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BOOK REVIEW

Nils Melzer, *Targeted Killing in International Law*, Oxford: Oxford University Press, 2008, ISBN 9780199533169, 524 pp., £69.00 (hb).
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It is difficult to imagine a much more topical and controversial issue in international law than the question of the legitimacy of targeted killings. Once a largely isolated phenomenon, since the beginning of the 'global war on terror' it has become a method to which an ever growing number of countries reserve the right to resort, hence a monographic treatment of the issue is long overdue. Nils Melzer, a legal adviser to the International Committee of the Red Cross, undertook this strenuous task, and his updated and revised doctoral thesis, which was accepted by the Faculty of Law of the University of Zürich, makes a commendable effort to analyse all the major legal problems.

The author does not limit his scope of inquiry to the targeting of suspected terrorists. After a thorough perusal of academic literature, he defines targeted killing 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' (p. 5). This broad definition enables Melzer to examine situations involving both domestic law enforcement action and trans-boundary action, and assists the concept of targeted killing, through an exhaustive scrutiny of the applicable normative framework, in 'escaping the shadowy realm of half-legality and non-accountability' (p. 9). Instead of a narrow focus on the applicability of the rules of international human rights and international humanitarian law (IHL), Melzer opts to adopt an analytical approach based on Kretzmer's work.[1] Although he does not accept all of Kretzmer's assumptions, Melzer borrows the idea of dividing the analytical framework into the normative paradigms of law enforcement and hostilities.

According to Melzer, the normative paradigm of law enforcement comprises the rules of international law, which govern the conduct of activities falling within

1 D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?', (2005) 16 EJIL 171.

the factual concept of law enforcement – that is, the balancing of 'the collective interest in enforcing public security, law and order against the conflicting interest in protecting individual rights and liberties' (p. 90). In situations not amounting to armed conflict – that is, in domestic law enforcement situations, the regulatory framework is human rights law. However, the law enforcement paradigm remains valid even in the context of armed conflict if lethal use of force is not part of the conduct of hostilities. In such cases, which deal with the exercise of power and authority over 'persons deprived of their freedom, combatants *hors de combat*, medical, religious, and humanitarian personnel, as well as individual civilians and the civilian population as a whole', both IHL and human rights law are applicable (p. 140). The normative paradigm of hostilities, on the other hand, comprises solely 'the rules and principles of IHL, which are specifically designed to govern the conduct of hostilities' (p. 298).

This distinction has potential pragmatic and humanitarian value; it finally clarifies that it is possible to resort to law enforcement methods even in the context of an armed conflict. It has been a recurring problem, especially in situations of belligerent occupation, that, due to a pervasive misconception holding that only those weapons can be used during an armed conflict that are not prohibited during the conduct of hostilities, certain means of law enforcement, especially riot control agents, were not issued. This view frequently had the tragic consequence that occupying soldiers dealing with law enforcement situations, for instance violent demonstrations, used lethal force. Acceptance of the applicability of the law enforcement regime even in armed conflicts would engender a fundamental change of perception: the fundamental aim would be the restoration of law and order and submission of the offenders to trial, therefore lethal force could only be used if it were unavoidable.

Nevertheless, the strict separation of the law enforcement paradigm from the conduct of hostilities paradigm has a possible Achilles heel. The author clearly believes that even in the course of an actual non-international armed conflict it could be possible to conduct certain operations whose purpose is 'restricted to the liberation of the hostages and the apprehension of hostage takers, and could not extend to fighting the hostage takers as a military force' (p. 376). However, in reality armed groups often commit criminal acts such as hostage taking or drug producing and trafficking in order to further their cause. In such circumstances it is impossible to separate fighting against an armed group as a matter of law enforcement from actual conduct of hostilities, therefore it might be more useful to restrict the law enforcement paradigm in the context of an armed conflict to situations which are not connected to the activities of armed groups taking part in hostilities.

Through a consistent application of this theoretical framework, Melzer researches every potentially significant issue, including the prohibition of use of force in inter-state relations, questions of state responsibility, the right to life under conventional and customary law, the extraterritorial application of human rights regimes, the scope of application of international humanitarian law, direct participation in hostilities, and the relationship between human rights law and humanitarian law. He comes to the conclusion that targeted killings can and should be fully regulated by international law. As a method of law enforcement, targeted killing

can be used only in exceptional circumstances. It must have a sufficient legal basis in domestic law, can only used for preventive purposes, and must be absolutely necessary for protecting human life from unlawful attack, and the killing can only be a consequence of undesired *ultima ratio*, 'not the actual aim of an operation which is planned, prepared and conducted so as to minimize, to the greatest extent possible, the recourse to lethal killing' (p. 239). In the context of hostilities, the use of targeted killing is less circumscribed: in an armed conflict military objectives can be lawfully targeted using legitimate means and methods of warfare if all necessary precautions have been taken to avoid collateral damage which is excessive in relation to the direct and concrete military advantage anticipated, until those taking part in the hostilities become *hors de combat* (pp. 426–7). Moreover, under both regimes, 'to the extent that State-sponsored targeted killings interfere with the sphere of sovereignty of another State, their international lawfulness additionally depends on the law governing the use of interstate force' (p. 74) – that is, the operations have to be conducted in conformity with *jus ad bellum*.

Consequently, the law enforcement paradigm restricts the use of lethal force to situations where the taking of life is unavoidable to save others, while in the conduct of hostilities states have more freedom to resort to targeted killing. Melzer attempts to bridge the gap between these two paradigms by suggesting that the principle of military necessity prohibits the employment of any kind or degree of force which is not indispensable for the achievement of 'the ends of war' (p. 287); hence targeted killing can only be carried out in the absence of a non-lethal alternative (p. 397). Nevertheless, this position will probably stir controversy. Even though the Israeli High Court of Justice came to an analogous conclusion,[2] and human rights bodies made similar claims in the context of non-international armed conflict,[3] the majority of legal literature and, more importantly, states themselves seem to consider that combatants and persons taking a direct part in hostilities are military objectives who, by their nature, make an effective contribution to military action.[4] Owing to this fact they can be targeted at any time and in any place during an armed conflict.[5]

This is not the only disputable argument in the book. While Melzer devotes long sections to analysing the relationship between international humanitarian law and human rights law and rightly eschews the narrow view of humanitarian law being *lex specialis* to human rights law in all circumstances, he concludes that in the paradigm of hostilities recourse to the *lex generalis* of human rights law is only possible where international humanitarian law does not provide any rule at all, and

2 'A civilian taking a direct part in hostilities cannot be attacked . . . if a less harmful means can be employed.' *Public Committee against Torture in Israel v. Government of Israel et al.*, Decision of 14 December 2006, HCJ 769/02, at 40.

3 *Hamiyet Kaplan et al. v. Turkey*, Decision of 13 September 2005, [2005] ECHR (Ser. A), at 51–5.

4 Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), 88.

5 Dinstein, for instance, affirms that '[t]he only way for members of the armed forces to immunize themselves from further attack is to surrender, thereby becoming *hors de combat*.' Ibid., 94. The major humanitarian law treatises seem to deem it obvious that all military objectives can be legitimately targeted. See *inter alia* Y. Sandoz, C. Swinarski, and B. Zimmermann (eds.), *Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 635; L. C. Green, *The Contemporary Law of Armed Conflict* (2000), 191; A. P. V. Rogers, *Law on the Battlefield* (1996), 33.

no sufficient guidance can be obtained by reference to general principles underlying it (p. 382). Based on this approach, he criticizes the European Court of Human Rights (ECtHR) for declaring in the *Isayeva* case[6] that in the absence of derogation from the European Convention of Human Rights the legality of the Russian military operation 'has to be judged against a normal background' (p. 391). Even though, as a matter of general international law, the reviewer agrees with the contention that since the rules of conduct in hostilities are specifically designed to regulate violence in an armed conflict, they should take precedence over the general rules of human rights, the author's criticism fails to take into account the specific jurisdictional aspects of human rights bodies.

For instance, although the ECtHR confirmed that 'the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part',[7] its applicable law is first and foremost the rules laid down in the European Convention on Human Rights. While Article 2(2)(c) of the Convention allows for deprivation of life 'in action lawfully taken for the purpose of quelling a riot or insurrection', which could be also interpreted as an implied authorization to use humanitarian law in cases of non-international armed conflict, the Court does not seem to accept this view. As Article 15(2) only allows for derogation from the right to life 'in respect of deaths resulting from lawful acts of war', it apparently takes the position that the application of international humanitarian law is conditioned by a derogation taken by the high contracting party. Relying on this interpretation, instead of employing IHL, the Court developed a body of jurisprudence referred to as 'a human rights law of internal armed conflict',[8] where the legality of even the conduct of hostilities in an armed conflict is judged through reference to human rights law. Even though the 'ivory tower approach'[9] of the ECtHR is open to criticism, especially from the point of view of the requirement of the systemic integration of international law, it seems perfectly justifiable on account of its subject-matter jurisdiction. After all, nothing prevents the states parties from derogating from the Convention in cases of armed conflict, thus opening the way for the ECtHR to apply the *lex specialis* of IHL with regard to the conduct of hostilities and not its own general law.

This reviewer also finds it difficult to agree with the author's analysis with regard to *jus ad bellum* and the definition of international armed conflict. Melzer submits that 'in principle, any State-sponsored targeted killing carried out within the sphere of sovereignty of another State comes under the prohibition of interstate force expressed in Article 2(4) UN Charter' (p. 74). This statement is overtly broad; notably it does not take into consideration the use of covert agents. In particular, the Israeli practice of liquidating the members of Black September after the terrorist attack at the 1972 Munich Olympic Games was widely condemned as a serious breach of the sovereignty of the states on whose territory the targeted killings took place,

6 *Isayeva v. Russia*, Decision of 24 February 2005, [2005] ECHR (Ser. A), at 191.
7 *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, [2002] ECHR (Ser. A), at 55.
8 W. Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', (2005) 16 EJIL 741.
9 G. Gaggioli and R. Kolb, 'A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights', (2007) 37 *Israel Yearbook of Human Rights* 115, at 124.

but there is no evidence that it was regarded by the international community as a violation of Article 2(4). Furthermore, even though the author refers to a secret intelligence memo signed by President George W. Bush on 17 September 2001, authorizing the US Central Intelligence Agency (CIA) to undertake 'lethal covert operations', he only focuses on the use of the Predator drone (pp. 40–1), but fails to research other operations and the ensuing international reaction. In similar vein, the author defines international armed conflict as 'minimum transgression expressing belligerent intent', where belligerent intent is presumed to exist 'as soon there is an armed interference with another State's sphere of sovereignty' (p. 250). In this case, the resuscitation of the concept of *animus belligerendi* seems unfortunate. Even though Melzer does not use it in the traditional sense, in its original meaning *animus belligerendi* was regarded as intrinsic to the concept of war,[10] and its application risks confusing *jus in bello* and *jus ad bellum*. In general, the analysis of the concept of armed conflict is somewhat unsatisfactory, as the book does not elaborate on the distinction between international and non-international armed conflict.[11]

A further point of disagreement between this reviewer and the author is the latter's uncritical reliance on the findings of the customary law study of the International Committee of the Red Cross (ICRC).[12] The most obvious example is the use of the term 'combatant' even when referring to non-international armed conflict. Even though Melzer affirms that the concept of combatancy cannot be applied to non-international armed conflicts, he still rejects the approach of the *Manual on the Law of Non-international Armed Conflict* (*San Remo Manual*), which prefers to refer to 'fighters'. The San Remo Manual was prepared by a group of eminent humanitarian law experts for the International Institute of Humanitarian Law, therefore its conclusions generally reflect the position of practitioners and the academic community. Melzer nevertheless rejects this term, as he regards it as too wide, including even civilians taking an active part in hostilities, and prefers to differentiate between 'privileged combatancy', which corresponds to the traditional understanding of combatancy, and 'functional combatancy', which means that persons remain subject to direct attack as long as they assume combatant function (pp. 324–7). It is unclear what the author expects to achieve with this categorization. He argues that 'from a linguistic point of view, 'fighter' means nothing other than 'combatant' and could not be translated differently in a number of languages' and that in the absence of this term, membership in an organized armed group 'should be regarded as a continuous form of direct participation in hostilities' ('membership approach'), which is merely a 'politically more convenient back door' to substitute the term 'combatant' (p. 327).[13]

10 Y. Dinstein, *War, Aggression and Self-Defence* (2002), 14.

11 See more in detail T. Hoffmann, 'Squaring the Circle? International Humanitarian Law and Transnational Armed Conflicts', in M. J. Matheson and D. Momtaz (eds.), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts* (2009) (forthcoming).

12 J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols. (2005).

13 The ICRC study uses exactly the same argument. In Rule 3 it stipulates that 'All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel', and while it affirms that combatant status only exists in international armed conflicts the study still finds useful the notion of 'combatant' for purposes of the principle of distinction even in non-international armed conflicts. The study cites as examples GA Res. 2676 (XXV) of 9 December 1970 and the Cairo Declaration and Cairo Plan for

However, the use of the term 'combatant' is much more than a linguistic issue; it is a legal category with precisely defined corresponding rights and duties, and using the term outside its scope of application can create confusion. On the other hand, avoidance of the 'membership approach' could hardly be a convincing reason for using the notion of 'combatant' even in a non-international armed conflict, as the author himself – in line with the recently issued Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law by the ICRC[14] – accepts a 'functional membership approach', meaning that, in the absence of an affirmative disengagement, members of organized armed groups should be regarded as taking direct part in hostilities, while at the same time unorganized civilians should only be deemed to have lost their civilian immunity and therefore be seen as 'fighters' when they are specifically engaged in acts of hostility (p. 350).

Another example of this reliance on the ICRC customary law study is the author's analysis of prohibited means and methods of warfare. Melzer quotes with approval Rule 77 of the study, prohibiting the use of bullets which expand or flatten, and relies on the *Tadić* decision of the International Criminal Tribunal for the former Yugoslavia[15] to affirm that 'as a matter of principle, there cannot be two different standards of humanity in international and non-international armed conflict' (p. 376). However, in the face of the apparent reluctance of the *San Remo Manual* to accept the prohibition of expanding bullets, the author attempts to resolve this contradiction by suggesting that the manual actually allows their employment in law enforcement situations. But in a moment of inadvertence uncharacteristic of the author's otherwise very thorough perusal of literature, Melzer relies on the 2004 draft version of the manual, which included expandable bullets in the list of prohibited weapons 'except as a special measure when their use against fighters is intended to lessen the risk to civilians, such as hostage rescue operations'. The final text, however, while indeed referring to terrorists and hostage takers, does not include expanding bullets in the list of weapons prohibited in non-international armed conflicts and declares that 'it is doubtful whether this age-old prohibition can be regarded as applicable in non-international armed conflicts'.[16]

Action, adopted at the Africa–Europe Summit held under the aegis of the Organization of African Unity and the European Union on 3–4 April 2000, but admits that treaty provisions use different designations and that therefore it is still difficult to see why any weight should be given to these non-binding documents. Ibid., at 11–13.

14 International Committee of the Red Cross, Interpretative Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law, available at www.icrc.org/Web/eng/siteengo.nsf/htmlall/direct-participation-ihl-article-020609/$File/direct-participation-guidance-2009-ICRC.pdf. Melzer played a significant part in the drafting of the document.

15 'Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.' *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 119. However, it is doubtful that the jurisprudence of the ICTY is completely reliable as evidence of customary international law. See T. Hoffmann, 'The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-international Armed Conflicts', in C. Stahn and L. V. D. Herik (eds.), *Future Perspectives on International Criminal Justice* (2009) (forthcoming).

16 Y. Dinstein, C. Garraway and M. Schmitt, *The Manual on the Law of Non-international Armed Conflict with Commentary* (2006), 35–6.

Finally, there is surprisingly little discussion of the practice of targeting political leaders in an international armed conflict. Melzer briefly mentions the 'decapitation strikes' attempted against Saddam Hussein in 2003, stating that, as a leader of the Iraqi armed forces, his targeting could not really be questioned (p. 401). Even though this evaluation is probably correct, it could have been useful to address the issue of targeting politicians such as presidents who are formally military leaders but in reality have a largely symbolic role. State practice demonstrates that states generally refrain from targeting the leader of the belligerent state, even if he or she would be a legitimate military objective. It would also have been informative to assess the US practice of targeting Ba'ath Party leadership.

In spite of these reservations, *Targeted Killing in International Law* is a piece of solid scholarship which can only be recommended, to scholars, practitioners, and students alike. Even though the generally very abstract treatment of the legal issues does not make for easy reading, the mostly self-contained chapters neatly summarize all the legal arguments, making the book a useful textbook but at the same time somewhat repetitive. Nevertheless, it is a very methodically researched treatise which will become a useful work of reference on the topic. It is definitely a step towards finally settling the legal problems surrounding the question of targeted killing and will hopefully help to bring an end to the 'shadowy realm of half-legality and non-accountability'.

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