

# Summary of Contents

<b>Introduction</b> .....	1
A. The Recent Situation in Israel .....	1
B. The Further International Context .....	6
C. Defining “Targeted Killings” .....	8
D. Moral Legitimacy and Effectiveness of Targeted Killings.....	22
E. The State of Research: Different Approaches .....	28
F. Terminology.....	37
 <b>Part One – Human Rights</b> .....	 41
A. Human Rights Conventions and the Right to Life .....	42
B. The International Covenant on Civil and Political Rights .....	48
C. The American Convention on Human Rights.....	111
D. The African Charter on Human and Peoples’ Rights .....	130
E. The European Convention on Human Rights.....	146
F. Other Treaties Protecting the Right to Life .....	183
G. General International Law Protection of the Right to Life .....	183
H. Conclusion: The Human Right to Life .....	198
 <b>Part Two – International Humanitarian Law</b> .....	 203
A. The Relevant Sources of Law .....	205
B. The Basic Principles Underlying International Human- itarian Law .....	215
C. Combatants.....	219
D. Civilians .....	263
E. Is there a Third Category such as “Unlawful Combatants”? .....	324
F. Conclusion: Targeted Killings and International Human- itarian Law .....	347
 <b>Part Three – No Additional Justifications or Excuses</b> .....	 351
A. Concepts Generally Capable of Precluding Wrongfulness.....	354
B. Limits to Circumstances Precluding Wrongfulness .....	356
C. Conclusion: No Additional Justifications or Excuses.....	364

**Part Four – The Applicability of the Relevant**

<b>International Law .....</b>	<b>367</b>
A. The Territorial and Extraterritorial Applicability of Human Rights Provisions.....	369
B. The Law Applicable in Times of a Public Emergency Falling Short of Being an Armed Conflict .....	402
C. The Law Applicable in Non-International Armed Conflicts.....	408
D. The Law Applicable in International Armed Conflicts .....	431
E. Military Occupation.....	441
F. International Humanitarian Law and the “War on Terror” .....	453

**Part Five – Consequences of the Aforementioned  
for the Situation in Israel.....**

<b>for the Situation in Israel.....</b>	<b>491</b>
A. The International Law Applicable .....	494
B. The Standards Applicable to the Targeted Killings by Israeli Forces .....	519
C. Conclusion: The Situation in Israel.....	531

**Conclusion: Targeted Killings and International  
Law.....**

<b>Conclusion: Targeted Killings and International Law.....</b>	<b>535</b>
A. Generally, Human Rights Law Applies to Targeted Killings .....	536
B. These Standards Are in Some Situations Amended by International Humanitarian Law .....	538
C. No Justifications for Targeted Killings Exist Outside the Human Rights and International Humanitarian Law Systems ....	539
D. The Most Prominent Cases Do Not Meet these Standards .....	540

**Bibliography/ Index of Authorities .....**

<b>Bibliography/ Index of Authorities .....</b>	<b>543</b>
A. Books, Treatises and Articles.....	543
B. Cases.....	606
C. International Treaties and Conventions (by Date).....	630
D. Other International Sources .....	638
E. National Sources .....	645
F. Press.....	647

**Index .....**

# Table of Contents

<b>Introduction.....</b>	<b>1</b>
A. The Recent Situation in Israel .....	1
B. The Further International Context .....	6
C. Defining “Targeted Killings” .....	8
I. Different Terms Frequently Used .....	9
II. Aspects of Intention .....	14
1. Intention in Relation to the Targeted Person.....	14
a) Capital Punishment.....	15
b) Targeted Killings.....	16
c) Preventive Killings.....	16
d) Preventive Use of Force Presumably Lethal .....	17
e) Preventive Use of Non-Lethal Force.....	18
2. Intention in Relation to Innocent Third Persons .....	18
III. “Assassination” .....	19
IV. Conclusion: Targeted Killings and Preventive Killings .....	22
D. Moral Legitimacy and Effectiveness of Targeted Killings.....	22
E. The State of Research: Different Approaches .....	28
I. The Topic’s Perception in Legal Writing .....	29
II. Different Approaches.....	32
F. Terminology.....	37
I. Occupied Palestinian Territory .....	38
II. Terrorism.....	38
 <b>Part One – Human Rights .....</b>	 <b>41</b>
A. Human Rights Conventions and the Right to Life .....	42
I. The Scope of Protection of Human Rights .....	46
II. The Special Status of the Right to Life.....	47
B. The International Covenant on Civil and Political Rights .....	48
I. The Scope of Protection of Article 6.....	51
1. The Defensive Function ( <i>status negativus</i> ) .....	51
a) “Arbitrary Deprivation” as “Unlawful Deprivation” of Life .....	52
b) “Arbitrary Deprivation” as a Broader Concept than “Unlawful Deprivation” of Life.....	54
(1) Text and Context .....	54
(2) Object and Purpose.....	57

(3) Preparatory Work.....	59
c) Guiding Principles.....	61
d) Specific Examples .....	62
(1) Genocide, Mass Killings and Other Acts of Mass Violence .....	62
(2) Killings that Contradict International Human- itarian Law.....	63
(3) Deaths Resulting from Acts of Aggression .....	64
(4) Deaths Resulting from Torture or Other Ill-Treatment .....	66
(5) Enforced or Involuntary Disappearances .....	67
(6) Deaths Resulting from Excessive Use of Force by Law-Enforcement Personnel.....	67
(7) Executions Carried Out without Due Process of Law.....	68
e) Characteristics of the Examples Discussed .....	68
2. The Beneficiary Function ( <i>status positivus</i> ) .....	69
a) Effects on the Burden of Persuasion.....	70
b) The Duty to Investigate as Part of the Right to Life .....	72
3. Limits of the Scope of Protection: The Socio-Economic Aspect.....	74
II. Exceptions: Non-Arbitrary Deprivations of Life.....	74
1. The Death Penalty.....	75
a) General Limitations.....	76
b) Due Process Requirements .....	77
2. Deprivation of Life in Self-Defence or in Defence of Another Person .....	78
a) Capability of Furthering the Goal .....	81
b) Necessity of the Means .....	81
(1) Self-Defence .....	82
(2) Defence of Another Person .....	85
(3) New Concepts of Immediacy? .....	89
(4) Dismissal of the Concept of Immediacy?.....	89
(5) The Classical Concept of Immediacy.....	91
(6) Consequences.....	93
c) Proportionality in the Narrow Sense.....	93
3. Deprivation of Life in Order to Effect an Arrest or Prevent the Escape of a Person Detained .....	94
a) Capability to Further the Aim .....	95
b) Necessity of the Means .....	96
(1) Effecting an Arrest.....	96
(2) Preventing an Escape.....	97

c) Proportionality in the Narrow Sense.....	98
4. Deprivation of Life for the Purpose of Quelling a Riot ....	100
a) Capability to Further the Aim .....	100
b) Necessity Regarding the Quelling of a Riot or Insurrection.....	101
c) Proportionality in the Narrow Sense?.....	103
5. Absolute Limits and Non-Derogability of Article 6 .....	103
6. Deprivation of Life in the Course of an Armed Conflict .....	106
7. Means of Control .....	107
a) Perspective of a Third Person as Standard?.....	108
b) Procedural Safeguards <i>ex post factum</i> .....	108
III. Conclusion: Killings Under the International Covenant .....	110
C. The American Convention on Human Rights.....	111
I. Article 4 American Convention on Human Rights' Scope of Protection .....	112
1. The Defensive Function ( <i>status negativus</i> ) .....	114
2. The Beneficiary Function ( <i>status positivus</i> ) .....	115
a) Effects on the Standards of Proof Applicable .....	117
b) The Duty to Investigate as Part of the Right to Life ....	118
II. Exceptions – Non-Arbitrary Deprivation of Life .....	120
1. The Death Penalty.....	120
2. Deprivation of Life in the Course of Administrative Police Action .....	122
a) A Different Concept of Immediacy? .....	124
b) A Different Concept Concerning the Quelling of a Riot?.....	125
3. Non-Derogability of Article 4 .....	126
4. Deprivation of Life in the Course of Armed Conflict.....	127
III. Conclusion: Killings Under the American Convention.....	130
D. The African Charter on Human and Peoples' Rights .....	130
I. Article 4 African Charter on Human and Peoples' Rights' Scope of Protection .....	133
1. The Defensive Function ( <i>status negativus</i> ) .....	133
2. The Beneficiary Function ( <i>status positivus</i> ) .....	136
II. Exceptions – Non-Arbitrary Deprivation of Life .....	140
III. No Explicit Non-Derogability of Article 4.....	143
IV. Conclusion: Killings Under the African Charter.....	145
E. The European Convention on Human Rights.....	146
I. Article 2 European Convention on Human Rights' Scope of Protection .....	148

1. The Defensive Function ( <i>status negativus</i> ) .....	149
a) Does “Intentional Deprivation” Require Dolus? .....	150
b) Does Article 2 Cover Negligent Deprivation of Life? .....	151
2. The Beneficiary Function ( <i>status positivus</i> ) .....	153
a) Effects on the Standards of Proof Applicable .....	154
b) The Duty to Investigate as Part of the Rights to Life... ..	157
c) The Duty to Ensure Adequate Planning and Control of Security Forces’ Operations.....	160
II. Exceptions – Permissible Deprivation of Life.....	162
1. The Death Penalty.....	163
2. Exceptions Enumerated in Article 2 Para. 2 .....	164
a) The Test of Absolute Necessity.....	167
b) The Use of Force in Defence of Any Person from Unlawful Violence.....	169
c) The Use of Force in Order to Effect a Lawful Arrest or to Prevent the Escape of a Person Lawfully Detained .....	172
d) The Use of Force in Action Lawfully Taken for the Purpose of Quelling a Riot or Insurrection .....	177
3. Non-Derogability of Article 2 and Deprivation of Life in the Course of Armed Conflict.....	179
III. Conclusion: Killings Under the European Convention.....	181
F. Other Treaties Protecting the Right to Life .....	183
G. General International Law Protection of the Right to Life .....	183
I. Customary International Law .....	184
II. General Principles of Law and Natural Law Foundations ....	191
III. Content and Exceptions of the Right to Life in General International Law .....	192
IV. The Right to Life as <i>jus cogens</i> .....	195
H. Conclusion: The Human Right to Life .....	198
<b>Part Two – International Humanitarian Law.....</b>	<b>203</b>
A. The Relevant Sources of Law .....	205
I. The Hague Law .....	205
II. The Geneva Law .....	207
1. The 1949 Geneva Conventions .....	208
2. The 1977 Additional Protocols .....	211
III. Other International Humanitarian Instruments .....	213
IV. Customary International Humanitarian Law .....	214

B. The Basic Principles Underlying International Humanitarian Law .....	215
I. Military Necessity .....	216
II. Humanity .....	217
III. Proportionality .....	217
IV. Distinction <i>ratione personae</i> .....	217
C. Combatants.....	219
I. Combatant Status in International Armed Conflicts.....	221
1. Members of the Armed Forces .....	222
2. Members of Militias and Volunteer Corps.....	227
a) Being Organized .....	227
b) Belonging to a Party to the Conflict .....	228
c) Being Commanded by a Person Responsible for His Subordinates .....	229
d) Having a Fixed Distinctive Sign Recognizable at a Distance.....	229
e) Carrying Arms Openly.....	230
f) Conducting Operations in Accordance with the Laws and Customs of War.....	231
g) Non-Allegiance to the Detaining Power .....	232
3. “ <i>Levée en masse</i> ” .....	233
4. Conclusion: Combatant Status .....	234
II. Fighters in Non-International Armed Conflicts .....	234
1. Defining Criteria .....	236
2. Problems Concerning Distinction.....	238
a) Active Participation as the Criterion .....	238
b) Group Membership as the Criterion .....	239
c) Discussion .....	241
3. Conclusion.....	242
III. Protection of Combatants and Fighters.....	243
1. Prohibition of Perfidy.....	243
a) General Definition of Perfidy .....	244
b) Distinction of Perfidy and Ruses of War.....	247
c) Prohibitions of Individual Perfidious Acts .....	248
(1) Targeted Killings Under a “Perfidious Cover” .....	249
(i) The Feigning of Civilian Status.....	250
(ii) The Improper Use of Flags and Symbols.....	250
(2) Killings Rendered Perfidious Due to the Status of the Targeted Person.....	253
(3) Killings by Perfidious Means.....	254
(4) Other Perfidious or Treacherous Killings.....	255
2. Prohibition to kill Persons <i>hors de combat</i> .....	257

3. Prohibition to Carry Out Executions without Previous Judgement .....	260
4. Further Limits that Apply to Any Attack .....	260
IV. Conclusion: Targeted Killings of Combatants .....	262
D. Civilians .....	263
I. Civilian Status .....	263
II. Protection of Civilians .....	265
1. Individually Targeted Civilians .....	265
a) Prohibition to Attack Civilians .....	267
b) Prohibition to Target Non-Military Objectives .....	267
c) Exception: Civilians Taking Direct Part in Hostilities .....	271
(1) "Hostilities" .....	273
(2) Taking "Direct" or "Active" Part in Hostilities .....	276
(i) Clear Cases of Direct Participation .....	280
(ii) Clear Cases of Non-Direct Participation .....	281
(iii) Grey Areas .....	282
(3) The Duration of Direct Participation .....	289
(i) The "Revolving Door" Theory .....	291
(ii) The "One Way" Approach .....	292
(iii) Critique .....	294
d) No Exception: Protected Persons Suspected or Engaged in Activities Hostile to the Security of the State .....	298
e) Further Restrictions .....	302
f) Conclusion: Targeted Killings of Civilians .....	303
2. Protection of Civilians not Specifically Targeted .....	304
a) Prohibition of Indiscriminate Attacks .....	305
b) Proportionality, Collateral Damage and Precautions in Attack .....	309
(1) Direct Military Advantage Anticipated by an Attack .....	311
(2) Excessive Civilian Damages .....	314
(3) Consequence: Precautions in Attack .....	320
(4) Proportionality and Non-International Armed Conflicts .....	321
c) Conclusion .....	322
3. Prohibition to Direct Reprisals Against the Civil Population .....	322
III. Conclusion: Targeted Killings of Civilians .....	324
E. Is there a Third Category such as "Unlawful Combatants"? .....	324
I. Terminology and Its Historical Basis .....	326



II. New Notions .....	328
III. The Status of “Unlawful Combatants” .....	331
1. “Unlawful Combatants” in International Armed Conflicts .....	331
a) “Unlawful Combatants” as “Unprotected Persons” ....	331
b) “Unlawful Combatants” as “Protected Persons” .....	335
2. “Unlawful Combatants” in Non-International Armed Conflicts .....	340
IV. Conclusion: No such Third Status Exists .....	340
V. Consequence: No Special Status of “Terrorists” Under International Humanitarian Law .....	342
F. Conclusion: Targeted Killings and International Human- itarian Law .....	347

### **Part Three – No Additional Justifications or**

<b>Excuses</b> .....	351
A. Concepts Generally Capable of Precluding Wrongfulness .....	354
B. Limits to Circumstances Precluding Wrongfulness .....	356
I. Peremptory Norms of General International Law ( <i>Jus Cogens</i> ) .....	357
II. Human Rights .....	360
III. International Humanitarian Law .....	361
C. Conclusion: No Additional Justifications or Excuses .....	364

### **Part Four – The Applicability of the Relevant**

<b>International Law</b> .....	367
A. The Territorial and Extraterritorial Applicability of Human Rights Provisions .....	369
I. The International Covenant on Civil and Political Rights .....	371
II. The American Convention on Human Rights .....	378
III. The European Convention on Human Rights .....	381
1. Effective Control Over Territory .....	382
2. “De facto Control” Over Persons .....	391
IV. The African Charter on Human and Peoples’ Rights .....	395
V. Customary International Law .....	398
VI. Conclusion .....	399
B. The Law Applicable in Times of a Public Emergency Falling Short of Being an Armed Conflict .....	402
I. Human Rights and Public Emergencies .....	402
II. International Humanitarian Law and Public Emergency .....	407
C. The Law Applicable in Non-International Armed Conflicts .....	408

I. Internal Disturbances.....	410
II. Non-International Armed Conflicts.....	411
1. Human Rights in Non-International Armed Conflicts.....	412
2. International Humanitarian Law in Non-International Armed Conflicts.....	413
3. The Relationship of Human Rights and Humanitarian Law in Non-International Armed Conflicts .....	421
4. Conclusion.....	424
III. The Treatment of Certain Non-International Armed Conflicts as International Armed Conflicts .....	425
D. The Law Applicable in International Armed Conflicts .....	431
I. The Intensity Necessary to Fulfil the Preconditions of an Armed Conflict.....	434
II. The International Character of an Armed Conflict.....	435
1. Horizontally Mixed Armed Conflicts.....	436
2. Vertically Mixed Armed Conflicts.....	437
3. Several Conflicts or One Situation that Must Be Regarded as a Whole? .....	438
III. Conclusion .....	440
E. Military Occupation.....	441
I. “Calm” Occupations.....	442
II. Special Exception to the Right to Life in Situations of “Calm” Occupation?.....	445
III. Resumption or Outbreak of Hostilities in a Territory Under Occupation.....	447
IV. Conclusion .....	452
F. International Humanitarian Law and the “War on Terror” .....	453
I. Is the “War on Terror” an International Armed Conflict? ....	456
1. Level of Violence.....	457
2. Parties to a Possible International Armed Conflict.....	460
a) An International Armed Conflict between a State and “Terrorist” Non-State Actors?.....	461
b) Armed Conflict between the Victim State of the Attack and a Foreign State Related to the “Terrorist” Group? .....	464
(1) Non-State Actors as “Other Militias and Members of Volunteer Corps Belonging to a Party to a Conflict” .....	466
(2) Attribution According to “ <i>Nicaragua</i> ” or “ <i>Tadić</i> ”?.....	467
(i) “ <i>Nicaragua</i> ” and the International Law Commission: Effective Control.....	467

(ii) “ <i>Tadić</i> ”: Overall Control .....	469
(iii) Conclusion: “ <i>Nicaragua</i> ” v. “ <i>Tadić</i> ”? .....	472
(3) Attribution According to “ <i>Tehran Hostages</i> ”? .....	473
3. Conclusion.....	475
II. Is the “War on Terror” a Non-International Armed Conflict?.....	477
1. Level of Violence.....	477
2. Non-International Character.....	480
3. Kretzmer’s “Mixed Model” .....	481
4. Critique.....	483
III. Conclusion .....	485
1. No General Applicability of International Humanitarian Law to the “War on Terror” <i>de lege lata</i> .....	486
2. Applicability of International Humanitarian Law to the “War on Terror” <i>de lege ferenda</i> ?.....	488
 <b>Part Five – Consequences of the Aforementioned for the Situation in Israel.....</b>	 491
A. The International Law Applicable .....	494
I. The Applicability of Human Rights Law .....	494
II. The Applicability of International Humanitarian Law .....	496
1. Historical Background.....	496
2. The Legal Status of the Occupied Palestinian Territories .....	499
a) Changes Due to the Oslo Accords?.....	502
(1) The Status of “Areas A” .....	505
(2) The Status of “Areas B” and “Areas C” .....	510
3. The Legal Nature of the Conflict .....	511
a) Is the Present Situation an Armed Conflict?.....	512
b) If at all, Is It an International, Internationalised or Non-International Armed Conflict? .....	515
III. Conclusion: The Law Applicable to the Situation in the Occupied Territories.....	518
B. The Standards Applicable to the Targeted Killings by Israeli Forces .....	519
I. Human Rights Standards .....	519
1. Targeted Killings as a Deterrent or Punishment Are Illegal.....	520
2. Preventive Killings Are Possible within Narrow Limitations.....	520
II. International Humanitarian Law .....	523

1. The Israeli Supreme Court's Assessment: The Law of Armed Conflict .....	523
2. "Terrorists" Are neither Combatants, nor "Unlawful Combatants" but Civilians .....	524
3. Direct Participation by Civilians in Hostilities .....	526
III. The Israeli Supreme Court's Further Preconditions for Targeted Killings .....	529
C. Conclusion: The Situation in Israel .....	531

### **Conclusion: Targeted Killings and International**

<b>Law</b> .....	535
A. Generally, Human Rights Law Applies to Targeted Killings .....	536
B. These Standards Are in Some Situations Amended by International Humanitarian Law .....	538
C. No Justifications for Targeted Killings Exist Outside the Human Rights and International Humanitarian Law Systems ....	539
D. The Most Prominent Cases Do Not Meet these Standards .....	540

### **Bibliography/ Index of Authorities** .....

A. Books, Treatises and Articles .....	543
B. Cases .....	606
I. International Tribunals and Human Rights Bodies .....	606
II. Arbitration Awards .....	626
III. National Courts .....	626
C. International Treaties and Conventions (by Date) .....	630
D. Other International Sources .....	638
E. National Sources .....	645
F. Press .....	647

### **Index** .....