

TO KILL OR NOT TO KILL - THE USE OF FORCE AGAINST LEGITIMATE TARGETS IN ARMED CONFLICTS¹

*PATRYCJA GRZEBYK**

INTRODUCTION

Armed conflicts involve killing, injuring, devastating. The International Humanitarian Law (IHL) accepts this reality, but limits the categories of persons and objects which can be attacked, as well as the means and methods by which they can be attacked. However, the main conventions of the IHL, i.e. the Geneva Conventions of 12 August 1949 (GC)² and their Additional Protocols of 8 June 1977 (AP)³, contain no indication as to how much force can be used against legitimate targets. Article 49 AP I defines attacks as “acts of violence against the adversary, whether in offence or in defence.” It provides no explanation as to what level of violence can be used in those acts. Therefore, for decades a vigorous debate has continued between scholars. Some argue that there is always an obligation to use the least harmful method against legitimate targets, which means capturing or injuring instead of killing if possible (in the chapter they are referred to as the “capture faction”)⁴. Others claim that a person who is a legitimate target can be killed without an attempt to capture or an attempt to use lesser force in order to achieve the same aim, i.e. elimination of the enemy (in the chapter they are referred to as the “kill faction”)⁵.

DOI: 10.1515/wrlae-2018-0051

*Assistant Professor, Institute of International Relations, University of Warsaw, patrycja.grzebyk@uw.edu.pl, ORCID: <https://orcid.org/0000-0003-4022-7018>.

¹ The project was financed from the means of the Polish National Center of Science based on the decision no. DEC-2013/11/D/HS5/01413.

² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609.

⁴ See eg R Goodman, ‘The Power to Kill or Capture Enemy Combatants’ (2013) 24 (3) EJIL 819; J Pictet, *Development and Principles of International Humanitarian Law* (1985) 75.

⁵ See eg GS Corn, LR Blank, Ch Jenks, E Talbot Jensen, ‘Belligerent Targeting and the Invalidity of a Least Harmful Means Rule’ (2013) 89 International Law Studies 536; M

This debate was reinvigorated with the adoption, by the Assembly of the International Committee of the Red Cross, of the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Interpretive Guidance) on 26 February 2009⁶. Its Section IX promotes the gradual use of force towards legitimate targets⁷. The ICRC's proposition was met with strong criticism and opened, once again, the discussion on the scope of methods that can be used against legitimate targets. The "kill or capture" dilemma also gained greater importance with the broadening of geographical scope of armed conflicts to which the IHL is supposed to be applied. According to the most radical interpretations, an armed conflict can encompass the whole globe. Thus states are free to use the IHL approach instead of the more restrictive HRL standards to decide on the use of lethal force against particular persons⁸. The practice of targeted killings against fighters of terrorist groups like Al-Qaeda, Daesh etc., which is allegedly justified in terms of International Humanitarian Law, is another symptom of this tendency⁹.

Both sides of the dispute on the "capture or kill" dilemma refer to customary law. What they interpret differently is the practice of states. The questions of content of customary International Humanitarian Law and the methodology of its assessment have been contentious for years. The International Committee of the Red Cross' Study on Customary International Humanitarian Law did not put an end to this discussion¹⁰. Notably, prof. Karol Wolfke was involved in the work leading up to the final draft of the Study. He was able to observe firsthand how difficult it was to agree on what

Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'' (2013) 24 (3) EJIL 855; JD Ohlin, 'The Duty to Capture' (2013) 97 (4) Minnesota Law Review 1268; WH Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 NYU Journal of International Law and Politics 769; TM McDonell, 'Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists' (2012) 44 George Washington International Law Review 243; RS Taylor, 'The Capture versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?' (2010) 6 Army Law 203.

⁶ N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC May 2009) <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (14.3.2016).

⁷ Assembly of the International Committee of the Red Cross, of the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Interpretive Guidance) (n 6) 77, Section IX.

⁸ See e.g. N Lubell, N Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 JICJ 65, 771 see also A Roberts, 'Counter-terrorism, armed force and the laws of war' (2002), 44:1 Survival 7, 11; BA Feinstein, 'The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel's Security Barrier' (2005) 4:2 Northwestern Journal of International Human Rights 238, 263-264.

⁹ See N Melzer, *Targeted Killings* (2009) 262

¹⁰ JM Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, (2005), the ICRC database on customary IHL is developed, see <https://www.icrc.org/customary-ihl/eng/docs/home> (access 14.3.2016).

should or should not be considered proof of existence of a customary norm¹¹. The main line of disagreement is the following: should we take into account only the actual conduct of the state's various bodies in the field, or should we should rather focus on the official statements, hypocritical as they may sometimes be? In this context, the words of prof. Wolfke should be noted: "Custom is built up (...) by practice, and not only by a promise of practice or by opinions as to its necessity."¹²

The aim of this chapter is threefold. Firstly, it is to present arguments derived from the IHL norms against the existence of an obligation to use the least harmful method against legitimate targets in armed conflicts. Secondly, it is to assess the argumentation (also based on the IHL) in favour of the existence of an obligation to minimize force used against legitimate targets. In both cases, advantages and disadvantages of each of the solutions will be presented. Thirdly, it is to assess the possibility of using other regimes to solve the dispute between two above-mentioned approaches and find some "golden means".

In the article, I do not delve into the doubts concerning who and what constitutes a legitimate target. I take it as granted that in all the cases discussed below, the person is a legitimate target (e.g. the person is a combatant in an international armed conflict or a member of an armed group with a combat function in a non-international armed conflict, or a civilian who takes direct part in hostilities in any kind of armed conflict)¹³ and thus not protected against attacks. I also assume that in all situations discussed below, the IHL is applicable, because an armed conflict exists.

I. TO KILL

There is no single provision in either the Geneva Conventions or in the Additional Protocols which would directly oblige those taking part in hostilities to consider capture instead of killing in case of legitimate targets. According to the kill faction, the Geneva Conventions and Additional Protocols "encompassed the concept of military necessity", i.e. the notion that the attacker does not have to consider whether or not the killing of legitimate targets will bring military advantage¹⁴. The IHL determines *a priori* the categories of persons that can be attacked in order to achieve the aims of armed conflicts. Thus, as long as e.g. the international armed conflict lasts, combatants can be killed, regardless of what kind of activities they were engaged at the moment of the attack¹⁵. In consequence, obviously they can be killed while they are taking part in hostilities, but also when they are taking a

¹¹ See K Wolfke, 'Kilka wstępnych refleksji w związku z artykułem M. Henckaerts', in *Studium poświęcone zwyczajowemu międzynarodowemu prawu humanitarnemu: wkład w zrozumienie i poszanowanie zasad prawa dotyczącego konfliktu zbrojnego* (2006) 3-4.

¹² K Wolfke, *Custom in Present International Law* (1964) 79.

¹³ Ohlin rightly stress that in case of civilians taking part in hostilities there are no different rules concerning capture in comparison to those applied to combatants. Ohlin (n 5) 1308.

¹⁴ Ohlin (n 5) 1301.

¹⁵ See eg I Henderson, *The Contemporary Law of Targeting* (2009) 79.

shower, reading, eating or sleeping, and there is no obligation to give them the opportunity to surrender¹⁶. It means e.g. that the assessment of the famous incident from the intervention against Iraq in 1991, in which hundreds of retreating Iraqi soldiers were killed on the so-called “highway of death” just 24 hours before the cessation of hostilities, must end in the conclusion that force was used legally. The fact that the attack did not bring any military advantage in this particular armed conflict is without any significance as long as legitimate targets were destroyed. In addition, it is impossible to know with certainty before the end of the conflict how many soldiers must die in order to secure a victory, so a specific attack cannot be assessed from the perspective of the closure of hostilities but only from the perspective of the moment in which it was performed.

The kill faction noted Section IX of the above-mentioned above Interpretive Guidance, which reads:

“In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”

However, the kill faction emphasizes that a significant number of experts participating in the works on the Guidance withdrew publicly from the ICRC project because of the inclusion of Section IX. This is the reason why the Interpretive Guidance is officially authored only by the International Committee of the Red Cross and not by all of the experts involved in discussion on its content¹⁷. Therefore, taking into account the vigorous opposition to Section IX during the works on the Guidance and the criticism with which Section IX was met after the adoption of the Interpretive Guidance, Section IX cannot be considered to be an expression of customary law. This statement is backed by the fact that, according to the kill faction, there is no practice of states indicating application of lesser force towards legitimate targets¹⁸. The example of Osama bin Laden, who was killed by American armed forces in a situation in which it was possible to capture rather than execute him, should be treated as an example of the typical approach of states towards legitimate targets¹⁹.

The kill faction stresses that the question of the limitation of force in the attack is the problem of proportionality. However, the principle of proportionality only requires a comparison of expected incidental civilian

¹⁶ There is discussion if e.g. sleeping soldiers, not having a chance to grab the gun, can be considered as hors de combat thus they would be protected against an attack, more in Goodman (n 4) 821 ff.

¹⁷ Parks (n 5) 784-785. He claims that one third of experts were willing to withdraw their names in response to inclusion of the section IX.

¹⁸ Goodman (n 4) 824-825. See also Ohlin (n 5) 1335 ff

¹⁹ On Osama bin Laden killing see eg B Van Schaack, ‘The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory’ (2011) 14 Yearbook of International Humanitarian Law 255 ff; M Marcinko, ‘Selektywna eliminacja Osamy bin Ladena w świetle prawa międzynarodowego’ (2013) 4 Międzynarodowe Prawo Humanitarne 75 ff.

losses with the concrete and direct military advantage anticipated²⁰. This would mean that if a person or an object is not of civilian character, there is no need to assess the question of proportionality in the context of the attack²¹. If there is no similar provision referring to the situation of military objects (which includes armed forces), there is no legal basis to broaden the scope of application of the principle of proportionality.

One of the strongest arguments of the kill faction is that the obligation to gradually use force would undermine any air warfare, as its obvious results are killings and destruction, to the practical exclusion of capture²². Taking into account that air bombing is the states' preferred method of conducting hostilities, because of its effectiveness in combating enemy forces combined with fewer losses on the side of intervening state in comparison to land operations, nobody can claim that the air warfare should be prohibited in light of the IHL. However, the question arises as to whether states are obliged to choose a method which would diminish the death toll among legitimate targets, and thus resign from air warfare, if e.g. a land operation is possible. The kill faction rejects the idea that soldiers should be obliged to choose between different kinds of legitimate weapons in order to use the one which causes lesser injuries, claiming that it is not acceptable from the practical point of view. Soldiers cannot be expected to have a full assortment of different weapons at their disposal and, in the case of each attack, be expected to deliberate on the question of which weapon to use. The battlefield is not a golf club, as Frits Kalshoven pointed out²³. We cannot burden soldiers with these kinds of decisions; they would not be able to perform their tasks with appropriate expediency and lack of hesitation. The task of armed forces is to combat enemy in the most effective and expedient way, to achieve goals quickly and with minimum expense. Without doubt, capture is considered a less effective (in terms of time, money, and permanency) way of elimination of the enemy²⁴. Moreover, the offer to surrender diminishes the value of surprising the enemy or the possibility of quiet retreat. In consequence, the application of the capture policy can prolong the conflict and increase losses²⁵. Therefore, soldiers cannot waste time, and even more importantly risk their life or health, in an attempt to capture a legitimate target²⁶. The kill faction stresses also that the enemy always has an opportunity to surrender, but the decision to take part in hostilities means the forfeit of the benefits of this solution²⁷. In addition, the kill faction emphasizes that it is only in theory that wounding the enemy can effectively eliminate him from the fighting, but

²⁰ Art. 51(5)(b) and Art. 57 API. Also Rule 14 of the Customary IHL applicable in both – international and non-international armed conflicts (see https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14, 20.12.2017).

²¹ See e.g. Corn, Blank, Jenks, Jensen (n 5) 579.

²² Schmitt (n 5) 859.

²³ F Kalshoven, 'The Soldier and His Golf Clubs', in F Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 359 ff

²⁴ D Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 *Leiden Journal of International Law* 315, 342; Ohlin (n 5) 1304.

²⁵ Ohlin (n 5) 1300.

²⁶ Ohlin (n 5) 1301.

²⁷ Schmitt (n 5) 858.

the practice proves that only killing him eliminates the risk of him counterattacking²⁸.

According to the kill faction, it is also debatable whether, in every situation, wounding would be more humanitarian than killing (taking into account the sometimes unbearable suffering from wounds) and therefore should be a method of warfare which does not cause “superfluous injury or unnecessary suffering” prohibited by Article 35 of the First Additional Protocol be preferred. In addition, the kill faction argues that it is not without reason that Article 35 AP I mentions only injury or suffering, as states were of the opinion that superfluous or unnecessary death is a term which cannot be used in reference to legitimate targets. There are also doubts as to whether the “kill or capture” policy can be considered a method of warfare at all and thus be covered by the restraints envisaged in Article 35 AP I²⁹.

In summary, it should be stressed that the kill faction considers killings of all possible legitimate targets to be the most effective way of conducting hostilities. This fits perfectly with the understanding of military necessity underlying the IHL provisions.

II. NOT TO KILL

The capture faction admits that there is no provision which directly imposes an obligation to attempt to wound or capture the enemy instead of killing him³⁰. However, there is also no legal obligation to kill the enemy: Nowhere in the GC and the AP is there a direct authorization to kill e.g. combatants. Combatants (as well as other persons taking part in hostilities) are not protected against attacks, but – as was stressed above – the treaty law is not precise as to what attacking means in terms of the scope of the use of lethal force.

Based on law we can assess, without any doubt, that the only legitimate aim in an armed conflict is to weaken the enemy forces, to put the enemy forces *hors de combat*³¹. Therefore the credo of the capture faction is Jean Pictet’s statement: “[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil”³². This approach is not a solitary opinion of one man obsessed with pacifist ideas. Almost the same statement was adopted in 1973 by the Expert Committee on

²⁸ Parks (n 5) 811.

²⁹ Schmitt (n 5) 857.

³⁰ Ohlin (n 5) 1270.

³¹ See the preamble of the Saint Petersburg Declaration of 29 November/11 December 1868 (Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight, available on <https://www.icrc.org/ihl/INTRO/130?OpenDocument>, accessed 20.12.2017) which states: ‘That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men’. See also Hague Regulation relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, Art. 22 and 23.

³² See JPictet, *Development and Principles of International Humanitarian Law* (1985) 75.

Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects, in which many eminent scholars (including Kalshoven, Fleck, Rogers) from various states participated³³.

The capture faction stresses the letter of Article 35 AP I, which emphasizes that “the right of the Parties to the conflict to choose methods or means of warfare is not unlimited”. The wording focuses not only on the different kinds of weapons (means) but also on the way they are used (methods), which is a great development of constraints on the conduct of hostilities in comparison to e.g. the Hague Regulations of 1907 (Article 22), which referred only to the means. Therefore the decision on the amount of force which can be used in an attack is at the same time a decision on the method of warfare. According to Article 35, no methods should ever cause “superfluous or unnecessary suffering”³⁴. It must be also stressed that the letter of Article 35, which mentions only unnecessary suffering or injuries, does not necessarily exclude the prohibition to cause unnecessary deaths. This conclusion can be derived by reference to the origins of the prohibition of the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering, i.e. the St. Petersburg Declarations of 1868 and the Hague Regulation of 1907. The St. Petersburg Declaration was adopted to alleviate “as much as possible the calamities of war”. Those calamities obviously referred to great death tolls. The Hague Regulation mentions in Article 23e the term “unnecessary suffering”, but this is – as Henri Meyrovitz rightly notes – a mistranslation of the notion of *maux supeflus* used in the French version of the Regulation, which encompasses not only injuries but also deaths³⁵. Historical arguments may not be convincing for everyone, but there is also a logical argumentation referring to the *argumentum a minori ad maius*. If causing unnecessary suffering is prohibited, logically also unnecessary killings must be prohibited³⁶. Moreover, the aim of weakening the enemy did not prevent states from prohibiting the use of some methods and means of warfare (e.g. poisoning, denial of quarter) which result in deaths or injuries from which fast recovery (and also return to fights) is not possible. Indeed the very concept of the status of prisoners of war proves that weakening of enemy forces cannot always mean killing them³⁷. PoW status was introduced despite the fact that granting rights of PoW always means additional costs and engagement of military staff. Therefore states clearly have agreed that killing cannot be considered the only method of combating the enemy.

³³ See ICRC, Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts 1973, para. 23 (available at https://www.loc.gov/rr/frd/Military_Law/pdf/RC-Weapons.pdf), where there is a statement: “[...] if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided.”. See an analysis of the mentioned report in Goodman (n 5) 839 ff.

³⁴ Goodman (n 5) 840.

³⁵ H Meyrovitz, ‘The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977’ (1994) 34 International Review of the Red Cross 98

³⁶ Meyrovitz (n 35) 99.

³⁷ Goodman (n 5) 826-827.

The capture faction is not persuaded that the question of military necessity and proportionality should not be considered in the case of legitimate targets³⁸. After all, those principles are interlinked with the prohibition of causing superfluous injury declared by the International Court of Justice as “an intransgressible principle of international customary law”³⁹. The principle of military necessity is inherent in the IHL as it stresses that only those measures which are indispensable for the achievement of the aim should be used⁴⁰. The IHL can be considered to be the branch of law which indirectly authorizes destructions, killings and injuries. Yet it does so only to the extent which is necessary to win an armed conflict, to combat the enemy. There is nothing in the GC and AP which can be interpreted as an authorization to use force without any military benefit. This would mean acceptance of cruelty and would be a clear violation of the main principle of the IHL: the principle of humanity⁴¹. Moreover, the fact that in the GC and AP there are references to definite or direct military advantage or military necessity⁴² cannot be understood to the effect that in other situations it is not necessary to consider the military usefulness of an attack. To the contrary, those references stress the need to take into account the question of military necessity at all times, even in situations where there is a strong temptation to avoid any humanitarian debates. It would be also incomprehensible if we were expected to assess the military usefulness of attacking objects⁴³ but not to consider the military necessity of killing persons⁴⁴. Importantly, according to the Martens Clause both civilians and combatants “remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of

³⁸ M Sassóli, LM Olson, ‘The relationship between international humanitarian and human rights law: where it matters: admissible killing and internment of fighters in non-international armed conflicts’ (2008) 90:871 *International Review of the Red Cross* 599, 606.

³⁹ ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 79. In para 78 of the mentioned opinion, the ICJ stated: “In conformity with the aforementioned principles, humanitarian law at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law”.

⁴⁰ See e.g. American Tribunal in *Hostage Case* of 19.2.1948 (XI Trials of War Criminals before the Nuernberg Military Tribunals US 1950, 1253) where the tribunal stated: “Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”

⁴¹ Ohlin (n 5) 1298 ff.

⁴² See eg Art. 42 GC IV, art. 53, 56 and 57 AP I.

⁴³ See Art. 52 AP I which defines lawful objects of attack as “those objects which by their nature, location, purpose or **use make an effective contribution** to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.

⁴⁴ See ICRC Commentary to Article 52 which notes “that the definition [of military objective] is limited to objects but it is clear that members of the armed forces are military objectives, for, as the Preamble of the Declaration of St. Petersburg states: ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; [...] for this purpose it is sufficient to disable the greatest possible number of men.’”.

public conscience”⁴⁵. Therefore from the principle of humanity, which must be applied in any and all circumstances, we can derive the prohibition of unnecessary killings of combatants.

The capture faction agrees that soldiers cannot be expected to have with them all sorts of weapons and in the “hot battlefield”, i.e. zone of active hostilities, deliberate in the case of each attack what kind of weapon would cause the least injury. However, their commanders/politicians can be obliged to consider what kind of weapon will be used in a specific conflict and in different situations and how the result of their use can be assessed in light of the IHL (e.g. from the perspective of the principle of proportionality). Possibly, a method such as air warfare in specific circumstances could be considered disproportional and causing unnecessary suffering, and therefore its use could be considered to be prohibited despite the fact that the air warfare is allowed as such.

As for the effectiveness of the capture policy in terms of expenses and time, practice shows that there are almost no short-term armed conflicts. Usually the phase of quick massive operation is followed by a stabilization process which lasts for years (the examples of conflict in Afghanistan and Iraq lasting from appropriately 2001 and 2003 are instructive). Therefore, prolongation of the conflict is an unavoidable trait of contemporary conflicts and it does not depend on the implementation of a capture policy. On the contrary, taking into account the political aims of the contemporary conflicts which are, in the overwhelming majority, of an internal character, the capture policy can be considered more effective in terms of winning the “hearts and minds” of the local population.

It is true that the work on Section IX of the Interpretive Guidance has proven that there are great controversies as to the ways in which legitimate targets can be attacked. However, criticism of the final version of the Section came from two directions: those focusing on its, allegedly, too restrictive approach, but also those who were against its excessively permissive character (who argued that the Human Rights Law perspective was neglected)⁴⁶. In addition, if we test Section IX against the most recent practice of states (understood as states’ official statements and not necessarily their actual actions in the field, because law-breaking cannot be considered law-making), which could be relevant for the creation of customary rule, we can easily deduce that states are willing to apply the gradual use of force standard. The proof is in the official declarations of e.g. President of the US concerning

⁴⁵ See art 1 (2) AP I. The Martens Clause was firstly formulated in the Preamble of the Hague Convention II of 1899.

⁴⁶ N Melzer, ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ (2010) 42 *International Law and Politics* 831, 896.

the targeted killings policy⁴⁷, new versions of military manuals⁴⁸ or judgments of national courts of states involved in armed conflicts⁴⁹.

III. TO THINK

As demonstrated above, there is a sharp division on what kind of level of lethal force can be used against legitimate targets according to the IHL. Therefore the answer to the question “to kill or not to kill” must be found in another regime which should be applied in armed conflicts, i.e. the Human Rights Law (HRL). Certainly, the kill faction prefers to describe the HRL as an aspiration, a catalogue of values rather than a set of norms that are practically applicable in extreme situations such as an armed conflict⁵⁰. Therefore, the opposition to applying the HRL in armed conflicts, especially in situations of extraterritorial hostilities, is noticeable⁵¹. However, the applicability of the HRL in armed conflicts (and also in situations of the assessment of the legality of particular conduct of hostilities) was confirmed in the jurisprudence of the International Court of Justice⁵², European Court of

⁴⁷ The White House Office of the Press Secretary, Remarks by the President at the National Defense University, National Defense University Fort McNair, Washington, DC 23.5.2013 (available at <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>, accessed 20.12.2017). The president stated: “To put it another way, our operation in Pakistan against Osama bin Laden cannot be the norm. The risks in that case were immense. The likelihood of capture, although that was our preference, was remote given the certainty that our folks would confront resistance. The fact that we did not find ourselves confronted with civilian casualties, or embroiled in an extended firefight, was a testament to the meticulous planning and professionalism of our Special Forces, but it also depended on some luck. And it was supported by massive infrastructure in Afghanistan.”; “Beyond the Afghan theater, we only target al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute. America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.”

⁴⁸ See Colombia, Comando General Fuerzas Militares, Manual de Derecho Operacional, FF.MM 3-41, 7.12.2009, p. 106.

⁴⁹ In particular the Sup. Ct Israel sitting as the High Court of Justice (so called “Targeted killings” case), *The Public Committee against Torture et al. v Israel*, Judgment, 11.12.2006, HCJ 769/02, par. 40: “[a]rrest, investigation, and trial are not means which can always be used. ... [A]t times it involves a risk so great to the lives of the soldiers, that it is not required. However, it is a possibility which should always be considered emphasis added); *ibid.* (‘[A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed.’).

⁵⁰ Ohlin (n 5) 1313.

⁵¹ See Human Rights Committee statements concerning US and Israel approach to application of the IHL in armed conflicts, e.g. CCPR/C/USA/CO/4; 23.4.2014, para. 4; CCPR/C/USA/CO/3/Rev.1, 18.12.2006, para 10; A/50/40, 3.10.1995, para 284; CCPR/C/ISR/CO/4, 21.11.2014, para 5; CCPR/C/SR.1675, 21.7.1998, para 23, 25; CCPR/CO/ISR/3, 3.9.2010, para. 5; CCPR/CO/78/ISR, 21.8.2003, para 11; CCPR/C/79/Add.93, 18.8.1998, para 10; CCPR/C/ISR/2001/2, 4.23.2001, para 8.

⁵² See e.g. ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226, para 25; *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 243, para 216.

Human Rights⁵³ and Inter-American Court of Human Rights⁵⁴. It must be also noted that certain treaties explicitly demand the interplay of both (the IHL and the HRL) regimes⁵⁵. Thus the Human Rights Committee rightly stressed that these two spheres of international law are complementary rather than mutually exclusive⁵⁶.

Therefore, taking into account Article 31 of the Vienna Convention on the Law of Treaties of 1969 which requires that “[a]ny relevant rules of international law applicable in the relations between the parties” must be taken into account while interpreting a treaty, the IHL provisions should be interpreted in light of relevant rules of the HRL.

The HRL allows for the use of lethal force which is no more than absolutely necessary⁵⁷. The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR)⁵⁸ specifies in the most detailed manner (in comparison to other HRL instruments) that taking someone’s life is allowed only in limited instances, such as e.g. the execution of a sentence of a court following a conviction of a crime for which this penalty is provided by law; in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection (Article 2). At the same time, it stresses in Article 15 that in “time of war or other public

⁵³ See eg ECtHR, Grand Chamber Judgment, *Case of Al-Skeini and Others v the United Kingdom* (Application no. 55721/07), 7.07.2011, para 164; ECtHR, Grand Chamber Judgment, *Case of Hassan v The United Kingdom* (Application no. 29750/09), 16.09.2014, para 77. There were also several interesting Chechen cases which clearly referred to situation of a non-international armed conflict, however the Court did not refer to the LOAC as Russia did not formally derogate from its obligations enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, 213 U.N.T.S. 222, based on the Article 15, that’s why the Court formally was talking about peacetime, see e.g. ECtHR, Former First Section Judgment, *Case of Esmukhambetov and Others v Russia* (Application no 23445/03), 29.03.2011, para 138 ff; ECtHR, Former First Section Judgment, *Case of Isayeva v Russia* (Application no 57950/00), 24.02.2005, para 209 ff; ECtHR, Former First Section Judgment, *Case of Isayeva, Yusupova and Bazayeva v Russia* (Applications nos. 57947/00, 57948/00 and 57949/00), 24.02.2005, para 168 ff. See also W Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005), 16: 4 EJIL 741.

⁵⁴ See e.g. Inter-American Court of Human Rights, *Bàmaca Velásquez v Guatemala* (Case no. 11/129), 25.11.2000, para. 209. See more in C Droege, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40:2 Israel Law Review 310, 321; C Droege, ‘Elective Affinities? Human Rights and Humanitarian Law’ (2008) 90:871 International Review of the Red Cross 501, 517 ff.

⁵⁵ See eg Article 21 of the Rome Statute or A/RES/60/147, 21.03.2006.

⁵⁶ HRC, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 11.

⁵⁷ See eg ECtHR, Grand Chamber Judgment, *Case of McCann and Others v The United Kingdom*, (Application no. 18984/91), 27.9.1995, para 148-149; HRC, *husband of Maria Fanny Suarez de Guerrero v Colombia*, Communication No. R.11/45, U.N. Doc. Supp. No. 40 (A/37/40) at 137 (1982) para 13.2. See also ‘the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’ 4 which state: “Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”.

⁵⁸ 213 UNTS 222.

emergency threatening the life of the nation” the derogation from the obligation to respect right to life is impossible with exception of “deaths resulting from lawful acts of war”. This provision can be interpreted as excluding the application of the HRL in situations of armed conflicts for the purposes of assessment of the legality of killing legitimate targets. However, it is possible to argue that the HRL should not undermine the qualification of persons as legitimate or illegitimate targets according to the IHL (it is noticeable that the HRL tribunals have never undermined the lawfulness of killing combatants in IACs or rebels in NIACs in situations of heavy fights⁵⁹) but still has some role in clarification of the provisions of the IHL which raise major doubt, e.g. those regarding the possible amount of lethal force against legitimate targets.

There are no exceptions similar to Article 15 ECHR as far as universal instruments are concerned. The International Covenant on Civil and Political Rights just generally prohibits arbitrary deprivation of life (Article 6) even in “time of public emergency which threatens the life of the nation” (Article 4), so there is no possibility of derogation from the obligation to respect the right to life. Situations in which lethal force can be used are specified in e.g. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* of 1990, which stresses that “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life”⁶⁰, while the commentary to the *Code of Conduct for Law Enforcement Officials* of 1979 notes that that force must be used exceptionally only “for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders”⁶¹. Consequently, it cannot be planned in advance that some categories of persons can be killed; other measures must always be taken into account and the whole operation must be planned in such a way as to minimize the risk of death or injury⁶². This requirement must be fulfilled even in exceptional circumstances, including those allowing for derogation from other rights (and thus e.g. in a situation of armed conflict)⁶³. However, the application of the HRL in armed conflicts cannot deprive the IHL of all its significance. As Yoram Dinstein rightly pointed out: “Should nothing be theoretically permissible to a belligerent engaged in war, ultimately

⁵⁹ See eg ECtHR, Former First Section Judgment, Case of *Isayeva v Russia* (Application no. 57950/00), 24.02.2005, para 180, ECtHR, Former First Section Judgment, Case of *Isayeva, Yusupova and Bazayeva v Russia* (Applications nos. 57947/00, 57948/00 and 57949/00), 24.02.2005, para 178. See also Sassóli, Olson (n 38)

⁶⁰ The Basic Principles were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27.08.-7.09.1990 (available <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>, 20.12.2017).

⁶¹ The Code was adopted by the General Assembly resolution 34/169 of 17.12.1979 (available with commentary at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>, 20.12.2017).

⁶² Droege (n 55) 344-345.

⁶³ F Bruscoli, ‘The Rights of Individuals in Times of Armed Conflict’ (2002), 6:1 The International Journal of Human Rights 45, 47. See also Basic Principles para. 8 which states that: “exceptional circumstances, such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles”.

everything will be permitted in practice – because the rules will be ignored”⁶⁴. Therefore, taking into account the aim of the armed conflict (to put the greatest number of enemies *hors de combat*) and the fact that the HRL swings the balance towards the capture faction’s interpretation of the IHL norms, the decision on the method used in attack should depend on the situation. If there is no time pressure and no risk of counterattack, the capture policy should be applied. In situation of heavy fightings, in the “hot battlefield” region, the killing policy obviously can be applied. It must be also noticed that the Interpretive Guidance, with all the criticism that it has drawn, nonetheless stresses that the imposition of minimum level of violence standard does not create an obligation on the part of the attacking party to assume any additional risk to its own forces⁶⁵. Therefore, it can be assumed that if there is no risk and no use in killing the enemy, this kind of action must be considered cruel and against the principle of humanity, and thus illegal.

CONCLUSIONS

The dilemma to kill or to capture cannot be solved *a priori*. The decision on the amount of lethal force which should be used in a particular attack must be taken after considering all the circumstances of a given case. If capture is possible, which means that the attacker will not endanger himself by capturing instead of killing the target, then capture must be performed. This means that the capture policy should always be considered a possible method of conducting hostilities. It cannot be excluded at the stage of planning and executing action. This rule can be derived from the International Humanitarian Law provisions interpreted in light of the Human Rights Law, which is – as confirmed by a number of bodies – applicable in armed conflicts. In consequence, Section IX of the Interpretive Guidance promoted by the International Committee of the Red Cross can be considered binding based on the treaty law. Taking into account the current practice, it can also be considered an expression of an emerging customary norm.

References

Abresch W, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005), 16: 4 EJIL 741.

Bruscoli F, ‘The Rights of Individuals in Times of Armed Conflict’ (2002), 6:1 The International Journal of Human Rights 45.

Corn GS, Blank LR, Jenks Ch, Talbot Jensen E, ‘Belligerent Targeting and the Invalidity of a Least Harmful Means Rule’ (2013) 89 International Law Studies 536.

Dinstein Y, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 1.

⁶⁴ Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 1-2.

⁶⁵ Interpretive Guidance 81.

Droege C, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90:871 *International Review of the Red Cross* 501.

Droege C, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40:2 *Israel Law Review* 310.

Feinstein BA, 'The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel's Security Barrier' (2005) 4:2 *Northwestern Journal of International Human Rights* 238.

Goodman R, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 (3) *EJIL* 819.

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

Henderson I, *The Contemporary Law of Targeting* (2009).

Kalshoven F, 'The Soldier and His Golf Clubs', in F Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 359.

Luban D, 'Military Necessity and the Cultures of Military Law' (2013) 26 *Leiden Journal of International Law* 315.

Lubell L, Derejko N, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 *JICJ* 65.

Marcinko M, 'Selektywna eliminacja Osamy bin Ladena w świetle prawa międzynarodowego' (2013) 4 *Międzynarodowe Prawo Humanitarne* 75.

McDonnell TM, 'Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists' (2012) 44 *George Washington International Law Review* 243.

Melzer N, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

Melzer N, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 831.

Melzer N, *Targeted Killings* (2009).

Meyrowitz H, 'The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977' (1994) 34 *International Review of the Red Cross* 98.

Ohlin JD, 'The Duty to Capture' (2013) 97 (4) *Minnesota Law Review* 1268.

Parks WH, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 *NYU Journal of International Law and Politics* 769.

Pictet J, *Development and Principles of International Humanitarian Law* (1985).

Roberts A, 'Counter-terrorism, armed force and the laws of war' (2002), 44:1 *Survival* 7.

Sassóli M, Olson LM, 'The relationship between international humanitarian and human rights law: where it matters: admissible killing and internment of fighters in non-international armed conflicts' (2008) 90:871 *International Review of the Red Cross* 599.

Schmitt M, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'' (2013) 24 (3) EJIL 855.

Taylor RS, 'The Capture versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?' (2010) 6 Army Law 203.

Van Schaack B, 'The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory' (2011) 14 Yearbook of International Humanitarian Law 255.

Wolfke K, 'Kilka wstępnych refleksji w związku z artykułem M. Henckaerts', in *Studium poświęcone zwyczajowemu międzynarodowemu prawu humanitarnemu: wkład w zrozumienie i poszanowanie zasad prawa dotyczącego konfliktu zbrojnego* (2006) 3.

Wolfke K, *Custom in Present International Law* (1964) 79.