

LEGAL ARGUMENTS OF THE STATE OF ISRAEL ON THE USE OF TARGETED KILLING AS A COUNTERTERRORISM TACTIC

ARGUMENTOS JURÍDICOS DO ESTADO DE ISRAEL PARA O EMPREGO DO ASSASSINATO SELETIVO COMO TÁTICA DE CONTRATERRORISMO

ARGUMENTOS JURÍDICOS DEL ESTADO DE ISRAEL PARA EL EMPLEO DE ASESINATO SELECTIVO COMO TÁTICA CONTRA EL TERRORISMO

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ABSTRACT

The purpose of this paper was to describe the legal arguments that have been invoked by State of Israel to justify the use of targeted killing as a counterterrorism tactic. The main Israeli arguments, such as the principle of jus ad bellum and the legitimate self-defense principle under Article 51 of the UN Charter, were listed and analyzed in the terms of Public International Law. The understanding of the Israel High Court of Justice on targeted killing as a legitimate mean of Israel's war against terrorism was also stated and discussed.

Keywords: Counterterrorism. Targeted Killing. Public International Law. jus ad bellum. Israel.

RESUMO

O objetivo do presente artigo foi descrever os argumentos jurídicos invocados pelo Estado de Israel para justificar o uso do assassinato seletivo como tática de contraterrorismo. Os principais argumentos israelenses, tais como o princípio do jus ad bellum e o instituto da legítima autodefesa com base no artigo 51 da Carta da ONU, foram enumerados e analisados à luz do Direito Internacional Público. O entendimento da Suprema Corte de Justiça de Israel de que o assassinato seletivo seria um meio legítimo da guerra de Israel contra o terrorismo também foi enunciado e discutido.

Palavras-chave: Contraterrorismo. Assassinato Seletivo. Direito Internacional Público. jus ad bellum. Israel.

RESUMEN

El objetivo de este trabajo fue describir los argumentos jurídicos invocados por Israel para justificar el uso de asesinatos selectivos como tácticas antiterroristas. Los principales argumentos israelíes, como el principio de jus ad bellum y el instituto de legítima defensa en virtud del artículo 51 de la Carta de la ONU, se enumeran y analizan a la luz del derecho internacional. La comprensión de la Corte Suprema de Israel de que el asesinato selectivo era un medio legítimo de la guerra de Israel contra el terrorismo también se enunció y discutido.

Palabras clave: Antiterrorismo. Asesinatos Selectivos. Derecho Publico Internacional. jus ad bellum. Israel.

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I INTRODUCTION

Along History, assassination has been broadly used as a political tool and war tactic (ZENDEL, 1992; LENZ, 2002; IQBAL; ZORN, 2006).

Although political assassination is expressly forbidden by article second of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (BRASIL, 1999), the lawfulness of targeted killing as a tactic of war has been the subject of heated debates in the light of the Public International law (KREZMER, 2005; EICHENSEHR, 2007; SADAT, 2012; STERIO, 2012).

Additionally, in the international juridical literature there are also dissenting arguments related to the distinction between the definition of political assassination and targeted killing (DAVID, 2003; TOVY, 2009). While political assassination would be a treacherous means of achieving a political objective by eliminating an enemy political leader, targeted killing would be a military operation, even if controversial, deployed by a State to fight terrorism and guerilla (TOVY, 2009).

According to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (UNITED NATIONS 2010), just three countries have openly resorted to targeted killing as a counterterrorism tactic: the State of Israel, the United States of America and the Russian Federation. There are suspicions, however, that in secret other States also resort to targeted killing (MATOS, 2012).

In 2006, the Supreme Court of Israel officially admitted that the State of Israel employs targeted killing, which is named the "policy of preventive strikes" in the fight against terrorism:

The Israeli government employs a policy of preventive strikes which cause the death of terrorists in Judea, Samaria or the Gaza Strip. It [the Government of Israel] fatally strikes these terrorists who plan, launch or commit terrorist attacks in Israel, in the area of Judea, Samaria and in the Gaza Strip, against both civilians and soldiers. These strokes, at times, also harm innocent civilians (ISRAEL, 2006, free translation).

The United Nations (UN) defines targeted killing as:

The intentional and deliberate use of lethal force by States or their agents acting beyond the limits of legal authority, or by organized armed groups in an armed conflict, against a specific person who is not under the physical custody of the perpetrator (UNITED NATIONS, 2010, p. 4, free translation).

As a rule, it can be said that targeted killing means to kill a previously determined person under express orders from the executive government of a sovereign State (SOFAER, 1989; ZENDEL, 1992; DAVID, 2003; BYMAN, 2006; KREZMER, 2005; FISHER, 2006; TOVY, 2009; STAHL, 2010; STERIO, 2012; MCNEAL, 2014).

The targeted killing of leaders and members of terrorist organizations is deemed a lawful act of self-defense by the countries that employ it (ZENDEL, 1992; LUFT, 2003; KREZMER, 2005; MCNEAL, 2014). In this context, targeted killing is seen as a counterterrorism tactic as lawful as any other military operation carried out by the Armed Forces of a sovereign state in a war or armed conflict (ZENDEL, 1992; DAVID, 2003; TOVY, 2009; MCNEAL, 2014).

Notwithstanding, questions about targeted killings have been frequently brought to the table and it is seen by the UN as an illegal extrajudicial execution (United Nations, 2010), the press (KITTFIELD, 2013) and by international non-governmental human rights organizations (SADAT, 2012). Moreover, there are legal experts to whom targeted killing is intrinsically immoral and ineffective (SADAT, 2012; STERIO, 2012).

Thus, in view of the controversy and the relevance of the subject both to the military organizations engaged in the fight against terrorism and to the International Public Law, the objective of this article was to present the legal arguments claimed by the State of Israel to justify the use of targeted killing as a legal counterterrorism tactic.

In order to achieve this goal, a narrative review was carried out of the legal and military literature on the subject. The articles published in international journals, which represent significant portion of the literature investigated in this study, were selected from the virtual library Periódicos CAPES.

2 TARGETED KILLING IN THE ISRAELI COUNTERTERRORISM DOCTRINE

2.1 Historical background

The unique historical features of the establishment of the State of Israel and the permanent state of hostility between Israel and the Palestinian terrorist organizations provide the basis understand the use of targeted killing by the Israeli (BYMAN, 2006).

During the Second World War, millions of European Jews were deliberately and systematically murdered by the Nazi government of Germany while implementing Hitler's "Final Solution to the Jewish Problem" (ARENDR, 1963; 1992; ROSEMAN, 2003).

The genocide of the Jewish people perpetrated by the Nazis made the pages of history as the Holocaust (Shoah in Hebrew).

The international community, with the exception of the International Red Cross, failed to take any kind of active measure to prevent the Holocaust (ARENDR, 1963; 1992; DAVIES, 2009; HASTINGS, 2012). Because thousands of Jews who had survived the Holocaust emigrated to Palestine, which was still under the British mandate, and took a direct part in the establishment of Israel, one of the express objectives of the foundation of the State of Israel, in 1948, was to become a home and refuge for the Jewish people scattered all over the world, further announcing that a new Holocaust would never take place (ISRAEL, 1948).

As a result, independent from political party, the government of the State of Israel is under strong pressure from the Israeli public opinion not to allow any attack against Israeli citizens to go unpunished (COHEN; CENTURY, 2008). Thus, the political survival of an Israeli government depends on the capacity this government must retaliate all and every terrorist strike against Israeli targets. This Israeli idea of mandatory retaliation after a terrorist attack is summarized in the following excerpt of a speech delivered by the Israeli political and military leader Moshe Dayan in 1955:

It is not also in our hands to prevent the murder of [Israeli] workers at the orchards, or of [Israeli] families on their bed, but it is in our hands to set a high price for our blood, so high that the Arab community, the Arab military forces and the Arab government will not be willing to pay (DAYAN, 1955 apud COHEN; CENTURY, 2008, p. 252).

The idea of mandatory retaliation became gradually stronger in the course of the successive decades of Israel's fight against strikes by the military forces of the bordering Arab states and, above all, by Palestinian paramilitary forces and terrorist organizations. Eventually, in the seventies, targeted killing appeared as a counterterrorism tactical tool to tackle the exacerbated terrorist attacks against Israel:

Israel has traditionally been resorting to assassination in responding to the waves of Palestinian terrorism activity. The first wave of terrorism took place in the seventies in a series of aircraft hijacks, strikes against Israeli targets abroad, (including the massacre of eleven Israeli athletes at the Olympic Games Munich 1972), and infiltration of terrorists across borders coming from Lebanon. This initial wave resulted in heavy losses ended up by demoralizing the Israeli society. Once the infrastructure of the Palestinian terrorist groups was mostly located in countries that were in a state of war against Israel, extradition or other forms of coordinated legal action against the Palestinian terrorists were unfeasible options.

The only form of retaliation against them [the Palestinian terrorists] was to eliminate the perpetrators and the intellectual masterminds [of the terrorist attacks against Israel] (LUFT, 2003, p. 3, free translation).

The escalating intensity of the terrorist onslaught against Israel by the Black September group, as of 1970 prompted the then Israeli government to develop a new counterterrorism policy specifically based on target killing (KLEIN, 2006; PEDAHZUR, 2008). Since that time, targeted killing has been one of the tenets of the Israeli counterterrorism doctrine (LUFT, 2003; KLEIN, 2006). This is why it is finding a legal grounds for its targeted killing military operations is so important to the state of Israel (DAVI, 2003; LUFT, 2003; KRETZMER, 2005; BYMAN, 2006; STAHL, 2010).

Once one of the declared key objectives of the Palestinian terrorist organizations that are in a state of armed conflict with Israel, is the total destruction of the State of Israel (see, for example, "The Hizballah Program. An Open Letter", 1988), negotiating with these organizations is not a viable alternative. Hence, the targeted killing military operations against members of the Palestinian terrorist organizations are seen by the Israeli government as the only currently available effective counterterrorism policy (DAVID, 2003; LUFT, 2003; SILVA KRETZMER, 2005; BYMAN, 2006; KLEIN, 2006; STAHL, 2010).

Additionally, the Israeli government deems that they would be hardly able to find an alternative to targeted killings as a counterterrorism tactic:

Because many of the Palestinians who, along the years, have been targeting Israel counted on the protection of Arab governments; [thus] extraditing them to be tried in Israel has often proved to be impossible. Without peaceful political options to bring the suspects of terrorism to be tried [in Israel] for a long time now, the Israeli governments have been employing targeted killing as the last resource to achieve some form of justice (BYMAN, 2006, p. 97, free translation).

Despite the arguments some authors have advanced about the ineffective nature of targeted killing in the fight against terrorism (SADAT, 2012), the point of view of the Israeli about the benefits reaped from targeted killing as an anti-terrorism tactic, are summarized as follows:

The targeted killing policy has prevented some of the attacks against Israel, reduced the effectiveness of the terrorist organizations, kept the potential bomb manufacturers on the run and deterred terrorist operations. It [targeted killing] has not prevented all the acts of terrorism, nor would it be able to do so. Nonetheless, as part of a set of policies, including road and incursion blockades, it [targeted killing] is a successful response to an intolerable threat (DAVID, 2003, p. 121, free translation).

Furthermore, according to Klein (2006, p. 192):

Figures show a marked drop in the frequency of terrorist strikes against Israel and the Israeli institutions abroad, from 1974 to this date. By the turning of the seventies the high intelligence officers of Israel were practically unanimous about the fact that the wave of Israeli retaliation and preventive killings after the Munich incident had seriously affected the terrorist organizations, leading some to shrink back and others to proceed with difficulty. The a Fatah and other groups that managed to survive, the violent retaliation hindered their ability to operate in Europe, prevented them from acting and gradually forced them to set aside the idea of the mega strikes against Israeli targets abroad.

2.2 Jus ad bellum and the right to self-defense

The principle of jus ad bellum refers to the right of a sovereign State to wage war on circumstances the said State considers just (REZEK, 2002).

To some authors (DAVID, 2003; BYMAN, 2006; KLEIN, 2006; COHEN; CENTURY, 2008), the use of targeted killings as an anti-terrorism tactic would be justified under the jus ad bellum principle, considering that the use of this tactic would be an effective form of expression of national sovereignty by the State of Israel through the projection of military power. According to Friede (2013, p. 385):

(...) Necessarily, national sovereignty must be recognized by the international community, allowing full achievement of national objectives through an effective national policy, which, in most cases, in practical terms, is only achievable through the perceptible projection of State power, in its different economic, political, psychosocial and, most of all, military variables.

Notwithstanding, the Israeli interpretation of the right to resort to armed attack as a self-defense tool has often been challenged based on the rejection of the jus ad bellum in the international legal framework, on grounds of provisions of paragraph four of article two of the Charter of the United Nations (BRAZIL, 1945):

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

Different from the Briand-Kellog Pact from 1928 that only repudiated war as a form of settlement of conflicts between States, and established that war was to be waived as means to achieve the national political objectives, the Charter of the United Nations prohibited all and every form of effective armed attack or threatened armed attack, including war (ACCIOLY; SILVA, 1996; RANGEL, 2002; REZEK, 2002; SHIRYAEV, 2007).

Nonetheless, the UN itself acknowledges exceptions to the prohibited use of force in the international relations in case of: 1) national liberation war aiming at the enforcement of the right of peoples to self-determination (UNITED NATIONS, 1965); 2) the use of force towards the enforcement of a resolution of the UN Security Council (article 42 of the Charter of the United Nations (BRAZIL, 1945)); and 3) individual or collective self-defense (article 51 of the Charter of the United Nations (BRAZIL, 1945)).

Ronzitti (1985, quoted by SHIRYAEV, 2007, p. 86, free translation) presents the minimum conditions a State is required to comply with so that a self-defense action complies with the international law:

- 1) the intervention must not be a punitive or retaliation action, 2) there must be "failure or lack of capacity" of local sovereignty in providing the necessary protection,
- 3) the intervention must be limited in time and in space (the State must not prolong its presence in a foreign territory), 4) the attack against the citizens of the State "target of the attack" must be "arbitrary" that is, groundless and against the minimum rule applicable to foreigners, 5) there is no way of rescuing the citizens by less aggressive means (for example, peaceful negotiations or another form of permission from the State where intervention will take place), and 6) a State is not allowed to resort to armed attack while waiting for international legal proceedings for a peaceful solution of the dispute.

Traditionally, the State of Israel has been claiming self-defense on grounds of article 51 of the Charter of the United Nations, to justify its counterterrorism operations in general (VELLOSO, 2003) and particularly the targeted killings actions (DAVID, 2003; LUFT, 2003; KRETZMER, 2005). More recently, as of the so-called "Second Intifada" (Palestinian uprising against the Israeli occupation between 2000-2005), the official adoption of targeted killing as a counterterrorism tactic by the State of Israel has been justified in terms of preventive self-defense, that is, aiming at preventing the accomplishment of a threatened imminent armed attack (DAVID, 2003; KRETZMER, 2005).

However, there is no consensus about the legality of the use of force on grounds of preventive self-defense, once for this concept, different from self-defense in response to an effective armed attack, there is no express provision on the Public International Law (ACCIOLY; SILVA, 1996; RANGEL, 2002; REZEK, 2002; VELLOSO, 2003).

Shiryayev (2007) states that there are two schools of thought on the legality of anticipatory self-defense by a sovereign State pursuant to article 52 of the UN Charter. The first one argues that correct interpretation of the UN Charter leads to prohibition of anticipatory self-defense.

On the other hand, the second school of thought believes that anticipatory self-defense would be allowed and would be based on the failure by the UN itself to promote collective security in the period that followed the Second World War (SHIRYAEV, 2007).

There are three types of anticipatory self-defense: interceptive, preemptive and preventive anticipatory self-defense (SHIRYAEV, 2007). The interceptive type of self defense refers to retaliation for an attack already in progress with the purpose of preventing it from succeeding (SHIRYAEV, 2007). In this event, provided that the principles of necessity, proportionality and absence of alternatives are complied with the use of force is justified under the Charter of the UN because the State that engages in interceptive self-defense is already the target of a strike (SHIRYAEV, 2007).

On its turn, the preemptive type of self-defense refers to a strike to prevent a threatened imminent attack (SHIRYAEV, 2007). Now, the preventive type of self-defense is related to a planned strike to frustrate an alleged attack at a still unknown time in the near future (SHIRYAEV, 2007). Thus, as the attack still has not occurred, no State should be entitled to anticipatory preemptive and preventive self-defense actions under provisions of article 52 of the Charter of the UN.

However, based on sources of customary international law, there are authors who argue that there are legal arguments justifying preemptive and preventive anticipatory self-defense actions (DAVID, 2003; LUFT, 2003) despite the opposition from most of the international community that fears this understanding will give rise to abuses in the exercise of the right to anticipatory self-defense (SHIRYAEV, 2007).

Israel has been trying to demonstrate that self-defense has been customary along its history, most of all with respect to the rescue of its citizens abroad and to the fight against terrorism (LUFT, 2003; KRETZMER, 2005; BYMAN, 2006; STAHL, 2010; MATOS, 2012). According to Rezek (2002), in the field of Public International Law, acknowledging a custom as a legal standard requires evidence of the material and subjective elements of this custom. The material element of a custom refers to the reiterated practice of a mode of action in face of a specific fact along time. On the other hand, the subjective element of a custom refers to the certainty that a given mode of action in face of a specific fact is necessary and just, hence, acquiring a juridical nature. Until the 9/11 terrorist attacks in 2001, the material and subjective elements of Israel's counterterrorism policy based on anticipatory self-defense, including targeted killing, were questioned by the UN (LUFT, 2003; KRETZMER, 2005; SHIRYAEV, 2007).

Yet, immediately after the terrorist attacks on September 11, of 2001, the United Nations Security

Council adopted Resolution 1368, on September 12, 2001, "recognizing the inherent right of individual or collective self-defense in accordance with the Charter [United Nations]". According to Shiryayev (2007), by recognizing the legitimate right of individual and collective self-defense, in responding to terrorist attacks, UN Security Council Resolution 1368 set the bases for a new understanding of the lawfulness of anticipatory self-defense in the scenario of the fight against terrorism. In this sense, according to the Israeli government, the Palestinian terrorist organizations carry out armed attacks against the State of Israel, which as a victim of an attack, and pursuant to article 51 of the United Nations Charter, should not be prevented from exercising its inherent and natural right to legitimate self-defense and to anticipatory self-defense (DAVID, 2003; LUFT, 2003).

The point of view of the Israeli government on this issue was summarized in the report on judgment 769/02 rendered by the Supreme Court of Israel, as follows:

The defendants [the government and the Defense Forces of Israel] understand that the argument according to which Israel is only permitted to defend itself against terrorism by enforcing the law. The concept that a State is allowed to respond by deploying military forces to a terrorist attack against it has ceased to be a subject of dispute. This is consistent with the right to self-defense provided for by article 51 of the Charter of the United Nations, which allows a State to defend itself against an "armed attack". Even if the opinion of experts is not unanimous about the actual definition of "armed attack", there can be no doubt that the onslaught of terrorism against Israel fits perfectly into the definition of armed attack. Hence, Israel is allowed to use military force against the terrorist organizations (ISRAEL, 2006, free translation).

Still on the issue, also on grounds of the *jus ad bellum* as a natural right, Israel argues that in case of a terrorist attack, exactly like the ones faced by Israel as of the "Second Intifada":

(...) it cannot be expected that States are to allow their civil population and their armed forces to be subject to unpunished attacks by well armed groups that have essentially entered into an armed conflict with the State, which is actually victim [of the terrorist attack] (MACDONALD, 2011, p. 153, free translation).

Nonetheless, in the light of the Public International Law, there is no justification for claiming *jus ad bellum*, once the war has ceased to be a licit option for conflict settlement between States (ACCIOLY; SILVA, 1996; RANGEL, 2002; REZEK, 2002). In effect, under the contemporary international legal framework, the principle of *jus ad bellum* was proscribed and has lost precedence to give way to the principle of *jus in bello*,

the right applicable in a situation of war, which is also known as the International Humanitarian Law (FISHER, 2006; BOUVIER, 2011; STERIO, 2012).

Bouvier (2011, p. 3) says the International Humanitarian Law applicable to armed conflicts is "a set of international rules, established by treaties or by custom, with the specific purpose of solving the humanitarian problems arising out of international or non international armed conflicts".

Bouvier (2011, p. 15) establishes the distinction between *jus ad bellum* and *jus in bello*:

Jus ad bellum refers to the principle of getting involved in a war for a just cause, such as self-defense. On the other hand, *jus in bello* refers to the principle of fighting a war in a just manner, and this is why it encompasses rules of proportionality and distinctions between civilians and combatants.

According to Fisher (2006), the International Humanitarian Law, also known as the Law of Armed Conflicts, is a branch of the Public International Law that sets the rules to govern the behavior of the States at war during an armed conflict. However, Fisher (2006) argues that the International Humanitarian Law does not cover several of the issues arising out of the mode of conflict prevalent in our days, that is, conflicts between sovereign States and transnational terrorist organizations.

On this aspect, despite prohibition of armed conflict as an alternative for settlement of conflict between States is seen as critical to balanced international relations, it has been argued that *jus ad bellum* would still be justifiable when States fight transnational terrorist organizations (DAVID, 2003; MCNEAL, 2014).

Thus, because of the anachronism of the International Humanitarian Law, developed at the time armed conflicts between Sovereign States were prevalent, in the International Humanitarian law and in the International Public Law there is no provision about several irregular war tactics that are typical of conflicts between States and non-state groups, such as targeted killing (FISHER, 2006).

Bouvier (2011) understands that although Protocol I Additional to the Geneva Conventions, adopted in 1977, ruled on the primacy of the principle of *jus in bello* over the principle of *jus ad bellum*, this would not invalidate resorting to *jus ad bellum* in exceptional cases, such as self-defense. On this issue:

This total separation between *jus ad bellum* and *jus in bello* means that the IHL [International Humanitarian Law] applies whenever a *de facto* armed conflict exists, independent from the conflict being justified under the *jus ad bellum*, or that the argument of *ad bellum* may be used to interpret the IHL. However, this also means that the IHL rules will fully prevent implementation of the *ad bellum* principle, e.g., making self-defense unlawful (BOUVIER, 2011, p. 16).

Several authors consider the possibility of members of terrorist organizations claiming enforcement of the rules of the International Humanitarian Law for their strikes (SOFAER, 1988; DAVID, 2003; LUFT, 2003). On this aspect, Sofaer (1988, p. 98, free translation) deems that:

The law can be used by terrorists and their supporters as means to strike at the roots of free nations' capacity to act against them. Terrorists have no respect for the law and do not undertake to accept the rules of any legal system. But, they are aware of the advantage of having the law on their side, and they will fight to influence the international legal system on their behalf.

Notwithstanding, the lawfulness of the use of targeted killing by Israel against the Palestinian terrorist organizations on grounds of self-defense has been challenged based on the fact that it is generally agreed by the international community that Israel is an occupying power and does not face the threat of transnational terrorism, but rather from armed groups of resistance to the Israeli military occupation (KREZMER, 2005). On this aspect it could be argued that the Palestinian terrorist organizations would be legal pursuant to Resolution 2105 adopted by the UN General Assembly on December 20, due to the fact that these organizations are engaged in a national liberation war against Israel.

In effect, Kretzmer (2005) argues that in the event the status of the Gaza Strip and the West Bank had before the Oslo Accords (1993 and 1995) has remained unchanged, Israel would be considered an occupying power under provisions of the Fourth Geneva Convention and, therefore, all Palestinians living on the above mentioned territories, including the members of the terrorist organizations, would be entitled to protection against attacks of any nature, including targeted killing, by Israel.

Nevertheless, after the Oslo Accords the Palestinians were entitled to self-government under the Palestinian Authority, the Gaza Strip was to be managed by the Palestinian Authority and the West bank was broken down into three administrative areas:

1) Area A: full control of the Palestinian Authority; 2) Area B: administrative control by the Palestinian Authority and Israel military control; 3) Area C: Under full Israeli military control (KREZMER, 2005).

Thus, the assignment to Israel of the status of occupying power was questioned, once, as Kretzmer says (2005, p. 206, free translation):

While the situation of areas "C", and, probably, also areas "B" was kept unchanged, the status of areas "A" became controversial. On the one hand, it is argued that having abandoned effective control of these areas, there would be no more reason for Israel to be seen as occupation power. On the other, it is claimed

that the fact that as Israel still holds supreme power over all areas, including full control of who is allowed to enter or exit, it is still an occupying power in all parts of the West Bank and Gaza.

2.3 The judgment of the Supreme Court of Israel on targeted killing

The official position of the State of Israel on the legality of the use of targeted killing as a counterterrorism tactic was summarized by judgment 769/02 issued by the Israel Supreme Court (ISRAEL, 2006).

The Supreme Court of Israel described the official policy of targeted killings enforced by Israel as a counterterrorism tactic, as follows:

The State of Israel employs several means in its war against terrorism. As part of the security actions designed to deal with the terrorist attacks, the State employs what it has been calling the "target frustrating policy" of terrorism. According to this policy the security forces take action to kill members of the terrorist organizations involved in planning, launching or execution of terrorist attacks against Israel. During the Second Intifada, such preventive strikes were carried throughout Judea, Samaria, and the Gaza Strip. (ISRAEL, 2006, free translation).

Before going into the specific discussion of targeted killings, the report on Judgment 769/02 of the Supreme Court of Israel described the historical context of Israel's fight against terrorism and ruled that there is an actual state of armed conflict between Israel and the Palestinian terrorist organizations.

Thus, the Supreme Court of Israel judged that the international law that governs armed conflicts is the rule applicable to the armed conflict between Israel and the Palestinian terrorist organizations, namely: 1) the IV Hague Convention, from 1907, and its respective regulations; 2) the humanitarian provisions of the Fourth Geneva Convention, from 1949; and 3) the customary provisions of the First Protocol Additional to the Geneva Convention, signed in 1977 (ISRAEL, 2006).

Notwithstanding, the Supreme Court of Israel understands that whenever no provisions exists in the Public International Law on an issue related to the armed conflict between Israel and the Palestinian terrorist organizations, this source may be supplemented by human rights laws and the law of the State of Israel (ISRAEL, 2006).

As to the legal standing of the Palestinian terrorist under the international law that governs the armed conflicts, the Supreme Court of Israel judged that the members of Palestinian terrorist organizations could fall into the category of illegal combatants in light

of the international laws on war. In view of this condition, the members of the Palestinian terrorist organizations would not be entitled to the protection afforded by the international laws on war to legitimate combatants (ISRAEL, 2006).

Hence, to the Supreme Court of Israel the members of the Palestinian terrorist organizations "would not be entitled to the protection afforded to "civilians" under the First Protocol Additional to the Geneva Conventions from 1977, once said members take an active part in the hostilities, which makes them lawful military targets subject to attack by the Israeli Defense Forces (ISRAEL, 2006).

In fact, according to Eichensehr (2007, p. 1874, free translation):

The international law of armed conflicts, particularly as consolidated by custom, under the Hague Convention, the Fourth Geneva Convention and the First Protocol Additional to the Geneva Conventions (Protocol I), forbids deliberate attacks on civilians, but does not confer them full immunity from such attacks. Instead, the international law embraces a balance between the military needs against the rights of individuals.

Notwithstanding, the Supreme Court of Israel came to the conclusion that an attack to a member of a terrorist organization by the Defense Forces of Israel, even if such attack results in the death of the member of the terrorist organization, is fully admissible, provided that: 1) this attack is subject to the condition that any incidental damage inflicted to innocent civilians meets the requirements of the principle of proportionality; and 2) it is impossible to use less harmful means (arrest, for example) than the use of lethal force (ISRAEL, 2006).

In his judgment, the President of the Supreme Court of Israel on the legality of the use of targeted killings by the Defense Forces of Israel states:

I also share the opinion that in the difficult war waged by Israel against terrorism, which has been ravaging the country, it should not be peremptorily affirmed that "targeted killing" is forbidden as one of the means of war against terrorism, and that the State must not be denied this right which, those responsible for security consider a necessary means to protect the life of the population [of Israel]. Notwithstanding, in view of the extreme nature of "targeted killings", this means should not be employed beyond the limitations and qualifications described in our judgment, in accordance with the circumstances of the merit of each case. Hence, it was decided that it is impossible to determine beforehand if each targeted killing is forbidden under the international common law, likewise it cannot be determined beforehand that each targeted killing is allowable according to the international common

law. The law of targeted killings is determined in the international common law, likewise, the lawfulness of each individual action [of targeted killing] must be determined according to it [international common law] (ISRAEL, 2006, free translation).

Thus, in 2006, judgment 769/02 issued by the Supreme Court of Israel, grounded on the Israeli point of view, ruled on the legality of targeted killings, thus enabling the Defense Forces of Israel to continue to deploy targeted killing missions against Palestinian terrorists.

Nevertheless, Israel Supreme Court judgment 769/02 became the target of criticism, especially with respect to the added flexibility to the possibility of military strikes against civilians in the course of armed conflicts (EICHENSEHR, 2007; SADAT, 2012).

According to Eichensehr (2007), the most important legal problem of Israel Supreme Court judgment 769/02 lies in the interpretation by this Court of paragraph three of article 51 of 1977 First Protocol Additional to the Geneva Conventions, according to which "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities". (BRAZIL, 1993).

To Eichensehr (2007), the customary understanding of paragraph three of article 51 of the 1997 First Protocol Additional to the Geneva Conventions is that direct participation of civilians in the hostilities would just apply to civilian carrying weapons, while the duration of this participation would be limited to the period of time immediately prior to, during and immediately after an act of hostility in which a civilian had taken part.

Notwithstanding, the interpretation of the Supreme Court of Israel was that direct participation of civilians in the hostilities would involve not just those carrying weapons but also any civilians planning acts of hostility or offering logistic support to acts of hostility by other civilians (EICHENSEHR, 2007). As to the duration of the participation of civilians in the hostilities, the Supreme Court of Israel understood that duration would involve the full period along which the civilian was an effective members of a terrorist organization, including any inactive time between periods of active participation in acts of hostility (EICHENSEHR, 2007). Thus, a member of a terrorist organization would be subject to targeted killing while he remains a member of this organization.

As a result, in Eichensehr's (2007) point of view, Israel Supreme Court judgment 769/02 weakens the international legal protection afforded to civilians during armed conflicts, once it broadens the definition of direct participation by civilians in the hostilities and, consequently, increases the number of susceptible

civilians to attacks by military forces during armed conflicts.

Hence, Eichensehr (2007, p. 1881, free translation) concludes that:

The Supreme Court of Israel should be praised for approaching such a complex and controversial issue, which other legal bodies are unable to tackle. But, the definition adopted by the Court about direct participation [of civilians in hostilities], plus the broadening of the requirement "while such participation lasts" in breach of the requirements of proof function, may undermine the protection afforded to civilians in armed conflicts by the international law, tipping the scales towards the military needs and increasing the likelihood of collateral damage (to non combatants).

3 CONCLUSION

The present study evidenced that the leading arguments claimed by Israel for the use of targeted killings as a counterterrorism tactic have been the principle of jus ad bellum and the concept of self-defense. Additionally, it was also evidenced that the Supreme Court of Israel understands that targeted killing is a lawful war practice against terrorism, provided that certain rules are complied with.

Thus, the point of view of Israel seems to be that prohibition of jus ad bellum in the contemporary international legal framework applies to conflict relations between sovereign States, but not to conflicts between a sovereign State and transnational terrorist organizations. The right to war was prohibited during a historical period when armed conflicts took place between Sovereign States. Currently, armed conflicts between a sovereign State and transnational terrorist groups add much complexity to the strict enforcement of the rules of the International Public Law and challenge law specialists to build a new international framework that takes into consideration the idiosyncrasies of counterterrorism and irregular war.

The specific case of the use of targeted killings as counterterrorism tactic by the State prompts us to engage in a deep reflection about the complex relations between the national defense policy and the International Public Law. The example of Israel suggests that in face of serious threat to national security, subjection of a State to the international legal framework may eventually conflict with the national defense policy.

In effect, the current political conditions favor Israel's belief that targeted killing is one of the few feasible forms of self-defense in the fight against terrorism. Thus, the issue of the legality of targeted killings evidences national sovereignty prevailing over the rules of the international legal framework on the war on terrorism.

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