

WORKING PAPER 35

MAY 2015

Executive Ordered Dead

A Consideration on the Legality of the Targeted Killing of Political Leaders

Mrs. Melody (Mostow) Coven



ICT
International Institute
for Counter-Terrorism
With the Support of Keren Daniel

International Institute for Counter-Terrorism (ICT)

ICTWPS May 2015 [35]

Abstract:

Is it legal to target political leaders of other nations in times of war? This issue is given virtually no attention in existing legal scholarship. International Humanitarian Law outlines who can be legally killed in wartime, but the legality of targeting political leaders is not addressed. Based on existing legal principles that determine when an individual can be targeted in wartime, I explore how these concepts can inform if and when it is legal to target political leaders. I use case studies from the United States, Britain, Israel, Australia, and Germany to illuminate the existing legal realities in which political leaders can and cannot be targeted. I find that political leaders can be legally targeted, depending on their combatant status, which is largely determined by their country's domestic designation of military powers. Leaders who are formally allotted military powers in their domestic constitutions and basic laws can be considered combatants and therefore can be targeted. Leaders who are not formally allotted military powers but in practice control the military must be considered civilians. These individuals can be legally targeted when taking direct part in hostilities, but legal debate has recently emerged arguing that civilians who fulfill a continuous combat function can be legally targeted at all times.

Executive Ordered Dead:

A Consideration on the Legality of the Targeted Killing of Political Leaders

Mrs. Melody (Mostow) Coven

"If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law."
— Hersch Lauterpacht

"There are 4 kinds of Homicide: felonious, excusable, justifiable, and praiseworthy."
— Ambrose Bierce

The laws of war are, as put so eloquently by Hersch Lauterpacht, "at the vanishing point of international law," and contained within these laws is a guideline for when it is legal to kill another human being (Lauterpacht, 1952). Ambrose Bierce jests that killing can be anywhere from "felonious" to "justifiable and praiseworthy," and the laws of war are what dictate into which category killing falls, at least as far as the law is concerned. The laws of war provide a framework for who can legally be killed and under what circumstances, but these laws are incomplete and often need further clarification. One question that is not explicitly addressed is the legality of killing a political leader. Is it ever legal for a nation to kill the leader of another nation? Would doing so be "felonious" or "praiseworthy?" Curiously, this legal question is not one that is answered in the current legal literature. International Humanitarian Law provides

guidelines for when it is legally permissible to kill someone, and although these guidelines put a strong emphasis on the status of the person being targeted, specifically whether s/he is a combatant, neither the law nor legal scholars have formally addressed how political leaders would fall under this legal distinction.

While virtually nothing has been written on this topic, the question of the legality of killing a political leader is becoming increasingly relevant as technologies associated with targeted killings, such as drones, are improving and becoming a popular military option. Countries such as the United States and Israel have adopted policies of targeted killing, and with this trend, an answer to the legality of the targeted killing of political leaders becomes all the more imperative (Friedman, 2012; Israel Ministry of Foreign Affairs, 2006). Although this question is not answered explicitly in the current literature, the principles provided in International Humanitarian Law regarding who can be legally killed in wartime give a framework to understand how to answer this question. When considering the relevant legal principles contained in International Humanitarian Law regarding the killing of individuals in wartime, we find that political leaders can be legitimately and legally targeted, depending on their combatant status which is largely determined by their country's domestic designation of military powers.

Uncharted Legal Territory

International law is a developing field, and as such, many issues within the international legal sphere are changing, not clearly defined, and often still being written. The legality of the targeted killing of a political leader is given almost no attention by codified international law or

by legal scholars. One exception is “The Case for Targeting Leadership in War,” by Lieutenant Commander Bruce Ross of the U.S. Navy. Ross argues that targeting political leaders is not only legal, but even encouraged in various contexts. He claims that,

“Targeting the individual leaders is not only permitted under domestic and international law, it may even be required under certain circumstances. Recalling that the use of armed force must be necessary and proportional, if the death of the enemy’s head of state would hasten an end to hostilities, the legal presumption under the law of armed conflict rests with targeting the leader” (Ross, 1992).

In this line of argument, Ross justifies the legality of killing a political leader based on the principle of proportionality. Similarly, scholar Robert Turner advocates for the legality of killing a leader when it could spare the lives of many soldiers.

“The ‘proportionality’ doctrine of international law supports a conclusion that it is wrong to allow the slaughter of 10,000 relatively innocent soldiers and civilians if the underlying aggression can be brought to an end by the elimination of one guilty individual” (Turner, 1990).

Both of these arguments focus on the legality of killing a political leader from the perspective of proportionality, but the principle of distinction, or whether a leader is a combatant or civilian, is barely addressed. This is a critical element of the question that deserves attention.

Another case in which the legality of the targeted killing of a leader is discussed can be found in Thomas C. Wingfield’s work, “Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine” (Wingfield, 2013). Although Wingfield explores this issue, his focus does not directly address it. His work is based on a hypothetical of the legality of killing Saddam Hussein, and his theoretical legal work explores the legality of killing elites of tyrannical regimes. He explicitly states in his work that, “Addressed here are only those

[leaders] who have already been judged lawful targets” according to international law (Wingfield, 2013). Wingfield thus outlines ways in which it would be legal to kill a regime leader. By approaching the topic assuming that the person has already been judged as a lawful target, the question of the legality of killing a political leader is not sufficiently addressed. How has the individual been judged to be a lawful target? Can political leaders be lawful targets? Are they always lawful targets? Are only regime heads lawful targets, and as Wingfield seems to imply, is every regime head a lawful target?

Wingfield further argues that regime elites can be targeted with a legal justification not applicable to targeting a democratic leader, as the killing of a regime leader could end a war but the killing of a democratic leader may not. Thus each killing would have a different implication for proportionality (Wingfield, 2013). This argument is very much in line with the claims of Ross and Turner, who argue that the notion of proportionality implies that it is legal to kill a political leader because doing so would bring a swift end to the conflict (Ross, 1992; Turner, 1990). For Wingfield, the form of government that one leads has major implications for the likely impact of killing him/her and therefore for the application of proportionality.

It is important to note that Wingfield raises a valuable issue. Does the form of government that one leads affect that person’s status as a legitimate target in wartime? I argue yes, but not in the way that Wingfield claims. Before we can fully explore this argument, its problems, and reach an understanding on the legality of killing a political leader, it is crucial to establish a foundation of principles that must be considered in assessing the legality of killing a leader. These principles are found in the Laws of Armed Conflict, or International Humanitarian Law (IHL).

When Is It Legal to Kill Someone?

International Humanitarian Law (IHL) is the body of law that governs behavior during wartime. Often referred to as *jus in bello*, the laws of war, or the laws of armed conflict, IHL is found in the Hague Regulations of 1907, the Geneva Conventions and their Additional Protocols I and II, as well as in customary law, such as in a comprehensive study put out by the International Committee of the Red Cross entitled “Customary International Humanitarian Law” (Henckaerts and Doswald-Beck, 2005). These laws only apply during war, as there are other bodies of international law that apply during times of peace and during times leading up to war. Like any other body of international law, there is debate as to what laws can be considered customary law and therefore binding, versus what laws are not customary law and therefore only binding to its specific signatories. With that in mind, assuming that an international (or non-international) armed conflict has been established, IHL is the legal body consulted to determine the legality of actions in wartime.

In regard to the killing of individuals, IHL outlines a framework for when doing so is legal (Melzer, 2008). The main questions to consider when killing a person would be those of “distinction” and “proportionality.” In terms of distinction, we must distinguish between civilians and combatants when targeting a person, and between civilian and military objectives when targeting a place (Additional Protocol I, 1977). As our question explores the legality of killing a leader, the distinction between civilian and combatant will be a crucial issue to explore. Although this principle is outlined in Additional Protocol I of the Geneva Conventions, of which many nations are not signatories, the principle of distinction is widely accepted as customary law, and therefore binding upon all nations (Melzer, 2009).

IHL states that combatants can always be legal targets, because as a member of an armed force, they essentially lose their right not to be killed. This is known as “status-based targeting.” Civilians can still be legally killed, but according to “activity-based targeting.” This means that a civilian can only be targeted if they are taking a “direct part in hostilities,” and even so, they can only be legally targeted while doing so (Additional Protocols I and II, 1977). Recently, the notion of when it is legal to target a civilian who is taking a direct part in hostilities has been called into question, which I will explore in depth later. Regardless, whether a political leader would be defined as a combatant or civilian would have significant implications regarding if and when s/he could be legally targeted.

The principle of proportionality assesses the military advantage gained from an act of war in comparison to the damage done (Additional Protocol I, 1977). For example, before a military strike is carried out, a commander must consider how much collateral damage will likely result from the strike, if this damage will be proportional to the military advantage gained from such an act, if there would be a less destructive way to achieve the same military goals, etc. Given the immense military advantage that would be gained from killing a political leader, it is reasonable to assume that the principle of proportionality could be met in such a situation. This is the argument to which the existing legal literature has been alluding. As of yet, though, the principle of distinction and its applicability towards the legality of killing political leaders has not been sufficiently explored. With that in mind, the crux of the legality of targeting a political leader lies in that individual’s status as a combatant or civilian.

Are Political Leaders Combatants?

The primary legal principle that must be clarified when considering the legality of killing a political leader is that individual's status as a combatant or civilian. Political leaders are not explicitly addressed in regard to this distinction within IHL, but consulting the definition of combatant should help shed light onto how political leaders would fall within the principle of distinction. Although the principle of distinction from Additional Protocol I is accepted as customary law, the definition of combatant from this same protocol is not. Article 43(2) of Additional Protocol I, which defines combatant, is considered controversial, as it broadens who would be considered a combatant and thus has rights as a prisoner of war (Turner and Norton, 2001). For this reason, many nations are not signatories of Additional Protocol I, and therefore, using its definition of combatant would risk providing a legal argument only narrowly relevant to those who are signatories to the protocol. Therefore, I have chosen to define combatant based on the designation of combatant implied by who is entitled to "prisoner of war" status found in the Third Geneva Convention, Article 4. It states,

"A. Prisoners of war...are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict..." (GCIII, Article 4).

This section of the Geneva Conventions designates that "members of the armed forces," are entitled to "prisoner of war" status, and therefore, we can infer that "members of the armed forces" are defined as combatants, as civilians are not entitled to "prisoner of war" status.

Additional Protocol I explicitly outlines this same principle of who counts as a combatant. Article 43(2) of Additional Protocol I states that, "Members of the armed forces of a Party to a conflict [other than medical personnel and chaplains covered by Article 33 of the Third

Convention] are combatants” (Additional Protocol I, 1977). In other words, combatants are those who are official members of “armed forces,” and can only be legally targeted if those armed forces are a party to the conflict. The notion of a combatant including those who are “members of the armed forces” is also completely in line with military manuals globally, and thus, we can accept this definition as applicable through customary law (International Committee of the Red Cross, 2014). For the scenario of targeting a political leader, we will assume that the individual is a leader of a side that is party to a conflict. With this understanding of the definition of combatant, for a political leader to be considered a combatant, they must be a “member of the armed forces.”

While finding that a political leader is *not* a combatant does not mean that it would never be legal to target him/her, classifying a political leader as holding combatant status would make it sufficiently easier to kill him/her legally. If this individual were found to be a combatant, other parties to the conflict could legally kill him/her at any time, as opposed to the restriction posed on only killing civilians while taking a direct part in hostilities. When considering what status to apply to a political leader, I argue that the relevant status would greatly depend on which leader one is considering.

Who is considered a political leader is not a simple question. Surely the president of the United States counts as a political leader. He is the top official of a recognized state. The members of the Cabinet of the United States, although not at the top of the chain of command, could still constitute political leaders. Both the prime minister and president of the State of Israel could be considered political leaders, although their roles and powers differ significantly. The Queen of England could be considered a political leader as well, even though in practice her role in society is more symbolic rather than political.

The category of “political leader” becomes more indistinct when considering leaders of political movements that are not recognized or do not have a state. Could the Dalai Lama be considered a political leader? Surely some would think of him as such, although he leads a people in exile. What about the head of Hezbollah? Hezbollah is simultaneously a terrorist and political organization, and practically speaking, it can be said to control Lebanon (Sorcher, 2011). Is this sufficient evidence for consideration as a political leader? I am not sure, nor do I believe that this question must be answered here. If the international community chooses to legally regulate the targeting killing of political leaders, of course a definition of “political leader” would be necessary. That said, this area is not specifically addressed in international law at all; therefore I will explore how existing law applies to targeting people who are unquestionably political leaders. By highlighting the complexity of defining a political leader, I invite others to explore the legal question of whether those who may or may not qualify as political leaders can be legally targeted. I will not, however, address these cases in this study.

To consider the combatant versus civilian status of a political leader, each leader must be examined on a case-by-case basis. The law provides no over-arching designation of legal status for leaders of countries, and therefore, their combatant status must be based on an individual consideration of their situation as applied to the definition of a combatant. I will start with one of the most clear-cut and notorious positions of political leadership: the president of the United States.

Is President Obama a combatant? We must return to the definition of a combatant to answer such a question. First, we must assume that the United States is a party to an international or non-international armed conflict, as IHL only applies during wartime. The next consideration must be if he is a member of armed forces. When we consider the domestic

designation of powers of the president, we will find that he certainly is. The United States constitution in Article II, Section II, Clause I, states that, “The President shall be the Commander in Chief of the Army and Navy of the United States.” If the president of the United States is the Commander-in-Chief of the United States Armed Forces, surely he qualifies as a member of the United States Armed Forces. Therefore, according to the Third Geneva Convention, Article 4, as well as Article 43(2) of Additional Protocol I, he *would* qualify as a combatant. This means that the laws of IHL would deem him a legitimate target during wartime.

With this line of argument, I propose that a political leader’s combatant status depends on the domestic designation of military powers within the country that s/he leads. Within the United States, the presidency is not the only position of leadership that would be considered a combatant. Surely the Secretary of Defense would also be considered a member of the armed forces, and therefore, a combatant. Thus, the Secretary of Defense could be legally targeted in wartime. The Secretary of Agriculture, however, is not by definition a member of the United States Armed Forces, and therefore, would be considered a civilian. It would, thus, be illegal to target the United States Secretary of Agriculture, unless this individual were taking a direct part in hostilities, and if so, s/he could only be targeted while participating in the conflict.

One legally unclear category within the United States as far as combatant status goes would be Members of Congress. The Constitution in Article I, Section 8, allots them the power to declare war. Is this power sufficient to be considered a member of the armed forces, and therefore to receive combatant status? I think the answer is likely not. While many Members of Congress served in the military before being elected to serve their districts, they are not commonly considered to be members of the U.S. Armed Forces. That said, the power to declare

war is significant and constitutes involvement in the armed forces; therefore, I do not think their legal status as civilians is straightforward.

Next, let us consider Britain. According to British law, the “head of the armed forces” and commander-in-chief is none other than the Queen of England, or whoever the reigning sovereign monarch may be (*British Monarchy*). As the head of the armed forces, the Queen of England would qualify as a “member” of the armed forces. She would thus be considered a combatant, and therefore, would be a legitimate target in wartime. Before we make the determination of the Queen as a combatant, though, one consideration that should be given is her religious role in society.

The definition of combatant, according to customary International Humanitarian Law, excludes religious personnel (Henckaerts and Doswald-Beck, 2005). Could the Queen or reigning monarch in Britain be considered religious personnel? The British monarch, after all, holds the title of the “Supreme Governor of the Church of England” (*British Monarchy*). A closer look at the definition of religious personnel suggests that the British monarch would not fall into this category. According to Article 8(d) of Additional Protocol I, “religious personnel means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry...” (Additional Protocol I, 1977). The Queen of England holds a position in Britain as a religious leader, but one cannot easily argue that she is “exclusively” engaged in religious work. Although Additional Protocol I is not wholly accepted as customary law, this definition of religious personnel is quite narrow, and as the Queen does not qualify, it can be inferred that she would not qualify in another, even more legally narrow context. With this in mind, I believe that she still qualifies as a combatant.

The notion that it would be legal to target the Queen of England in war is somewhat mind-boggling, as in practice, she plays almost no role in Britain's military affairs. Although the British Prime Minister holds *de facto* authority over the armed forces, the Queen of England's official capacity as commander-in-chief reasonably grants her combatant status. The Queen is, thus, a political leader who could be legally targeted in wartime.

When Political Leaders Are Not Combatants

In countries that explicitly designate their top political leader as the commander-in-chief of their armed forces, legally speaking, we can consider these leaders to hold combatant status. Combatants, according to IHL, are legitimate targets in wartime, and therefore, political leaders who are formally allotted military powers within their domestic constitutions can be considered combatants and thus legal targets. We also should consider the situation of political leaders who are not clearly allotted military powers in their country's foundational laws. The legal considerations for the targeted killing of a political leader who does not hold combatant status would be significantly more complicated.

One example of this situation would be the Prime Minister of Israel. Although Israel has no constitution, they have outlined Basic Laws that essentially function as such. Within these Basic Laws, their Basic Law of the Military explains that, "The Minister in charge of the Army on behalf of the Government is the Minister of Defense. The supreme command level in the Army is the Chief of General Staff" (*Basic Law: The Military*, 1976). The Basic Laws of Israel do not explicitly give military power to the Israeli Prime Minister; he is not designated as the country's commander-in-chief.

According to Israel's Basic Law, the Minister of Defense is in charge of the armed forces, and therefore, we can consider him to be a combatant (*Basic Law: The Military*, 1976). The question at hand is whether we can say the same of the Israeli Prime Minister. In practice, the Prime Minister of Israel plays a central role in military decisions, but does he have combatant status? To be a combatant, one must be a member of the armed forces. Technically, according to the design of Israel's government, the Prime Minister is not considered a member of the armed forces. With this in mind, I do not think that the Prime Minister of Israel can be considered a combatant. While this does not mean that he can never be legally targeted, it would be much harder to legally kill him than it would be to legally kill someone with combatant status, such as the Queen of England or the President of the United States. The idea that it would be easier to legally justify killing the Queen of England than killing the Prime Minister of Israel is somewhat shocking, but based on domestic designations of military powers, this seems to be the case.

In order to legally kill a civilian, whom Prime Minister Netanyahu would be considered from a legal standpoint, he must be taking a "direct part in hostilities" (Additional Protocol I, 1977). This principle is outlined in Article 51(3) of Additional Protocol I and has been adopted as an accepted concept, although what exactly constitutes "direct part in hostilities" continues to be a source of legal debate (Melzer, 2008; Melzer, 2009). For our purposes in analyzing the behavior of a political leader, the application is quite simple. Practically speaking, Netanyahu plays a principal role in the military decisions and actions of the Israel Defense Forces (IDF). The IDF formulates their operations around the instructions and guidance of the Government of Israel, with the Prime Minister leading the way.

While a combatant, such as the President of the United States, could be legally targeted at his own dinner table, the Prime Minister of Israel, according to this principle, could only be

legally targeted while participating in the hostilities, such as during a meeting advising the Secretary of Defense or the IDF Chief of Staff. It would be illegal to target him during his morning cup of coffee. This is the result of status-based versus activity-based targeting, as combatants are always legal targets simply by virtue of their status but civilians are only legal targets when they take direct part in hostilities. This distinction has been questioned in recent legal debate, which I will address shortly.

First, another country which can provide helpful insight into this legal issue is Australia. In the Commonwealth of Australia, the Prime Minister acts as the head of government, but technically, no such position exists in the Australian constitution (Commonwealth of Australia Constitution, Chapter II). According to the constitution, the Governor-General is the head of the Australian government, when in reality, the Governor-General is not nearly as powerful as the Prime Minister (*Governor-General's Role*, 2014). This designation of powers has major legal implications. Because the Australian Prime Minister technically exists as an informal role, s/he does not hold concrete powers designated in the constitution and therefore is not officially allotted military powers. As such, the Australian Prime Minister cannot be considered a combatant, as s/he is not an official member of the Australian Defense Force (ADF). Rather, s/he would be considered a civilian.

While the Australian Prime Minister is a civilian, it seems as though the Australian Governor-General is not. Article 68 of the Australian constitution states that, "The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative." As the official head of the ADF, the Governor-General would be considered a combatant, despite that in reality, this designation as head of the ADF is understood to be ceremonial. Much like the case of Israel, the Australian Prime Minister, as a civilian,

could only be targeted while taking direct part in hostilities, while the Ministers of Defense and Australian Governor-General, as combatants, could be targeted at any time.

In the case of Australia, another interesting and problematic issue comes to light. Australia is one of many countries that still have a monarchy, with the Queen of Australia, Queen Elizabeth II, who also serves as the Queen of England, serving as the current head of the Australian monarchy (*The Queen and the Commonwealth*). This is of course a remnant of British colonialism dating back before Australia's independence. Queen Elizabeth II also holds the role of the Queen of Canada, Queen of Jamaica, Queen of The Bahamas, and more, in the same spirit remnant of the era of British colonialism (*The Queen and the Commonwealth*).

While practically speaking these roles mean very little, the Queen's official honors, titles, and designations have potential legal implications. Many armies of states that were former colonies have special positions in their armies designated for members of the royal family, called "Colonels-in-Chief." This designation is a clear vestige of a world much different than today, in which Britain held colonies all over the world and monarchies in general held much more practical power than they do today. Colonels-in-chief are appointed positions with virtually no operational role, in which someone serves as a patron of a regiment of the army (Merriam-Webster). In the case of Australia, Queen Elizabeth II is the colonel-in-chief of the Royal Australian Infantry Corps, of the Royal Regiment of the Australian Artillery, of the Corps of Royal Australian Engineers, and the list goes on (*The Australian Army*). Furthermore, the Queen's husband, the Duke of Edinburgh, serves as the colonel-in-chief of the Corps of Royal Australian Electrical and Mechanical Engineers (*The British Monarchy*).

Although one can discern the historical source of these positions in the Australian Army, the legal reality is that both the Queen and her husband technically hold positions in the

Australian Defense Force. This implies that they could be considered combatants in the Australian army, and that if Australia were party to an international armed conflict, the Queen and her husband could be legally targeted. Even more surprising, the King of Jordan currently holds a post in the army of the United Kingdom, designated as colonel-in-chief of the Light Dragoons regiment (*Light Dragoons*). As such, there is a strong legal argument that the King of Jordan, as a technical “member” of the armed forces, could be targeted as a combatant were the United Kingdom to be party to a conflict. There is no question that this network of colonels-in-chief provides a legal disarray as far as IHL is concerned, so rather than individually analyzing each member of the royal family who holds such a post, I simply wish to raise the issue from the perspective of international law as far as combatant status is concerned.

Germany, Israel, and New Conceptions of Combatant Status

My final case study analyzes this issue in Germany. According to German Basic Law, the German military, or the Bundeswehr, is under the German Minister of Defense during times of peace and under the Federal Chancellor during times of war (Basic Laws of Germany, Ch. Xa, § 115b). As we are only examining the legality of killing a political leader during wartime, the Federal Chancellor is the relevant leader in charge of the military for our purposes. Because s/he is outlined as head of the military in German Basic Law, it would seem s/he would be a combatant as a member of the German Armed Forces.

However, unlike in other cases, Germany’s Military Manual explicitly addresses the question of political leaders as targets in wartime (ICRC). According to their military manual, “Persons who are members of the armed forces but... do not have any combat mission, such as

judges, government officials and blue-collar workers, are non-combatants” (German Military Manual Vol. II, Ch. 1, § 587, 1992).

This is highly significant for a number of reasons. First of all, German law explicitly says that “government officials” are non-combatants. While we may have assumed that the German Federal Chancellor, as head of the military, would be classified as a combatant, Germany is a rare case in which military doctrine specifically addresses such a situation and protects this position from being targeted by labeling all government officials as non-combatants. Germany outlines that its government officials are not combatants, while in comparison with countries like the United States, it seems clear that government officials can be considered combatants. These conflicting designations demonstrate that no customary law exists yet on this issue. Customary law must be mainstream and widespread among states, and as Germany and the United States have differing realities in regard to the combatant status of their leaders, we can infer that there is no overarching customary law on the combatant status of political leaders.

Further, Germany’s decision to specify that government officials are non-combatants implies that such a status is not assumed. By specifying that government officials are non-combatants, coupled with the fact that such a specification in a military manual is quite rare, one may infer that the default assumption is that government officials in fact could be classified as combatants. This is further supported by the fact that government officials are listed as an example of a “member of the armed forces...[who does] not have a combat mission” (German Military Manual Vol. II, Ch. 1, § 587, 1992).

The definition of combatant as outlined by the Geneva Conventions considers “members of the armed forces” to be combatants; whether someone does or does not have a combat mission

is not relevant to their combatant status (GCIII, Article 4). According to German law, though, “members of the armed forces...[who do] not have a combat mission” are categorized as “non-combatants.” This directly conflicts with established international law regarding the definition of combatant.

Does it conflict with international law regarding the status of government officials, though? As has been noted, international law does not specifically address the combatant status of government officials. If international law does not address their status at all and Germany states that they are non-combatants, perhaps Germany is simply one of the few countries that has legally addressed the combatant status of political leaders. While this would be a strong legal argument in a country like Israel where the Prime Minister is not formally allotted military powers, in Germany, the Federal Chancellor meets the standard international legal definition of a combatant. She is a “member of the armed forces;” after all, she is formally in charge of them.

With this in mind, the German case is an example in which domestic law and international law conflict. German law is clear that government officials are non-combatants. International law, however, clearly states that “members of the armed forces” are combatants, and as a member of the German Armed Forces, the German Federal Chancellor would, by definition, be a combatant by international legal standards. Because of this, Germany highlights the risk run by using domestic law to better inform international law. While we turned to domestic designations of military powers to help enlighten the existing international law regarding the targeted killing of political leaders, Germany is a case in which doing so brings about a legal contradiction. It seems as though targeting the Federal Chancellor of Germany in wartime would be legal according to international law and illegal according to German law. It is

not an anomaly to find a case of domestic and international law conflicting, but even so, this conflict does not help to resolve the legality of targeting political leaders in wartime.

Other elements that complicate determining the legality of targeting political leaders in wartime are recent decisions on the notion of “direct participation” and when civilians can legally be targeted. As far as international law is concerned, combatants can be legally targeted in wartime. This does not mean that an army can kill members of another army en masse for no reason, as other legal principles such as proportionality are relevant in determining the legality of each specific situation. That said, for our purposes of determining how political leaders fall under the principle of distinction, leaders who can be considered combatants are a relatively clear-cut case. They are legal targets.

What is less straightforward are political leaders who we found not to be combatants. These are leaders, such as the Prime Ministers of Australia or Israel, who practically control the military but officially are not members of the armed forces. Can they be legally targeted, and if so, when? Up to this point, I have referenced that political leaders found to maintain civilian status could still be legally targeted when they “take direct part in hostilities” (Melzer, 2008). The notion of direct participation in hostilities, though, is controversial and intensely debated.

In an era in which unconventional armies are playing a continuously greater role in conflict, international law is struggling to address the legal status of individuals who are not technically a member of armed forces, but for all intents and purposes, belong to an armed movement such as a terrorist group. Allotting them protection under civilian status seems problematic, and yet, blurring the lines of who can be defined as a combatant is problematic as well. As international legal scholars attempt to address these difficult questions, we find rulings

and legal opinions that are particularly relevant to determining the legal status of political leaders who are not, by definition, combatants but who, practically speaking, control military affairs.

In a report published by the International Committee of the Red Cross (ICRC) in 2009 on direct participation in hostilities, legal scholar Nils Melzer outlines the notion of “continuous combat function” (Melzer, 2009). International law has two relatively clear categories that inform when an individual can be legally targeted. Combatants, as we have explored, can be legally targeted based on their status, regardless of their actions. Civilians cannot be legally targeted, unless and for which time that they “take direct part in hostilities.” Falling in between these two categories is Melzer’s notion of “continuous combat function.” Melzer describes it as follows.

“Where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group. In other words, the ‘revolving door’ of protection starts to operate based on membership” (Melzer, 2009).

While traditionally, non-combatants can only be targeted if and when they are taking direct part in hostilities, Melzer argues that individuals who “go beyond spontaneous, sporadic, or unorganized direct participation in hostilities” should be treated differently than other civilians who take direct part in hostilities (Melzer, 2009). There is a line that they can cross, described by Melzer as “continuous combat function,” and once this line is crossed, they can be legally targeted at all times just like a combatant. This is the case until they “cease [continuous combat] function” (Melzer, 2009).

This has potential implications for targeting political leaders. For a leader like the Prime Minister of Australia or Israel, we have determined two key factors. First, they are not

combatants, and second, practically speaking, they have a major hand in military affairs. Can they only be targeted when taking direct part in hostilities, such as while they sit in military meetings and give orders to military chiefs of staff? Based on Melzer's concept of "continuous combat function," perhaps these leaders could actually be targeted at all times due to the nature of their continuous role in military affairs. Surely their role in hostilities "[goes] beyond spontaneous, sporadic, [and] unorganized" action. According to this legal principle, there is a strong argument that political leaders who control or play a major role in the military could be legally targeted at all times during war.

A similar sentiment can be found in a ruling from three years prior decided by the Israeli High Court of Justice. In a decision regarding the legality of the targeted killing of terrorists, the High Court ruled that targeted killing is legal under international law in some circumstances, and outlined primary criteria that must be considered in assessing the legality of targeting a civilian (Yoaz, 2006). First and foremost, the court explained that "information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking a direct part in the hostilities" (Israeli High Court of Justice, 2006).

Establishing that the burden of proof is on the army to confirm that a civilian is taking direct part in hostilities, the court goes on to highlight the challenge of assessing the legality of targeting an individual who is continuously involved in hostilities, as international law allows civilians to be targeted "for such time" that they participated in hostilities. The court addressed,

"...The dilemma regarding the requirement which 'for such time' presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the 'revolving door' phenomenon, by which each terrorist can rest and prepare for the next act of hostilities while receiving immunity from attack, is to be avoided. In the wide area between those two possibilities, one finds the 'gray' cases,

about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case” (Israeli High Court of Justice, 2006).

In this decision, the Israeli High Court advocates for a case-by-case determination on the legality of targeting a civilian, to avoid allowing immunity to civilians who benefit from this legal loophole while they prepare for the next attack.

This recognition of “gray cases” which should be assessed on a case-by-case basis has major implications for the targeted killing of political leaders. After all, by the components set forth by the Israeli High Court, political leaders pass their test of legality with flying colors. Take the Prime Minister of Israel. We have established that he is a civilian. In his role as the Prime Minister, he directs decisions of the army, and therefore, takes direct part in hostilities. It would not only be easy to satisfy the High Court’s standard of identifying the civilian and proving that he directly participates in hostilities, as the fact that the Prime Minister leads the army is well known. It is also easy to prove that his involvement in the hostilities is ongoing.

Unlike the “gray cases” that the High Court describes, the frequency and predictability of the Prime Minister’s involvement in hostilities is unequivocal. Therefore, according to the opinion of the Israeli High Court of Justice, political leaders who maintain civilian status but control military affairs would most likely be legal to target at all times during war. It is unclear if the opinions of the High Court and of the International Committee of the Red Cross can be considered customary law, and therefore binding. Regardless, it is important to understand the implications this debate has for the legality of targeting political leaders.

Conclusion

International law says nothing explicit as to the legality of targeting a political leader during wartime. With a consideration of the principle of distinction and its applicability to the

killing of political leaders during wartime, I conclude that a political leader can be legally targeted, depending on the domestic designation of military powers granted to the leader. In any country in which a political leader is established as the commander-in-chief of the armed forces, such a leader can be considered to hold combatant status and therefore be legally targeted. Domestic designation of power is critical in determining one's legal status, and therefore, even a symbolic figurehead like the Queen of England, who may not practically play a role in military affairs, can still be considered a combatant due to her official power over the British Armed Forces.

The opposite is true as well. A leader who directs the decisions of his/her country's armed forces but is not officially allotted power over them according to his/her nation's basic laws cannot legally be considered a combatant. Instead s/he would be a civilian who takes a direct part in hostilities, and the law is still developing regarding when it would be legal to target him/her. International law states that civilians can only be targeted for such time that they take direct part in hostilities, but recent legal opinions have suggested that civilians who continuously take part in hostilities can be targeted for such time that they fulfill a continuous combat function. In addition to the consideration of distinction, we have established that the principle of proportionality would reasonably be met with the targeting of a political leader, and therefore, the main question in assessing the legality of targeting a specific political leader would be their status as a combatant or civilian.

This consideration of the relevant legal principles in the targeted killing of political leaders is an exploratory study into an issue that is virtually never discussed in the legal literature. International law, especially the laws of war, is largely influenced by legal norms, and norms by definition evolve. I encourage scholars of international law to consider what the laws

are now in regard to the targeted killing of political leaders and how these laws can be rewritten to create a more desirable legal reality. Perhaps IHL should specifically address political leaders when it outlines the distinction between combatant and civilian, as does Germany in their military manual. Perhaps figureheads, such as the Queen of England, who officially have military powers but in practice do not play a role in military affairs, should be granted civilian status according to IHL. As the law exists today, I do not believe that is currently the case.

At a point in history in which policies of targeted killing are becoming more common and the technologies associated with targeted killings are improving, it is concerning that IHL does not address the legality of killing a political leader. This area of law essentially does not exist, but the relevancy of such laws is likely to increase in our lifetime. With this in mind, I hope that this work can serve as a foundation for considering how the targeted killing of political leaders fits into the laws of war and encourage other legal scholars to shed light onto this topic which until now has been largely ignored.

The author holds a Bachelor of Arts in Political Science and Jewish Studies from Indiana University and a Masters degree in Diplomacy and Conflict Studies from IDC Herzliya. She is available by email at melody.coven@gmail.com.

List of References

Additional Protocol I Relating to the Protection of Victims of International Armed Conflicts, Geneva, 08 June 1977.

Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 08 June 1977.

"Ambrose Bierce Quotes" (2014). *Goodreads.com*. Goodreads Inc.

Colonel-in-Chief. Merriam-Webster. Retrieved October 31, 2014.

Commonwealth of Australia Constitution Act [Australia], 9 July 1900, available at: <http://www.refworld.org/docid/483ea5622.html> [accessed 31 October 2014]

Corps. The Australian Army. Retrieved October 31, 2014, from <http://www.army.gov.au/Who-we-are/Corps>

Friedman, U. (2012, August 13). In Box Targeted Killings: A Short History- How America came to embrace assassination. *Foreign Policy*. Retrieved October 31, 2014, from http://www.foreignpolicy.com/articles/2012/08/13/targeted_killings

German Military Manual (1992). Vol. II, Ch. 1, § 587.

Germany: Practice Relating to Rule 3. Definition of Combatants. ICRC. Retrieved October 31, 2014.

Governor-General's Role. (2014, September 3). Retrieved October 31, 2014.

Henckaerts, J., & Doswald-Beck, L. (2005). *Customary International Humanitarian Law*.

Israel Supreme Court decision on targeting terrorist operatives. *Israel Ministry of Foreign Affairs* (2006, December 20). Retrieved October 31, 2014.

Lauterpacht, H. (1952). *Disputes, War, and Neutrality* (7th ed., Vol. II, p. 941). London: Longman.

Melzer, N. (2009). *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*. Geneva: International Committee of the Red Cross.

Melzer, N. (2008). *Targeted Killing in International Law*. Oxford: Oxford University Press.

"Queen and the Church of England." *The Official Website of the British Monarchy*. The British Monarchy. Web.

Ross, B. (1992). The Case for Targeting Leadership in War. *Naval War College*.

Rule 3. Definition of Combatants. (2014). Retrieved October 31, 2014.

Sorcher, S. (2011, June 13). Lebanon's Government Now Officially Dominated by Hezbollah. *National Journal*. Retrieved October 31, 2014.

Tomuschat, C., & Currie, D. (2010). *Deutscher Bundestag: Basic Law for the Federal Republic of Germany*. Article Xa, 115b.

The Duke of Edinburgh: Military Involvement. *The Official Website of the British Monarchy*. Retrieved October 31, 2014, from <http://www.royal.gov.uk/ThecurrentRoyalFamily/TheDukeofEdinburgh/Militaryinvolvement.aspx>

The Geneva Conventions of August 12, 1949: Reprint (1983). Geneva: International Committee of the Red Cross.

The Hague Convention for the Pacific Settlement of International Disputes (1907). Netherlands. *Centre for International Law*.

The Light Dragoons. Retrieved October 31, 2014, from <http://www.lightdragoons.org/>.

The Public Committee against Torture in Israel et al v. The Government of Israel et al, Supreme Court of Israel sitting as the High Court of Justice, Judgment, 11 December 2006, HCJ 769/02.

The Queen and the Armed Forces. *The Official Website of the British Monarchy*. The British Monarchy.

The Queen and the Commonwealth. *The Official Website of the British Monarchy*. Retrieved October 31, 2014, from <http://www.royal.gov.uk/MonarchAndCommonwealth/Overview.aspx>

The State of Israel (1976). The Knesset. *Basic Law: The Military*. Prime Minister Yitzchak Rabin and President Efrayim Katzir.

Turner, L., & Norton, L. (2001). Civilians at the Tip of the Spear. *Air Force Law Review*.

Turner, R. (1990). Killing Saddam: Would It Be A Crime. *NAT'L L J*.

Wingfield, T. (2013). Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine. *Maryland Journal of International Law*, 22(2), 287-317.

US Constitution. Art. I and II, Web.

Yoaz, Y. (2006, December 14). High Court: International law does not forbid targeted killings. *Haaretz*.