INTRODUCTORY NOTE TO THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL V. THE GOVERNMENT OF ISRAEL

BY MARK E. WOJCIK*

[February 26, 2007]
+Cite as 46 ILM 373 (2007)+

The Israel Supreme Court can sit either as an appellate court to review criminal and civil judgments, or it can sit as the High Court of Justice—a court of first instance with power to review the legality of Israeli government acts. Sitting as the High Court of Justice, the Israel Supreme Court ruled in December 2006 that targeted government killings of terrorists and bystanders could not be pre-determined to violate customary international law, nor could such killings always be permitted under customary international law. Instead, the legality of targeted killings must be determined on a case-by-case basis. The High Court ruling in Judgment 769/02 *(The Public Committee against Torture in Israel v. The Government of Israel)* is therefore not a blanket approval of killings, but the ruling will allow the Israel Defense Force to carry out targeted killings so long as each case is examined individually.

The proceedings were lengthy, being first initiated in 2002. During the proceedings, the State of Israel stated that it was suspending the use of targeted killings, but it resumed the practice in June 2005.

As noted in the court decision, Israel used "preventative strikes" to kill approximately 300 terrorists in Judea, Samaria, and the Gaza Strip. These preventative strikes also killed approximately 150 civilians who were near the persons targeted. The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment argued that targeted killings violate international law, Israeli law, and basic principles of human morality. They alleged that the practice violated the rights of innocent bystanders, as well as those who were targeted.

The defendants argued that it was not controversial for a state to respond with military force to terrorist attacks. They pointed out that more than 1,000 Israeli citizens had been killed from 2000 to 2005 in such attacks. They argued that international law should recognize a category of "unlawful combatants" as legitimate subjects for attack, but who should not enjoy the rights of legal combatants.

The Israel Supreme Court determined that the normative legal framework applicable to the armed conflict between Israel and the terrorist organizations was the body of international law dealing with armed conflicts of an international character. Because that law represents "a delicate balance" between humanitarian considerations and military need, the law of armed conflict should protect human rights, but not to their full extent. Similarly, military needs can be fulfilled, but not to their full extent. Although combatants can be legitimate targets for military attack, civilians enjoy comprehensive protection of their lives, liberty, and property. The court stated that "unlawful combatants are not beyond the law. They are not 'outlaws'. God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law." However, civilians taking a direct part in hostilities enjoy no protection "for such time" as they take a direct part in hostilities. Questions arise then as to when a civilian is taking part in hostilities.

In this decision, the Israel Supreme Court finds itself reviewing the actions of military commanders and officers. Other national courts might avoid the question entirely and take the position that military determinations are beyond the scope of judicial review. But the Israeli Supreme Court—sitting as the High Court of Justice—has judicially reviewed the exercise of military discretion since the Six Day War in 1967. As stated here by the court, the phrases "military discretion" and "state security" are "not magic words which prevent judicial review." Nonetheless, the intensity of judicial review here is relatively low, and judicial review of targeted killings cannot be performed in advance.

The Israel Supreme Court found that the "preventative strikes, with all the military importance they entail, must be made within the framework of the law." Although a state undoubtedly has the right to defend itself against terrorism, there must be a balance between security needs and individual rights. The court recognized that such balancing "casts a heavy load upon those whose job it is to provide security." The court pointed to an earlier decision outlawing the use of torture when interrogating prisoners, in which it recognized that it was "the fate of democracy, in whose eyes not all means are permitted, and to whom not all of the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper

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hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties.''

The retired president of the court, A. Barak, wrote the main decision. Vice President E. Rivlin, in a concurring opinion, notes the difficult questions presented by the proper classification of terrorist organizations and their members, and the difficulties in application of the proportionality principle, which prohibits excessive damage to civilians. That principle of proportionality ''is easy to phrase but difficult to implement.'' He concludes that one can neither determine in advance that targeted killing is always illegal, just as one cannot determine in advance that it is always a violation.

The court's current President D. Beinisch, said that the legal issue involved was complex and could not be resolved in a single, all-encompassing rule. The legal difficulties arise in part because international law has not yet developed the law of armed conflict to fit a country's efforts to combat terrorist organizations.

The court's ultimate decision is that the legality of targeted killing must be determined in each individual case. For those targeted, the decision brings no comfort. For those implementing targeted killings, the decision offers no green light.

ISRAEL SUPREME COURT: PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL v. ISRAEL*

[December 16, 2006]

+Cite as 46 ILM 375 (2007)+

1. The Public Committee against Torture in Israel
2. Palestinian Society for the Protection of Human Rights and the Environment

v.

1. The Government of Israel
2. The Prime Minister of Israel
3. The Minister of Defense
4. The Israel Defense Forces
5. The Chief of the General Staff of the Israel Defense Forces
6. Shurat HaDin — Israel Law Center and 24 others

The Supreme Court Sitting as the High Court of Justice

[December 11 2005]

Before President (Emeritus) A. Barak, President D. Beinisch, and Vice President E. Rivlin

Petition for an *Order Nisi* and an *Interlocutory Order*
For Petitioners: Avigdor Feldman, Michael Sfarad
For Respondents no. 1-5: Shai Nitzan
For Respondents no. 6: Nitsana Darshan-Leitner, Sharon Lubrani

JUDGMENT

President (Emeritus) A. Barak:

The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.

1. Factual Background

In February 2000, the second *intifada* began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis. This assault of terrorism differentiates neither between combatants and civilians, nor between women, men, and children. The terrorist attacks take place both in the territory of Judea, Samaria, and the Gaza Strip, and within the borders of the State of Israel. They are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed. Thousands of Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.

2. In its war against terrorism, the State of Israel employs various means. As part of the security activity intended to confront the terrorist attacks, the State employs what it calls "the policy of targeted frustration" of terrorism. Under this policy, the security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel. During the second *intifada,* such preventative strikes have been performed across Judea, Samaria, and the Gaza Strip. According to the data relayed by petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them. More than thirty targeted killing attempts have failed. Approximately one hundred and fifty civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded. The policy of targeted killings is the focus of this petition.

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2. The Petitioners' Arguments

3. Petitioners' position is that the targeted killings policy is totally illegal, and contradictory to international law, Israeli law, and basic principles of human morality. It violates the human rights recognized in Israeli and international law, both the rights of those targeted, and the rights of innocent passersby caught in the targeted killing zone.

4. Petitioners' position is that the legal system applicable to the armed conflict between Israel and the terrorist organizations is not the laws of war, rather the legal system dealing with law enforcement in occupied territory. Changes were made in petitioners' stance during the hearing of the petition; some as a result of changes in respondents' position. At first it was claimed that the laws of war deal primarily with international conflicts, whereas the armed conflict between Israel and the Palestinians does not fit the definition of an international conflict. Thus, the laws which apply to this conflict are not the laws of war, rather the laws of policing and law enforcement. In the summary of their arguments (of September 9 2004), petitioners conceded that the conflict under discussion is an international conflict, however they claim that within its framework, military acts to which the laws of war apply are not allowed. That is since Israel's right to self defensive military action, pursuant to article 51 of the Charter of the United Nations of 1945, does not apply to the conflict under discussion. The right to self defense is granted to a state in response to an armed attack by another state. The territories of the area of Judea, Samaria, and Gaza are under belligerent occupation by the State of Israel, and thus article 51 does not apply to the issue. Since the State cannot claim self defense against its own population, nor can it claim self defense against persons under the occupation of its army. Against a civilian population under occupation there is no right to self defense; there is only the right to enforce the law in accordance with the laws of belligerent occupation. In any case, the laws applicable to the issue at hand are the laws of policing and law enforcement within the framework of the law of belligerent occupation, and not the laws of war. Within that framework, suspects are not to be killed without due process, or without arrest or trial. The targeted killings violate the basic right to life, and no defense or justification is to be found for that violation. The prohibition of arbitrary killing which is not necessary for self defense is entrenched in the customary norms of international law. Such a prohibition stems also from the duties of the force controlling occupied territory toward the members of the occupied population, who are protected persons according to IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter — *the Fourth Geneva Convention*), as well as the two additional protocols to the conventions signed in 1977. All of this law reflects the norms of customary international law, which obligate Israel. According to petitioners' argument, the practice employed by states fighting terrorism unequivocally indicates international custom, according to which members of terrorist organizations are treated as criminals, and the penal law, supplemented at times with special additional emergency powers, is the law which controls the ways of the struggle against terrorism is conducted. Petitioners note, as examples on this point, Britain's struggle against the Irish underground, Spain's struggle against the Basque underground, Germany's struggle against terrorist organizations, Italy's struggle against the Red Brigades, and Turkey's struggle against the Kurdish underground.

5. Alternatively, petitioners claim that the targeted killings policy violates the rules of international law even if the laws applicable to the armed conflict between Israel and the Palestinians are the laws of war. These laws recognize only two statuses of people: combatants and civilians. Combatants are legitimate targets, but they also enjoy the rights granted in international law to combatants, including immunity from trial and the right to the status of prisoner of war. Civilians enjoy the protections and rights granted in international law to civilians during war. *Inter alia,* they are not a legitimate target for attack. The status of civilians, and their protection, are anchored in Common Article 3 of the Geneva Conventions. That is the basic principle of customary international law. Petitioners' stance is that this division between combatants and civilians is an exhaustive division. There is no intermediate status, and there is no third category of "unlawful combatants". Any person who is not a combatant, and any person about whom there is doubt, automatically has the status of civilian, and is entitled to the rights and protections granted to civilians at the time of war. Nor is a civilian participating in combat activities an "unlawful combatant"; he is a civilian criminal, and in any case he retains his status as a civilian. Petitioners thus reject the State's position that the members of terrorist organizations are unlawful combatants. Petitioners note that the State itself refuses to grant those members the rights and protections granted in international law to combatants, such as the right to the status as prisoners of war. The result is that the State wishes to treat them according to the worst of the two worlds: as combatants, regarding the justification for killing them, and as civilians, regarding the need to arrest them and try them. That result is unacceptable. Even if they participate in combat

activity, members of terrorist organizations are not thus removed from the application of the rules of international law. Therefore, according to petitioners' position, terrorist organization members should be seen as having the status of civilians.

6. Petitioners note that a civilian participating in combat might lose part of the protections granted to civilians at a time of combat; but that is so only when such a person takes a direct part in combat, and only for such time as that direct participation continues. Those conditions are determined in article 51(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter — *The First Protocol*). According to petitioners' position, the provisions of that article reflect a customary rule of international law. Those provisions have been adopted in international caselaw, and they are referred to in additional international documents, as well as in the military manuals of most western states. In order to preserve the clear differentiation between combatants and civilians, a narrow and strict interpretation has been given to those provisions. According to that interpretation, a civilian loses his immunity from attack only during such time that he is taking a direct and active part in hostilities, and only for such time that said direct participation continues. Thus, for example, from the time that the civilian returns to his house, and even if he intends to participate again later in hostilities, he is not a legitimate target for attack, although he can be arrested and tried for his participation in the combat. Petitioners claim that the targeted killings policy, as carried out in practice, and as respondents testify expressly, strays beyond those narrow boundaries. It harms civilians at times when they are not taking a direct part in combat or hostilities. The targeted killings are carried out under circumstances in which the conditions of immediacy and necessity — without which it is forbidden to harm civilians — are not fulfilled. Thus, it is an illegal policy which constitutes forbidden attack of civilian targets.

7. Petitioners attached the expert opinion of Professor Cassese, expert in international law, who served as the first president of the International Criminal Tribunal for the former Yugoslavia. In his opinion, Professor Cassese discusses the principled differentiation in international law between civilians and combatants, which is entrenched, *inter alia*, in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, annex to Convention (IV) respecting the Laws and Customs of War on Land. Those who do not fall into the category of combatants are, by definition, civilians. There is no third category of "unlawful combatants". Thus, those who participate in various combat activities without fitting the definition of combatant, are of civilian status, and are entitled to the protections granted them in the laws of war. A civilian who participates in combat activities loses those protections, and might be a legitimate target for attack. However, that is the case only if he is taking a direct part in the hostilities, and only if the attack against him is carried out during such time of said participation. That rule is determined in article 51(3) of *The First Protocol*, but it reflects a rule of customary international law. Professor Cassese's position is that the terms "direct part" and "such time" are to be interpreted strictly and narrowly. A civilian participating in hostilities loses the protections granted to civilians only for such time that he is actually taking a direct part in the combat activities, such as when he shoots or positions a bomb. A civilian preparing to commit hostilities might be considered a person who is taking a direct part in hostilities, if he is openly bearing arms. When he lays down his weapon, or when he is not committing hostilities, he ceases to be a legitimate target for attack. Thus, a person who merely aids the planning of hostilities, or who sends others to commit hostilities, is not a legitimate target for attack. Such indirect aid to hostilities might expose the civilian to arrest and trial, but it cannot turn him into a legitimate target for attack.

8. Petitioners' stance is that the targeted killings policy, as employed in practice, violates the proportionality requirements which are part of Israeli law and customary international law. The principle of proportionality is a central principle of the laws of war. It forbids striking even legitimate targets, if the attack is likely to lead to injury of innocent persons which is excessive, considering the military benefit stemming from the act. This principle is entrenched in article 51(5)(B) of *The First Protocol*, which constitutes a customary rule. The targeted killing policy does not fulfill that requirement. Its implementers are aware that it may, at times nearly certainly, lead to the death and injury of innocent persons. And, indeed, that result occurs time after time. Due to the methods used in implementing that policy, many of the targeted killing attempts end up killing and wounding innocent civilians. Thus, for example, on July 22 2002 a 1000 kg bomb was dropped on the house of wanted terrorist Salah Shehade, in a densely populated civilian neighborhood in the city of Gaza. The bomb and its shock waves caused the death of the wanted terrorist, his wife, his family, and the deaths of twelve neighbors. Scores were wounded. This case, like other cases, demonstrates the damage caused by the targeted killings policy, which does not discriminate

between terrorists and innocent persons. Thus, petitioners' stance is that the targeted killings policy does not withstand the proportionality requirement *stricto senso.* Moreover, petitioners argue that the policy does not withstand the second proportionality test, regarding the least harmful means. Petitioners argue that respondents use the means of targeted killings often, including on occasions when there are other means for apprehending those suspected of terrorist activity. Petitioners point out that the security forces made hundreds of arrests in "area A" — in Judea, Samaria, and the Gaza Strip during the second *intifada.* Those figures show that the security forces have the operational ability to arrest suspects even in "area A", and to bring them to detention and interrogation centers. In those circumstances, targeted killing is not to be done. Last, petitioners claim that the targeted killings policy is not immune from severe mistakes. The targeted persons are not granted an opportunity to prove their innocence. The entire targeted killings policy operates in a secret world in which the public eye does not see the dossier of evidence on the basis of which the targets are determined. There is no judicial review: not before, nor after the targeted killing. In at least one case, it is suspected that there was a mistake in identity, and a person with a name similar to the wanted terrorist, who lived in the same village, was killed.

3. The Respondents" Response

9. In their preliminary response to the petition, respondents pointed out that an essentially identical petition, with essentially identical arguments, had been heard and rejected by the Supreme Court (HCJ 5872/01, judgment of January 29 2002). In that judgment it was determined that "the choice of means of war employed by respondents in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene." Respondents' position is that this approach is appropriate. This petition, like its predecessor, is intended to lead this Court into the heart of the combat zone, into a discussion of issues which are operational *par excellence,* which are not justiciable. For those reasons, the petition should be rejected *in limine.* However, respondents did not repeat that argument in the later briefs they submitted.

10. On the merits, respondents point out the security background which led to the targeted killings policy. Since late September 2000, acts of combat and terrorism are being committed against Israel. As a result of those acts, more than one thousand Israeli citizens have been killed during the period from 2000-2005. Thousands more have been wounded. The security forces take various steps in order to confront these acts of combat and terrorism. In light of the armed conflict, the laws applicable to these acts are the laws of war, or the laws of armed conflict, which are part of international law. Respondents' stance is that the argument that Israel is permitted to defend herself against terrorism only via means of law enforcement is to be rejected. It is no longer controversial that a state is permitted to respond with military force to a terrorist attack against it. That is pursuant to the right to self defense determined in article 51 of the Charter of the United Nations, which permits a state to defend itself against an "armed attack". Even if there is disagreement among experts regarding the question what constitutes an "armed attack", there can be no doubt that the assault of terrorism against Israel fits the definition of an armed attack. Thus, Israel is permitted to use military force against the terrorist organizations. Respondents point out that additional states have ceased to view terrorist activity as mere criminal offenses, and have begun to use military means and means of war to confront terrorist activities directed against them. That is especially the case when dealing with wide scale acts of terrorism which continue for a long period of time. Respondents' stance is that the question whether the laws of belligerent occupation apply to all of the territory in the area is not relevant to the issue at hand, as the question whether the targeted killings policy is legal will be decided according to the laws of war, which apply both to occupied territory and to territory which is not occupied, as long as armed conflict is taking place on it.

11. Respondents' position is that the laws of war apply not only to war in the classic sense, but also to other armed conflicts. International law does not include an unequivocal definition of the concept of "armed conflict". However, there is no longer any doubt that an armed conflict can exist between a state and groups and organizations which are not states. That is due, *inter alia,* to the military ability and means which such organizations have, as well as their willingness to use them. The current conflict between Israel and the terrorist organizations is an armed conflict, in the framework of which Israel is permitted to use military means. The Supreme Court also made that determination in a series of cases. Regarding the classification of the conflict, respondents originally argued that it is an international armed conflict, to which the usual laws of war apply. In their summary response (of January 26 2004), respondents claim that the question of the classification of the conflict between Israel and the Palestinians is a complicated question, with characteristics that point in different directions. In any case, there

is no need to decide that question in order to decide the petition. That is because according to all of the classifications, the laws of armed conflict will apply to the acts of the State. These laws allow striking at persons who are party to the armed conflict and take an active part in it, whether it is an international or non-international armed conflict, and even if it belongs to a new category of armed conflict which has been developing over the last decade in international law — a category of armed conflicts between states and terrorist organizations. According to each of these categories, a person who is party to the armed conflict and takes an active part in it is a combatant, and it is permissible to strike at him. Respondents' position is that the members of terrorist organizations are party to the armed conflict between Israel and the terrorist organizations, and they take an active part in the fighting. Thus, they are legal targets for attack for as long as the armed conflict continues. However, they are not entitled to the rights of combatants according to the Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (hereinafter *The Third Geneva Convention*) and *The Hague Regulations*, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. In light of that complex reality, respondents' position is that a third category of persons — the category of unlawful combatants — should be recognized. Persons in that category are combatants, and thus they constitute legitimate targets for attack. However, they are not entitled to all the rights granted to legal combatants, as they themselves do not fulfill the requirements of the laws of war. Respondents' stance is that members of terrorist organizations in the boundaries of the *area* fall into the category of "unlawful combatants". The status of terrorists actively participating in the armed conflict is not that of civilians. They are party to the armed conflict, and thus they can be attacked. They do not obey the laws of war, and thus they do not benefit from the rights and protections granted to legal combatants, who obey the laws of war. Respondents' position is, then, that according to each of the alternatives, "the State is permitted to kill those who fight against it, in accordance with the fundamental principles of the laws of war which apply in every armed conflict" (paragraph 68 of respondents' response of January 26 2004).

12. Alternatively, respondents' position is that the targeted killings policy is legal even if the Court should reject the argument that terrorist organization members are combatants and party to the armed conflict, and even if they are to be seen as having the status of civilians. That is because the laws of armed conflict allow harming civilians taking a direct part in hostilities. Indeed, in general, the laws of war grant civilians immunity from harm. However, a "civilian" who takes a direct part in hostilities loses his immunity, and can be harmed. Thus, it is permissible to harm civilians in order to frustrate the intent to commit planned or future hostilities. Every person who takes a direct part in committing, planning, or launching hostilities directed against civilian or military targets is a legitimate target for attack. This exception reflects a customary rule of international law. Respondents' stance is that the simultaneity requirement determined in article 51(3) of *The First Protocol*, pursuant to which a civilian who takes a direct part in hostilities can be harmed only during such time that he is taking that direct part, does not obligate Israel, as it does not reflect a rule of customary international law. On this point respondents note that Israel, like other states, has not joined *The First Protocol*. Thus, harming civilians who take a direct part in hostilities is permitted even when they are not participating in the hostilities. There is no prohibition on striking at the terrorist at any time and place, as long as he has not laid down his arms and exited the circle of violence. Last, respondents claim that even if all of the provisions of article 51(3) of *The First Protocol* are considered customary rules, the targeted killings policy complies with them. That is since the article is to be interpreted more widely than the interpretation proposed by petitioners. Thus, the term "hostilities" is to be interpreted as including acts such as the planning of terrorist attacks, launching of terrorists, and command of a terrorist ring. There is no basis for Professor Cassese's position, according to which "hostilities" must include use of weapons or carrying of weapons. In addition, the term "direct part" should be given a wide interpretation, so that a person who plans, launches, or commits a terrorist attack is considered to be taking a direct part in hostilities. Finally, even the simultaneity condition should be interpreted widely, so that it is possible to strike at a terrorist at any time that he is systematically involved in terrorist acts. Respondents' position is that the very narrow interpretation proposed by petitioners for article 51(3) is unreasonable and angering. It appears from the stance of petitioners, as well as from the expert opinion on their behalf, that terrorists are granted immunity from harm for the entire time that they plan terrorist attacks, and that this immunity is removed for only a most short time, at the time of the actual execution of the terrorist attack. After the execution of the terrorist attack the immunity once again applies to the terrorists, even if it is clearly known that they are returning to their homes to plan and execute the next terrorist attack. This interpretation allows those who take an active part in hostilities to "change their hat" at will, between the hat of a combatant and the hat of a civilian. That result is unacceptable. Nor is it in line with the purpose of the exception, which is intended to allow the state to act against civilians who take part in a conflict against it.

Respondents'' response is that the targeted killings policy complies with the laws of war, even if terrorists are to be seen as civilians, and even the provisions of article 51(3) of *The First Protocol* are to be considered customary rules.

13. Respondents' position is that the targeted killings policy, as implemented in practice, fulfills the proportionality requirement. The proportionality requirement does not lead to the conclusion that it is forbidden to carry out combat activities in which civilians might be harmed. Such a requirement would mean that harm to the civilians must be proportionate to the security benefit likely to stem from the military act. Moreover, the proportionality of the act is to be examined against the background of the inherent uncertainty which clouds all military activity, especially considering the circumstances of the armed conflict between Israel and the terrorist organizations. The State of Israel fulfils the proportionality requirement. Targeted killings are performed only as an exceptional step, when there is no alternative to them. Its goal is to save lives. It is considered at the highest levels of command. In every case, an attempt is made to minimize the collateral damage liable to be caused to civilians during the targeted killing. In cases in which security officials are of the opinion that alternatives to targeted killing exist, such alternatives are implemented to the extent possible. At times targeted killing missions have been canceled, when it has turned out that there is no possibility of performing them without disproportionately endangering innocent persons.

4. The Petition and its Hearing

14. The petition was submitted (on January 24 2002), and after preliminary responses were submitted, it was scheduled for hearing before a panel of three Justices. After the first session (on April 18th 2002, before *Barak P., Dorner J. & Englard J.*), the parties were asked to submit supplementary briefs, including responses to a series of questions which were posed by the Court. After submission of those responses, an additional session of the petition's hearing was held (on July 8 2003, before a panel consisting of *Barak P., Or V.P. & Mazza J.*). During that session, petitioners' motion for interlocutory injunction was heard. The motion was denied. At the request of the parties, additional dates for submission of supplemental briefs were set. At petitioners' request, an additional session was held (on February 16 2005, before a panel consisting of *Barak P., Cheshin V.P. & Beinisch J.*). During this hearing respondents presented the Prime Minister's statement at the *Sharem a-Sheikh* conference, according to which the State of Israel suspended the use of the targeted killings policy. In light of that statement, we decided to suspend the hearing of the petition to another date, in case that should be necessary. In June 2005 the State renewed the implementation of the policy. In light of that, and to the parties' request, an additional hearing was held (on December 11, 2005, before a panel consisting of *Barak P., Cheshin V.P. & Beinisch J.*). At the end of that hearing, we determined that judgment would be given after the submission of additional supplementary briefs on behalf of the parties. According to the decision of *Beinisch P.* (of November 22 2006), *Rivlin V.P.* replaced *Cheshin V.P.*, who had retired.

15. After the petition was submitted, two additional motions for enjoinder were submitted. First (on July 22 2003), petitioners' counsel submitted a motion, on behalf of the National Lawyers Guild and the International Association of Democratic Lawyers, for enjoinder to the petition and to submit briefs as *amici curie.* Respondents opposed the motion. Later (on February 23 2004) a motion was submitted by ''Shurat ha-Din — Israel Law Center'' and 24 additional applicants, for enjoinders as respondents to the petition. Petitioners opposed the motion. We decide to allow both motions and to enjoinder the applicants as parties to the petition. The arguments of *amici curie* support most of petitioners' arguments. They further argue that the killing of religious and political leaders contradicts international law and is illegitimate, both in times of war and in times of peace. In addition, the policy of targeted killing is not to be implemented against those involved in terrorist activity except in cases in which there is immediate danger to human life, and even then it is to be implemented only if there is no other means that can be used to remove the danger. The arguments on behalf of ''Shurat haDin'' support most of respondents' arguments. It further claims that targeted killings are permissible, and even required, pursuant to the Jewish law principle of ''if one rises to kill you, rise and kill him first'' (BABYLONIAN TALMUD, SANHEDRIN 8, 72a), and pursuant to the Jewish law rule regarding ''he who pursues his fellow man to kill him& '' (MAIMONIDES, MISHNE TORAH, NEZIKIM, *Halachot Rotzeach v'Shmirat Nefesh,* chapter 1, halacha 6).

5. The General Normative Framework

A. International Armed Conflict

16. The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter "the area") a continuous situation of armed conflict has existed since the first *intifada*. The Supreme Court has discussed the existence of that conflict in a series of judgments (*see* HCJ 9255/00 *El Saka v. The State of Israel* (unpublished); HCJ 2461/01 *Kna'an v. The Commander of IDF Forces in the Judea and Samaria Area* (unpublished); HCJ 9293/01 *Barake v. The Minister of Defense,* 56(2) PD 509; HCJ 3114/02 *Barake v. The Minister of Defense,* 56(3) PD 11; HCJ 3451/02 *Almandi v. The Minster of Defense,* 56(3) PD 30 (hereinafter *'Almandi'*); HCJ 8172/02 *Ibrahim v. The Commander of IDF Forces in the West Bank* (unpublished); HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* (unpublished, hereinafter — *Mara'abe*). In one case I wrote:

> "Since late September 2000, severe combat has been taking place in the areas of Judea and Samaria. It is not police activity. It is an armed conflict" (HCJ 7015/02 *Ajuri v. The Military Commander of the Judea and Samaria Area,* 56(6) PD 352, 358; hereinafter *"Ajuri"*).

This approach is in line with the definition of armed conflict in the international literature (*see* O. BEN-NAFTALI & Y. SHANI, INTERNATIONAL LAW BETWEEN WAR AND PEACE, 142 (2006) [HAMISHPAT HABEINLEUMI BEIN MILCHAMA LE'SHALOM], hereinafter "BEN-NAFTALI & SHANI"; Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 201 (4th ed. 2005); H. DUFFY, THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW 219 (2005), hereinafter DUFFY). It accurately reflects what is taking place, to this very day, in the *area.* Thus the situation was described in the supplement to the summary on behalf of the State Attorney (on January 26 2004):

> "For more than three years now, the State of Israel is under a constant, continual, and murderous wave of terrorist attacks, directed at Israelis — because they are Israelis — without any discrimination between combatants and civilians or between men, women, and children. In the framework of the current campaign of terrorism, more than 900 Israelis have been killed, and thousands of other Israelis have been wounded to date, since late September 2000. In addition, thousands of Palestinians have been killed and wounded during that period. For the sake of comparison we note that the number of Israeli casualties in proportion to the population of the State of Israel, is a number of times greater than the percentage of casualties in the US in the events of September 11 in proportion to the US population. As is well known, and as we have already noted, the events of 9/11 were defined by the states of the world and by international organizations, with no hesitation whatsoever, as an "'armed conflict" justifying the use of counterforce.
>
> The terrorist attacks take place both within the territories of Judea, Samaria, and the Gaza Strip (hereinafter "the territories") and in the State of Israel proper. They are directed against civilians, in civilian population concentrations, in shopping centers and in markets, and against IDF soldiers, in bases and compounds of the security forces. In these terrorist attacks, the terrorist organizations use military means *par excellence,* whereas the common denominator of them all is their lethalness and cruelty. Among those means are shooting attacks, suicide bombings, mortar fire, rocket fire, car bombs, *et cetera*" (p. 30).

17. This armed conflict does not take place in a normative void. It is subject to the normative systems regarding the permissible and the prohibited. I discussed that in one case, stating:

> "Israel is not an isolated island. It is a member of an international system'.... The combat activities of the IDF are not conducted in a legal void. There are legal norms — some from customary international law, some from international law entrenched in conventions to which Israel is party, and some in the fundamental principles of Israeli law — which determine rules about how combat activities should be conducted" (HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza,* 58(5) PD 385, 391, hereinafter *Physicians for Human Rights*).

What is the normative system that applies in the case of an armed conflict between Israel and the terrorist organizations acting in the *area*?

18. The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its center stands the international law regarding international armed conflict. Professor Cassese discussed the international character of an armed conflict between the occupying state in an area subject to belligerent occupation and the terrorists who come from the same area, including the armed conflict between Israel and the terrorist organizations in the *area*, stating:

> "An armed conflict which takes place between an Occupying Power and rebel or insurgent groups — whether or not they are terrorist in character — in an occupied territory, amounts to an international armed conflict" (A. CASSESE, INTERNATIONAL LAW 420 (2nd ed. 2005), hereinafter CASSESE).

This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character — in other words, one that crosses the borders of the state — whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *iue in bello*. From the humanitarian perspective, it is part of international humanitarian law. That humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law (*see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226, 240, hereinafter *The Legality of Nuclear Weapons;* Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, hereinafter *The Fence*; Bankovic v. Belgium, 41 ILM 517 (ECHR, 12 December 2001); *see also* Meron, *The Humanization of Humanitarian Law,* 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239 (2000)). Alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier "carries in his pack" and which go along with him wherever he may turn, may apply (see HCJ 393/82 *Jami'at Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters v. The Commander of IDF Forces in the Judea and Samaria Area,* 37(4) P.D. 785, 810, hereinafter *Jami'at Ascan; Ajuri,* at p. 365; *Mara'abe,* at paragraph 14 of the judgment).

19. Substantial parts of international law dealing with armed conflicts are of customary character. That customary law is part of Israeli law, "by force of the State of Israel's existence as a sovereign and independent state" (*S.Z. Cheshin, J.,* CrimApp 174/54 *Shtempfeffer v. The Attorney General,* 10 PD 5, 15; *see also* CrimApp 336/61 *Eichmann v. The Attorney General,* 17 PD 2033; CApp 7092/94 *Her Majesty the Queen in Right of Canada v. Edelson,* 51(1) PD 625, 639 *and the caselaw referred to within, and* Ruth Lapidoth, *The Status of Public International Law in Israeli Law,* 19 MISHPATIM 809 (5750) [*Mikumo shel haMishpat haBeinleumi haPombi beMishpat haYisraeli*]; R. SABLE, INTERNATIONAL LAW 29 (2003) [MISHPAT BEINLEUMI]). *Shamgar P.* expressed that well, stating:

> "According to the consistent caselaw of this Court, customary international law is a part of the law of the country, subject to Israeli statute determining a contrary provision" (HCJ 785/87 *Afu v. The Commander of IDF Forces in the West Bank,* 42(2) PD 4, 35).

The international law entrenched in international conventions which is not part of customary international law (whether Israel is party to them or not), is not enacted in domestic law of the State of Israel (*see* HCJ 69/81 *Abu A'ita v. The Commander of the Judea and Samaria Area,* 37(2) PD 197, 234, *and* Zilbershatz, *Integration of International Law into Israeli Law — The Current Law is the Desirable Law,* 24 MISHPATIM 317 (5754) [*Klitat haMishpat haBeinleumi leMishpat haYisraeli — haDin haMatzui, Ratzui*]). In the petition before us, there is no question regarding contradictory Israeli law. Public Israeli law recognizes the Israel Defense Forces as "The People's Army" (article 1 of Basic Law: the Army). The army is authorized "to do all acts necessary and legal, in order to defend the State and in order to attain its security-national goals" (article 18 of the Administration of Rule and Justice Ordinance, 5708-1948). Basic Law: the Government recognizes the legality of "any military acts needed in order to defend the State and public security (article 40(b)). These acts also include, of course, armed conflict against terrorist organizations outside of the boundaries of the State. Also to be noted is the exception to criminal liability determined in article 34m(1) of The Penal Code, 5737-1977, according to which a person shall not be criminally liable for an act which he "has a duty, or is authorized, by law, to do." When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting "by law", and they have a good justification defense. However, if they act contrary to the laws of armed conflict they may be, *inter alia,* criminally liable for their actions. Indeed, the "geometric location" of our issue is in customary international law dealing

with armed conflict. It is from that law that additional law which may be relevant will be derived according to our domestic law. International treaty law which has no customary force is not part of our internal law.

20. International law dealing with the armed conflict between Israel and the terrorist organizations is entrenched in a number of sources (*see* DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (2004), hereinafter DINSTEIN). The primary sources are as follows: the fourth Hague convention (Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), hereinafter *The Hague Convention*). The provisions of that convention, to which Israel is not a party, are of customary international law status (*see Jami'at Ascan,* at p. 793; HCJ 2056/04 *The Beit Sourik Village Council v. The Government of Israel,* 58(5) PD 817, 827, hereinafter *Beit Sourik; Ajuri,* at p. 364). Alongside it stands *The Fourth Geneva Convention* (IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)). Israel is party to that convention. It has not been enacted through domestic Israeli legislation. However, its customary provisions constitute part of the law of the State of Israel (*see* the judgment of *Cohen, J.* in HCJ 698/80 *Kawasme v. The Minister of Defense,* 35(1) PD 617, 638, hereinafter *Kawasme*). As is well known, the position of the Government of Israel is that, in principle, the laws of belligerent occupation in *The Fourth Geneva Convention* do not apply regarding the *area.* However, Israel honors the humanitarian provisions of that convention (*see Kawasme; Jami'at Ascan,* at p. 194; *Ajuri,* at p. 364; HCJ 3278/02 *Hamoked: Center for Defense of the Individual founded by Dr. Lotte Salzberger v. The Commander of IDF Forces in the West Bank Area,* 57(1) PD 385, 396, hereinafter *Hamoked: Center for Defense of the Individual; Beit Sourik,* at p. 827; *Mara'abe,* at paragraph 14 of the judgment). That is sufficient for the purposes of the petition before us. In addition, the laws of armed conflict are entrenched in 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, hereinafter *The First Protocol*). Israel is not party to that protocol, and it was not enacted in domestic Israeli legislation. Of course, the customary provisions of *The First Protocol* are part of Israeli law.

21. Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the *area* is the international law dealing with armed conflicts. So this Court has viewed the character of the conflict in the past, and so we continue to view it in the petition before us. According to that view, the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict (*see* CASSESE, at p. 420). Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character. A number of other possibilities have been raised in the legal literature (*see* DUFFY, at p. 218; EMANUEL GROSS, DEMOCRACY'S STRUGGLE AGAINST TERRORISM; LEGAL AND MORAL ASPECTS 585 (2004) [MA'AVAKA SHEL DEMOCRATIA BETEROR: HEIBETIM MISHPATI'IM VE'MUSARI'IM] hereinafter GROSS; Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': a Legal Analysis of the Israeli Policy of Targeted Killings,* 36 CORNELL INTERNATIONAL LAW JOURNAL 233 (2003), hereinafter "Ben-Naftali & Michaeli"; Derek Jinks, *September 11 and the Law of War* 28 YALE JOURNAL OF INTERNATIONAL LAW 1 (2003), hereinafter "Jinks"). According to the approach of Professor Kretzmer, that armed conflict should be categorized as a conflict which is not of purely internal national character, but also not of international character, rather is of a mixed character, to which both international human rights law and international humanitarian law apply (*see* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171 (2000), hereinafter "Kretzmer"); Respondents' counsel presented those possibilities to us, and pointed out their problems, without taking any stance on the issue. As stated, for years the starting point of the Supreme Court — and also of the State's counsel before the Supreme Court — is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view. It should be noted that even those who are of the opinion that the armed conflict between Israel and the terrorist organizations is not of international character, think that international humanitarian or international human rights law applies to it (*see* Kretzmer, at p. 194; BEN-NAFTALI & SHANI, at p. 142), as well as Hamdan v. Rumsfeld, 165 L. Ed. 2d 729 (2006); *and* Prosecutor v. Tadic, ICTY, case no. IT-94-1, para. 127, hereinafter *Tadic*; regarding armed conflict which is not international, *see* YORAM DINSTEIN, CHARLES H. B. GARRAWAY & MICHAEL N. SCHMITT, THE MANUAL ON NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY (2006).

22. The international law dealing with armed conflicts is based upon a delicate balance between two contradictory considerations (*see Jami'at Ascan,* at p. 794; *Moked: Center for Defense of the Individual,* at p. 396; *Beit Sourik,* at p. 833). One consists of the humanitarian considerations regarding those harmed as a result of an armed conflict. These considerations are based upon the rights of the individual, and his dignity. The other consists of military need and success (*see* DINSTEIN, at p. 16). The balance between these considerations is the basis of international law of armed conflict. Professor Greenwood discussed that, stating:

> "International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity" (DIETER FLECK (ed.) THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 32 (1995), hereinafter FLECK).

In *Jami'at Ascan,* I wrote:

> "*The Hague Regulations* revolve around two central axes: one, the ensuring of the legitimate security interests of the occupier in the territory under belligerent occupation; the other, the ensuring of the needs of the civilian population in the territory under belligerent occupation" (p. 794).

In another case *Procaccia J.* noted that *The Hague Convention* authorizes the military commander to look after two needs:

> "The one need is a military, and the other is civilian-humanitarian. The first focuses on concern for the security of the military force occupying the area, and the second on the responsibility for maintaining the welfare of the inhabitants. Within the latter sphere, the commander of the *area* is responsible not only for maintaining order and the security of the inhabitants, but also for protecting their rights, especially their constitutional human rights. The concern for human rights lies at the heart of the humanitarian considerations that the commander must consider" (HCJ 10356/02 *Hass v. The Commander of IDF Forces in the West Bank,* 58(3) PD 443, 455, hereinafter — *Hass*).

In *Beit Sourik* I added that —

> "The law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to thus protect the security of his country and its citizens. However, it imposes upon the use of this authority the condition of a proper balance between that security and the rights, needs, and interests of the local population" (p. 833).

Indeed,

> "like in many other areas of law, the solution is not found in 'all' or 'nothing'; the solution is in location of the proper balance between the clashing considerations. The solution is not in assignment of absolute weight to one of the considerations; the solution is in assignment of relative weights to the various considerations, while balancing between them at the point of decision" (*Mara'abe,* paragraph 29 of the judgment).

The result of that balancing is that human rights are protected by the law of armed conflict, but not to their full scope. The same is so regarding the military needs. They are given an opportunity to be fulfilled, but not to their full scope. This balancing reflects the relativity of human rights, and the limits of military needs. The balancing point is not constant. "In certain issues the accent is upon the military need, and in others the accent is upon the needs of the civilian population" (*Jami'at Ascan,* at p. 794). What are the factors affecting the balancing point?

23. A central consideration affecting the balancing point is the identity of the person harmed, or the objective compromised in armed conflict. That is the central principle of the distinction (*see* DINSTEIN, at p. 82; BEN-NAFTALI & SHANI, at p. 151). Customary international law regarding armed conflicts distinguishes between combatants and military targets, and non-combatants, in other words, civilians and civilian objectives (*see The Legality of Nuclear Weapons,* at p. 257; *The First Protocol,* art. 48). According to the basic principle of the distinction, the balancing point between the State's military need and the other side's combatants and military objectives is not the same as the balancing point between the state's military need and the other side's civilians and civilian

objectives. In general, combatants and military objectives are legitimate targets for military attack. Their lives and bodies are endangered by the combat. They can be killed and wounded. However, not every act of combat against them is permissible, and not every military means is permissible. Thus, for example, they can be shot and killed. However, "treacherous killing" and "perfidy" are forbidden (*see* DINSTEIN, at p. 198). Use of certain weapons is also forbidden. The discussion of all these does not arise in the petition before us. Moreover, comprehensive legal rules deal with the status of prisoners of war. Thus, for example, prisoners of war are not to be put on criminal trial for their very participation in combat, and they are to be "humanely treated" (*The Third Geneva Convention*, art. 13). They can of course be tried for war crimes which they committed during the hostilities. Opposite the combatants and military objectives stand the civilians and civilian objectives. Military attack directed at them is forbidden. Their lives and bodies are protected from the dangers of combat, provided that they themselves do not take a direct part in the combat. That customary principle is worded as follows:

> "Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.
>
> Rule 6: Civilians are protected against attack unless and for such time as they take a direct part in hostilities.
>
> Rule 7: The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects" (J. I. HENCKAERTS & L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW pp. 3, 19, 25 (Vol. 1, 2005), hereinafter HENCKAERTS & DOSWALD-BECK).

This approach — which protects the lives, bodies, and property of civilians who are not taking a direct part in the armed conflict — passes like a thread throughout the caselaw of the Supreme Court (see *Jami'at Ascan*, at p. 794; HCJ 72/86 *Zalub v. The Military Commander of the Judea and Samaria Area,* 41(1) PD 528, 532; *Almandi,* at p. 35; Ajuri, at p. 365; *Moked: Center for the Defense of the Individual,* at p. 396; HCJ 5591/02 *Yasin v. The Commander of the Ktzi'ot Military Camp,* 57(1) PD 403, 412, hereinafter *Yasin;* HCJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area,* 57(2) PD 349, 364; *Hass,* at p. 465; *Mara'abe,* at paragraphs 24-29 of the judgment; HCJ 1890/03 *The Municipality of Bethlehem v. The State of Israel,* 59(4) PD 736, paragraph 15 of the judgment, hereinafter *The Municipality of Bethlehem*); HCJ 3799/02 *Adalah — The Legal Center for Arab Minority Rights in Israel v. GCO Central Command, IDF,* paragraph 23 of my judgment, hereinafter *The "Early Warning" Procedure*). I discussed that in *Physicians for Human Rights,* which dealt with the combat activity during the armed conflict in Rafiah:

> "... the central provision of international humanitarian law applicable in times of combat is that civilian persons are '... entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof' (*Fourth Geneva Convention,* § 27. *See also Hague Regulations,* regulation 46.) At the foundation of that provision is the recognition of the value of man, the sanctity of his life, and his freedom. ... His life, and dignity as a person may not be harmed, and his dignity must be protected. This basic duty is not absolute. It is subject to '. . . such measures of control and security. . . as may be necessary as a result of the war" (*See Fourth Geneva Convention,* § 27, final clause). These measures may not affect the fundamental rights of the persons concerned. . . . They must be proportionate" (p. 393).

Later in the same case I stated:

> "The duty of the military commander according to the basic rule is twofold. First, he must refrain from acts that harm the local civilians. That is his 'negative' duty. Second, he must take action necessary to ensure that the local civilians are not harmed. That is his 'positive' duty. . . . Both these duties — the boundary between which is fine — should be fulfilled reasonably and proportionately, according to the requirements of time and place" (p. 394).

Are terrorist organizations and their members combatants, in regards to their rights in the armed conflict? Are they civilians taking an active part in the armed conflict? Are they possibly neither combatants nor civilians? What, then, is the status of those terrorists?

B. Combatants

24. What makes a person a combatant? This category includes, of course, the armed forces. It also includes people who fulfill the following conditions (*The Hague Regulations,* §1):

> "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> 2. To have a fixed distinctive emblem recognizable at a distance;
>
> 3. To carry arms openly; and
>
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> . . ."

Article 13 of *The First and Second Geneva Conventions* and article 4 of *The Third Geneva Conventions* repeat that wording (*compare also* article 43 of *The First Protocol*). Those conditions are examined in the legal literature, as well as additional conditions which are deduced from the relevant conventions (*see* DINSTEIN, at p. 39). We need not discuss all of them, as the terrorist organizations from the *area,* and their members, do not fulfill the conditions for combatants (*see* GROSS, at p. 75). It will suffice to say that they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war. In one case, I wrote:

> "The Lebanese detainees are not to be seen as prisoners of war. It is sufficient, in order to reach that conclusion, that they do not fulfill the provisions of article 4a(2)(d) of *The Third Geneva Convention,* which provides that one of the conditions which must be fulfilled in order to fit the definition of 'a prisoner of war' is 'that of conducting their operations in accordance with the laws and customs of war.' The organizations to which the Lebanese detainees belonged are terrorist organizations acting contrary to the laws and customs of war. Thus, for example, these organizations intentionally harm civilians, and shoot from within the civilian population, which serves them as a shield. Each of these is an act contrary to international law. Indeed, Israel's constant stance throughout the years has been to view the various organizations, like the *Hizbollah,* as organizations to which *The Third Geneva Convention* does not apply. We found no cause to intervene in that stance" (HCJ 2967/00 *Arad v. The Knesset,* 54 PD(2) 188, 191; *see also* Severe CrimC 1158/02 (TA) *The State of Israel v. Barguti* (unpublished, paragraph 35 of the verdict); Tav Mem/69/4 *The Military Prosecutor v. Kassem,* 1 SELECTED JUDGMENTS OF THE MILITARY TRIBUNALS IN THE ADMINISTERED TERRITORIES 403 [PISKEI DIN NIVCHARIM SHEL BATEI HADIN HATSVAYIM BASHTACHIM HAMUCHZAKIM]).

25. The terrorists and their organizations, with which the State of Israel has an armed conflict of international character, do not fall into the category of combatants. They do not belong to the armed forces, and they do not belong to units to which international law grants status similar to that of combatants. Indeed, the terrorists and the organizations which send them to carry out attacks are unlawful combatants. They do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished. The Chief Justice of the Supreme Court of the United States, *Stone C.J.* discussed that, writing:

> "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatant are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful" (Ex Parte Quirin 317 U.S. 1, 30 (1942); *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004)).

The Imprisonment of Unlawful combatants Law, 5762-2002 authorizes the chief of the general staff of the IDF to issue an order for the administrative detention of an "unlawful combatant'. That term is defined in the statute

as "a person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force which commits hostilities against the state of Israel, who does not fulfill the conditions granting prisoner of war status in international humanitarian law, as determined in article 4 of III Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949." Needless to say, unlawful combatants are not beyond the law. They are not "outlaws". God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law (Neuman, *Humanitarian Law and Counterterrorist Force*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 283 (2003); Georg Nolte, *Preventative Use of Force and Preventative Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQUIRIES IN LAW 111, 119 (2004), hereinafter "Nolte"). That is certainly the case when they are in detention or brought to justice (*see §75 of The First Protocol*, which reflects customary international law, *as well as* Knut Dormann, *The Legal Situation of 'Unlawful/Unprivileged' Combatants*, 849 INTERNATIONAL REVIEW OF THE RED CROSS 45, 70 (2003), hereinafter "Dormann'). Does it follow that in Israel's conduct of combat against the terrorist organizations, Israel is not entitled to harm them, and Israel is not entitled to kill them even if they are planning, launching, or committing terrorist attacks? If they were seen as (legal) combatants, the answer would of course be that Israel is entitled to harm them. Just as it is permissible to harm a soldier of an enemy country, so can terrorists be harmed. Accordingly, they would also enjoy the status of prisoners of war, and the rest of the protections granted to legal combatants. However, as we have seen, the terrorists acting against Israel are not combatants according to the definition of that term in international law; they are not entitled to the status of prisoners of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army. Are they seen as civilians under the law? It is to the examination of that question which we now turn.

C. Civilians

26. Customary international law regarding armed conflicts protects "civilians" from harm as a result of the hostilities. The International Court of Justice discussed that in *The Legality of Nuclear Weapons*, stating:

> "states must never make civilians the object of attack" (p. 257).

That customary principle is expressed in article 51(2) of *The First Protocol*, according to which:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack".

From that follows also the duty to do everything possible to minimize collateral damage to the civilian population during the attacks on "combatants" (*see* Eyal Benvenisti, *Human Dignity in Combat: the Duty to Spare Enemy Civilians*, 39 ISRAEL LAW REVIEW 81 (2006). Against the background of that protection granted to "civilians", the question what constitutes a "civilian" for the purposes of that law arises. The approach of customary international law is that "civilians" are those who are not "combatants" (*see* §50(1) of *The First Protocol, and* SABLE, at p. 432). In the *Blaskic* case, the International Criminal Tribunal for the former Yugoslavia ruled that civilians are —

> "Persons who are not, or no longer, members of the armed forces" (Prosecutor v. Blaskic (2000) Case IT-95-14-T, para 180).

That definition is "negative" in nature. It defines the concept of "civilian" as the opposite of "combatant". It thus views unlawful combatants — who, as we have seen, are not "combatants" — as civilians. Does that mean that the unlawful combatants are entitled to the same protection to which civilians who are not unlawful combatants are entitled? The answer is, no. Customary international law regarding armed conflicts determines that a civilian taking a direct part in the hostilities does not, at such time, enjoy the protection granted to a civilian who is not taking a direct part in the hostilities (*see* §51(3) of *The First Protocol*). The result is that an unlawful combatant is not a combatant, rather a "civilian". However, he is a civilian who is not protected from attack as long as he is taking a direct part in the hostilities. Indeed, a person's status as unlawful combatant is not merely an issue of the internal state penal law. It is an issue for international law dealing with armed conflicts (*see* Jinks). It is manifest in the fact that civilians who are unlawful combatants are legitimate targets for attack, and thus surely do not enjoy the rights of civilians who are not unlawful combatants, provided that they are taking a direct part in the hostilities at such time. Nor, as we have seen, do they enjoy the rights granted to combatants. Thus, for example, the law of prisoners of war does not apply to them.

D. A Third Category: Unlawful combatants?

27. In the oral and written arguments before us, the State asked us to recognize a third category of persons, that of unlawful combatants. These are people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. Thus, for example, they are not entitled to the status of prisoners of war. The State's position is that the terrorists who participate in the armed conflict between Israel and the terrorist organizations fall under this category of unlawful combatants.

28. The literature on this subject is comprehensive (Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs,* 28 BRITISH YEARBOOK OF INTERNATIONAL LAW 323 (1951); Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy,* 11 HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (2005), hereinafter "Watkin"; Jason Callen, *Unlawful Combatants and the Geneva Conventions,* 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1025 (2004); Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction With Implications for the Future of International Humanitarian Law,* 34 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 227 (2002); Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?* 38 ISRAEL LW REVIEW 378 (2005); Nolte; Dormann). We shall take no stance regarding the question whether it is desirable to recognize this third category. The question before us is not one of desirable law, rather one of existing law. In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category. That is the case according to the current state of international law, both international treaty law and customary international law (*see* CASSESE, at pp. 408, 470). It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions.* It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law. However, new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality (*see Jami'at Ascan,* at p. 800; *Ajuri,* at p. 381). In the spirit of such interpretation, we shall now proceed to the customary international law dealing with the status of civilians who constitute unlawful combatants.

6. Civilians who are Unlawful combatants

A. The Basic Principle: Civilians Taking a Direct Part in Hostilities are not Protected at Such Time they are Doing So

29. Civilians enjoy comprehensive protection of their lives, liberty, and property. "The protection of the lives of the civilian population is a central value in humanitarian law" (*The "Early Warning" Procedure,* at paragraph 23 of my judgment). "The right to life and bodily integrity is the basic right standing at the center of the humanitarian law intended to protect the local population" (HCJ 9593/04 *Yanun Village Council Head v. The Commander of IDF Forces in Judea and Samaria* (yet unpublished)). As opposed to combatants, whom one can harm due to their status as combatants, civilians are not to be harmed, due to their status as civilians. A provision in this spirit is determined in article 51(2) of *The First Protocol,* which constitutes customary international law:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. . ."

Article 8(2)(b)(i)-(ii) of the Rome Statute of the International Criminal Court determines, in the same spirit, in defining a war crime, that if an order to attack civilians is given intentionally, that is a crime. That crime applies to those civilians who are "not taking direct part in hostilities". In addition, civilians are not to be harmed in an indiscriminate attack; in other words, in an attack which, *inter alia,* is not directed against a particular military objective (see §51(4) of *The First Protocol,* which constitutes customary international law: *see* HENCKAERTS & DOSWALD-BECK, at p. 37). That protection is granted to all civilians, excepting those civilians taking a direct part in hostilities. Indeed, the protection from attack is not granted to unlawful combatants who are taking a direct part in the hostilities. I discussed that in one case, stating:

> "The fighting is against the terrorists. The fighting is not against the local population" (*Physicians for Human Rights*, at p. 394).

What is the source and the scope of that basic principle, according to which the protection of international humanitarian law is removed from those who take an active part in hostilities at such time that they are doing so?

B. The Source of the Basic Principle and its Customary Character

30. The basic principle is that the civilians taking a direct part in hostilities are not protected from attack upon them at such time as they are doing so. This principle is manifest in §51(3) of *The First Protocol*, which determines:

> "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

As is well known, Israel is not party to *The First Protocol*. Thus, it clearly was not enacted in domestic Israeli legislation. Does the basic principle express customary international law? The position of The Red Cross is that it is a principle of customary international law (HENCKAERTS & DOSWALD-BECK, at p. 20). That position is acceptable to us. It fits the provision Common Article 3 of *The Geneva Conventions,* to which Israel is party and which, according to all, reflects customary international law, pursuant to which protection is granted to persons "[T]aking no active part in the hostilities." The International Criminal Tribunal for the former Yugoslavia determined that article 51 of *The First Protocol* constitutes customary international law (*see* Struger ICTY IT-OT-42-T-22 (2005)). In military manuals of many states, including England, France, Holland, Australia, Italy, Canada, Germany, the United States (Air Force), and New Zealand, the provision has been copied verbatim, or by adopting its essence, according to which civilians are not to be attacked, unless they are taking a (direct) part in the hostilities. The legal literature sees that provision as an expression of customary international law (*see* DINSTEIN, at p. 11; Kretzmer, at p. 192; Ben-Naftali & Michaeli, at p. 269; CASSESE, at p. 416; *and* Marco Roscini, *Targeting and Contemporary Aerial Bombardment,* 54 INTERNATIONAL AND COMPARATIVE LAW QUATERLY 411, 418 (2005), hereinafter "Roscini"; Vincent-Jöel Proulx, *If the Hat Fits Wear It, If the Turban Fits Run for Your Life: Reflection on the Indefinite Detention and Targeted Killings of Suspected Terrorists,* 56 HASTINGS LAW JOURNAL 801, 879 (2005); George Aldrich, *Laws of War on Land*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 42, 53 (2000)). Respondents' counsel stated before us that in Israel's opinion, not all of the provisions of article 51(3) of *The First Protocol* reflect customary international law. According to the State's position, "all that is determined in customary international law is that it is forbidden to harm civilians in general, and it expressly determines that it is permissible to harm a civilian who 'takes a direct part in hostilities.' Regarding the period of time during which such harm is permitted, there is no restriction" (supplement to summary on behalf of the State Attorney (of January 26 2004), p. 79). Therefore, according to the position of the State, the non-customary part of article 51(3) of *The First Protocol* is the part which determines that civilians do not enjoy protection from attack "*for such time*" as they are taking a direct part in hostilities. As mentioned, our position is that all of the parts of article 51(3) of *The First Protocol* express customary international law. What is the scope of that provision? It is to that question that we now turn.

C. The Essence of the Basic Principle

31. The basic approach is thus as follows: a civilian — that is, a person who does not fall into the category of combatant — must refrain from directly participating in hostilities (*see* FLECK, at p. 210). A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy — during that time — the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, *e.g.* those granted to a prisoner of war. True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack (*see* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,* 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2004), hereinafter "Watkin"). Gasser discussed that, stating:

> "What are the consequences if civilians do engage in combat? . . . Such persons do not lose their legal status as civilians. . . . However, for factual reasons they may not be able to claim the

> protection guaranteed to civilians, since anyone performing hostile acts may also be opposed, but in the case of civilians, only for so long as they take part directly in hostilities'' (FLECK, at p. 211, paragraph 501).

The Red Cross Manual similarly states:

> ''Civilians are not permitted to take direct part in hostilities and are immune from attack. If they take a direct part in hostilities they forfeit this immunity'' (MODEL MANUAL ON THE LAW OF ARMED CONFLICT FOR ARMED FORCES, at paragraph 610, p. 34 (1999)).

That is the law regarding unlawful combatants. As long as he preserves his status as a civilian — that is, as long as he does not become part of the army — but takes part in combat, he ceases to enjoy the protection granted to the civilian, and is subject to the risks of attack just like a combatant, without enjoying the rights of a combatant as a prisoner of war. Indeed, terrorists who take part in hostilities are not entitled to the protection granted to civilians. True, terrorists participating in hostilities do not cease to be civilians, but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack. Nor do they enjoy the rights of combatants, *e.g.* the status of prisoners of war.

32. We have seen that the basic principle is that the civilian population, and single civilians, are protected from the dangers of military activity and are not targets for attack. That protection is granted to civilians ''unless and for such time as they take a direct part in hostilities'' (§51(3) of *The First Protocol*). That provision is composed of three main parts. The first part is the requirement that civilians take part in ''hostilities''; the second part is the requirement that civilians take a ''direct'' part in hostilities; the third part is the provision by which civilians are not protected from attack ''for such time'' as they take a direct part in hostilities. We shall discuss each of those parts separately.

D. The First Part: ''Taking . . . part in hostilities''

33. Civilians lose the protection of customary international law dealing with hostilities of international character if they ''take . . . part in hostilities.'' What is the meaning of that provision? The accepted view is that ''hostilities'' are acts which by nature and objective are intended to cause damage to the army. Thus determines COMMENTARY ON THE ADDITIONAL PROTOCOLS, published by the Red Cross in 1987:

> ''Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces'' (Y. SANDOZ et al. COMMENTARY ON THE ADDITIONAL PROTOCOLS 618 (1987)).

A similar approach was accepted by the Inter-American Commission on Human Rights, and is positively referred to in HENCKAERTS & DOSWALD-BECK (p. 22). It seems that acts which by nature and objective are intended to cause damage to civilians should be added to that definition. According to the accepted definition, a civilian is taking part in hostilities when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for the hostilities. Regarding taking part in hostilities, there is no condition that the civilian use his weapon, nor is their a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all. COMMENTARY ON THE ADDITIONAL PROTOCOLS discussed that issue:

> ''It seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon'' (p. 618-619).

As we have seen, that approach is not limited merely to the issue of ''hostilities'' toward the army or the state. It applies also to hostilities against the civilian population of the state (*see* Kretzmer, at p. 192).

E. Second Part: '''Takes a Direct Part''

34. Civilians lose the protection against military attack, granted to them by customary international law dealing with international armed conflict (as adopted in *The First Protocol*, §51(3)), if ''they take a direct part in hostilities''. That provision differentiates between civilians taking a direct part in hostilities (from whom the protection from attack is removed) and civilians taking an indirect part in hostilities (who continue to enjoy protection from attack).

What is that differentiation? A similar provision appears in Common Article 3 of *The Geneva Conventions,* which uses the wording "active part in hostilities". The judgment of the International Criminal Tribunal for Rwanda determined that these two terms are of identical content (*see* The Prosecutor v. Akayesu, case no. ICTR-96-4-T (1998)). What is that content? It seems accepted in the international literature that an agreed upon definition of the term "direct" in the context under discussion does not exist (*see* DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, REPORT PREPARED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS (2003); DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2004)). HENCKAERTS & DOSWALD-BECK rightly stated that—

> "It is fair to conclude . . . that a clear and uniform definition of direct participation in hostilities has not been developed in state practice" (p. 23).

In that state of affairs, and without a comprehensive and agreed upon customary standard, there is no escaping going case by case, while narrowing the area of disagreement (*compare Tadic*). On this issue, the following passage from COMMENTARY ON THE ADDITIONAL PROTOCOLS is worth quoting:

> "Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly" (p. 516).

Indeed, a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it, is a civilian taking "an active part" in the hostilities (*see* Watkin, at p. 17). However, a civilian who generally supports the hostilities against the army is not taking a direct part in the hostilities (*see* DUFFY, at p. 230). Similarly, a civilian who sells food or medicine to unlawful combatants is also taking an indirect part in the hostilities. The third report of the Inter-American Commission on Human Rights states:

> "Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party" (IACHR THIRD REPORT ON HUMAN RIGHTS IN COLOMBIA, par. 53, 56 (1999)).

And what is the law in the space between these two extremes? On the one hand, the desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term "direct" part in hostilities. Professor CASSESE writes:

> "The rationale behind the prohibition against targeting a civilian who does not take a direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the *need to avoid killing innocent civilians*" (p. 421, emphasis original).

On the other hand, it can be said that the desire to protect combatants and the desire to protect innocent civilians leads, in the hard cases, to a wide interpretation of the "direct" character of the hostilities, as thus civilians are encouraged to stay away from the hostilities to the extent possible. Schmitt writes:

> "Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible — in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted" (Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict,* in H. FISCHERR (ed.), CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSHRIFT FUR DIETER FLECK 505-509 (2004), hereinafter "Schmitt").

35. Against the background of these considerations, the following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities (*see* Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVEW 1, 116 (1990), hereinafter "Parks"), or beyond those issues (*see* Schmitt, at p. 511); a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities (*see* Watkin, at p. 17; Roscini). However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. The same is the case regarding a person who distributes propaganda supporting those unlawful combatants. If such persons are injured, the State is likely not to be liable for it, if it falls into the framework of collateral or incidental damage. This was discussed by Gasser:

> "Civilians who directly carry out a hostile act against the adversary may be resisted by force. A civilian who kills or takes prisoners, destroys military equipment, or gathers information in the area of operations may be made the object of attack. The same applies to civilians who operate a weapons system, supervise such operation, or service such equipment. The transmission of information concerning targets directly intended for the use of a weapon is also considered as taking part in hostilities. Furthermore, the logistics of military operations are among the activities prohibited to civilians . . . [N]ot only direct and personal involvement but also preparation for a military operation and intention to take part therein may suspend the immunity of a civilian. All these activities, however, must be proved to be directly related to hostilities or, in other words to represent a direct threat to the enemy . . . However, the term should not be understood too broadly. Not every activity carried out within a state at war is a hostile act. Employment in the armaments industry for example, does not mean, that civilian workers are necessarily participating in hostilities& Since, on the other hand, factories of this industry usually constitute lawful military objectives that may be attacked, the normal rules governing the assessment of possible collateral damage to civilians must be observed" (FLECK, at p. 232, paragraphs 517, 518).

In the international literature there is a debate surrounding the following case: a person driving a truck carrying ammunition (*see* Parks, at p. 134; Schmitt, at p. 507; ANTHONY P. V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996), hereinafter ROGERS; *and* Lisa L. Turner &. Lynn G. Norton, *Civilians at the Tip of the Spear,* 51 AIR FORCE LAW REVEW 1, 31 (2001); John R. Heaton, *Civilians At War: Re-examining the Status of Civilians Accompanying the Armed Forces,* 57 AIR FORCE LAW REVEW 155, 171 (2005)). Some are of the opinion that such a person is taking a direct part in the hostilities (and thus he can be attacked), and some are of the opinion that he is not taking a direct part (and thus he cannot be attacked). Both opinions are in agreement that the ammunition in the truck can be attacked. The disagreement regards the attack upon the civilian driver. Those who think that he is taking a direct part in the hostilities are of the opinion that he can be attacked. Those who think that he is not taking a direct part in the hostilities believe that he cannot be attacked, but that if he is wounded, that is collateral damage caused to civilians proximate to the attackable military objective. In our opinion, if the civilian is driving the ammunition to the place from which it will be used for the purposes of hostilities, he should be seen as taking a direct part in the hostilities (*see* DINSTEIN, at p. 27; Schmitt at p. 508; ROGERS, at p. 7; ANTHONY .P .V. ROGERS & P. MALHERBE, MODEL MANUAL OF THE LAW OF ARMED CONFLICT 29 (ICRC, (1999)).

36. What is the law regarding civilians serving as a "human shield" for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities (*see* Schmitt, at p. 521 *and* Michael N. Schmitt, *Humanitarian Law and* Direct Participation in Hostilities by Private Contractors or Civilian Employees, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 511, 541 (2004))

37. We have seen that a civilian causing harm to the army is taking "a direct part" in hostilities. What says the law about those who enlist him to take a direct part in the hostilities, and those who send him to commit

hostilities? Is there a difference between his direct commanders and those responsible for them? Is the "direct" part taken only by the last terrorist in the chain of command, or by the entire chain? In our opinion, the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take "a direct part". The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active) (*see* Schmitt, at p. 529).

F. The Third Part: "For Such Time"

38. Article 51(3) of *The First Protocol* states that civilians enjoy protection from the dangers stemming from military acts, and that they are not targets for attack, unless "and for such time" as they are taking a direct part in hostilities. The provisions of article 51(3) of *The First Protocol* present a time requirement. A civilian taking a part in hostilities loses the protection from attack "for such time" as he is taking part in those hostilities. If "such time" has passed — the protection granted to the civilian returns. In respondents' opinion, that part of article 51(3) of *The First Protocol* is not of customary character, and the State of Israel is not obligated to act according to it. We cannot accept that approach. As we have seen, all of the parts of article 51(3) of *The First Protocol* reflect customary international law, including the time requirement. The key question is: how is that provision to be interpreted, and what is its scope?

39. As regarding the scope of the wording "takes a direct part" in hostilities, so too regarding the scope of the wording "and for such time" there is no consensus in the international literature. Indeed, both these concepts are close to each other. However, they are not identical. With no consensus regarding the interpretation of the wording "for such time", there is no choice but to proceed from case to case. Again, it is helpful to examine the extreme cases. On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility (*see* Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES IN LAW 179, 195 (2004)).

40. These examples point out the dilemma which the "for such time" requirement 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 has "horns of the alter" (1 Kings 1:50) to grasp or a "city of refuge" (Numbers 35:11) to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided (*see* Schmitt, at p. 536; Watkin, at p. 12; Kretzmer, at p. 193; DINSTEIN, at p. 29; *and* Parks, at p. 118). 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. In that context, the following four things should be said: first, well based information is needed before categorizing a civilian as falling into one of the discussed categories. Innocent civilians are not to be harmed (*see* CASSESE, at p. 421). Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities (*see* Ergi v. Turkey, 32 EHRR 388 (2001). CASSESE rightly stated that —

> "[I]f a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into question and the whole body of law relating to armed conflict would eventually be eroded" (p. 421).

The burden of proof on the attacking army is heavy (*see* Kretzmer, at p. 203; GROSS at p. 606). In the case of doubt, careful verification is needed before an attack is made. HENCKAERTS & DOSWALD-BECK made this point:

> "[W]hen there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious" (p. 24).

Second, 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. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed (*see* Mohamed Ali v. Public Prosecutor [1969] 1 A.C. 430). Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force. That question arose in McCann v. United Kingdom, 21 E.H.R.R. 97 (1995), hereinafter *McCann.* In that case, three terrorists from Northern Ireland who belonged to the IRA were shot to death. They were shot in the streets of Gibraltar, by English agents. The European Court of Human Rights determined that England had illegally impinged upon their right to life (§2 of the European Convention on Human Rights). So wrote the court:

> "[T]he use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk" (p. 148, at paragraph 235).

Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required (*see* ALAN DERSHOWITZ, PREEMTION: A KNIFE THAT CUTS BOTH WAYS 230 (2005)). However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities (*see* §5 of *The Fourth Geneva Convention*). Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used. Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent (*see* Watkin, at p. 23; DUFFY, at p. 310; CASSESE, at p. 419; *see also* Colin Warbrick, *The Principle of the European Convention on Human Rights and the Responses of State to Terrorism,* EUROPEAN HUMAN RIGHTS LAW REVIEW 287, 292 (2002); *McCann*, at pp. 161, 163; *as well as* McKerr v. United Kingdom, 34 E.H.R.R. 553, 559 (2001)). In appropriate cases it is appropriate to pay compensation as a result of harm caused to an innocent civilian (*see* CASSESE, at pp. 419, 423, *and* §3 of *The Hague Regulations;* §91 of *The First Protocol*). Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test. We shall now proceed to the examination of that question.

7. Proportionality

A. The Principle of Proportionality and its Application in Customary International Law

41. The principle of proportionality is a general principle in law. It is part of our legal conceptualization of human rights (*see* §8 of Basic Law: Human Dignity and Freedom; *see also* AHARON BARAK, A JUDGE IN A DEMOCRATIC SOCIETY 346 (2004) [SHOFET BECHEVRA DEMOKRATIT], hereinafter BARAK). It is an important component of customary international law (*see* ROSALYN HIGGINS, PROBLEMS AND PROCESS — INTERNATIONAL LAW AND HOW WE USE IT 219 (1994); Delbruck, *Proportionality,* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1144 (1997). It is an integral part of the law of self defense. It is a substantive component in protection of civilians in situations of armed conflict (*see* DINSTEIN, at p. 119; Gasser, at p. 220; CASSESE, at p. 418; BEN-NAFTALI & SHANI, at p. 154; *and* HENCKAERTS & DOSWALD-BECK, at p. 60; Judith Gardam, *Proportionality and Force in International Law,* 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 391 (1993), hereinafter "Gardam"; J.S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 62 (1985); William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare,* 98 MILITARY LAW REVIEW 91 (1982); T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 73 (1989)). It is a central part of the law of belligerent occupation (*see Hass*, at p. 461; *The Municipality of Bethlehem; Beit Sourik*, at p. 836; HCJ 1661/05 *Gaza Coast Regional Council v. The Knesset,* 59(2) PD 481, paragraph 102 of the judgment of The Court; *Mara'abe,* paragraph 30 of my judgment; *see also* DINSTEIN, at p. 119; HENCKAERTS & DOSWALD-BECK, at p. 60). In a long list of judgments, the Supreme Court has examined the authority of the military commander in the area according to the standards of proportionality. It has done so, *inter alia*, regarding

restriction of place of residence (*Ajuri*); regarding encirclement of villages and positioning checkpoints on the access roads to and from them in order to frustrate terrorism (HCJ 2847/03 *Alauna v. The Commander of IDF Forces in Judea and Samaria* (unpublished)); regarding harm to property of protected persons due to army operations (*see* HCJ 9525/00 *Ali Skai v. The State of Israel* (unpublished)); regarding the safeguarding of freedom of worship and the right to access to holy places (*Hass*); regarding demolition of houses due to operational needs (*see* HCJ 4219/02 *Gusin v. The Commander of IDF Forces in the Gaza Strip,* 56(4) PD 608); regarding the laying of siege (*Almandi*); regarding the erection of the security fence (*Beit Sourik*; *Mara'abe*).

B. Proportionality in an International Armed Conflict

42. The principle of proportionality is a substantial part of international law regarding armed conflict (*compare* §51(5)(b) and *57 of The First Protocol* (see HENCKEARTS & DOSWALD-BECK, at p. 46; BEN-NAFTALI & SHANI, at p. 154)). That law is of customary character (see HENCKEARTS & DOSWALD-BECK, at p. 53; DUFFY, at p. 235; *and* Prosecutor v. Kupreskic, ICTY Case no. IT-95-16 (2000)). The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate (*see* DINSTEIN, at p. 119). Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as "human shields" from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, *inter alia*, the requirements of the principle of proportionality.

43. The principle of proportionality applies in every case in which civilians are harmed at such time as they are not taking a direct part in hostilities. Judge Higgins pointed that out in the *Legality of Nuclear Weapons* case:

> "The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack" (p. 587).

A manifestation of this customary principle can be found in *The First Protocol*, pursuant to which indiscriminate attacks are forbidden § 51(4)). *The First Protocol* further determines (§51(5)):

> Among others, the following types of attacks are to be considered as indiscriminate:
> (a) ...
> (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

44. The requirement of proportionality in the laws of armed conflict focuses primarily upon what our constitutional law calls proportionality "*stricto senso*", that is, the requirement that there be a proper proportionate relationship between the military objective and the civilian damage. However, the laws of armed conflict include additional components, which are also an integral part of the theoretical principle of proportionality in the wider sense. The possibility of concentrating that law into the legal category to which it belongs, while formulating a comprehensive doctrine of proportionality, as is common in the internal law of many states, should be considered. That cannot be examined in the framework of the petition before us. We shall concentrate upon the aspect of proportionality which is accepted, without exception, as relevant to the subject under discussion.

Proper Proportion between Benefit and Damage

45. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests (*see Beit Sourik*, at p. 850; HCJ 7052/03 *Adalah — The*

Legal Center Arab Minority Rights in Israel (unpublished, paragraph 74 of my judgment, hereinafter *Adalah*). It is accepted in the national law of various countries. It constitutes a central normative test for examining the activity of the government in general, and of the military specifically, in Israel. In one case I stated:

> "Basically, this subtest carries on its shoulders the constitutional view that the ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy" (HCJ 8276/05 *Adalah - The Legal Center for Arab Minority Rights in Israel v. The Minister of Defense* (unpublished, paragraph 30 of my judgment; *see also* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66 (2002)).

As we have seen, this requirement of proportionality is employed in customary international law regarding protection of civilians (*see* CASSESE, at p. 418; Kretzmer, at p. 200; Ben-Naftali & Michaeli, at p. 278; *see also* Gardam; *as well as* §51(2)(III) of *The First Protocol*, which constitutes customary law). When the damage to innocent civilians is not proportionate to the benefit of the attacking army, the attack is disproportionate and forbidden.

46. That aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might — like a combatant — be the objective of a fatal attack. That killing is permitted. However, that proportionality is required in any case in which an innocent civilian is harmed. Thus, the requirements of proportionality *stricto senso* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The proportionality rule applies in regards to harm to those innocent civilians (*see* § 51(5)(b) of *The First Protocol*). The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists (*see* HENCKAERTS & DOSWALD-BECK, at p. 49). Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed (*compare* DINSTEIN, at p. 123; GROSS, at p. 621). The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated (*see* §57(2)(iii) of *The First Protocol*). Indeed, in international law, as in internal law, the ends do not justify the means. The state's power is not unlimited. Not all of the means are permitted. The Inter-American Court of Human Rights pointed that out, stating:

> "[R]egardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the state resort to any means to attain its ends" (Velasquez Rodriguez v. Honduras, I/A Court H.R. (Ser. C.), No 4, 1, para. 154 (1988)).

However, when hostilities occur, losses are caused. The state's duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists. That balancing is difficult when it regards human life. It raises moral and ethical problems (*see* Asa Kasher & Amos Yadlin, *Assassination and Preventative Killing,* 25 SAIS REVIEW 41 (2005). Despite the difficulty of that balancing, there's no choice but to perform it.

8. Jusiticiability

47. A considerable part of the State Attorney's Office's response (of March 20, 2002) was dedicated to preliminary arguments. According to that response, "the IDF combat activity in the framework of the combat events occurring in the *area,* which are of operational character *par excellence*, are not justiciable — and at very least are not institutionally justiciable — and this honorable Court will not judge them" (paragraph 26, p. 7; emphasis original). In explaining this approach, respondents' counsel emphasized that in his opinion "the dominant character of the issue is not legal, and the attribute of judicial restraint requires that the Court refrain from stepping down into the combat zone and from judging the operational acts *par excellence* which are occurring in that zone" (*ibid*, paragraph 36, p. 11; emphasis original). Respondents' counsel emphasized that "clearly, the subject's status as 'non-justiciable' does not mean that means of supervision and control on the part of the executive branch itself

are not employed on this issue . . . the units of the army have been instructed by the Attorney General and the Military Advocate General to act on this issue, as in others, strictly according to the provisions of international law regarding laws of conflict, and they comply with that instruction'' (*ibid,* paragraph 40, p. 13).

48. As is well known, we differentiate between an argument of normative non-justiciability and an argument of institutional non-justiciability (*see* HCJ 910/86 *Ressler v. The Minister of Defense,* 42(2) PD 441, hereinafter *Ressler*). An argument of normative non-justiciability claims that legal standards for deciding the dispute put before the Court do not exist. An argument of institutional non-justiciability claims that it is not proper that the dispute be decided in Court according to the law. The argument of normative non-justiciability has no legal base: not in general, and not in the issue before us. The argument of non-justiciability has no legal base in general, since there is always a legal norm according to which the dispute can be solved, and the existence of a legal norm provides the basis for the existence of legal standards for such decision. It may be easy to identify the norm and the standards behind it; it may be difficult to do so. However, at the end of the day, a legal norm will always be found, and legal standards will always be found. That norm can be general, *e.g.* ''a person is permitted to do everything except that which has been forbidden, and the government is permitted to do only what it has been permitted to do''. At times the norm is much narrower. So it is in the case before us. There are legal norms which deal with the case before us, from which we can derive standards which determine what is permitted and what is forbidden. There is thus no foundation to the argument of normative non-justiciability.

49. The second type of non-justiciability is institutional non-justiciability. That non-justiciability deals with the question whether the law and the Court are the appropriate framework for deciding in the dispute. The question is not whether it is possible to decide in the dispute according to the law, in Court. The answer to that question is in the affirmative. The question is whether it is desirable to decide in the dispute — which is normatively justiciable — according to legal standards, in Court (*Ressler,* at p. 488). That type of non-justiciability is recognized in our law. Thus, for example, it was decided that in general, questions of the day to day affairs of the legislature are not institutionally justiciable (*see* HCJ 9070/00 *MK Livnat v. The Chairman of the Constitution, Law, and Justice Committee,* 55(4) PD 800, 812; HCJ 9056/00 *MK Kleiner v. The Chairman of the Knesset,* 55(4) PD 703, 708). Only if it is claimed that the violation of rules regarding internal management harms the parliamentary fabric of life and the foundations of the structure of our constitutional system of government is it appropriate to decide the issue in court (*see* HCJ 652/81 *MK Sarid v. The Chairman of the Knesset,* 36(2) PD 197; HCJ 73/85 *''Kach'' Knesset Faction v. The Chairman of the Knesset,* 39(3) PD 141; HCJ 742/84 *Kahane v. The Chairman of the Knesset,* 39(4) PD 85.

50. The scope of the institutional non-justiciability doctrine in Israel is not wide. There is not a consensus about its boundaries. As for me, I am of the opinion that it should be recognized only within very limited boundaries (*see* BARAK, at p. 275). Whatever its boundaries, the doctrine does not apply in this case, for four reasons: first, there is a clear trend in the caselaw of the Supreme Court, according to which there is no application of the institutional non-justiciability doctrine where recognition of it might prevent the examination of impingement upon human rights. *Witkon, J.* discussed that in the *Oyeb* case. That case dealt with the legality of a settlement in the *area.* It was argued by the State that the question of the legality of a settlement in the *area* is non-justiciable. In rejecting that claim, *Witkon, J.* wrote:

> ''I am not impressed by that argument whatsoever . . . . it is clear that issues of foreign policy — like a number of other issues — are decided by the political branches, and not by the judicial branch. However, assuming . . . that a person's property is harmed or expropriated illegally, it is difficult to believe that the Court will whisk its hand away from him, merely since his right might be disputed in political negotiations'' (HCJ 606/78 *Oyeb v. The Minister of Defense,* 33(2) PD 113, 124).

In *Duikat* the question of the legality of a settlement in the area was again decided by the Court. *Landau, V.P.* wrote:

> ''A military government wishing to impinge upon the property right of an individual must show a legal source for it, and cannot except itself from judicial supervision over its acts by arguing non-justiciability'' (HCJ 390/70 *Duikat v. The Government of Israel,* 34(1) PD 1, 15, hereinafter — *Duikat*).

In *Mara'abe* the legality of the separation fence according to the rules of international law was discussed. Regarding the justiciability of that question, I ruled:

> ". . . the Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiceable. The door of the Court is open. The argument that the impingement upon human rights is due to security considerations does not rule out judicial review. 'Security considerations' or 'military necessity' are not magic words . . . . This is appropriate from the point of view of protection of human rights" (*Mara'abe,* paragraph 31 of the judgment).

The petition before us is intended to determine the permissible and the forbidden in combat which might harm the most basic right of a human being — the right to life. The doctrine of institutional non-justiciability cannot prevent the examination of that question.

51. Second, Justices who support the doctrine of institutional non-justiciability note that the test is the dominant character of the disputed question. When the character of the disputed question is political or military, it is appropriate to prevent adjudication. However, when that character is legal, the doctrine of institutional non-justiciability does not apply (*see* HCJ 4481/91 *Bargil v. The Government of Israel*, 37(4) PD 210, 218). The questions disputed in the petition before us are not questions of policy. Nor are they military questions. The question is whether or not to employ a policy of preventative strikes which cause the deaths of terrorists and at times of nearby innocent civilians. The question is — as indicated by the analysis of our judgment — legal; the question is the legal classification of the military conflict taking place between Israel and terrorists from the *area*; the question is the existence or lack of existence of customary international law on the issue raised by the petition; the question is of the determination of the scope of that custom, to the extent that it is reflected in §51(d) of *The First Protocol*; the question is of the norms of proportionality applicable to the issue. The answers to all of those questions are of a dominant legal character.

52. Indeed, in a long list of judgments the Supreme Court has examined the rights of the inhabitants of the *area.* Thousands of judgments have been handed down by the Supreme Court, which, lacking any other adjudicative instance, has dealt with those issues. That examination has dealt with the powers of the army during times of combat, and with the limitations placed upon on them by international humanitarian law. Thus, for example, the rights of the local population to food, medicine, and similar needs of the population during combat operations have been examined (*see Physicians for Human Rights*); as well as the rights of the local population during the arrest of terrorists (*see The "Early Warning" Procedure*), transport of casualties (*see* HCJ 2117/02 *Physicians for Human Rights v. The Commander of IDF Forces in the West Bank,* 56(3) PD 26), siege on a church (*Almandi*), and detention and interrogation (*Hamoked: Center for the Defense of the Individual; Yasin; Marab*). In more than one hundred petitions this Court has examined the rights of the local protected persons according to international humanitarian law as a result of the erection of the separation fence (*see Beit Sourik*; *Mara'abe*; HCJ 5488/04 *The a-Ram Local Council v. The Government of Israel* (unpublished)). In all these cases, the dominant question of the disputed question was legal. True, the legal answer was likely to have political or military implications. However, it was not those implications which determined the character of the question. It is not the results derived from the judgment which determine its character, rather the questions decided in it and they way they are solved. Those questions were in the past, and are now, of dominant legal character.

53. Third, the types of questions examined by this Court have also been decided by international courts. International law dealing with the army's duties toward civilians during an armed conflict has been discussed, for example, by the international criminal tribunals for the former Yugoslavia and Rwanda (*see* paragraphs 26, 30 & 34 above). These courts have examined the legal aspects of the conduct of armies. Why can't an Israeli court perform that same examination? Why do those questions, which are justiciable in international courts, cease to be justiciable in national tribunals?

54. Last, the law dealing with preventative acts on the part of the army which cause the deaths of terrorists and of innocent bystanders requires ex post examination of the conduct of the army (*see* paragraph 40 above). That examination must — thus determines customary international law — be of an objective character. In order to intensify that character, and ensure a maximum of that required objectivity, it is best to expose that examination

to judicial review. That judicial review is not review instead of the regular monitoring by the army officials, who perform that review in advance. "According to the structure and role of the Court, it cannot act by way of continuous monitoring and supervision" (*Shamgar, P.* in HCJ 253/88 *Sejdia v. The Minister of Defense,* 42(3) PD 801, 825). In addition, that judicial review is not review instead of ex post objective review, after an event in which it is alleged that harm was caused to innocent civilians who were not taking a direct part in hostilities. After the (*ex post*) review, in the appropriate cases, judicial review of the decisions of the objective examination committee should be allowed. That will ensure its proper functioning.

9. The Scope of Judicial Review

55. The Supreme Court, sitting as High Court of Justice, judicially reviews the legality of the use of the discretion of the commanders of the army forces in the *area.* Thus this Court has done since the Six Day War. The starting point which has guided the Court has been that the military commanders and officers who answer to the commander of army forces in the *area* are public officials fulfilling roles pursuant to law (*Jami'at Ascan,* at p. 809). That review preserves the legality of the use of discretion on the part of the military commander.

56. The scope of judicial review of the decision of the military commander to perform a preventative strike causing the deaths of terrorists in the *area,* and at times of innocent civilians, varies according to the essence of the concrete question raised. On the one end of the spectrum stands the question which we have discussed in this petition, regarding the content of international law dealing with armed conflicts. That is a question of determination of the applicable law, *par excellence.* According to our legal outlook, that question is within the realm of the judicial branch. "The final and decisive interpretative decision regarding a statute, as per its wording at any given time, is granted to the Court" (HCJ 306/81 *Sharon v. The Knesset* Committee, 35(4) PD 118, 141, *Shamgar, J.*). The task of interpreting the law is in the hands of the Court. So it is regarding basic laws, statutes, and regulations. So it is regarding the Israeli common law. So it certainly also is regarding the customary international law which applies in Israel. The Court is not permitted to liberate itself from the burden of that authority. The question which the Court must ask itself is not whether the executive branch's understanding of the law is a reasonable understanding; the question which the Court must ask itself is whether it is the correct understanding (HCJ 693/91 *Efrat v. The Population Registry Commissioner in the Ministry of the Interior,* 47(1) PD 749, 762). The expertise in interpreting the law is in the hands of the Court (see HCJ 3648/97 *Stamka v. The Minister of the Interior,* 53(2) PD 728, 305; HCJ 399/85 *Kahane v. Broadcasting Agency Executive Committee Chairman,* 41(3) PD 255, 305). As seen, judicial review of the content of the customary international law regarding the issue before us is comprehensive and complete. The Court asks itself what the international law is and whether the understanding of the military commander is in line with that law.

57. On the other end of the spectrum of possibilities is the decision, made on the basis of the knowledge of the military profession, to perform a preventative act which causes the deaths of terrorists in the *area.* That decision is the responsibility of the executive branch. It has the professional-security expertise to make that decision. The Court will ask itself if a reasonable military commander could have made the decision which was made. The question is whether the decision of the military commander falls within the zone of reasonable activity on the part of the military commander. If the answer is yes, the Court will not exchange the military commander's security discretion with the security discretion of the Court (*see* HCJ 1005/89 *Aga v. The Commander of IDF Forces in the Gaza Strip Area,* 44(1) PD 536, 539; *Ajuri,* at p. 375. In *Beit Sourik,* which dealt with the route of the security fence, we stated:

> "We, the Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours — to the extent that we have a military opinion regarding the military quality of the route. So we act in all questions of professional expertise, and so we act in military affairs as well. All we can determine is whether a reasonable military commander could have determined the route as this military commander did" (*ibid,* at p. 843).

As seen, judicial review regarding the military means to be taken is regular review of reasonableness. True, "military discretion" and "state security" are not magic words which prevent judicial review. However, the question is not what I would decide in the given circumstances, rather whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make. On that subject,

special weight is to be granted to the military opinion of the official who bears the responsibility for security (*see* 258/79 *Amira v. The Minister of Defense,* 34(1) PD 90, 92; *Duikat,* at p. 25; *Beit Sourik,* at p. 844; *Mara'abe,* at paragraph 32 of the judgment).

58. Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. To the extent that it has a legal aspect, it approaches the one end of the spectrum. To the extent that it has a professional military aspect, it approaches the other end of the spectrum. Take, for example, the question whether the decision to perform a preventative strike causing the deaths of terrorists fulfills the conditions which customary international law determines on that point (as determined in §51(3) of *The First Protocol*). What is the scope of judicial review of the military commander's decision that these conditions are fulfilled in the specific case? Our answer is that the question of the fulfillment of the conditions determined in customary international law for performing military operations is a legal question, the expertise in which is the Court's. I discussed that in *Physicians for Human Rights*:

> "Judicial review does not review the wisdom of the decision to take military action. The examination in judicial review is of the legality of the military action. Thus, we assume that the operations in Rafiah are necessary from a military standpoint. The question before us is whether these military operations adhere to the national and international standards which determine the legality of that action. The fact that the action is necessary from a military standpoint does not mean, from the standpoint of the law, that it is legal. Indeed, we do not replace the discretion of the military commander regarding the military considerations. That is his expertise. We examine the result from the standpoint of humanitarian law. That is our expertise" (*ibid,* at p. 393).

The approach is similar regarding proportionality. The decision of the question whether the benefit stemming from the preventative strike is proportionate to the collateral damage caused to innocent civilians harmed by it is a legal question, the expertise about which is in the hands of the judicial branch. I discussed that in *Beit Sourik*, regarding the proportionality of the harm which the separation fence causes to the fabric of life of the local inhabitants:

> "The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportionate. That is our expertise" (*Beit Sourik*, at p. 846; *Ma'arabe,* at paragraph 32 of the judgment).

Proportionality is not a standard of precision. At times there are a number of ways to fulfill its conditions. A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch's decision. That is its margin of appreciation (*see* HCJ 3477/95 *Ben Atiya v. The Minister of Education, Culture, and Sport,* 49(5) PD 1, 12; HCJ 4769/95 *Menachem v. The Minister of Transportation,* PD 57(1) 235, 280; *Adalah,* at paragraph 78 of my judgment).

59. The intensity of judicial review of military decisions to make a preventative strike causing the deaths of terrorists and innocent civilians is, by nature, low. The reason for that is twofold: first, judicial review cannot be performed in advance. Having determined in this judgment the provisions of customary international law on the issue before us, we naturally cannot examine its realization in advance. Judicial review on this issue will, by nature, be retrospective. Second, the principle examination must be performed by the examination committee, which according to international law must perform an objective retrospective examination. The review of this Court can, by nature, be directed only against the decisions of that committee, and only according to the accepted standards regarding such review.

Implementation of the General Principles in This Case

60. The *Order Nisi* given at the request of petitioners was as follows:

> "to obligate respondents 1-3 to appear and explain why the 'targeted killing' policy (hereinafter — 'execution policy') should not be annulled, and why they should not refrain from ordering respondents 4-5 to implement that policy, and to obligate respondents 4-5 to appear and explain why they should not refrain from carrying out executions of wanted persons according to said policy."

The examination of the "targeted killing" — and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians — has shown that the question of the legality of the preventative strike according to customary international law is complex (for an analysis of the Israeli policy, *see* Yuval Shany, *Israeli Counter — Terrorism Measures: Are They 'Kosher' Under International Law?,* MICHAEL N. SCHMITT & GIAN LUCA BERUTO (eds.), TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 96 (2002); Michael L. Gross, *Fighting By Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy,* 51 POLITICAL STUDIES 360 (2003); Steven R. David, *Debate: Israel's Policy of Targeted Killing,* 17 ETHICS & INTERNATIONAL AFFAIRS 111 (2003); Yael Stein, *Response to Israel's Policy of Targeted Killing: By Any Name Illegal and Immoral,* 17 ETHICS & INTERNATIONAL AFFAIRS 127 (2003); Amos Guiora, *Symposium: Terrorism on Trial: Targeted Killing As Active Self-Defense* 36 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LW 319; Leora Bilski, *Suicidal Terror, Radical Evil, and The Distortion of Politics and Law* 5 THEORETICAL INQUIRIES IN LAW 131 (2004)). The result of that examination is not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" (§51(3) of *The First Protocol*). Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.

Conclusion

61. The State of Israel is fighting against severe terrorism, which plagues it from the *area.* The means at Israel's disposal are limited. The State determined that preventative strikes upon terrorists in the *area* which cause their deaths are a necessary means from the military standpoint. These strikes at times cause harm and even death to innocent civilians. These preventative strikes, with all the military importance they entail, must be made within the framework of the law. The saying "when the cannons roar, the muses are silent" is well known. A similar idea was expressed by Cicero, who said: "during war, the laws are silent" (*silent enim legis inter arma*). Those sayings are regrettable. They reflect neither the existing law nor the desirable law (*see* Re. Application Under s.83.28 of the Criminal Code [2004] 2 S.C.R. 248, 260). It is when the cannons roar that we especially need the laws (*see* HCJ 168/91 *Murkus v. The Minister of Defense*, 45(1) PD 467, 470, hereinafter *Murkus*). Every struggle of the state — against terrorism or any other enemy — is conducted according to rules and law. There is always law which the state must comply with. There are no "black holes" (see JOHAN STEYN, DEMOCRACY THROUGH LAW: SELECTED SPEECHES AND JUDGMENTS 195 (2004)). In this case, the law was determined by customary international law regarding conflicts of an international character. Indeed, the State's struggle against terrorism is not conducted "outside" of the law. It is conducted "inside" the law, with tools that the law places at the disposal of democratic states.

62. The State's fight against terrorism is the fight of the state against its enemies. It is also law's fight against those who rise up against it (*see Kawasme,* at p. 132). In one of the cases in which we examined the laws of armed conflict, I stated:

> "This fighting is not taking place in a normative void. It is being conducted according to the rules of international law, which determine principles and rules for combat activity. The saying, 'when the cannons roar, the muses are silent,' is incorrect. Cicero's aphorism, that laws are silent during war, does not reflect modern reality. . . . The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it. . . . Moreover, the State of Israel is a state whose values are Jewish and democratic. We established a law abiding state, which realizes its national objectives and the vision of generations, and does so while recognizing human rights in general,

> and human dignity specifically, and while upholding those rights. Between these — the realization of national objectives and the vision of generations, and human rights — there is harmony and fit, not contradiction and alienation'' (*Almandi,* at p. 34; *see also Murkus,* at p. 470; HCJ 1730/96 *Sabih v. The Commander of IDF Forces in the Judea and Samaria Area,* 50(1) PD 353, 369).

Indeed, in the State's fight against international terrorism, it must act according to the rules of international law (see Michael Kirby, *Australian Law — After 11 September 2001,* 21 AUSTRALIAN BAR REVIEW 253 (2001)). These rules are based on balancing. They are not ''all or nothing''. I discussed that in *Ajuri,* stating:

> ''In this balancing, human rights cannot receive their full protection, as if there was no terrorism, and state security cannot receive its full protection, as if there were no human rights. A delicate and sensitive balancing is needed. That is the price of democracy. It is a dear price, which is worthwhile to pay. It maintains the strength of the state. It makes the State's struggle worthwhile (*Ajuri,* at p. 383).

Indeed, the struggle against terrorism has turned our democracy into a ''defensive democracy'' or a ''militant democracy'' (*see* ANDRAS SAJO, MILITANT DEMOCRACY (2004)). However, we cannot allow that struggle to deny our State its democratic character.

63. The question is not whether it is possible to defend ourselves against terrorism. Of course it is possible to do so, and at times it is even a duty to do so. The question is how we respond. On that issue, a balance is needed between security needs and individual rights. That balancing casts a heavy load upon those whose job is to provide security. Not every efficient means is also legal. The ends do not justify the means. The army must instruct itself according to the rules of the law. That balancing casts a heavy load upon the judges, who must determine — according to the existing law — what is permitted, and what forbidden. I discussed that in one case, stating:

> ''The role of decision has been placed at our door, and we must fulfill it. It is our duty to preserve the legality of government, even when the decisions are difficult. Even when the cannons roar and the muses are silent, the law exists, and acts, and determines what is permissible and what is forbidden; what is legal and what is illegal. As the law exists, so exists the Court, which determines what is permissible and what is forbidden, what is legal and what is illegal. Part of the public will be happy about our decision; the other part will oppose it. It may be that neither part will read our reasoning. But we will do our job'' (HCJFH 2161/96 *Sharif v. GOC Home Front Command,* 50(4) PD 485, 491).

Indeed, decision of the petition before us is not easy;

> ''We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terrorism. We are aware of the killing and destruction wrought by the terrorism against the State and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against terrorism's severe blow. We are aware that in the short term, this judgment will not make the State's struggle against those rising up against her easier. That knowledge is difficult for us. But we are judges. When we sit in trial, we stand trial. We act according to our best conscience and understanding. Regarding the State's struggle against the terror that rises up against her, we are convinced that at the end of the day, a struggle according to law (and while complying with the law) strengthens her and her spirit. There is no security without law. Satisfying the provisions of the law is a component of national security'' (*Beit Sourik,* at p. 861).

64. In one case we decided the question whether the State is permitted to order its interrogators to employ special methods of interrogation which involve the use of force against terrorists, in a ''ticking bomb'' situation. We answered that question in the negative. In my judgment, I described the difficult security situation in which Israel finds itself, and added:

> ''We are aware that this judgment of ours does not make confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her

> back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties (HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel,* 53(4) PD 817, 845).

Let it be so.

Vice President E. Rivlin

1. I concur in the important and comprehensive judgment of my colleague President A. Barak.

The spread of terrorism in recent years — a spread in scope and in intensity — has raised difficult questions regarding the way a democratic state should, and is permitted, to struggle against those rising up against it and its citizens in order to destroy them. Indeed, it is uncontroversial that a state is permitted to, and must, fight against terrorism. Nor is it controversial that not all means are legal. The outline of the fight against terrorism, and of self defense against terrorism, is difficult to draw. The usual means with which a state defends itself and its citizens are not necessarily effective against terrorist organizations and their members. Nor do policing and enforcement means which characterize the struggle against "conventional" illegal phenomena fit the needs of the fight against terrorism (*see also* Daniel Statman, *Targeted Killing,* 5 THEORETICAL INQUIRIES IN LAW 179 (2004), hereinafter "Statman"). Thus, the State of Israel (like other states) takes, and has taken throughout the years, various actions in order to confront terrorism, and this Court, on various occasions, has dealt with the question of the delicate balances involved in such actions.

The petition before us regards the "targeted killing" policy. In the framework of that policy, the State of Israel strikes at persons whom it identifies as involved in the planning and execution of terrorist attacks. The goal is: on the one hand, to protect the civilians and soldiers of the State of Israel; and on the other hand, to prevent harm, or minimize collateral damage, to the Palestinian civilian population. My colleague President A. Barak is of the opinion that the issue before us should be examined in light of international law regarding armed conflict of an international character. I share that position (*see* Nicholas J. Kendall, *Israeli Counter-Terrorism: 'Targeted Killings' under International Law,* 80 NORTH CAROLINA LAW REVIEW 1069 (2002)). For years there has been a continuous state of armed conflict between Israel and the various terrorist organizations active in the *area.* That conflict, notes my colleague President Barak, does not exist in a normative void. Two legal systems apply here, and in the words of my colleague President Barak: "alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier 'carries in his pack' and which go along with him wherever he may turn, may apply." Indeed, two normative systems require examination on the issue before us — one, the rules of international law, and the other, the legal rules and moral principles of the State of Israel in general, including the basic value of human dignity.

2. During a discussion of the normative system within international law, my colleague President Barak deals with the question of the correct classification of the terrorist organizations and their members: are they to be seen as combatants, as civilians, or as a separate group of unlawful combatants? My colleague's conclusion is that, as far as existing law is concerned, "we were [not] presented with data sufficient to allow us to say . . . that such a third category [of unlawful combatants] has been recognized in customary international law," and since such combatants do not fulfill the conditions for entry into the category of "combatant", they are to be classified as civilians. That classification, he clarifies, does not, according to international law, grant protection to civilians taking a direct part in hostilities; accordingly, they are not protected from attack at such time as they take a direct part in terrorist acts.

The issue of the correct, proper classification of terrorist organizations and their members raises difficult questions. Customary international humanitarian law obligates the parties to the conflict to differentiate between civilians and combatants and between military objectives and civilian objectives, and to refrain from causing extensive damage to enemy civilians. The question is whether *reality* hasn't created, *de facto,* an additional group, with a special legal status. Indeed, the scope of danger posed to the State of Israel and the security of her civilians by the terrorist organizations, and the fact that the means usually employed against lawbreaking citizens are not suitable to meet the threats posed by terrorist activity, make one uneasy when attempting to fit the traditional category of "civilians" to those taking an active part in acts of terrorism. They are not "combatants" as per the

definition in international law. The way in which "combatants" were defined in the relevant conventions actually stemmed from the desire to deny "unlawful combatants" certain protections granted to legal combatants (especially protections regarding the issues of prisoner of war status and criminal prosecution). The latter are "unprivileged belligerents" (*see* Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy,* 11 HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (2005); Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs,* 28 BRITISH YARBOOK OF INTERNATIONAL LAW 323 (1951)). However, the very characteristics of the terrorist organizations and their members that exclude them from the category of "combatants" — lack of fixed distinctive emblems recognizable at a distance and noncompliance with the laws and customs of war — create difficulty. Awarding a preferential status, even if only on certain issues, to those who choose to become "unlawful combatants" and do not act according to the rules of international law and the rules of morality and humanitarianism might be undesirable.

The classification of members of terrorist organizations under the category of "civilians" is not, therefore, an obvious one. DINSTEIN wrote, on this point, that:

"... a person is not allowed to wear simultaneously two caps: the hat of civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War specifically permits derogation from the rights of such a person (the derogation being less extensive in occupied territories, pursuant to the second Paragraph of Article 5)" (YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 29-30 (2004)).

Elsewhere it was written that "if it is not proper to see terrorists as combatants, and as a result to grant them the protections to which combatants are entitled, they should even less be seen as civilians who are not combatants, and thus granted many more rights" (EMANUEL GROSS, DEMOCRACY'S STRUGGLE AGAINST TERRORISM; LEGAL AND MORAL ASPECTS 76 (2004) [MA'AVAKA SHEL DEMOCRATIA BETEROR: HEIBETIM MISHPATI'IM VE'MUSARI'IM]; *also see* Yoram Dinstein, *Unlawful Combatancy* 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 249 (2002), *and* Baxter, at p. 342). Those of the opinion that the third category of unlawful combatants exists emphasize that its members include those who wish to blur the boundaries between civilians and combatants (John C. Yoo & James C. Ho, *The New York University — University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists,* 33 VIRGINIA JOURNAL OF INTERNATIONAL LAW 217 (2003)). The difficulty intensifies when we take into account that those who differentiate themselves from legal combatants on the one hand, and from innocent civilians on the other, are not homogenous. They include groups which are not necessarily identical to each other in terms of the willingness to abide by fundamental legal and human norms. It is especially appropriate, in this context, to differentiate between unlawful combatants fighting against an army and those who purposely act against civilians.

It thus appears that international law must adapt itself to the era in which we are living. In light of the data presented before us, President Barak proposes to perform the adaptation within the framework of the existing law, which recognizes, in his opinion, two categories — combatants and civilians. (Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong,* 38 ISRAEL LAW REVIEW 378 (2005)). As stated, other approaches are possible. I do not find a need to expand on them, since in light of the rules of interpretation proposed by President Barak, the theoretical distinction loses its sting.

The interpretation proposed by my colleague President Barak in fact creates a new group, and rightly so. It can be derived from the combatant group ("unlawful combatants") and it can be derived from the civilian group. My colleague President Barak takes the second path. If we go his way, we should derive a group of international-law-breaking civilians, whom I would call "uncivilized civilians". In any case, there is no difference between the two paths in terms of the result, since the interpretation of the provisions of international law proposed by my colleague President Barak adapts the rules to the new reality. That interpretation is acceptable to me. It is a dynamic interpretation which overcomes the limitations of a black letter reading of the laws of war.

3. Against the background of the differences between "legal" combatants and "international-law-breaking combatants", an analogy can be made between the means of combat permitted in a conflict between two armies, and "targeted killing" of terrorists (*see also* Statman). The attitude behind the "targeted killing" policy is that

the weapons should be directed exclusively toward those substantially involved in terrorist activity. Indeed, in conventional war combatants are marked and differentiated from the civilian population. Those combatants can be harmed (subject to the restrictions of international law). Civilians are not to be harmed. Similarly, in the context of the fight against terrorism, it is permissible to harm international-law-breaking combatants, but harm to civilians should be avoided to the extent possible. The difficulty stems, of course, from the fact that the unlawful combatants, by definition, do not act according to the laws of war, often disguising themselves within the civilian population, in contradiction to the express provisions of *The First Protocol of The Geneva Conventions.* They do so in order to gain an advantage from the fact that their opponent wishes to honor the rules of international law (*see* Jason Callen, *Unlawful Combatants and the Geneva Conventions,* 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1025 (2004)).

However, even under the difficult conditions of combating terrorism, the differentiation between unlawful combatants and civilians must be ensured. That, regarding the issue at hand, is the meaning of the "targeting" in "targeted killing". That is the meaning of the proportionality requirement with which my colleague President Barak deals with extensively.

4. Regarding the implementation of the proportionality requirement, the appropriate point of departure emphasizes the right of innocent civilians. The State of Israel has a duty to honor the lives of the civilians of the other side. She must protect the lives of her own citizens, while honoring the lives of the civilians who are not subject to her effective control. When the rights of the civilians are before our eyes, it becomes easier for us to recognize the importance of placing restrictions upon the conduct of hostilities. (*see* Eyal Benvenisti, *Human Dignity in Combat: the Duty to Spare Enemy Civilians,* 39 ISRAEL LAW REVIEW 81, 96 (2006), hereinafter "Benvenisti").

That duty is also part of the additional normative system which applies to the armed conflict: it is part of the moral code of the state and the fundamental principle of protecting human dignity. I discussed this when dealing with the issue of "early warning" ("the neighbor procedure"):

> "On one issue there are clear and sharp lines — the safeguarding of human dignity, of every person, as a person. It is the duty of an army occupying territory in belligerent occupation to protect the life of the local resident. It must also preserve his dignity. The very presentation of the choice given to such a resident, who has happened upon a battle zone, whether or not to grant the request of the army to relay a warning to the wanted person, puts that resident in an impossible dilemma. The choice itself is immoral. The presentation of it violates human dignity" (HCJFH 10739/05 *The Minister of Defense v. Adalah — The Legal Center for Arab Minority Rights in Israel* (unpublished)).

Both normative systems applicable to the armed conflict are united, in that they place in their centers the principle of human dignity. That principle feeds the interpretation of international law, just as it feeds the interpretation of internal Israeli public law. It expresses a general value, from which various specific duties stem. (On the status of this principle in international law, *see* Benvenisti; it should be noted that Benvenisti identifies two principles which are relevant to the implementation of the principle of preserving human dignity in the context under discussion: the individuality principle, according to which every person is responsible only for his own actions; and the universality principle, according to which all of the individuals are entitled to the same rights, be their group identification as it may. The latter principle is not expressly recognized in the laws of armed conflict. That does not negate the duty regarding enemy civilians. The scope of the duty varies, but the very existence of the duty does not (*ibid,* at p. 88.))

5. The proportionality principle, which is a general principle entrenched in various provisions of international law, is intended to fulfill that duty. That principle prohibits excessive damage to innocent civilians. The principle requires that the attainment of a worthy military objective be proportional to the damage caused to innocent civilians. This demands that the collateral damage not be excessive under the particular circumstances. Some see the placing of the benefit opposite the damage as a concretization of the provision regarding the duty to refrain from exaggerated harm to civilians. Although the link between the two is clear, it seems that there can be collateral damage to the civilian population which is so severe that even a military objective with very substantial benefit cannot justify it. In any case, these are values based requirements. "That is a values based test" notes my colleague President Barak, "it is based upon a balancing between conflicting values and interests." That values based attitude

is accepted in customary international law regarding the protection of civilians (§51 of *The First Protocol*). It is also accepted in the national legal systems of many states. As President Barak wrote in one case,

> "basically, this subtest carries on its shoulders the constitutional view that the ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy" (HCJ 8276/05 *Adalah — The Legal Center for Arab Minority Rights in Israel* (unpublished)).

The duty to honor the lives of innocent civilians is thus the point of departure. Stemming from it is the requirement that collateral damage to civilians not be exaggerated, and that it be proportional to the benefit which will result from the operation. This values based attitude produces restrictions on the attack upon the unlawful combatants. The restrictions may relate to the type of weapons used during the targeted killing. The restrictions might lead to a decision to employ a means which presents less danger to the lives of innocent civilians. The restrictions might relate to the level of caution required regarding identification of the target. All these are restrictions which strive to fulfill the duty to honor the lives of the innocent civilians, and will be interpreted accordingly.

The point of departure is, thus, the rights of the innocent civilians, but it is not the endpoint. It cannot negate the human dignity of the unlawful combatants themselves. Indeed, international law does not grant them rights equal to those granted to lawful combatants or to innocent civilians. However, human dignity is a principle which applies to every person, even during combat and conflict. It is not dependent upon reciprocity. One of the conclusions stemming from that — which the State does not dispute — is where it is possible to arrest a terrorist taking a direct part in hostilities and to put him on trial, he will not be targeted. To bring him to trial is a possibility which should always be considered. However, as my colleague President Barak notes, at times that possibility might be completely impractical, or put the soldiers at too high a risk.

6. The principle of proportionality is easy to phrase but difficult to implement. When dealing with it in advance, under time constraints, and in light of a limited amount of information, the decision is likely to be difficult and complex. It is often necessary to consider values and attributes which are not easily compared. Moreover, each of the competing considerations is itself subject to relative variables. None of them can be considered standing alone. The proportionate military need includes humanitarian elements. The scope of the humanitarian consideration often includes existential military need. As my colleague President Barak notes, courts determine the law applying to the decision of the military commander. The professional military decision is the responsibility of the executive branch, and the court will ask whether a reasonable military commander would have made the decision which was actually made, in light of the normative systems which apply to the case. (*compare:* FINAL REPORT TO THE PROSECUTOR OF THE ICTY BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL RPUBLIC OF YUGOSLAVIA, June 2000.)

7. To conclude, like my colleague President Barak, I am of the opinion that one cannot determine in advance that targeted killing is always illegal, just as one cannot determine in advance that under any circumstances it is legal and permissible. In order to be legal, such an act must comply with the rules of law, including the proportionality requirement, as discussed above, in light of the view which grants central weight to the right of the State of Israel to defend itself and the lives of its citizens, and at the same time holds the principle regarding human dignity as a fundamental principle.

Thus, I concur in the judgment of my colleague President Barak.

President D. Beinisch:

I concur in the judgment of President (emeritus) Barak, and wish to emphasize a number of aspects regarding the difficult issue which was placed before us.

In the petition before us, petitioners requested that we order respondents to cancel the "targeted killing" policy, and order that they refrain from acting according to that policy. That is a petition for all-encompassing and wide relief, on the basis of petitioners' argument that Israel's policy on this issue is "totally illegal". Among their arguments on the basis of international and internal Israeli law, petitioners also based their arguments upon specific examples from the past, which in their opinion indicate the illegality of that policy. Those specific examples show the problematic nature of the "targeted killings" policy and the risks which accompany it, however they cannot decide the legal question of the legality of the policy in its entirety.

For the reasons detailed in the opinion of my colleague President Barak, I concur with the conclusion that the issue before us is controlled by the laws applying to international armed conflict, and thus that the sweeping stance of petitioners is not the necessary conclusion from international humanitarian law. The conclusion reached by President Barak, with which I concur, is that it cannot be said that this policy is always prohibited, just as it cannot be said that it is permitted in all circumstances according to the discretion of the military commander. The legal issue before us is complex, and cannot be exhausted in the all-encompassing and wide fashion claimed by petitioners.

This Court has repeatedly ruled in the past that even combat operations are conducted according to norms entrenched in both international and internal law, and that military activity does not take place in a normative void. The legal difficulties with which we must contend stem primarily from the fact that international law has not yet developed the laws of armed conflict to respond to combat against terrorist organizations, as opposed to a regular army. Therefore, we must use interpretational tools in order to adapt the existing humanitarian laws to the difficult reality which the State of Israel confronts. It should be noted that the spread of the affliction of terrorism in recent years has occupied legal thinkers in various countries, and experts in the field of international law, in an attempt to determine the norms of what is permissible and forbidden against terrorists who obey no law. Against the background of this normative reality, I also accept that in the framework of the existing law, terrorists and their organizations are not to be categorized as "combatants", rather as "civilians". In light of that, §51(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 — an arrangement which is part of customary international law — applies to them. That provision states:

> "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

In his judgment, President Barak extensively discussed the interpretation of the main components of said §51(3), in light of the need to define civilians who "take a direct part in hostilities", and to clarify what "for such time" means. As it appears from the interpretation in the President's judgment, there are qualifications and limitations on the power of the state to carry out acts of "targeted killing". It appears, from those qualifications, that not all involvement in terrorist activity constitutes taking "a direct part in hostilities" pursuant to §51(3), which is limited to activity at the core of the hostilities themselves — activity which, on the one hand, is not limited merely to the physical attack itself, but on the other hand does not include indirect aid (*see* paragraph 35 of the President's decision). I agree that the dilemmas that arise in light of the interpretation of the components of said §51(3) require specific examination in each single case. It must be remembered that the purpose of "targeted killing" is to prevent harm to human life as part of the State's duty to protect its soldiers and civilians. Since §51(3) is an exception to the duty to refrain from causing harm to innocent civilians, great caution must be employed when removing the law's protection of the lives of civilians in the appropriate circumstances. In the framework of that caution, the extent of information for categorization of a "civilian" as taking a direct part in hostilities must be examined. The information must be well based, strong, and convincing regarding the risk the terrorist poses to human life — risk including continuous activity which is not merely sporadic or one-time concrete activity. I should like to add that in appropriate circumstances, information about the activity of the terrorist in the past might be used for the purposes of examination of the danger he poses in the future. I further add that in the framework of estimating the risk, the level of probability of life threatening hostilities is to be taken into account. On that point, a minor possibility is insufficient; a significant level of probability of the existence of such risk is required. I of course accept the determination that a thorough and independent (retrospective) examination is required, regarding the precision of the identification of the target and the circumstances of the damage caused. Two additional requirements are to be added to all those: first, "targeted killing" is not to be carried out when it is possible to arrest a terrorist taking a direct part in hostilities, without significant risk to the lives of soldiers; and second, the proportionality principle accepted as customary international law, according to which collateral damage must not be disproportionate, is to be adhered to. When the damage to innocent civilians is not of proper proportion to the benefit from the military activity (the test of "proportionality *stricto senso*"), the "targeted killing" is disproportionate. Vice President Rivlin extensively discussed that issue, and I concur in his opinion as well. Ultimately, when an act of "targeted killing" is carried out in accordance with the said qualifications and in the framework of the customary laws of international armed conflict as interpreted by this Court, it is not an arbitrary taking of life, rather a means intended to save human life.

Thus, I too am of the opinion that in Israel's difficult war on terrorism which is plaguing her, it should not be sweepingly said that the use of "targeted killing" as one of the means for war on terrorism is prohibited, and the State should not be denied that means which, according to the opinion of those responsible for security, constitutes a necessary means for protection of the lives of its inhabitants. However, in light of the extreme character of "targeted killing', it should not be employed beyond the limitations and qualifications which have been outlined in our judgment, according to the circumstances of the merits of each case.

Thus it is decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law. The law of targeted killing is determined in the customary international law, and the legality of each individual such act must be determined in light of it.
Given today, 23 Kislev 5767 (13 December 2006)

ENDNOTES

* Translator's note: "area A'" consists of the territories in Judea, Samaria, and the Gaza Strip most densely populated by Palestinians, which, according to the Oslo Accords, were to come under Palestinian security and civilian control.