

Nils Melzer. *Targeted Killing in International Law*. Oxford: Oxford University Press, 2008. Pp. liv, 468. \$130.00. ISBN 9780199533169.

Studies of targeted killing are often situated within the politically fraught debate over Hellfire missile attacks on suspected terrorists. The scope of Melzer's analysis is, then, refreshingly broad, covering equally sniper shots used to end hostage stand-offs, poison letters sent to insurgent commanders, and commando raids launched with orders to liquidate opponents. These diverse practices are marked off from other uses of lethal force by states, such as soldiers shooting in a fire-fight, with a precise and intuitively satisfying definition. Melzer defines targeted killing as a use of lethal force by a subject of international law that is directed against an individually selected person who is not in custody and that is intentional (rather than negligent or reckless), premeditated (rather than merely voluntary), and deliberate (meaning that 'the death of the targeted person [is] the actual aim of the operation, as opposed to deprivations of life which, although intentional and premeditated, remain the incidental result of an operation pursuing other aims') (at 3–4).

It is a strength of Melzer's book that, although the concepts deployed in this definition do not correspond with those found in either international human rights law or international humanitarian law (IHL), he eschews *de lege ferenda* argumentation in favour of a rigorous elaboration of the implications of the *lex lata* for the practices covered by his definition.

Melzer posits that the legal regulation of targeted killing should be understood to comprise two normative paradigms. The 'hostilities paradigm' governs the targeted killing, as an integral part of the conduct of hostilities, of any person 'not entitled to protection against direct attack' (at 426) – i.e., a combatant or a civilian directly participating in hostilities. All other targeted killings, whether at home or abroad, are governed by the 'law enforcement paradigm'. This distinction does not turn on the existence of an armed conflict: The targeted killing of a civilian who is not directly participating in hostilities will fall within the law enforcement paradigm even if it takes place in the midst of an armed conflict. Neither may this distinction be fully reduced to that between international humanitarian law and international human rights law. Because Melzer considers IHL provisions on the conduct of hostilities, when they apply, to constitute a *lex specialis* to human rights norms on the use of force, his analysis of the hostilities paradigm is dominated by humanitarian law, and his analysis of the law enforcement paradigm is dominated by human rights law. However, because he rejects a categorical confinement of IHL to 'wartime' or of human rights law to 'peacetime', he does include chapters on the relevance of IHL within the law enforcement paradigm and of human rights law within the hostilities paradigm. This principled division of the analysis into two paradigms in line with what is likely to be the majority view on the question of how the human rights and IHL regimes interact is a fruitful move which lays the groundwork for a clear and cogent interpretation of the law.

Keeping his single definition in view, Melzer analyses each paradigm in turn, identifying criteria for lawful targeted killing under each. He concludes that a targeted killing that falls

within the law enforcement paradigm must have a legal basis in domestic law, be preventative rather than punitive, have protecting human life from unlawful attack by the target as its exclusive purpose, 'be absolutely necessary in qualitative, quantitative and temporal terms for the achievement of this purpose', and be the undesired outcome of an operation planned and conducted to minimize recourse to lethal force (at 423). In contrast, with respect to a targeted killing that falls within the hostilities paradigm, he concludes that it must be 'likely to contribute effectively to the achievement of a concrete and direct military advantage without there being an equivalent non-lethal alternative', not be directed against a civilian or other individual entitled to protection against direct attack, abide by the requirement of proportionality with respect to collateral damage, 'be planned and conducted so as to avoid erroneous targeting' and otherwise comply with the precautionary measures required by IHL, 'be suspended when the targeted individual surrenders or otherwise falls *hors de combat*, regardless of the practicability of capture and evacuation', 'not be conducted by undercover forces feigning non-combatant status or otherwise by resort to perfidy', and 'not be conducted by resort to poison, expanding bullets or other prohibited weapons and must respect the restrictions imposed by IHL on booby-traps and other devices' (at 426–427). As these conclusions suggest, the range of issues addressed is substantial. Several points of analysis may, however, be expected to make especially significant contributions to our efforts to come to terms with the legal regulation of targeted killing.

Melzer's analysis of those targeted killings that fall within the law enforcement paradigm exemplifies how a legal analysis tailored to the specificity of a killing which is intentional, premeditated, and deliberate will differ from a general analysis of the use of lethal force. This difference pertains in part to 'the practical consequences of an operational shift from "potentially" to "intentionally" lethal force' (at 424). Melzer observes that international human rights law's requirement that any deprivation of life by the state be 'absolutely necessary'

means that such deprivation is lawful only if 'in the concrete circumstances, the killing of a person is qualitatively, quantitatively and temporally indispensable for the removal of the threat in question', and that human rights law's requirement of 'proportionality' means that the threat in question must be 'an unlawful attack on human life' (at 228, 424). These principles require law enforcement operations to be planned and conducted with the constant aim of avoiding the use of even potentially lethal force. The intended result of a law enforcement operation is the arrest of the suspect. Even as the operation proceeds, warnings, protocols for gradually escalating force, and other measures serve to forestall a decision to kill for as long as possible. Intentionally lethal force remains only a last resort, should an operation unfold in an especially undesirable manner. For this reason, Melzer argues that the intentional, premeditated, and deliberate deprivation of life characteristic of a targeted killing is nearly always – though not invariably – irreconcilable with the human rights law framework under the law enforcement paradigm. (To what extent this would be the case when aerial bombardment is the only plausible measure, as has surely been the case in at least some of the high-profile targeted killings by the US and Israel, is a question which receives less treatment than it warrants.)

Melzer's most interesting contribution to our understanding of targeted killings within the hostilities paradigm is to locate in IHL a requirement which has generally — and controversially — been located in human rights law. His conclusion that a targeted killing is impermissible when there is a 'non-lethal alternative which would entail a comparable military advantage without unreasonably increasing the risk to the operating forces or the civilian population' is far from novel (at 397). Indeed, in its landmark decision on targeted killing, Israel's High Court of Justice (HCJ) similarly held that 'a civilian taking a direct part in hostilities cannot be attacked ... if a less harmful means can be employed'.<sup>1</sup>

<sup>1</sup> HCJ 769/02, *The Public Committee against Torture in Israel v. Gov't of Israel et al.*, at para. 40.

The HCJ justified this conclusion by reference to the human rights norm that lethal force would violate the right to life unless its use were 'absolutely necessary' to, *inter alia*, defend a person from unlawful violence. This 'mixed model' approach in which the use of force is constrained simultaneously by norms drawn from IHL and from human rights law had previously been developed by scholars.<sup>2</sup> The concept is, in sum, that IHL limits the permissible targets of attack to combatants and civilians directly participating in hostilities and that human rights law further limits the use of force against these targets to that which is absolutely necessary under the circumstances. If a group of commandos, for example, were to encounter a rebel commander shopping, unarmed, in the capital, they would be obligated to capture him rather than kill him, notwithstanding his combatant status.

This 'mixed model' approach has, however, been criticized by scholars who argue that the human rights norm on lethal force is only a general rule from which the IHL norms on the conduct of hostilities derogate in accordance with the principle that *lex specialis derogat legi generali*. On this analysis, when targeting someone within the conduct of hostilities, one is constrained solely by IHL rather than also by human rights law. Thus, Cohen and Shany contend that under IHL 'combatants may be targeted even if less-injurious alternatives are available'<sup>3</sup> and find the HCJ's attempt to temper this permissive rule with human rights norms to be 'at best, unsubstantiated and probably also inaccurate'.<sup>4</sup> The common ground shared by proponents and opponents of a non-lethal

<sup>2</sup> Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 *EJIL* (2005) 171; Ben-Naftali and Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings', 36 *Cornell Int'l LJ* (2003) 233.

<sup>3</sup> Cohen and Shany, 'A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case' 5 *J Int'l Criminal Justice* (2007) 310, at 314.

<sup>4</sup> *Ibid.*, at 315.

alternative test is that IHL, taken alone, permits attacks even when a non-lethal alternative is available. Thus, although he concurs with this aspect of the HJC's decision, Milanovic has written that 'the rule of humanitarian law is very clear; states have quite deliberately left themselves the freedom to kill combatants, or civilians engaged in hostilities, and are under no obligation to capture them and put them on trial instead'.<sup>5</sup> Given this shared understanding of what is required by IHL, the narrow question whether targeted killing is permitted only when there is no non-lethal alternative has been entangled in the much broader debate over the relationship between the human rights law and IHL regimes.

Melzer's analysis cuts across the terms of this debate. On the one hand, he rejects the mixed model analysis and concludes that attacks on legitimate military objectives are governed solely by IHL without reference to human rights law. On the other hand, he argues that the consensus view on what IHL permits is mistaken. He notes that, while IHL expressly prohibits attacks on civilians, it does not expressly authorize attacks on combatants and civilians directly participating in hostilities. The inference of such a blanket licence to kill is, he argues, due only to the 'mysterious disappearance ... from the radar screen of mainstream legal awareness' of 'military necessity' as a general principle of IHL (at 283). This principle, he observes, has two functions. The 'permissive function' is the basis on which IHL permits exceptions to what is generally prohibited – e.g., killing one's enemies – in order to accommodate that which is indispensable to the conduct of war

(at 289–291). The 'restrictive function' is the basis on which these exceptions are limited to that which is truly necessary – e.g., killing combatants – as opposed to merely expedient – e.g., killing civilian collaborators (at 286–289). That states negotiated the provisions of IHL treaties in part by identifying the permissive and restrictive implications of the principle of military necessity for particular military tactics is uncontroversial. It is similarly uncontroversial that some provisions, such as that objects may be attacked only when their destruction would offer a 'definite military advantage', make IHL's application contingent on a context-specific analysis of military necessity. Melzer, however, moves beyond the conventional wisdom by providing a strong argument that, as a principle of humanitarian law, military necessity imposes restrictions on military action additional to those restrictions codified in IHL treaties. The proliferation of treaties codifying the norms of IHL should not, he insists, lead us to disregard IHL's fundamental sources. Thus, 'the principle of military necessity reduces the sum total of lawful military action from that which IHL does not prohibit *in abstracto* to that which is actually required *in concreto*' (at 286). On this basis, he concludes that, while IHL does not prohibit attacks on combatants or civilians directly participating in hostilities, such attacks are permitted only when required by military necessity. The gratuitous or superfluous killing of combatants is forbidden even in the midst of hostilities. The principle of military necessity would, then, prohibit the targeted killing of a military commander when it would not be unreasonably risky to capture him instead.

Melzer's approach to the question whether combatants and civilians directly participating in hostilities may be attacked with lethal force when a non-lethal alternative is available will be thought-provoking to those on both sides of this debate. To those who have believed that without the complementary role of human rights law, attacks permitted by IHL would include acts indistinguishable from murder, Melzer's argument suggests that this is not the case. To those who have rejected a mixed approach as repugnant to the primacy which states intended IHL to

<sup>5</sup> Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case', 866 *Int'l Rev of the Red Cross* (2007) 373, at 391; see also Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law', 5 *J Int'l Criminal Justice* (2007) 322, at 330; Parks, 'Memorandum of Law: Executive Order 12333 and Assassination' [1989], *Army Law* 4, at 5. For a view closer to Melzer's, see Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?', 864 *Int'l Rev of the Red Cross* (2006) 881.

hold in regulating the conduct of hostilities, Melzer's argument suggests that the non-lethal alternative requirement is, in fact, rooted in IHL itself.

As a rigorous and creative exposition of the *lex lata*, Melzer's book makes a significant contribution to our understanding of how targeted killing is regulated by international law. His sensible definition of the problem, his principled division of the analysis into law enforcement and hostilities paradigms, his provocative analysis of military necessity, and his coverage of often overlooked aspects, such as booby-traps, will no doubt influence future work on this issue. However, while the analysis is strong, the book's style and presentation sometimes fall short. Like many dissertations that become books, the survey of international instruments and jurisprudence can be as exhausting as it is exhaustive. Similarly, while Melzer's commitment to exploring the full range of relevant norms is commendable, it makes the book unwieldy, occasionally feels indulgent (a section on expanding bullets?), and draws attention to its omissions (such as any sustained engagement with the *jus ad bellum*). However, as a practical matter, the more expert or less patient reader may readily leap between the relatively self-contained chapters summarizing his conclusions regarding each paradigm, flipping back when a deeper analysis is desired. The strengths of the analysis will amply compensate for the reader's occasional frustration with its presentation.

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*doi: 10.1093/ejil/chp012*