesty International believes that Israel's claims that it only resorts to assassinations in response to an immediate security threat which cannot be otherwise dealt with, are not credible and that such practices cannot be justified* (emphasis added).<sup>252</sup>

AI appears to err regarding the legal theory on which its demand (that Israel not resort to TKs unless the targeted individuals pose an imminent danger) was based. To reiterate, this issue was specifically discussed at length at one of the meetings of legal and military experts held under the auspices of the ICRC. At the expert meeting, when discussing TKs in Area A, the experts agreed that the demand for an imminent threat in order to justify a TK was nonsensical in the situation in which Israel found itself, and should be dispensed with.<sup>253</sup> As stated in a summary of the meeting:

Most of the experts concluded that, while constrained by the principle of necessity, the use of potentially lethal force need not always be in response to an imminent threat. A targeted killing, a number of experts observed, could be described as a use of force in order "to prevent the perpetration of a particularly serious crime."<sup>254</sup>

So as this very issue was being debated by legal and military experts at conferences held under the auspices of the ICRC, part of years of in-depth analysis by the ICRC of the concept of “direct participation in armed conflict,” AI presented a categorical approach to the issue and failed to correct this approach when the final conclusions of the ICRC work were released.

The problems with AI’s work do not end here. AI has constantly questioned, both implicitly and explicitly, Israel’s choice of targeted individuals. AI questions the involvement of the targeted individuals in the armed conflict with Israel, often describing them as “those *alleged* to have carried out, or to have planned to carry out, violent attacks against Israel”<sup>255</sup> (emphasis added) and sometimes going so far as labeling them as mere “political opponents.”<sup>256</sup> AI also suggests that Israel has no basis of proof on which to target these individuals and that in cases where Israel does have proof of the targeted individual’s involvement in the armed conflict or membership in an armed group, it nonetheless fails to provide proof of guilt in the aftermath of any Israeli TK.<sup>257</sup>

However, as mentioned above, in well over 95 percent of Israeli TKs there was never any dispute over the identity of the targeted militant or their involvement in hostilities.<sup>258</sup> In fact, a dispute only arose with respect to less than 2 percent of Israeli TKs.<sup>259</sup> Moreover, in the rare instance where a dispute arose, it concerned the exact military role of the individual targeted, rather than their membership in an armed group, or involvement in hostilities.<sup>260</sup>

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Similarly, following virtually every Israeli TK, the Israeli army, or Israeli government, released detailed statements as to the membership of the targeted individual in an armed Palestinian group, or the targeted individual’s involvement in hostilities.<sup>261</sup> More often than not, the statements released included lists of the specific terror attacks in which the targeted individual had been involved.<sup>262</sup>

Unlike Israel’s policy, the Western policy of TK is deliberately opaque and routinely characterized by official silence. If statements are released at all, they provide minimal information, which often does not even include the name of the targeted individual. While such a policy might be justifiable, it is certainly not characterized by offers of proof of guilt. Yet AI expressed no similar reservations to those expressed with respect to Israeli TKs; nor did it impugn the legitimacy of the Western TKs by describing those targeted as “alleged” or “suspected” militants.

AI questions not only Israel’s choice of targets, but also the very utilization of TKs. AI has long rejected the claim that Israel is more often than not unable to arrest individuals in Area A, and has consistently continued to claim that individuals targeted by Israeli officials are killed in circumstances where they “might easily have been arrested.”<sup>263</sup> AI insists that “the whole area (the West Bank and the Gaza Strip) remains under Israeli occupation” and that Israel “retains effective control” of these areas and therefore has the authority and ability to arrest Palestinians at will.<sup>264</sup> Even where AI implicitly acknowledges that Israel may be unable to enter Area A, where the majority of Israeli TKs occur, it nonetheless insists that “as the islands of Palestinian control in Area A are

not large, those whom Israel seeks to arrest are likely to pass an Israeli checkpoint by travelling into Areas B or C; otherwise they live effectively under town arrest.”<sup>265</sup>

AI's claim is erroneous in several respects. First, as indicated in Appendix A, the vast majority of TKs occurred in areas where the PA enjoyed substantial security and civilian control (Area A). Thus, as discussed in detail in Part II, in these areas the IDF was unable to operate freely or to exercise effective control. In addition, as detailed in Part II the Israeli government prevented the IDF from operating in Area A. Even when this prohibition was gradually relaxed following Operation Defensive Shield, practical circumstances (including extensive international pressure) as well as military conditions on the ground impeded ground operations.<sup>266</sup> It is therefore incorrect to assert that the IDF could operate to arrest militants with few impediments; in fact, quite the opposite is true.

Further, even as AI sharply criticized Israeli TKs for the alleged failure to employ available law enforcement means, the organization consistently ignored instances of Western TKs where an arrest option was clearly available.<sup>267</sup>

Finally, throughout its reports, AI has criticized Israeli TKs as “disproportionate,”<sup>268</sup> characterized both by “an attitude of complete disregard for civilians lives”<sup>269</sup> and by a “reckless use of force,”<sup>270</sup> and as resulting in the “unlawful killing of scores and injury of hundreds of bystanders, including children.”<sup>271</sup> In fact, as discussed above, the Israeli TK policy is marked by an exceptionally low number of civilian fatalities.<sup>272</sup>

There are only two ways to explain AI's statements. The first is a utopian view of warfare – a naïve, unrealistic expectation that war could be conducted in such a way that no harm is ever caused to civilians. This attitude pervades many of AI's statements, in particular the sweeping denunciations of virtually any collateral damage caused by Israeli TKs as reckless and disproportionate. Yet IHL recognizes that when fighting occurs in residential areas, as is the case in asymmetric warfare, civilian collateral damage is certain to occur. In order to reach a determination that such damage is in fact reckless or disproportionate, one must carefully consider various factors (discussed in detail in Part II). It appears that AI failed to do so; and instead, expecting a sterile war, criticized all civilian collateral damage, and not just that which actually raised questions under IHL.

The second alternative is to adopt the position of Walzer, in his piece “On Proportionality.” As quoted above, of the commentators and critics who today so freely use the term “disproportionate” to describe almost any military action with civilian casualties, Walzer says: “disproportionate violence for them is simply violence they don't like, or it is violence committed by people they don't like.”<sup>273</sup> Walzer's argument rings even truer in light of the fact that AI's criticism concerning Israeli TKs is not directed against Western TKs, where civilian fatalities often exceed ten per TK.<sup>274</sup> This disparity offers compelling evidence of a significant double standard at work in the approach of AI, much like in the work of HRW.

## IV. Conclusion

When taken cumulatively, the defects analyzed within this monograph appear more anomalous than each taken alone. On the one hand, there is a TK policy which has been conducted in almost full compliance with HRW's stated test, executed with remarkable transparency, and put under intense local and international public scrutiny (including judicial review). Most remarkably, the policy has achieved unprecedented levels of intelligence accuracy. This TK policy was implemented with precision targeting and virtually no mistakes as regards the location of the terrorist and with less than one civilian fatality average per TK.<sup>275</sup> Yet this has not prevented Kenneth Roth, HRW, and AI from implicitly and explicitly denouncing Israeli TK policy as unlawful.

On the other hand, there is a TK policy which in many cases did not comply with HRW's stated test. This second TK policy was conducted behind the cloak of systemic and deliberate opacity, with virtually no public scrutiny. Due to faulty or compromised intelligence, this policy resulted in many incidents which ought to have raised red flags regarding the core principles of distinction and proportionality. These shortcomings resulted in a large number of TKs where the target was not in fact at the targeted location, and a ratio of more than ten civilian fatalities per TK.<sup>276</sup>

This Western TK policy was not subjected to any legal criticism by Roth or HRW, which issued no statements raising concern regarding the hundreds of civilian casualties. Moreover, HRW's Senior Military Analyst Marc Garlasco repeatedly praised the U.S. Army's efforts to minimize civilian casualties. For example, Garlasco has stated, "I don't think people really appreciate the gymnastics that the U.S. military goes through in order to make sure that they're not killing civilians."<sup>277</sup> In a report examining the conduct of U.S. forces during Operation Iraqi Freedom entitled *Off Target*, HRW stated that, "U.S.-led Coalition forces took precautions to spare civilians and, for the most part, made efforts to uphold their legal obligations."<sup>278</sup> Given the many failings that *Off Target* itself identified in the American TK policy, it is unclear how HRW reached this conclusion.

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AI fares somewhat better in this regard than HRW, in that it did release some reports critical of the Western TK policy. Yet neither the character nor the frequency of critique was in any way comparable to that leveled by AI against the Israeli TK policy. Despite AI's and HRW's harsh criticisms of Israel's TK policy, British Col. Richard Kemp, former commander of British forces in Afghanistan, said that the IDF in Gaza "did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare."<sup>279</sup> Among those civilians were persons whose lives were saved due to the IDF's restraint in using TKs.

It is difficult, then, to contemplate a stronger case for a thorough and independent revision of both HRW's and AI's methodologies, to be followed by a public retraction of relevant statements and reports by Roth, HRW and AI. Moreover, given Marc Garlasco's central responsibility for TKs that resulted in hundreds of civilian deaths during the Operation Iraqi Freedom, a drastic revision in HRW's hiring and promotion policies is urgently called for.

On October 26, 2009, the Jerusalem Center for Public Affairs submitted a letter (attached as Appendix D) to HRW, addressed to Roth, detailing the findings of this monograph, and requesting a response to these findings from HRW. On October 26, 2009, a similar letter was submitted to Dr. Irene Kahn, Secretary General of AI.<sup>280</sup> As of March 2012, neither has replied. So much for the self-proclaimed “protectors” and “defenders” of universal human rights.

Unfortunately, HRW and AI's longstanding preoccupation with perceived Israeli “wrongdoing” has resulted in another highly biased rendition, this time of a key issue with which armies, governments and human rights NGOs will likely have to contend in years to come.

## Appendices

The several appendices summarizing the extensive research and its findings are not included in the print version of this study, but are available on the website of the Jerusalem Center for Public Affairs, [www.jcpa.org](http://www.jcpa.org).

Appendix A is concerned with IDF TKs and contains a table setting out all available facts regarding each IDF TK identified by the human rights organization B'tselem from November 2000 until May 2008. Although the author has relied upon the B'tselem figures, several of the incidents which B'tselem lists as TKs are disputed by both the author and the IDF. Those disputed TKs are discussed in Appendix C.

The table included in Appendix A incorporates not only basic information reported on the B'tselem website, and the location of the TK, but also more detailed and extensive information regarding statements released by the IDF with respect to each TK. Appendix A also contains a table reflecting the frequency (in percentage terms) of the release of statements by Israel following Israeli TKs and the percentage of Palestinian responses thereto – both those confirming the Israeli statements, and those disputing them (corresponding to part two of HRW's test – *infra*). Appendix A further offers a table indicating the percentage of IDF TKs located in the territory known as Area A, and the consequent availability of law enforcement means (corresponding to part three of HRW's test – see below). Another table sets out the number of civilian casualties resulting from each IDF TK, and the ratio of civilian casualties per militant killed. Other tables reflect the accuracy of IDF TKs – both in terms of information received regarding the targeted individual's location ("Information Accuracy"), and whether the TK struck the intended target ("Precision Targeting").

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Appendix B highlights the startling differences in Information Accuracy and Targeting Precision between IDF TKs and Western TKs, and underscores the disturbing double standard with which HRW treats IDF TKs and Western TKs. In order to reflect these distinctions, Appendix B has been divided in the same manner as Appendix A. Thus Appendix B contains a table setting out all relevant facts regarding Western TKs which the author has been able to identify.

## Notes

- 1 Justus Reid Weiner is an international human rights lawyer and a member of the Israel and New York Bar Associations. He received his Juris Doctor degree from the School of Law (Boalt Hall), University of California, Berkeley. Weiner's professional publications have appeared in prominent law journals, monographs, and intellectual magazines. He is currently a Scholar in Residence at the Jerusalem Center for Public Affairs and an adjunct lecturer at The Hebrew University of Jerusalem. Weiner was formerly a Visiting Assistant Professor at the School of Law, Boston University. He also practiced law as an associate in the international law firm White & Case and served as the Director of American Law and External Relations at the Israel Ministry of Justice specializing in human rights and other facets of public international law. This publication is also based on an early study conducted by Chaim Sonnenfeld. The author wishes to commend the people that helped him prepare this monograph for publication. He especially wishes to express his indebtedness to Ambassador Alan Baker and Steven Aiello for their earnest efforts in researching and editing the text. The author wishes to express his appreciation to attorneys Diane Morrison and Avi Sutton for their research assistance, and to acknowledge the valuable input of Jennifer Chemel, Eliza Cohen, Alon Elhanan, Elana Friedman, Sussi Hochman, Autumn Joy Landrum, Imogen Pickup, Jeffrey Smagley, Samuel Spencer, Dmitri Teresh, and Zoe Zetlin.
- 2 Nils Melzer, *Targeted Killing in International Law 468* (Vaughan Lowe. ed. *Oxford Monographs in International Law*, Oxford University Press) (2008).
- 3 Gen. Jim Jones, President Obama's National Security Adviser, stated that the U.S. believes that Mehsud was in fact killed in the TK – "we put it in the 90 percent [likelihood] category." *Official: Likelihood of Pakistani Taliban leader's death '90 percent,'* CNN International.com, available at <http://edition.cnn.com/2009/WORLD/asiapcf/08/09/us.pakistan.taliban/index.html>, last accessed on July 18, 2009.
- 4 Janullah Hashimzada, *14 Dead in Pakistan in Suspected Drone Strike*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/asiapcf/08/12/pakistan.drone.attack/index.html#cnnSTCText>, last accessed on July 18, 2009.
- 5 *Pakistan Taliban Leader's Wife Dies in Suspected Drone Attack*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/asiapcf/08/05/pakistan/drone/attack/index.html>, last accessed on July 18, 2009.
- 6 Janullah Hashimzada, *14 Dead in Pakistan in Suspected Drone Strike*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/asiapcf/08/12/pakistan.drone.attack/index.html#cnnSTCText>, last accessed on July 18, 2009.
- 7 Nils Melzer, *Targeted Killing in International Law 468* (Vaughan Lowe. ed. *Oxford Monographs in International Law*, Oxford University Press) (2008).
- 8 It has been alleged that an HRW delegation to Saudi Arabia highlighted HRW's demonization of Israel in order to raise funds from wealthy Saudis – "an HRW spokesperson, Sarah Leah Whitson, highlighted HRW's battles with "pro-Israel pressure groups in the US, the European Union and the United Nations." This was reported by David Bernstein in an op-ed piece in the Wall Street Journal; David Bernstein, Op-Ed, *Human Rights Watch Goes to Saudi Arabia Seeking Saudi Money to Counterbalance "Pro-Israel Pressure Groups,"* THE WALL STREET JOURNAL, July 15, 2009, available at <http://online.wsj.com/article/SB124528343805525561.html>. Kenneth Roth, Executive Director of HRW, when asked whether an HRW staff person attempted to raise funds in Saudi Arabia by advertising HRW's opposition to the pro-Israel lobby, replied: "That's certainly part of the story. We report on Israel. Its supporters fight back with lies and deception. It wasn't a pitch against the Israel lobby per se. Our standard spiel is to describe our work in the region. Telling the Israel story – part of that pitch – is in part telling about the lies and obfuscation that are inevitably thrown our way." This exchange was cited in Jeffrey Goldberg, *Fundraising Corruption at Human Rights Watch*, THE ATLANTIC, July 15, 2009, available at [http://jeffreygoldberg.theatlantic.com/archives/200907/fundraising\\_corruption\\_at\\_huma.php](http://jeffreygoldberg.theatlantic.com/archives/200907/fundraising_corruption_at_huma.php)
- 9 NGO Monitor, *Experts or Ideologues: A Systematic Analysis of HRW's Focus on Israel*, Sept. 8, 2009, available at <http://www.ngo-monitor.org/hrw.pdf>



- 10 Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, Feb. 2001, AI Index MDE 15/005/2001, available at <http://www.amnesty.org/en/library/asset/MDE15/005/2001/en/818d1e6d-dc4b-11dd-a4f4-6f07ed3e68c6/mdel150052001en.pdf>
- 11 For example, as will be discussed in detail below, AI consistently refers to Israeli TKs as “assassinations” or “liquidations,” while no such terminology is ever employed with respect to Western TKs.
- 12 HRW is asked to retract the following publications and statements:
1. Human Rights Watch World Report (Israel) 2002, available at <http://www.hrw.org/legacy/wr2k2/mena5.html>;
  2. Human Rights Watch, Human Rights Watch World Report 2003 - Israel, the Occupied West Bank and Gaza Strip, and Palestinian Authority Territories, 14 January 2003, available at: <http://www.unhcr.org/refworld/docid/3e2818338.html> [accessed 2 July 2009]
  3. The Human Rights Watch World Report 2004 – Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)
  4. Human Rights Watch, Human Rights Watch World Report 2006 (2006), available at <http://www.hrw.org/en/reports/2006/01/17/world-report-2006>
  5. Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone Launched Missiles*, June 2009, available at [http://www.hrw.org/sites/default/files/reports/ipt0609webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/ipt0609webwcover_0.pdf)
  6. Human Rights Watch, *Israel: Misuse of Drones Killed Civilians in Gaza*, June 30, 2009, available at <http://www.hrw.org/en/news/2009/06/30/israel-misuse-drones-killed-civilians-gaza>

AI is asked to retract the following publications and statements:

1. Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, Feb. 2001, AI Index MDE 15/005/2001, available at <http://www.amnesty.org/en/library/asset/MDE15/005/2001/en/818d1e6d-dc4b-11dd-a4f4-6f07ed3e68c6/mdel150052001en.pdf>;
2. Amnesty International, Amnesty International’s Annual Report for Israel/ Occupied Territories, 2002, available at <http://www.amnesty.org/en/library/asset/MDE15/001/2003/en/dom-MDE150012003en.html>;
3. Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, July 2003, AI Index MDE 15/056/2003 (Public), <http://www.amnesty.org/en/library/asset/MDE15/056/2003/en/0f527cb4-d6bd-11dd-ab95-a13b602c0642/mdel150562003en.pdf> ;
4. Amnesty International, Amnesty International’s Annual Report for Israel, 2003 available at <http://www.unhcr.org/refworld/category,COI,AMNESTY,ANNUALREPORT,ISR,3edb47d88,0.html>;
5. Amnesty International Press Release, *Israel/Occupied Territories: Amnesty International Strongly Condemns the Assassination of Sheik Yassin*, March 2004, AI Index MDE 15/029/2004 (Public), available at <http://www.amnesty.org/en/library/asset/MDE15/029/2004/en/236729d4-fab9-11dd-b6c4-73b1aa157d32/mdel150292004en.pdf>;
6. Amnesty International, Open Letter to President George W. Bush, April 29, 2004, AI Index: MDE 15/048/2004 (Public), available at <http://www.amnesty.org/en/library/asset/MDE15/048/2004/en/4354587-fab5-11dd-b6c4-73b1aa157d32/mdel150482004en.pdf>;
7. Amnesty International, Amnesty International’s Annual Report for Israel and the Occupied Territories, 2004, available at <http://unispal.un.org/UNISPAL.NSF/db942872b9eae454852560f6005a76fb/ddbcc0a854abdfb085256ea000685e967>
8. Amnesty International, Amnesty International’s Annual Report for Israel, 2005,

available at <http://www.amnesty.org/en/library/asset/POL10/001/2005/en/6287f77f-d53a-11dd-8a23-d58a49c0d652/pol100012005en.html>;

9. Amnesty International, *Israel and the Occupied Territories: Road to Nowhere*, Dec. 2006, AI Index MDE 15/093/2006, available at <http://www.amnesty.org/en/libraru/asset/MDE15/029/2008/en/55336155-59a1-11dd-bc96-55b5ceea4018/mdel150292008eng.pdf>;
10. Amnesty International, Amnesty International's Annual Report for Israel, 2006, available at <http://www.amnesty.org/en/library/asset/POL10/001/2006/en/59ad70c9-d46f-11dd-8743-d305bea2b2c7/pol100012006en.pdf>;
11. Amnesty International, Report 2007, The State of the World's Human Rights, Israel and the Occupied Territories, 2007, available at <http://archive.amnesty.org/report2007/eng/Regions/Middle-East-and-North-Africa/Israel-and-the-Occupied-Territories/default.htm>;
12. Amnesty International, Submission to the U.N. Universal Periodic Review, Third Session of the UPR Working Group of the Human Rights Council, Dec. 2008, AI Index MDE 15/029/2008, available at <http://www.amnesty.org/en/library/asset/MDE15/029/2008/en/55336155-59a1-11dd-bc96-55b5ceea4018/mdel150292008eng.pdf>;
- 13 Nils Melzer, Targeted Killing in International Law 468 (Vaughan Lowe. ed. Oxford Monographs in International Law, Oxford University Press) (2008).
- 14 Gen. Jim Jones, President Obama's National Security Adviser, stated that the U.S. believes that Mehsud was in fact killed in the TK – "we put it in the 90 percent [likelihood] category." *Official: Likelihood of Pakistani Taliban Leader's Death '90 percent,'* CNN International.com, available at <http://edition.cnn.com/2009/WORLD/asiapcf/08/09/us.pakistan.taliban/index.html>, last accesses on July 18, 2009.
- 15 Janullah Hashimzada, *14 Dead in Pakistan in Suspected Drone Strike*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/asiapcf/08/12/pakistan.drone.attack/index.html#cnnSTCText>, last accessed on July 18, 2009.
- 16 *Pakistan Taliban Leader's Wife Dies in Suspected Drone Attack*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/asiapcf/08/05/pakistan/drone/attack/index.html>, last accessed on July 18, 2009.
- 17 Janullah Hashimzada, *14 Dead in Pakistan in Suspected Drone Strike*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/asiapcf/08/12/pakistan.drone.attack/index.html#cnnSTCText>, last accessed on July 18, 2009.
- 18 Nils Melzer, Targeted Killing in International Law 468 (Vaughan Lowe. ed. Oxford Monographs in International Law, Oxford University Press) (2008).
- 19 Harold Hongju Koh, Legal Adviser, U.S. Department of State, Address in Washington D.C. to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010).
- 20 Kenneth Anderson, Targeted Killing in US Counterterrorism Strategy and Law, 8 (May 11, 2009) (The Brookings Institution and the Hoover Institution, unpublished working paper) available at <http://ssrn.com/abstract=1415070>
- 21 Robert Tomes, *Relearning Counterinsurgency Warfare*, Parameters (US Army War College), (Spring 2004). available at: [http://www.army.mil/prof\\_writing/volumes/volume2/march\\_2004/3\\_04\\_1.html](http://www.army.mil/prof_writing/volumes/volume2/march_2004/3_04_1.html).
- 22 Former U.S. Secretary of Defense Robert Gates has said that the next generation of fighter planes – the F-35 – will be the last manned aircraft; Nic Robertson, *How Robot Drones Revolutionized the Face of Warfare*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/americas/07/23/wus.warfare.remote.uav/index.html>, last accessed on July 18, 2009.
- 23 See Andrew Rosenthal, *Targeted Killing*, N.Y. Times, March 12, 2012; Pete Yost, See AG Holder to address targeted killing, AP, March 5, 2012.
- 24 Nic Robertson, *How Robot Drones Revolutionized the Face of Warfare*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/americas/07/23/wus.warfare.remote.uav/index.html>, last accessed on July 18, 2009.

25 Nic Robertson, *How Robot Drones Revolutionized the Face of Warfare*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/americas/07/23/wus.warfare.remote.uav/index.html>, last accessed on July 18, 2009.

26 Nic Robertson, *How Robot Drones Revolutionized the Face of Warfare*, CNN International.com, available at <http://edition.cnn.com/2009/WORLD/americas/07/23/wus.warfare.remote.uav/index.html>, last accessed on July 18, 2009.

27 The U.S. has expanded its list of individuals who may be targeted so as to include drug traffickers with ties to the Taliban. This was reported in the New York Times. James Risen, *U.S. to Hunt Down Afghan Drug Lords Tied to Taliban*, The New York Times, Aug. 10, 2009.

28 Mark Mazzetti, *C.I.A Sought Blackwater's Help to Kill Jihadists*, The New York Times, Aug. 20, 2009.

29 The exhaustive appendices are available on the website at [www.jcpa.org](http://www.jcpa.org)

30 The Human Rights Watch *World Report 2004* officially examines the IDF TK Policy for the year 2003; but contains sweeping statements that encompass the IDF TK policy from November 2000 until December 2003; Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch *World Report 2004* (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958). During this time, there were 88 IDF TKs according to a list produced by B'tselem, The Israeli Information Center for Human Rights in the Occupied Territories; which is available on B'tselem's website, [http://www.btselem.org/English/Statistics/Casualties\\_Data.asp?Category=19&region=TER](http://www.btselem.org/English/Statistics/Casualties_Data.asp?Category=19&region=TER). This monograph focuses primarily on these 88 IDF TKs that occurred between November 2000 and December 2003. However, it also analyses IDF TKs that occurred subsequently.

31 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch *World Report 2004* (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

32 This is the period from when IDF TKs began, until the time at which the *HRW World Report 2004* was released.

33 Appendix A, Sec. I

34 Appendix A, Sec. I

35 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch *World Report 2004* (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

36 From November 2000 until December 2003.

37 Appendix A, Sec. I

38 Appendix A, Sec. I

39 Appendix A, Sec. I

40 Human Rights Watch, *Human Rights Watch World Report 2003 – Israel, the Occupied West Bank and Gaza Strip, and Palestinian Authority Territories*, January 14, 2003, available at: [/refworld/docid/3e2818338.html](http://refworld/docid/3e2818338.html) [accessed 2 July 2009]

41 See Yoram Dinstejn, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 55-61(2004).

42 HRW, *Iraq: Off Target: The Conduct of the War and Civilian Casualties in Iraq*, Dec. 11, 2003, available at <http://www.hrw.org/en/reports/2003/12/11/target>

43 NGO Monitor is an NGO whose stated aims and objectives are “to generate and distribute critical analysis and reports on the output of the international NGO community for the benefit of government policy makers, journalists, philanthropic organizations and the general public” and “to end the practice used by certain self-declared 'humanitarian NGOs' of exploiting the label 'universal human rights values' to promote politically and ideologically motivated anti-Israel agendas;” <http://www.ngo-monitor.org/articles.php?type=about>

44 NGO Monitor, *Human Rights Watch in 2005: Political Bias Against Israel Continues Despite Wider Middle East Focus 4*, April 6, 2006

45 NGO Monitor, *Human Rights Watch in 2005: Political Bias Against Israel Continues Despite Wider Middle East Focus 4*, April 6, 2006.

46 NGO Monitor, *Human Rights Watch in 2005: Political Bias Against Israel Continues Despite*

Wider Middle East Focus 4, April 6, 2006.

- 47 NGO Monitor, Human Rights Watch in 2005: Political Bias Against Israel Continues Despite Wider Middle East Focus 4, April 6, 2006.
- 48 NGO Monitor, Examining Human Rights Watch in 2008: Double Standards and Post-Colonial Ideology 2-3, January 13, 2009.
- 49 The difference in terminology is evident even in *HRW's World Report 2004*. Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)
- 50 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)
- 51 In every annual report released by AI for Israel and the Occupied Territories, a section is dedicated to Palestinian armed groups' attacks against Israeli civilians and soldiers both within Israel and the Occupied Territories. This is detailed in Part III of this monograph, Section C.
- 52 Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, Feb. 2001, AI Index MDE 15/005/2001, available at <http://www.amnesty.org/en/library/asset/MDE15/005/2001/en/818d1e6d-dc4b-11dd-a4f4-6f07ed3e68c6/mdel150052001en.pdf>
- 53 Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, Feb. 2001, AI Index MDE 15/005/2001, available at <http://www.amnesty.org/en/library/asset/MDE15/005/2001/en/818d1e6d-dc4b-11dd-a4f4-6f07ed3e68c6/mdel150052001en.pdf>
- 54 Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, Feb. 2001, AI Index MDE 15/005/2001, available at <http://www.amnesty.org/en/library/asset/MDE15/005/2001/en/818d1e6d-dc4b-11dd-a4f4-6f07ed3e68c6/mdel150052001en.pdf>; Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, July 2003, AI Index MDE 15/056/2003 (Public), <http://www.amnesty.org/en/library/asset/MDE15/056/2003/en/0f527cb4-d6bd-11dd-ab95-a13b602c0642/mdel150562003en.pdf> ; and Amnesty International, Open Letter to President George W. Bush, April 29, 2004, AI Index: MDE 15/048/2004 (Public), available at <http://www.amnesty.org/en/libraru/asset/MDE15/048/2004/en/4354587-fab5-11dd-b6c4-73b1aa157d32/mdel150482004en.pdf>
- 55 Appendix A,
- 56 Appendix A
- 57 Appendix A, Sec. II
- 58 Appendix A, Sec. II
- 59 Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, Feb. 2001, AI Index MDE 15/005/2001, available at <http://www.amnesty.org/en/library/asset/MDE15/005/2001/en/818d1e6d-dc4b-11dd-a4f4-6f07ed3e68c6/mdel150052001en.pdf>; Amnesty International, *Amnesty International's Annual Report for Israel/Occupied Territories, 2002*, available at <http://www.amnesty.org/en/library/asset/MDE15/001/2003/en/dom-MDE150012003en.html>; Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, July 2003, AI Index MDE 15/056/2003 (Public), <http://www.amnesty.org/en/library/asset/MDE15/056/2003/en/0f527cb4-d6bd-11dd-ab95-a13b602c0642/mdel150562003en.pdf> ;Amnesty International, *Amnesty International's Annual Report for Israel, 2003* available at <http://www.unhcr.org/refworld/category,COI,AMNESTY,ANNUALREPORT,ISR,3edb47d88,0.html>; Amnesty International Press Release, *Israel/Occupied Territories: Amnesty International Strongly Condemns the Assassination of Sheik Yassin*, March 2004, AI Index MDE 15/029/2004 (Public), available at <http://www.amnesty.org/en/library/asset/MDE15/029/2004/en/236729d4-fab9-11dd-b6c4-73b1aa157d32/mdel150292004.en.pdf>; Amnesty International, Open Letter to President George W. Bush, April 29, 2004, AI Index: MDE 15/048/2004 (Public), available at <http://www>

amnesty.org/en/libraru/asset/MDE15/048/2004/en/4354587-fab5-11dd-b6c4-73b1aa157d32/mdel150482004en.pdf; Amnesty International, *Israel and the Occupied Territories: Road to Nowhere*, Dec. 2006, AI Index MDE 15/093/2006, available at <http://www.amnesty.org/en/libraru/asset/MDE15/029/2008/en/55336155-59a1-11dd-bc96-55b5ceea4018/mdel150292008eng.pdf>; Amnesty International, Submission to the U.N. Universal Periodic Review, Third Session of the UPR Working Group of the Human Rights Council, Dec. 2008, AI Index MDE 15/029/2008, available at <http://www.amnesty.org/en/library/asset/MDE15/029/2008/en/55336155-59a1-11dd-bc96-55b5ceea4018/mdel150292008eng.pdf>.

60 Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, Feb. 2001, AI Index MDE 15/005/2001, available at <http://www.amnesty.org/en/library/asset/MDE15/005/2001/en/818d1e6d-dc4b-11dd-a4f4-6f07ed3e68c6/mdel150052001en.pdf>

61 Amnesty International, *State of the World, Annual Report 2008 Iraq*, available at <http://archive.amnesty.org/air2008/eng/regions/middle-east-and-north-africa/iraq.html>

62 For example, Amnesty International, *Iraq: Civilians Under Fire*, April 2003, AI Index MDE 14/071/2003, available at <http://www.amnesty.org/en/library/asset/MDE14/071/2003/en/a344b7fb-d709-11dd-b0cc-1f0860013475/mde140712003en.html>

63 <http://www.hrw.org/en/node/75134>

64 <http://www.hrw.org/en/node/75134>

65 <http://www.hrw.org/en/node/75134>

66 Article 71 of the UN Charter states that, “the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.” U.N. Charter, art. 71.

67 General consultative status is reserved for large international NGOs whose area of work covers most of the issues on the agenda of ECOSOC and its subsidiary bodies. These tend to be fairly large, established international NGOs with a broad geographical reach. Special consultative status is granted to NGOs which have a special competence in, and are concerned specifically with, only a few of the fields of activity covered by the ECOSOC. These NGOs tend to be smaller and more established. Organizations that apply for consultative status but do not fit in any of the other categories are usually included in the Roster. These NGOs tend to have a rather narrow and/or technical focus. This information is available at <http://esango.un.org/paperless/Web?page=static&content=intro>

68 <http://esango.un.org/paperless/Web?page=static&content=intro>

69 <http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=1059>

70 <http://esango.un.org/civilsociety/showProfileDetail.do?method=showProfileDetails&tab=3&profileCode=1059>

71 <http://www.un.org/ecosoc/about/>

72 <http://www.ngocongo.org/index.php?what=about>

73 [http://www.ngocongo.org/files/congo\\_membership\\_directory\\_2007.pdf](http://www.ngocongo.org/files/congo_membership_directory_2007.pdf)

74 <http://www.ngocongo.org/index.php?what=pag&id=14>

75 [www.ngocongo.org/files/codeofconductrev2.doc](http://www.ngocongo.org/files/codeofconductrev2.doc)

76 Kenneth Roth, *Justice and the “War” Against Terrorism*, Jan. 5, 2003, available at <http://www.hrw.org/en/news/2003/01/05/justice-and-war-against-terrorism>

77 Kenneth Roth, *Justice and the “War” Against Terrorism*, Jan. 5, 2003, available at <http://www.hrw.org/en/news/2003/01/05/justice-and-war-against-terrorism>

78 Kenneth Roth, *Justice and the “War” Against Terrorism*, Jan. 5, 2003, available at <http://www.hrw.org/en/news/2003/01/05/justice-and-war-against-terrorism>

79 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

80 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

81 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror*

in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

82 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

83 Roth misstates the law regarding occupied territories; presenting a picture where every inhabitant of the occupied area is to be presumed a “protected person.” While the Hague Regulations employ the blanket term “inhabitants” of an occupied territory, all of whom enjoy the protection specified in the Regulations, the Fourth Geneva Convention does not follow suit, and specifically excludes certain persons from the status of “protected persons.” These persons include nationals of the occupying power, persons who are protected by the Geneva Conventions I to III, nationals of a state not bound by the Geneva Convention, and nationals of a neutral state and those of a co-belligerent state, depending on the existence of normal diplomatic protection with the state in whose hands they are. This is discussed at length by Yoram Dinstein in his work *The International Law of Belligerent Occupation*. Yoram Dinstein, *The International Law of Belligerent Occupation* 60-62 (2009).

84 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

85 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

86 Roth in fact formulated the three-part test so as to determine whether Western TKs, in particular those employed by the U.S. armed forces, were legitimate. However, with respect to Western TKs, Roth set out only the very basic test quoted on page 11. With respect to Israeli TKs, Roth added additional components, such as the need to provide evidence of a targeted individual’s direct involvement in plotting or directing violence before affecting the TK, and the need for an independent review mechanism to verify Israeli claims. See Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

87 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

88 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

89 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

90 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

91 Human Rights Watch, *Off Target*, Dec. 11, 2003 available at <http://www.hrw.org/en/reports/2003/12/11/target>, last accessed on August 23, 2009.

92 Appendix A, Sec. I.

93 Appendix A, Sec. I.

94 Philip Alston, Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, ¶ 33, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010)

95 Appendix A, Sec. I.

96 Dispute arose in less than two percent of Israeli TKs, and, more often than not, where dispute did arise, it was over the exact role played by the targeted individual in a militant organization, rather than whether he/she was a member of the organization.

97 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror*

in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

98 Robert L. Bernstein, *Rights Watchdog, Lost in the Mideast*, N.Y. Times, Oct. 20, 2009, at A31. available at <http://www.nytimes.com/2009/10/20/opinion/20bernstein.html?scp=1&sq=robert%20l.%20bernstein&st=cse>

99 Western countries that were involved in TKs included the Netherlands, Canada and Australia.

100 Appendix B, section I.

101 Human Rights Watch, *Off Target*, Dec. 11, 2003 available at <http://www.hrw.org/en/reports/2003/12/11/target>, last accessed on August 23, 2009.

102 For example, the U.S. alleged that Qaed Salim Sinan al-Harethi, target of a U.S. TK in Yemen in 2002, was “a top bin Laden operative in Yemen.” This claim was accepted unquestioningly by HRW. See Human Rights Watch, *The Law of War in the War on Terror*, Dec. 22, 2003, available at <http://www.hrw.org/en/news/200322/12//law-war-war-terror>

103 *Bombing Afghanistan* (CBS Sixty Minutes broadcast August 31, 2008), available at [http://www.cbsnews.com/stories/2007/10/25/60minutes/main3411230\\_page3.shtml?tag=contentMain;contentBody](http://www.cbsnews.com/stories/2007/10/25/60minutes/main3411230_page3.shtml?tag=contentMain;contentBody)

104 Human Rights Watch, *Off Target*, Dec. 11, 2003 available at <http://www.hrw.org/en/reports/2003/12/11/target>, last accessed on August 23, 2009.

105 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)

106 Rubenstein was quoted in an article in Ha’aretz; Alon Gidon, *Attorney General Supports the Policy of Targeting*, Ha’aretz, Dec.2, 2001, available at [www.haaretz.co.il](http://www.haaretz.co.il)

107 HCJ 769/02, *The Public Committee Against Torture in Israel et al v the Government of Israel et al*.

108 HCJ 769/02, *The Public Committee Against Torture in Israel et al v the Government of Israel et al*.

109 HCJ 769/02, *The Public Committee Against Torture in Israel et al v the Government of Israel et al*.

110 Under the Oslo Accords, it was agreed that Israel would withdraw from the Gaza Strip and the West Bank in phases. Accordingly, the two areas were divided into three sections: Area A, Area B, and Area C. Area A was to be under the complete control of the PA, Area B was to be under Palestinian civil control and Israeli security control, and Area C was to be under complete Israeli control, except for Palestinian civilians.

111 HCJ 769/02 *The Public Committee Against Torture in Israel et al v the Government of Israel et al*

112 During the relevant period, 40 percent of the IDF’s 88 TKs were conducted in Area A. Appendix A, Sec. II

113 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex I, Protocol Concerning Redeployment and Security Arrangements, Washington, D.C., September 28, 1995 available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI+PALESTINIAN+INTERIM+AGREEMENT++Annex+I.html>

114 Human Rights Watch, *Human Rights Watch World Report 2006* (2006), available at <http://www.hrw.org/en/reports/2006/01/17/world-report-2006>

115 Human Rights Watch, *Human Rights Watch World Report 2006* (2006), available at <http://www.hrw.org/en/reports/2006/01/17/world-report-2006>

116 Interview with Major General Ya’akov Amidror in Jerusalem (July 1, 2009).

117 Interview with Major General Ya’akov Amidror in Jerusalem (July 1, 2009).

118 Interview with Major General Ya’akov Amidror, in Jerusalem (July 1, 2009).

119 Interview with Major General Ya’akov Amidror, in Jerusalem (July 1, 2009).

120 Harel Amos and Regular Arnon, *IDF: Qussama Killed during an Attempt to Arrest him in his Hiding-Place in Hevron*, Ha’aretz, June 22, 2003, available at [www.haaretz.co.il](http://www.haaretz.co.il)

121 Efrat Weiss, *Hamas Vows Revenge After Leader Killed*, YNet News. com, May 28, 2009, available at <http://www.ynetnews.com/articles/0,7340,L-3722971,00.html>

122 As reported on YNet News.com, in 2001, Israel relayed a list of seven terror suspects to the PA, and asked that the PA arrest the suspects; Felix Frish, *For the First Time: A List of Israel’s Wanted Palestinians*, YNet News.com, May 8, 2001, available at <http://www.ynet.co.il/articles/1,7340,L-989570,00.html>. A second longer list of wanted Palestinians was provided

to the PA by Israel later the same year; Felix Frish, *Security Sources: Another List of Wanted People has been Given to the Palestinians*, YNet News.com, June 12, 2001, available at <http://www.ynet.co.il/articles/0,7340,L-1391629,00.html>

- 123 Human Rights Watch, *World Report 2002 (Israel)*, available at <http://www.hrw.org/legacy/wr2k2/mena5.html>
- 124 Ali Waked and Felix Frish, *A Senior Member of Islamic Jihad Blows Up While Talking on His Phone*, Ynet News.com, April 5, 2001, available at <http://www.ynet.co.il/articles/0,7340,L-652248,00.html>
- 125 Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, organized by the University Centre for International Humanitarian Law, Geneva, under the auspices of the ICRC, Convened at International Conference Centre, Geneva, 1-2 September, 2005.
- 126 Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, organized by the University Centre for International Humanitarian Law, Geneva, under the auspices of the ICRC, Convened at International Conference Centre, Geneva, 1-2 September, 2005, pg 32.
- 127 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)
- 128 *Bombing Afghanistan* (CBS Sixty Minutes, broadcast August 31, 2008) available at [http://www.cbsnews.com/stories/2007/10/25/60minutes/main3411230\\_page3.shtml?tag=contentMain;contentBody](http://www.cbsnews.com/stories/2007/10/25/60minutes/main3411230_page3.shtml?tag=contentMain;contentBody)
- 129 Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terror* in, Human Rights Watch World Report 2004 (2004) available at [http://www.hrw.org/legacy/wr2k4/9.htm#\\_Toc58744958](http://www.hrw.org/legacy/wr2k4/9.htm#_Toc58744958)
- 130 Article 3(c) of CONGO's Code of Conduct, available at [www.ngocongo.org/files/codeofconductrev2.doc](http://www.ngocongo.org/files/codeofconductrev2.doc)
- 131 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 119 (2005).
- 132 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 115 (2005).
- 133 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 115 (2005).
- 134 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 120 (2005).
- 135 See Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 115 (2005).
- 136 Human Rights Watch, *Human Rights Watch World Report 2003 - Israel, the Occupied West Bank and Gaza Strip, and Palestinian Authority Territories*, 14 January 2003, available at: <http://refworld/docid/3e2818338.html> [accessed 2 July 2009]. Note that the Report continues to say that, "An IDF inquiry held the next day determined the means of attack had been 'inappropriate.'" This comment has not been referenced by HRW, and it is therefore impossible to verify its accuracy. This is a clear violation of CONGO's Code of Conduct, Article 3(b) which states that "there should be scrupulous attention to accuracy; sources should be revealed unless legitimate confidentiality would be betrayed or unless groups or individuals would be put at risk." (Available at [www.ngocongo.org/files/codeofconductrev2.doc](http://www.ngocongo.org/files/codeofconductrev2.doc)) Moreover, statements released by army officials subsequent to the TK paint a more complex picture of what an IDF inquiry may have found. For example, then deputy chief of General Staff Maj. Gen. Dan Halutz stated that there had been unexpected last-minute changes on the ground which had caused the Israeli intelligence information to be wrong. Halutz further stated that had the army known what was to happen, it would have canceled the mission; Dan Izenberg, "*Halutz: I would've halted mission had I known. My values and morals are those of the IDF*," The Jerusalem Post, Dec. 3, 2004, at 5, available at <https://secure.pqarchiver.com/jpost/access/754429761.html?FMT=FT&dids=754429761:754429761&FMTS=ABS:FT&type=current&date=Dec+3%2C+>



- 2004&author=DAN+IZENBERG&pub=Jerusalem+Post&desc=Halutz%3A+I+would%27ve+h  
 alted+mission+had+I+known.+My+values+and+morals+are+thos+of+the+IDF%27. Such a  
 statement is however in no way equivalent to the out of context quote cited by HRW.
- 137 HRW itself documents the U.S. Armed Forces use of four two-ton bombs, which were all  
 directed against an individual target on March 20, 2003 in Al-Dura in Baghdad. Four 2000-  
 pound penetrator bombs were employed in the TK. This is noted by HRW in its Report entitled  
*Off Target*. Despite being aware of Western forces' use of several large bombs against one  
 target, in a residential area, HRW expressed no criticism of the choice of weaponry. HRW, *Iraq:  
 Off Target: The Conduct of the War and Civilian Casualties in Iraq*, Dec. 11, 2003, available at  
<http://www.hrw.org/en/reports/2003/12/11/target>
- 138 For example, as early as 1954, the Russians built bombs far larger than a one-ton bomb;  
 building a three-ton, five-ton and nine-ton bomb respectively. See [http://en.wikipedia.org/  
 wiki/General-purpose\\_bomb](http://en.wikipedia.org/wiki/General-purpose_bomb)
- 139 In November 2011 the Pentagon announced its acquisition of a 15-ton bomb, in preparation  
 for a potential strike against underground nuclear facilities in Iran.
- 140 *Bombing Afghanistan* (CBS Sixty Minutes, broadcast August 31, 2008) available at [http://www.  
 cbsnews.com/stories/2007/10/25/60minutes/main3411230\\_page3.shtml?tag=contentMain;c  
 ontentBody](http://www.cbsnews.com/stories/2007/10/25/60minutes/main3411230_page3.shtml?tag=contentMain;contentBody)
- 141 Laura Blumenfeld, *In Israel, a Divisive Struggle over Targeted Killing*, THE WASHINGTON POST, Aug.  
 27, 2006, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/  
 AR2006082600917\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/AR2006082600917_pf.html)
- 142 Laura Blumenfeld, *In Israel, a Divisive Struggle over Targeted Killing*, The Washington Post, Aug.  
 27, 2006, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/  
 AR2006082600917\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/AR2006082600917_pf.html)
- 143 *Bombing Afghanistan* (CBS Sixty Minutes, broadcast August 31, 2008) available at [http://www.  
 cbsnews.com/stories/2007/10/25/60minutes/main3411230\\_page3.shtml?tag=contentMain;c  
 ontentBody](http://www.cbsnews.com/stories/2007/10/25/60minutes/main3411230_page3.shtml?tag=contentMain;contentBody)
- 144 Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone Launched Missiles*,  
 June 2009, available at [http://www.hrw.org/sites/default/files/reports/iopt0609webwcover\\_0.  
 pdf](http://www.hrw.org/sites/default/files/reports/iopt0609webwcover_0.pdf)
- 145 Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone Launched Missiles*,  
 June 2009, available at [http://www.hrw.org/sites/default/files/reports/iopt0609webwcover\\_0.  
 pdf](http://www.hrw.org/sites/default/files/reports/iopt0609webwcover_0.pdf)
- 146 Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone Launched Missiles*,  
 June 2009, available at [http://www.hrw.org/sites/default/files/reports/iopt0609webwcover\\_0.  
 pdf](http://www.hrw.org/sites/default/files/reports/iopt0609webwcover_0.pdf)
- 147 Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone Launched  
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 iopt0609webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/iopt0609webwcover_0.pdf)
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- A. Reliable information is required before a civilian can be categorized as directly participating in hostilities.
  - B. "A civilian taking a direct part in hostilities cannot be attacked if a less harmful means can be employed," such as detention and trial, as required by the principle of proportionality (according to which the anticipated degree of danger to soldiers' lives is also weighed versus the possibility of detaining the terrorist operative instead of harming him).
  - C. After an attack on a civilian suspected of taking an active part in hostilities, a thorough *ex post facto investigation* should be carried out regarding the identity of the target and the circumstances of the attack.
  - D. "Harm to innocent civilians caused during military attacks (collateral damage) must be proportional. That is, attacks should be carried out only if the expected harm to innocent civilians is not disproportional to the military advantage to be achieved by the attack." In certain cases, payment of compensation might be considered in the event of harm caused to innocent civilian; HCJ 76902/ *The Public Committee Against Torture in Israel et al v the Government of Israel et al.*
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# STRATEGIC PERSPECTIVES



The wreckage of an Israeli bus in which 22 people died and scores were injured on October 19, 1994, in one of Tel Aviv's busiest streets. (AP Photo, Jerome Delay)

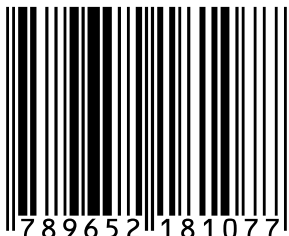


Yehiya Ayyash, the mastermind of Palestinian suicide bus bombings, who was killed on January 5, 1995, by explosives planted in a cellphone that he answered. (AP Photo)



Waving Hamas flags, mourners carry the coffin with the remains of Yehiya Ayyash during his funeral procession on January 6, 1996. (AP Photo, Khaled Zighari)

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