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CURRENT LEGAL DEVELOPMENTS

A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing

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Abstract
The Israeli official policy of targeted killing has often been a subject of controversy and criticism. Although still applied by the state of Israel, this cruel practice was recently limited in a courageous decision handed down by the Israeli Supreme Court. The new restrictions on targeted killing represent an important step towards its criminalization. Despite this, the Court's interpretation of the international humanitarian law requirements is still too broad and there is a need for more restrictive safeguards. In addition, the current uncertainties of this field of law, replicated in the decision, exacerbate the problem further. The main difficulty, however, lies in the theoretical assumption that targeted killing is legal. This article proposes instead to view targeted killing as an exception to the presumption of protection of the civilian population. The authors review the recent trends in international humanitarian law in order to assess the impact of the Court's reasoning. Although this landmark case represents an important breakthrough, it will certainly not be the last word on targeted killing.

Key words
direct participation in hostilities; fragmentation of international law; international humanitarian law; Israeli Supreme Court; targeted killing

1. Introduction

1.1. The judgment in brief

On 13 December 2006, the Supreme Court of the State of Israel (sitting as the High Court of Justice) issued its decision in the case of *Public Committee Against Torture in Israel v. the Government of Israel*.[1] The decision concerned a petition filed on

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1. HCJ 769/02, *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, 13 December 2006. The judgment is also available in English at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf. It has been recently analysed in the following articles: S. Schondorf, 'The *Targeted Killings* Judgment: A Preliminary Assessment', (2007) 5 (2) *Journal of International Criminal Justice* 301; A. Cohen and Y. Shany, 'A Development of Modest Proportions: The Application of the

24 January 2002 by the Public Committee Against Torture in Israel (PCATI) and the Palestinian Society for the Protection of Human Rights and the Environment (LAW) to bring the Israeli policy of targeted killing to an end. Following the Sharm el-Sheikh Summit, where a ceasefire was agreed between Palestinians and Israelis, Israel suspended its policy of targeted killing in February 2005. As a result, the Supreme Court decided to 'freeze' the petition submitted. The policy of targeted killing resumed in June 2005 and the Court re-opened the case on 12 December 2005. A year later, a three-judge panel headed by Chief Justice Aharon Barak finally ruled that a limited form of targeted killing is allowed, thereby providing a long-awaited answer to a highly controversial question.

1.2. The practice of targeted killing

Israel is one of the few states in the world to apply openly an official and deliberate policy of targeted killing.[2] On 4 January 2001, Ehud Barak – then Prime Minister – was reported saying: 'If people are shooting at us and killing us – our only choice is to strike back. A country under terrorist attack must strike back.'[3] The former Deputy Defence Minister, Ephraim Sneh, announced that 'If anyone has committed or is planning to carry out terrorist attacks, he has to be hit. It is effective, precise, and just'.[4] Other similar statements were made by government officials, as well as representatives of the Israel Defense Forces (IDF), where it was admitted that a targeted-killing policy does exist.[5] It is estimated that between 29 September 2000 and 28 February 2007, 338 Palestinians died during the course of targeted killings, of which 210 were targeted and 128 were bystanders.[6] It therefore appears that 38 per cent of those killed in total were bystanders, and that only 62 per cent of them were accurately targeted. Israel has claimed that these preventive killings are measures of self-defence, that they are proportional and that they are conducted against legitimate targets and not against civilians. Nonetheless, these reassurances did not satisfy everyone. The amplitude of the targeted killings and the likelihood

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Principle of Proportionality in *Targeted Killings* Case', (2007) 5 (2) *Journal of International Criminal Justice* 310; O. Ben-Naftali, 'A Judgment in the Shadow of International Law', (2007) 5 (2) *Journal of International Criminal Justice* 322; W. J. Fenrick, 'The *Targeted Killings* Judgment and the Scope of Direct Participation in Hostilities', (2007) 5 (2) *Journal of International Criminal Justice* 332; A. Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings', (2007) 5 (2) *Journal of International Criminal Justice* 339; O. Ben-Naftali and K. Michaeli, 'Public Committee Against Torture in Israel et al. v. Government of Israel', (2007) 101 (2) AJIL 459.

2. For further information on the origins of the targeted-killing policy, see O. Ben-Naftali and K. Michaeli, 'Justiciability: A Critique of the Alleged Non-justiciability of Israel's Policy of Targeted Killing', (2003) 1 (2) *Journal of International Criminal Justice* 368.
3. A. Eldar, 'Nay-Sayers Speak Out while Silenced Man Blushes in the Corner', *Ha'aretz*, 4 January 2001; Y. Stein, 'Israel's Assassination Policy: Extra Judicial Executions', Position Paper, B'Tselem, Jerusalem, 2001.
4. BBC News, 'Israel's Assassination Policy', 1 August 2001, available at http://news.bbc.co.uk/2/hi/middle_east/1258187.stm.
5. For further information about these statements, see Stein, *supra* note 3, at 1–2.
6. B'Tselem, Statistics: Fatalities, available at http://www.btselem.org/English/Statistics/Casualties.asp.

that civilian lives might be taken in error has brought severe criticism on the part of the international community[7] and academic circles.[8]

1.3. The function of the Israeli Supreme Court

The Israeli Supreme Court has two major, fundamentally different, functions. On the one hand, it acts as an appellate court and, as such, supervises the two courts of lower instance – the district courts and the local courts. On the other hand, it acts as a High Court of Justice, supervising the compatibility of governmental or legislatory acts with constitutional rights. As such, the Court plays an important and controversial role within the Israeli constitutional system, which belongs to the family of neither common-law nor civil-law jurisdictions.[9] As the United Kingdom, Israel does not have a written constitution. However, the Israeli Declaration of Independence, issued on 14 May 1948, envisaged the existence of a constitution for Israel. Pursuant to the

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7. The most forceful opinions came from human rights organizations. See Amnesty International, 'Israel and the Occupied Territories: Israel must end its policy of assassinations', 4 July 2003, MDE 15/056/2003, available at http://web.amnesty.org/library/index/engmde150562003. The EU also strongly condemned the targeted killings. See Council of the European Union, Press Release, S0076/04, 22 March 2004, Brussels, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/declarations/79544.pdf. The UN Secretary-General used more moderate words and 'deeply deplored' the killing of children and the injury of other innocent bystanders during a targeted killing carried out on 20 June 2006. See Office of the Spokesperson for the Secretary-General, Statement attributable to the Spokesman for the Secretary-General on the Middle East, 21 June 2006, Geneva, available at http://www.un.org/apps/sg/sgstats.asp?nid=2099. The UN General Assembly passed several resolutions condemning the practice of targeted killings. See UN Doc. A/RES/58/2; UN Doc. A/RES/58/96; UN Doc. A/RES/58/99; UN Doc. A/RES/57/127; UN Doc. A/RES/56/62; UN Doc. A/RES/ES-10/12; UN Doc. A/RES/ES-10/13.
8. S. David, 'Israel's Policy of Targeted Killing', (2003) 17 *Ethics & International Affairs* 111; Y. Stein, 'By Any Name Illegal and Immoral', (2003) 17 *Ethics & International Affairs* 127; S. David, 'Reply to Yael Stein: If Not Combatants, Certainly Not Civilians', (2003) 17 *Ethics & International Affairs* 138; A. Guiora, 'Targeted Killing as Active Self-Defense', (2004) 36 *Case Western Reserve Journal of International Law* 319; O. Ben-Naftali and K. Michaeli, 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings', (2003) 36 *Cornell International Law Journal* 233; E. Gross, 'Thwarting Terrorists Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens', (2001) 15 *Temple International & Comparative Law Journal* 195; N. Kendall, 'Israeli Counter-terrorism: "Targeted Killings" under International Law', (2002) 80 *North Carolina Law Review* 1069; D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?', (2000) 16 EJIL 171; T. Ruys, 'License to Kill? State-Sponsored Assassination under International Law', (2005) 22 (1–2) *Military Law and Law of War Review* 13; G. Nolte, 'Preventative Use of Force and Preventative Killings: Moves into a Different Legal Order', (2004) 5 *Theoretical Inquiries in Law* 111, at 119; D. Statman, 'Targeted Killing', (2004) 5 *Theoretical Inquiries in Law* 179.
9. Under the Ottoman Empire, the territory then called Palestine was subject to a mixture of Islamic law and modern laws adopted by Turkey. When Turkey was defeated in the First World War and the British Mandate was established, the Mandatory government retained the pre-existing law and, through Art. 46 of the King's Order in Council, 1922, ruled that the law that was in force before the British takeover 'will remain in force to the extent that it does not conflict with the changes that occurred as a result of the conquest and that in the event of a legal lacuna, the principles of English Common law and equity will apply'. Pursuant to Art. 46 of the King's Ordinance, the English legal system, including the jurisdiction of the English courts, was imported into Palestine. Following the establishment of the state of Israel on 14 May 1948, one of the first legislative texts to be issued by the Provisional Council of State (which was superseded by the Knesset, the Israeli parliament) was the Administration and Law Ordinance, which followed the tradition of preserving the existing law and provided that it 'will remain in force insofar as it is not repugnant to this ordinance or other (later enacted) laws and subject to such modifications necessitated by the establishment of the State and its institutions'. As a result of this, British law continued to influence the Israeli legal system for a long time after the establishment of the state through the lasting effects of Art. 46 of the King's Order. The direct application of English law was abolished with time as new influences, particularly those originating from German law, were included in Israeli legislation. See also I. Zamir and S. Colombo, *The Law of Israel: General Surveys* (1995), at 2.

1950 Harari Resolution, the Knesset instructed the Constitution, Law, and Justice Committee to establish the Israeli constitution chapter by chapter (these would be called Basic Laws), instead of as a single document. Until 1992 the Basic Laws did not automatically take precedence over regular laws unless explicit entrenchment clauses provided for such supremacy.[10] The Supreme Court had the power to strike down legislation only if it violated a Basic Law with an entrenchment clause, which were very few at the time.

The situation changed in 1992, when two additional entrenched laws were adopted, namely the Basic Law: Freedom of Occupation, and the Basic Law: Human Dignity and Liberty.[11] They renewed the desire to enact a written constitution for Israel and initiated a new era in Israeli constitutional law, spearheaded by Chief Justice Barak.[12] In fact, Barak considered that, due to the specific clauses that they contained, the two Basic Laws entailed that all Basic Laws preceded ordinary legislation.[13] As a result, the Supreme Court played an important role in the constitutional context and assumed the power of judicial review of Knesset legislation violating any Basic Law.[14]

In its function as appellate court, the Supreme Court has jurisdiction to hear criminal and civil appeals from judgments of the district courts. Generally, the Israeli judicial system is based on the principle that each case should have one instance for appeal. Consequently, the district courts (which are the second instance in the Israeli judicial system) hear appeals from the local courts and the Supreme Court has jurisdiction to hear appeals from judgments issued by the district courts as the first instance. Cases can go through several instances of appeal in limited circumstances. For example, when the district court acts as an appellate court, the matter can then be brought before the Supreme Court at its discretion.

When sitting as the High Court of Justice, the Supreme Court exercises judicial review over the other branches of government. It can review cases which are not within the jurisdiction of any other court and in which it considers that it is necessary to grant relief in the interests of justice. These are often high-profile cases challenging acts of high-ranking government officials. This function is unique to the Israeli system, given that the Supreme Court acts as a court of first and last instance.

The number of Justices working for the Court is established by a Knesset resolution. As a general rule, the most senior justice is the President (Chief Justice) of

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10. Ibid., at 8; The Knesset, The Constitution, Law and Justice Committee, Constitution for Israel Project, The History of the Constitution of Israel, available at http://www.cfisrael.org//a23.html?rsID=278.
11. Zamir and Colombo, *supra* note 9, at 8. Both laws included a limitation clause forbidding violations of rights except by a law benefiting the values of the state of Israel (enacted for a proper purpose and to an extent no greater than is required). In addition, the Basic Law: Freedom of Occupation included an entrenchment clause which provided that it cannot be amended except by a basic law passed by a majority of Knesset members.
12. S. Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (1994), at 2; A. Barak, 'The Constitutional Revolution: Protected Human Rights', (1992) 1 *Mishpar U'Mimshal* 9.
13. Shetreet, *supra* note 12, at 2.
14. Ibid.

the Court and the next senior justice is the Deputy President.[15] The President of the Court is the head of the entire judicial system in Israel.[16] The current President of the Court is Dorit Beinisch and the Deputy President is Eliezer Rivlin.[17] Aharon Barak, the former President of the Court, retired in September 2006, but continued to be involved in the Court's decisions until December 2006 (Israeli law provides a retiring judge with three months to complete his opinions on pending cases). When judges sit together they are all equal, and there is no difference in importance between their opinions. The Supreme Court generally sits in panels of three justices.[18] After reaching a verdict, the judges usually appoint one of their number to draft the leading opinion giving reasons for the decision. Subsequently, every other justice on the panel may either fully agree with the leading opinion or add a dissenting or a concurring opinion.

1.4. The purpose of the analysis

The aim of this article is to evaluate the impact of the Israeli Supreme Court's decision on the legality of targeted killing and to map out the manifold changes and improvements that will arise in any future application of this policy.[19] The authors question the underlying assumption of the legality of targeted killing. They endeavour to demonstrate that the situations in which targeted killing was considered to be legal were too broadly defined. One of the central points to be discussed within this framework is the extent to which the decision uses international humanitarian law (IHL) and contributes towards its clarification. By evaluating recent trends in this rather ambiguous field of international humanitarian law, it will be demonstrated, on the one hand, that Chief Justice Barak has been very receptive and has resorted to a wide array of international legal sources, literature as well as international decisions. On the other hand, it will be seen that there are also several limitations in this judgment that will need to be taken up in the upcoming cases. As the decision demonstrates, domestic courts are currently dealing with certain lacunae of international humanitarian law which need to be addressed promptly.

The analysis of the case is conducted in five steps. First, it will be seen that the Court's qualification of the situation as an international armed conflict is compliant with international humanitarian law. Here, unfortunately, the Court missed an opportunity to pay further attention to the application of the law of belligerent

15. Israel Ministry of Foreign Affairs, The Judiciary: The Court System, available at http://www.mfa.gov.il/mfa/government/branches%20of%20government/judicial/the%20judiciary-%20the%20court%20system.
16. Ibid.
17. The remaining members of the Court are Justice Ayala Procaccia, Justice Edmond Levy, Justice Asher Dan Grunis, Justice Miriam Naor, Justice Edna Arbel, Justice Elyakim Rubinstein, Justice Esther Hayut, Justice Salim Joubran, Justice Shoshana Leibovic, and Justice Yigal Mersel.
18. Israel Ministry of Foreign Affairs, *supra* note 15.
19. Due to lack of space, this article does not address the justiciability of targeted killing, which is another major development following the judgment. In fact, the question of targeted killing was found to be non-justiciable in an earlier decision. See HCJ 5872/01, *Barakeh v. Prime Minister*, 56(3) PD 1, 29 January 2002. For further information, see Ben-Naftali and Michaeli, *supra* note 2. Barak, however, decided that the Court could rule on the issue. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, paras. 47–54. See also Cassese, *supra* note 1, at 340–1; Ben-Naftali, *supra* note 1, at 326.

occupation as well as to the relationship between international humanitarian and human rights law. Second, it will become apparent that the Court's characterization of terrorists as civilians is accurate, despite the existing alternative approaches. Third, the Court's interpretation of the various components of the notion of 'direct participation in hostilities' will be considered. It will be demonstrated that Barak's interpretation of this notion is very broad and that it should be narrowed down in order to comply fully with the presumption of the protection of civilians as enshrined in international humanitarian law. Finally, this article will also attempt to answer the general question underpinning the issue of targeted killing, namely whether it should be treated as an exception in international humanitarian law.

Throughout his opinion, Chief Justice Barak resorted to dynamic and teleological interpretation to adapt the law to present conditions.[20] Usually, he first delineated the contours of a given issue by enumerating two extreme examples, and then, in the margin between them, he used a balancing test to determine how the law would apply to specific cases that ran into the legal 'grey zone'. This task was rendered difficult by the fact that international humanitarian law on the conduct of hostilities is rather broad and ambiguous and may not offer great certainty in guiding combatants.[21] Independently of the view taken on the substance of the judgment, it is undeniable that Barak's efforts to flesh out as much as possible certain standards to be applied during attacks on civilians participating directly in hostilities were admirable. Also, the examples which he presented may be helpful for those involved in deciding on the approach to adopt in combat.[22]

2. Analysis of Chief Justice Barak's reasoning

2.1. Qualification of the conflict

2.1.1. The nature of the conflict

The Israeli–Palestinian conflict is a sensitive, multifaceted and extremely complex situation. It is an arduous task to characterize it under international humanitarian law. Due to the fact that they do not constitute a state, the Occupied Territories have a rather complex status in international humanitarian law. In this context, several interpretations of the conflict as well as of the content of the rights and obligations attributed to civilians and combatants have been formulated. Among the options available, Chief Justice Barak appears to have reached a satisfactory solution by qualifying the conflict as an international armed conflict. This, in turn, resulted in attributing substantial protection to the civilians affected. It will be demonstrated that, as part of Barak's interpretation, it would have been possible to protect civilians even further.

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20. For further information regarding Barak's perceptions on the role of a judge, his interpretation techniques, his judicial philosophy, and his reasoning style, see A. Barak, *The Judge in a Democracy* (2006).
21. Cassese, *supra* note 1, at 342. According to Cassese, this is due to two reasons: 'First, it is objectively difficult to lay down precise and specific legal standards in the area at issue . . . Second, states, in particular major powers, have demonstrated themselves prepared to leave these standards as loose as possible, in order to retain a broad margin of manoeuvre when engaged in combat.' Ibid.
22. Ibid., at 343.

2.1.2. The threshold for the application of international humanitarian law

In determining whether international humanitarian law applies to any given situation, it is necessary to evaluate first whether the required threshold has been reached. International humanitarian law applies in two types of situations, namely in international armed conflicts and in non-international conflicts. It does not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'.[23] Thus a given situation must first reach the level of an 'armed conflict' or 'hostilities' in order to trigger the application of the Geneva Conventions and the Additional Protocols.

The concept of 'armed conflict' was defined more precisely in the first case before the International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić*,[24] where it was found that 'an armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached'.[25] In addition, although not ratified by Israel, it is interesting to note that the Rome Statute of the International Criminal Court[26] recognizes the existence of such armed conflicts in Article 8 Section 2(f): 'It applies to armed conflicts that take place in the territory of a State when there is *protracted armed conflict between governmental authorities and organized armed groups or between such groups*'.[27]

In his opinion, Chief Justice Barak used a similar reasoning to that used in *Tadić* with regard to the threshold of application of IHL. He explained that 'a continuous situation of armed conflict has existed since the first *intifada*',[28] which has been recognized in the previous decisions of the Supreme Court as well as in the relevant literature. Having established that an armed conflict exists and that IHL applies, Justice Barak went on to evaluate the type of conflict involved in this case.[29]

2.1.3. An international armed conflict

Differentiating international conflicts from non-international conflicts may at times prove to be difficult. Although Chief Justice Barak classified the Israeli–Palestinian conflict as an international armed conflict, this finding is not self-evident, since international conflicts have been traditionally fought between states.[30] However, as

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23. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II), 1125 UNTS 609, entered into force 7 December 1978. Israel is not a state party.
24. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-AR72, A.Ch., 2 October 1995.
25. Ibid., para. 70 (emphasis added).
26. Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002. It was signed by Israel on 31 December 2000. However, Israel announced that it would not proceed to the ratification.
27. Ibid. (emphasis added).
28. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 16.
29. Ibid.
30. Additional Protocol I enlarged this notion of international armed conflict by providing in Art. 1(4) that it covers 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and

noted by Gross, '[t]his is not the case in the Palestinian–Israeli conflict. As Palestine has not been recognized as an independent State, it is at most a "State in the making" or an independent political authority'.[31]

The petitioners argued that the legal system applicable to the conflict includes the law of policing and law enforcement (as part of the law of belligerent occupation) and that it prohibits killing someone without due process, arrest, and trial. However, Chief Justice Barak found that the situation should be considered instead as an ongoing international armed conflict. He grounded his reasoning in a statement written by Antonio Cassese, who considered that '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.'[32] Cassese provided three reasons in support of his argument:

> (1) internal armed conflicts are those between a central government and a group of insurgents belonging to the *same State* (or between two or more insurrectional groups belonging to that State); (2) the object and purpose of international humanitarian law impose that in case of doubt the protection deriving from this body of law be *as extensive as possible*, and it is indisputable that the protection accorded by the rules on international conflicts is much broader than that relating to internal conflicts; (3) as belligerent occupation is governed by the Fourth Geneva Convention[33] and customary law, it would be *contradictory* to subject occupation to norms relating to international conflict while regulating the conduct of armed hostilities between insurgents and the Occupant on the strength of norms governing internal conflict.[34]

For Cassese, '[i]t follows that the rules on international armed conflict also apply to the armed clashes between insurgents in occupied territories and the belligerent Occupant'.[35]

In Barak's 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

against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3, entered into force 7 December 1978, Art. 1(4). Unfortunately, Additional Protocol I has not been signed by Israel. Furthermore, Art. 1(4) has generated much controversy, thereby precluding it being considered as customary law. See Ben-Naftali and Michaeli, *supra* note 8, at 256. For this reason, it is not applicable to the Israeli–Palestinian conflict. Still, if Additional Protocol I had been ratified by Israel and Art. 1(4) applied, it is debatable whether Hamas could be considered as a party to the conflict. The United Nations General Assembly has recognized that Palestinian people have a right to self-determination without external interference as well as a right to national independence and sovereignty. This was recognized in a situation where the Palestinians were represented by the Palestine Liberation Organization which, under the leadership of Yasser Arafat, was granted observer status at the United Nations.

31. Gross, *supra* note 8, at 196.
32. A. Cassese, *International Law* (2005), at 420. In response to this statement, it can be argued that the preliminary determination whether the situation constitutes an 'armed conflict' was superfluous. The sole fact of the occupation would have been sufficient to characterize the conflict as an international armed conflict.
33. Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, entered into force 21 October 1950, for Israel 6 July 1951.
34. Cassese, *supra* note 32, at 420 (emphasis in original).
35. Ibid.

state conflict'.[36] In support of this, he referred to Cassese's opinion on the topic and added that '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.'[37]

It should be acknowledged that opinions to the contrary exist. In fact, the Israeli–Palestinian conflict has been interpreted by a few UN bodies as a non-international conflict.[38] In this context, active members of organized armed groups were classified as combatants despite the fact that they do not enjoy the privileges attributed to combatants in international law.[39] This view has been recently taken a step further. It has been argued that there are two conflicts: one is international and the other non-international. In this context, organized armed groups having a combatant function became a party to a non-international conflict with Israel, a conflict that grew out of an international armed conflict.[40] It is, however, beyond the scope of this article to consider in greater detail the advantages and disadvantages of each interpretation of the conflict at hand.

Despite the existence of these various evaluations, it is submitted that the teleological and dynamic interpretation adopted by Cassese and followed by Barak in his opinion is appropriate, as it grants substantial protection to innocent civilians[41] and achieves results similar to the alternative approaches. Also, given that Barak's reasoning is less sophisticated, it provides a pattern that domestic courts unaccustomed to using international humanitarian law may find easier to follow.

2.1.4. The law of belligerent occupation

Following this decision, it is not clear whether all the rights enshrined in the Fourth Geneva Convention[42] are enforceable in the context of targeted killing. While Chief Justice Barak did mention that targeted killing is not to be carried out when arrest is possible,[43] he did not elaborate further about the situation following the moment of capture. Thus the requirements relating to conditions of imprisonment and procedural guarantees fall beyond the scope of the decision. This is also the case for all the

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36. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 21.
37. Ibid.
38. Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000, UN Doc. E/CN.4/2001/121 (2001), at 12–13, para. 39. The following is stated in para. 39 of the Report: 'Clearly, there is no international armed conflict in the region, as Palestine, despite widespread recognition, still falls short of the accepted criteria of statehood.' Judge Kooijmans also opined that the Israeli–Palestinian conflict is a non-international one. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 229–30 (Judge Kooijmans, Separate Opinion), paras. 35–36. See also Ben-Naftali and Michaeli, *supra* note 8, at 256, and Kretzmer, *supra* note 8, at 210.
39. Ben-Naftali and Michaeli, *supra* note 8, at 271; Kretzmer, *supra* note 8, at 210.
40. N. Melzer, 'Targeted Killing under the International Normative Paradigms of Law Enforcement and Hostilities', doctoral dissertation, Department of Law, University of Zurich, 2007, 445–6 (published as *Targeted Killing in International Law* (2008, forthcoming), 351).
41. It is submitted, however, that Chief Justice Barak could have gone further as part of this interpretation by granting even more protection to civilians.
42. Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 33.
43. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 40.

other rights of protected persons as enshrined in the Convention. The inadequate analysis of this point remains a serious limitation of the judgment.[44] The question needs to be clarified further in future decisions.

Having qualified the conflict in the case, Barak clarified that the law of international armed conflict includes the law of belligerent occupation. This was often a point of controversy: Israel has claimed that the law of belligerent occupation does not apply to the conflict, arguing that there was no sovereign power at whose expense the territories were to be occupied, as Jordan's sovereignty in the West Bank was questionable and Egypt has never asserted sovereignty over the Gaza Strip.[45] Israel also asserted that despite its adherence to the Fourth Geneva Convention,[46] within the meaning of the same Convention it was not bound to treat the territories as occupied.[47] Israel did, however, recognize that it would apply to the Occupied Territories some of the humanitarian provisions contained therein on a de facto basis.[48] Despite these arguments, the International Court of Justice recognized in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that Israel was the occupying power in the West Bank and that the Fourth Geneva Convention did indeed apply (the Advisory Opinion did not concern the Gaza Strip).[49] According to the Commission of Enquiry established by the Commission on Human Rights to investigate violations of human rights and humanitarian law in the occupied Palestinian territories, the conflict falls under the Fourth Geneva Convention.[50] Furthermore, the Report of the Secretary-General prepared pursuant to General Assembly resolution ES—10/2 of 25 April 1997[51] stated that Israel is the only high contracting party that does not recognize the applicability of the Fourth Geneva Convention: 'All other High Contracting Parties, as well as the International Committee of the Red Cross, have retained their consensus that the Convention does apply de jure to the occupied territories'.[52] In addition, there was a 'very large number of resolutions adopted by the Security Council and the General Assembly often unanimously or by overwhelming majorities, including binding decisions of the Council and other resolutions which, while not binding, nevertheless produce legal effects and indicate a constant record of the international community's

44. See also Ben-Naftali and Michaeli, *supra* note 1, at 464.
45. Question of the Violation of Human Rights in the Occupied Arab Territories, *supra* note 38, at 11, para. 35.
46. Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 33.
47. Question of the Violation of Human Rights in the Occupied Arab Territories, *supra* note 38, at 11, para. 35.
48. Ibid.
49. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 38. See Judge Kooijmans' Separate Opinion, at 222, para. 9; Judge Al-Khasawneh's Separate Opinion, at 236, para. 4; Judge Buergenthal's Separate Opinion, at 240, para. 2; Judge Owada's Separate Opinion, at 270–1, para. 30.
50. Question of the Violation of Human Rights in the Occupied Arab Territories, *supra* note 38, at 13, para. 41.
51. UN Doc. No. A/RES/ES-10/2.
52. Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/2 of 25 April 1997, Tenth emergency special session, Agenda item 5, Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory, UN Doc. A/165–10/6-S/1997/494, 26 June 1997, para. 21. This was also noted by Judge Al-Khasawneh in his Separate Opinion in the ICJ's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 38 (underlining in original), at 236, para. 4.

opinio juris'[53] that the law of belligerent occupation applies to the Israeli–Palestinian conflict.

Nonetheless, Chief Justice Barak did not consider further the content of the rights afforded to the population under occupation and the obligations imposed upon Israel. The Israeli Supreme Court has not always been very open to the idea that the Fourth Geneva Convention applies to the Gaza Strip and the West Bank.[54] Perhaps it was not desirable to decide this sensitive question here and potentially restrain Israeli action during ongoing hostilities. It could also be that the question was slightly different from the one lying at the heart of this case, namely the legality of targeted killing. Clearly, acknowledging that all the rights contained in the Convention are enforceable would have had wide-ranging political and legal implications for the Israeli–Palestinian conflict. Also, recognizing the enforceability of certain Articles may have been thought to be precipitated by the Court. Despite these considerations, one could have reasonably expected the Chief Justice to consider the rights of the Occupied Territories' inhabitants and Israel's obligations towards them in this landmark case which will undeniably affect the civilian population.

2.1.5. Selective references to international human rights law

Another fundamental issue considered by the Court in the decision is the application of human rights law to the Israeli–Palestinian conflict. This question is not devoid of complexity, given that it is not entirely clear to what extent international humanitarian law and international human rights can interact within the framework of international armed conflicts. In addition, a recent phenomenon transcending public international law – 'fragmentation',[55] which is also apparent in the reasoning of the Chief Justice – complicates the interpretation even further.[56]

There is a rich academic debate with regard to the degree that international human rights law and international humanitarian law interact.[57] There is a disagreement among scholars with regard to the exact meaning and nature of this relationship. Nonetheless, the prevailing view in this field seems to be that international

53. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 38, Judge Al-Khasawneh's Separate Opinion, at 236, para. 3. It should be noted that most of the documents referred to by Judge Al-Khasaweh in the citation above can be found here: United Nations Information Service on the Question of Palestine, UN Resolutions, available at http://domino.un.org/unispal.nsf/UNpercent20resolutions!OpenPage.

54. For further details see D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), at 43–56.

55. See M. Koskenniemi, Fragmentation of International Law: Difficulties Arising form the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission, Geneva, UN Doc. A/CN.4/L.682, 13 April 2006.

56. In recent years, it appears that the scope of international law has increased dramatically and specialized autonomous legal systems have emerged. Areas that were once regulated by general international law could now fall under several specialized international legal systems. As noted by the International Law Commission, '[s]ome commentators have been highly critical of what they have seen as the erosion of general international law, emergence of conflicting jurisprudence, forum shopping and loss of legal security'. See ibid., at 12, para. 9.

57. See e.g. T. Meron, 'The Humanization of Humanitarian Law', (2000) 94 AJIL 239; Ruys, *supra* note 8, at 22 f., 30; Kretzmer, *supra* note 8, at 210; Melzer, *supra* note 40, at 254; Ben-Naftali and Michaeli, *supra* note 8, at 289; K. Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', (2004) 98 AJIL 1, at 24, 34.

humanitarian law is the *lex specialis* during hostilities and international human rights law is superseded or derogated from in these circumstances.

Chief Justice Barak followed the direction of this prevailing view. First, he observed that 'humanitarian law is the *lex specialis* which applies in the case of armed conflict. Where there is a gap (*lacuna*) in that law, it can be supplemented by human rights law'.[58] In support of this statement, the Chief Justice quoted two Advisory Opinions of the International Court of Justice, namely the Opinion relating to the *Legality of the Threat or Use of Nuclear Weapons*[59] and the Opinion pertaining to the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[60] as well as a decision of the European Court of Human Rights (ECHR), *Bankovic v. Belgium*.[61]

Clearly, there are situations where both systems can come into play. As the International Court of Justice noted in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,

> [T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both of these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[62]

Human rights norms can also interact in international humanitarian law through Article 75 of Additional Protocol I,[63] which protects an important number of them. Although Israel did not ratify Additional Protocol I, Article 75 can be regarded as declaratory of customary law.[64] There are also several important human rights

58. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 18.
59. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226.
60. Ibid. It was stated, at 240 in para. 25,

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

61. *Bankovic and Others v. Belgium and Others* (Appl. 52207/99), ECtHR Decision (G.C.) of 12 December 2001, Reports 2001-XII, at 335.
62. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 38, at 178, para. 106.
63. Additional Protocol I, *supra* note 30; K. Watkin, 'Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy', Harvard Program on Humanitarian Policy and Conflict Research, Occasional Paper, Winter 2005, at 69.
64. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 25.

included in the Fourth Geneva Convention[65] which apply in the Occupied Territories. In addition, the ICRC Study on International Customary Humanitarian Law enumerates a wide array of human rights in Rules 87 to 105,[66] and draws on the jurisprudence of various international human rights bodies.[67]

In this part of his reasoning, the Chief Justice also referred to the human rights enshrined in international humanitarian law:

> 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 honoured; they as well enjoy and are entitled to protection, even if most minimal, by customary international law.[68]

In his opinion Justice Rivlin further clarified this point when he considered that '[b]oth normative systems applicable to armed conflict are united, in that they place in their centres the principle of *human dignity*.'[69] The common denominator of these two passages is important, as it demonstrates that human dignity is a value that international human rights law and international humanitarian law share.

Barak further remarks that international humanitarian law is a compromise between military and humanitarian needs. In this context, he balanced individual rights and dignity against military need and success, observing that

> 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. The balancing reflects the relativity of human rights and the limits of military needs. The balancing point is not constant.[70]

Here, Chief Justice Barak applied the *lex specialis* rule in a similar way to the International Court of Justice in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[71] as he recognized the continuous applicability of international human rights law to a situation of armed conflict.[72]

Chief Justice Barak also alluded to international human rights law when he stated that '[t]he principle of proportionality is a general principle in law. It is part

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65. Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 33.
66. J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. I, at 299–383.
67. See H. Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', (2006) 11 *Journal of Conflict & Security Law* 265.
68. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 25 (emphasis added).
69. Ibid., Opinion of Justice Rivlin, para. 4 (emphasis added).
70. Ibid., para. 22.
71. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 38.
72. Despite this, the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, a decision of considerable importance for the Israeli–Palestinian conflict, was only relied on once by the Chief Justice, namely in the specific context of the relationship between international humanitarian and human rights law. Interestingly, it was not used to bolster the Chief Justice's conclusion that the law of belligerent occupation applies in the Occupied Territories, although this was clearly one of the findings of the International Court of Justice. The reason behind this selective and rare reliance on the Advisory Opinion could be due to the far-reaching legal consequences for Israel flowing from the ICJ's findings.

of our legal conceptualization of human rights.'[73] However, the subsequent part of this argument revealed that he is not referring to the principle of proportionality under international human rights law, but rather to the principle of proportionality inherent in international humanitarian law. Additionally, one may legitimately question why Chief Justice Barak did not mention here the rights of 'protected persons' included in the Fourth Geneva Convention.

Overall, within the framework of his balancing test, Barak's treatment of the interactions between international human rights and humanitarian law complies with the position prevailing in international humanitarian law. This clarity breaks down when the Chief Justice considers the principle of proportionality. His reasoning here was probably influenced by the increasingly fragmented international legal system and the overlapping international humanitarian and human rights law. The application of the *lex specialis* rule throughout the judgment to some extent minimized such confusions.[74] Despite this, the relationship between both systems as envisaged by Chief Justice Barak should be explained further. Also, the degree to which international human rights law applies to the situation should have been more clearly stated. These clarifications are needed in order to avoid confusion in future cases relating to targeted killing.

2.2. Qualification of terrorists

In order to pursue the balancing of interests in the case further, Chief Justice Barak needed to examine the status of the terrorists targeted in the light of international humanitarian law. The classification established under international humanitarian law provides two possible categories of persons, namely combatants and civilians. Combatants and military objectives are legitimate targets for military attack, although not every act of combat is allowed against them.[75] Civilians and civilian objectives cannot be attacked, provided that they do not take direct part in hostilities.[76]

Chief Justice Barak found that terrorists do not fulfil the criteria for being combatants. Combatants are usually considered to be members of the armed forces of a party to the conflict, or members of militias or volunteer corps forming part of such armed forces. Article 1 of the Hague Regulations provides that

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

73. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 41.
74. There are some difficulties associated with the application of the *lex specialis* rule: 'In particular two sets of difficulties may be highlighted. First, it is often hard to distinguish what is "particular" and paying attention to the substantive coverage of a provision or to the number of legal subjects to whom it is directed one may arrive at different conclusions. . . . Second, the principle also has an unclear relationship to other maxims of interpretation or conflict-solution techniques such as, for instance, the principle *lex posterior derogat legi priori* (later law overrides prior law) and may be offset by normative hierarchies or informal views about "relevance" or "importance".' Koskenniemi, *supra* note 55, at 35–6, para. 58 (emphasis in original). Despite this, the *lex specialis* rule 'is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts'. Ibid., at 34, para. 56.
75. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 23.
76. Ibid.

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.[77]

Barak argued that terrorists have no fixed recognizable emblem and that they do not conduct their operations in accordance with laws and customs of war. According to his view, terrorists are not members of the armed forces or any units with similar status, which entails that they do not fulfil the criteria for being considered as combatants. Thus they cannot be granted prisoner-of-war status, although they can be prosecuted for their membership of terrorist organizations and their participation in hostilities. However, they could potentially be considered as 'unlawful combatants', which is a category of persons regulated under Israeli law.[78] The existence of this classification in international humanitarian law is highly disputed and Chief Justice Barak took no stance with regard to its recognition.[79]

Instead, he found that terrorists – or 'unlawful combatants'[80] – have to be viewed as civilians, since they do not fall under the combatant category. In support of this argument he quoted Article 50(1) of Additional Protocol I, which provides that

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[81]

He referred to a case before the ICTY, *Prosecutor v. Blaškić*,[82] where it was considered that civilians are 'persons who are not, or no longer, members of the armed forces'.[83] In his view, this definition is negative in nature and it defines 'civilians' as the opposite of 'combatants'.[84] Thus terrorists are to be viewed as 'civilians'; however, this does not entitle them to the same protection as this category of persons under international humanitarian law. Indeed, as noted by Barak, Article 51(3) of Additional Protocol I provides that '[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'.[85] According to Barak, terrorists are both 'unlawful combatants' and civilians who are not entitled to the same protections as the latter category, provided that they are taking a direct part

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77. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, 26 *Martens Nouveau Recueil* (ser. 2) 949, 187 Consol. T.S. 429, entered into force on 4 September 1900. Israel is not a state party.
78. This argument is analysed in section 2.3.
79. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 28.
80. The use of this expression under international humanitarian law is not entirely legally correct. A better alternative is to use the expression 'unprivileged combatants'.
81. Additional Protocol I, *supra* note 30.
82. *Prosecutor v. Blaškić*, Case No. IT-95–14, T. Ch. I, 3 March 2000.
83. Ibid., para. 180.
84. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 26.
85. Additional Protocol I, *supra* note 30.

in hostilities at that time.[86] From this, it follows that terrorists taking a direct part in hostilities have a civilian *status* and combatant *function*, which entitle them to neither combatant privilege nor civilian protection. The view that terrorists can be considered as civilians is supported by abundant expert opinion.[87]

While Justice Rivlin accepted this line of reasoning in his concurring opinion, he also demonstrated that it is problematic to grant civilian status to terrorists. It was argued that the danger that terrorists represent to Israel and civilians, in addition to the fact that the means usually used against ordinary citizens breaking the law are insufficient to fight terrorists, 'make one uneasy when attempting to fit the traditional category of "civilians" to those taking an active part in acts of terrorism'.[88] Rivlin made an interesting point by noting that those differentiating themselves from civilians and combatants do not form a homogeneous category of people:

> 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.[89]

Indeed, there are strong reasons for not treating all unlawful combatants equally.

Despite this remark, Chief Justice Barak's opinion on this issue appears to be compliant with international humanitarian law. Clearly, it is not shared by everyone;[90] however, it provides an acceptable legal framework that can be applied to a category of persons difficult to define within the framework of the *lex lata*, already suffering from lack of consensus. Finally, it is also consonant with the requirements of Article 50(1) of Additional Protocol I, which, as stated earlier, stipulates that, in case of doubt, a person should be treated as a civilian.

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86. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 26.
87. For instance, the UN Inquiry Commission rejected the view that individuals targeted by Israel can be considered as combatants. See Question of the Violation of Human Rights in the Occupied Arab Territories, *supra* note 38, at 19, para. 62. According to Kretzmer, international terrorists 'do not meet the conditions to be regarded as combatants and must, by definition, be regarded as civilians'. See Kretzmer, *supra* note 8, at 191–2. Watkin considers that they can be classified as civilians who momentarily lose the protection of that status, 'unless and for such times as they take direct part in hostilities'. Watkin, *supra* note 63, at 6. Zachary argues that '[t]errorism itself has no status under international law, but the individual terrorist does, since he is first and foremost a civilian. No one is born a combatant, whether lawful or not, without being a civilian first'. S. Zachary, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?', (2005) 38 *Israel Law Review* 378, at 390. Amnesty International has also expressed the view that Palestinian terrorists are civilians who have lost their protection: 'Palestinians engaged in armed clashes with Israeli forces are not combatants. They are civilians who lose their protected status for the duration of the armed engagement. They cannot be killed at any time other than while they are firing upon or otherwise posing an immediate threat to Israeli troops or civilians.' See Amnesty International, 'Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings', MDE 15/005/2001, February 2001, at 29, available at http://web.amnesty.org/library/pdf/MDE150052001ENGLISH/$File/MDE15005.01.pdf. In addition, in his expert opinion on the legality of targeted killing, Cassese treated Palestinian terrorists in this case as civilians. See A. Cassese, Expert Opinion on whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law, *Public Committee Against Torture et al. v. The Government of Israel et al.*, June 2003, at 16–18.
88. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Justice Rivlin, para. 2.
89. Ibid.
90. Ben-Naftali and Michaeli, *supra* note 8, at 271.

2.3. Civilians who are unprivileged combatants

Illegitimate participants or unauthorized combatants have long taken part in hostilities. However, the notion of 'unlawful combatants' seems only to have been explicitly acknowledged in the *Ex Parte Quirin*[91] decision of the US Supreme Court.[92] The Court defined it in these words:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations 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 combatants 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.[93]

In subsequent practice, the Supreme Court has resorted to the concept of 'enemy combatant' and has used it up to the present day.

Despite this acknowledgement, the status of 'unprivileged combatant' is rather uncertain in international humanitarian law. Only a few countries have domestic legislation to regulate this notion. The United States has recently preferred to use the notion of 'unlawful enemy combatants' to define a similar concept in the newly enacted Military Commission Act 2006.[94] Israel has enacted the Incarceration of Unlawful Combatants Law,[95] where 'unlawful combatant' is defined as a 'person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to the prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him'.[96] The Law also authorizes the chief of general staff of the Israel Defence Forces to issue an order for the administrative detention of an 'unlawful combatant'.[97]

In oral and written arguments the State of Israel asked the Court to recognize the category of 'unlawful combatants'.[98] This category would be composed of people taking an active and continuous part in an armed conflict, who would be treated – contrary to the Court's opinion – as combatants. It was argued that these persons do not differentiate themselves from the civilian populations and that they do not obey the laws of war. Thus they could be deprived of rights and privileges granted to this category of persons and be legitimately targeted.

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91. *Ex Parte Quirin*, 317 US 1 (1942).
92. J. Woolman, 'The Legal Origins of the Term "Enemy Combatant" Do Not Support its Present Day Use', (2005) 7 *Journal of Law & Social Challenges* 145, at 147. For a comprehensive overview of the history of unlawful combatancy, see Watkin, *supra* note 63, at 45–9.
93. Ibid., at 30–1.
94. The Military Commissions Act of 2006, Pub. L. No. 109–366 (S.3930), 120 Stat. 2600, § 948a(1)(A), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf.
95. Incarceration of Unlawful Combatants Law, 5762–2002, Art. 2, available at http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf.
96. Ibid.
97. Ibid., Art. 3(a).
98. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 27.

This argument was rejected by the Chief Justice, who reasoned that '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'.[99] In addition, Chief Justice Barak refused to entertain the question of whether it is desirable to recognize such a category.

The Geneva Conventions and the Additional Protocols refer to only two categories of person, namely combatants and civilians. As is accurately pointed out by Cassese,

> No 'intermediate status' exists between that of combatant and the status of civilian. A civilian who takes direct part in hostilities does not forfeit his or her civilian status but may become the lawful object of attack for the duration of his or her participation in combat. The term 'unlawful combatant' is a shorthand expression useful for describing those civilians who take up arms without being authorized to do so by international law; it has an exclusively *descriptive* character.[100]

In line with this reasoning, Barak did not create a third category of persons.[101] He did, however, seem to acknowledge *sub silentio* that unprivileged combatants have a civilian *status* and a combatant *function*. This hybrid legal concept nonetheless seems to be accommodated by the *lex lata*. In fact, individuals having a combatant *function* without the combatant privileges are recognized under international humanitarian law.[102]

2.3.1. Applicable law

Civilians not taking a direct part in hostilities are considered to be 'protected persons' under the Fourth Geneva Convention of 1949.[103] They have a special status under international humanitarian law and they are immune from attack. Three important customary principles regulate the protection of civilians in situations of conflict, namely Rules 1, 6, and 7. Rule 1 provides that the parties to the conflict must at all times distinguish between civilians and combatants, and that attacks cannot be directed at civilians.[104] Rule 6 stipulates that '[c]ivilians are protected against

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99. Ibid., para. 28.
100. Cassese, *supra* note 87, at 14–15, para. 26 (emphasis in original). Dörmann recognizes as well that neither the terms 'unlawful combatant' nor 'unprivileged combatant/belligerent' appear in international humanitarian law treaties. See K. Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"', (2003) 85/849 *International Review of the Red Cross* 45, at 46.
101. It is important to note that recognizing an ambiguous category within the existing framework of international humanitarian law could have serious consequences. Zachary warns that it could result in 'a situation where in every conflict, a State will have numerous options by which to define people it holds captive, in ways that serve his own purposes and interests. The creation of a legal hybrid through which States can . . . enjoy only the advantages provided by the Third and Fourth Geneva Conventions, without granting the detainees defined status, is contradictory to recent trends in international law.' Zachary, *supra* note 87, at 415.
102. '1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, "inter alia", shall enforce compliance with the rules of international law applicable in armed conflict. 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities. 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.' Additional Protocol I, *supra* note 30, Art. 43.
103. Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 33.
104. Henckaerts and Doswald-Beck, *supra* note 66, at 3.

attack unless and for such time as they take a direct part in hostilities'.[105] Rule 7 additionally specifies that '[t]he 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'.[106] Barak considered that these rules are entrenched in the Supreme Court's case law.

Furthermore, according to Article 51(2) of Additional Protocol I (a customary principle in Barak's view), '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.[107] However, civilians who decide to take part in hostilities are no longer subject to these privileges and immunity. Pursuant to Article 51(3) of Additional Protocol I, '[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'.[108] Chief Justice Barak accurately reminded the court that, while Israel did not ratify Additional Protocol I, Article 51(3) expressed a principle of international customary law and was thereby applicable to the case. In support of his position, he cited the positions of the International Committee of the Red Cross (ICRC)[109] and the ICTY[110] as well as national military manuals and scholarly opinion.[111] In his Expert Opinion, Cassese expressed the same view.[112]

The precise meaning and content of Article 51(3) of Additional Protocol I is still subject to intense debate. The provision contains three main elements – the notion of 'hostilities', the notion of 'direct participation', and the notion of 'for such time' – which have never been defined in treaty law. These three expressions were thoroughly considered during a series of Expert Meetings,[113] organized by the ICRC in co-operation with TMC Asser Institute and aimed at clarifying the meaning of the notion of 'direct participation in hostilities'. However, at the time of writing, the

105. Ibid., at 19.
106. Ibid., at 25.
107. Additional Protocol I, *supra* note 30, Art. 51(2).
108. Ibid., Art. 51(3).
109. Henckaerts and Doswald-Beck, *supra* note 66, at 20.
110. *Prosecutor v. Strugar*, IT-01–42-T , T.Ch. II, 31 January 2005, para. 220.
111. G. Aldrich, 'The Laws of War on Land', (2000) 94 AJIL 42, at 53; Ben-Naftali and Michaeli, *supra* note 8, at 269; Cassese, *supra* note 32, at 416; Kretzmer, *supra* note 8, at 192; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), at 11; V. J. 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', (2005) 56 *Hastings Law Journal* 801, at 879; M. Roscini, 'Targeted Killing and Contemporary Aerial Bombardment', (2005) 54 ICLQ 411, at 418.
112. Cassese, *supra* note 87, at 6, para. 10. He added that the ICTY expressed the same idea in *Prosecutor v. Strugar et al.*, Case No. IT-01–42-AR72, A. Ch., 22 November 2002, paras. 9–10 and *Prosecutor v. Martić*, Case No. IT-95–11-R61, T. Ch., 8 March 1996, paras. 13–14. However, in the opinion of Israel, not all parts of Art. 51(3) of Additional Protocol I have a customary character. According to the state, the part of the Article which determines that civilians do not enjoy protection from attack 'for such time' as they are taking direct part in hostilities is not a customary rule. See *Public Committee Against Torture in Israel v. Government of Israel, supra* note 1, Opinion of Chief Justice Barak, para. 30.
113. International Committee of the Red Cross, 'Direct Participation in Hostilities under International Humanitarian Law', Summary Report, Geneva, September 2003; International Committee of the Red Cross/TMC Asser Institute, 'Second Expert Meeting: Direct Participation in Hostilities under International Humanitarian Law', Summary Report, The Hague, 25–6 October 2004; International Committee of the Red Cross (ICRC)/TMC Asser Institute, 'Third Expert Meeting on the Notion of Direct Participation in Hostilities', Summary Report, Geneva, 23–5 October 2005; all three reports are available at http://www.icrc.org/Web/Eng/siteengo.nsf/html/participation-hostilities-ihl-311205.

final draft of the deliberations has not yet been published. During these meetings it was agreed that the final document will offer interpretative guidance in identifying 'direct participation in hostilities'. The experts preferred this type of guideline to an abstract definition supplemented by examples.

In his analysis, however, Chief Justice Barak resorted to a broad interpretation of the components of Article 51(3) of Additional Protocol I. This approach currently complies with international humanitarian law. However, it could have been narrower and it could have emphasized further the protection of innocent civilians.

2.3.2. Hostilities

The notion of 'hostilities' is used extensively in conventional law, although it is not defined therein.[114] Overall, the use of the term in the convention suggests that the notion of 'hostilities' is narrower than that of 'armed conflict', yet wider than that of 'attack'.[115] During the Third Expert Meeting on 'Direct Participation in Hostilities', co-organized by the ICRC and the TMC Asser Institute, the prevailing opinion was that, on the basis of a descending scale from the widest to narrowest concept, the following order could be established: (i) 'armed conflict'; (ii) 'hostilities'; (iii) 'military operations' (they constitute a subset within the conduct of 'hostilities') and (iv) 'attacks' (they constitute an aspect of military operations').[116]

During the Third Expert Meeting, three proposals of a definition of the 'hostilities' concept were made: (i) it should include 'all acts that adversely affect or aim to adversely affect the enemy's pursuance of its military objective or goal';[117] (ii) it should comprise 'all military activities directed against the enemy in an armed conflict'[118] ; and (iii) the term 'hostilities' should cover tactical situations rather than an accumulation of individual acts, which are difficult to define.[119] As part of this last proposal, it was argued that there is a 'zone of hostilities' where military objectives[120] are situated. In that case, if civilians are located in or around these military objectives, they can be targeted (regardless of their membership in a group or their conduct).[121] It remains to be seen whether one of these proposals will be adopted in the final document of the deliberations that took place during the ICRC–TMC Asser Press Meetings.

Chief Justice Barak did not follow either of these proposals. He grounded his view in the definition of 'hostile acts' provided by the ICRC Commentary to Article 51(3) of Additional Protocol I mentioned above.[122] This position, noted Barak, is

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114. ICRC/TMC Asser Institute, 'Third Expert Meeting', *supra* note 113, at 17.
115. Ibid.
116. Ibid., at 18–19.
117. Ibid., at 22.
118. Ibid., at 23.
119. Ibid., at 24.
120. Such as houses where civilians prepared and conducted their operations or places where a car bomb was being installed; ibid.
121. Ibid.
122. He observed that 'acts which are intended to cause damage to civilians should be added to that definition'. See *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 33. Hostile acts were defined as 'acts which by their nature and purpose are intended to cause harm to the personnel and equipment of the armd forces'. See V. Sandoz, C. Swinarski, and B. Zimmermann,

also accepted by the Inter-American Commission on Human Rights and positively received in authoritative legal literature. Thus the definition used by Chief Justice Barak is an appropriate alternative, and this part of his opinion is not controversial.

The more contentious articulation of his argument is the reference to another passage of the ICRC Commentary to Article 51(3) which provides that 'the word "hostilities" covers not only the time 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'.[123] This particular reference sets up the context for his analysis of 'direct participation'. As will become apparent in the next section, Barak's interpretation of this concept was wide and included an extensive array of events.

2.3.3. Direct participation

2.3.3.1. Conventional law. The concept of 'direct participation in hostilities' is a corollary of the principle of distinction between civilians and combatants enshrined in international humanitarian law. According to the ICRC Commentary to Article 51(3) of Additional Protocol I, direct participation

> means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of enemy forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effect of hostilities, and he may no longer be attacked.[124]

There are also references to the concept in Article 77(2) and (3) of Additional Protocol I, which regulate the protection of children with regard to their participation in hostilities.

2.3.3.2. Lack of definition. Despite these numerous references, the concept of 'direct participation in hostilities' is not defined precisely anywhere in treaty law or in state practice.[125] There is great uncertainty as to its exact meaning and the acts that it includes. Moreover, the wealth of scholarly opinion on the topic does not point to a single approach to the question.

In his opinion, Chief Justice Barak observed that Articles 51(3) differentiate between direct and indirect participation in hostilities, and states that civilians taking an indirect part in them should not be attacked.[126] He acknowledged the problem of the lack of definition of the 'direct participation in hostilities' concept, and opined that each situation should be treated on a case-by-case basis. According to his view, it is not clear how the law may apply to certain situations, as there are

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Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), 618, para. 1942.

123. Sandoz, Swinarski, and Zimmermann, *supra* note 122, 618–19, para. 1943.

124. Ibid., at 619, para. 1944.

125. Henckaerts and Doswald-Beck, *supra* note 66, at 22.

126. As stated earlier, there is some room for manoeuvre in the interpretation of the concept. The ICRC Commentary provides that to restrict it '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'. See Sandoz et al., *supra* note 123, at 516, para. 1679.

two interpretations possible. The first interpretation, according to the Chief Justice, is the one advocated by Cassese, which adopts a narrow interpretation of 'direct' part in hostilities in difficult cases.[127] The second interpretation is the one suggested by Schmitt, which resorts to a wide interpretation of the 'direct' participation in hostilities.[128] Chief Justice Barak does not appear to have followed either one of these approaches to the letter.[129]

Despite this lack of clarity, Barak found that there are certain cases where it can be clearly determined whether a civilian is participating directly. On the one hand, civilians who generally support the hostilities against the army, civilians who sell food or medicine to unlawful combatants, civilians who aid unlawful combatants by general strategic analysis, those who grant them logistical and general support (including monetary aid), as well as those who distribute propaganda to support them, would only participate indirectly in hostilities. According to Barak, '[i]f 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'.[130]

On the other hand, civilians bearing arms (openly or concealed) on their way to the place where they will use them against the army (at such place, or on their way back from it), civilians collecting intelligence on the army (on issues regarding hostilities and beyond), civilians transporting unlawful combatants to or from the place where hostilities are taking place, those who operate, supervise, or service weapons used by unlawful combatants (independent of their distance to the battlefield), those driving a truck carrying ammunition to the site where it will be used for the purposes of hostilities,[131] those acting deliberately as 'human shields',[132] those who send

127. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 34.

128. Ibid.; M. Schmitt, '"Direct Participation" in Hostilities and 21st Century Armed Conflict', in F. Horst et al. (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (2004), at 505–29.

129. He did quote a passage written by Schmitt:

> Grey areas should be interpreted liberally, i.e. in favour 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. (Schmitt, *supra* note 128, at 509)

This statement may have informed his reasoning, but he does not appear to have relied on it.

130. For the examples in this paragraph, see *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, paras. 34–35.

131. Ibid., paras. 34–35.

132. Ibid., para. 36. Here, Chief Justice Barak's finding follows existing Israeli case law and it implies that using involuntary 'human shields' is illegal. The Supreme Court, sitting as the High Court of Justice, has previously ruled that it is illegal for the IDF to use Palestinian civilians during military actions and that it is forbidden to use the 'early warning' procedure because it contradicts international law. See *Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. GOC Central Command IDF et al.*, HCJ 3799/02, 6 October 2005. This stance also reflects the position taken in international humanitarian law. See Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 33, Art. 28; Additional Protocol I, *supra* note 30. Art. 51(7). In this context, it should be noted further that the IDF Judge Advocate General has recently ordered the Military Police to initiate a criminal investigation into allegations that IDF soldiers have used Palestinians as human shields during an operation in the West Bank. See 'Report: IDF Used Palestinians as Human Shields in Nablus', *Jerusalem Post*, 16 March 2007; C. Urquhart, 'Israel Accused of Using Palestinian Children as Human

terrorists, and those who decide upon an attack as well as those who have planned it[133] are taking a 'direct part in hostilities'.

Chief Justice Barak's finding that voluntary 'human shields' take a direct part in hostilities deserves further attention, given that the recent trend in international humanitarian law in this regard has been equivocal. The Chief Justice did not explain his reasoning further; however, it is not entirely clear whether all those acting deliberately as 'human shields' can be targeted. It has been suggested that civilians acting voluntarily or involuntarily as 'human shields' should not be harmed, given that their actions do not pose a direct risk to the opposing forces.[134] Also, during the Second Meeting of Experts organized by the ICRC and TMC Asser Press[135] , voluntary human shielding was a contentious issue.[136] An interesting alternative to Barak's finding seems to be the compromise view presented during the meeting. This view consists in qualifying voluntary shielding as direct participation depending on the circumstances and subject to a proportionality test.[137] Given that it is narrower than Barak's position, this approach seems to be more compliant with the protection granted to civilians under international humanitarian law.[138]

2.3.3.3. The functional approach: a wide interpretation. The principle used by Chief Justice Barak in identifying which of the above-mentioned activities constitute 'direct participation in hostilities' was the one proposed by Watkin[139] as part of his functional approach, namely whether civilians are performing the *function* of combatants.[140] In order to identify direct participation in hostilities, Watkin proposes to 'apply the basic military staff structure (personnel, intelligence, operations,

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Shields', *Guardian*, 9 March 2007; BBC News, 'Israeli Army "Used Human Shields"', 8 March 2007; BBC News, 'Israelis Accused of "Human Shields" Tactic', 25 July 2006. See also R. Otto, 'Neighbours as Human Shields? The Israel Defense Forces' "Early Warning Procedure" and International Humanitarian Law', (2004) 86/856 *International Review of the Red Cross* 771.

133. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 36.
134. 'Like workers in munitions factories, civilians acting as human shields, whether voluntary or not, contribute indirectly to the war capability of a state. Their actions do not pose a direct risk to opposing forces. Because they are not directly engaged in hostilities against an adversary, they retain their civilian immunity from attack. They may not be targeted, although a military objective protected by human shields remains open to attack, subject to the attacking party's obligations under IHL to weigh the potential harm to civilians against the direct and concrete military advantage of any given attack, and to refrain from attack if civilian harm would appear excessive.' Human Rights Watch, 'International Humanitarian Law Issues in a Potential War in Iraq', briefing paper, 20 February 2003, available at http://www.hrw.org/backgrounder/arms/iraq0202003.htm#1. Schmitt, however, considered that civilians – with the exception of children – who act voluntarily as human shields unquestionably take a direct part in hostilities. See M. Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Companies', (2005) 5 *Chicago Journal of International Law* 511, at 541.
135. ICRC/TMC Asser Institute, 'Second Expert Meeting', *supra* note 113.
136. Ibid., at 6. However, it was agreed that 'shielded' objects remain military objectives.
137. 'In aerial warfare, for instance, civilians shielding military objectives with their presence constituted much more of a legal obstacle for the attacker than an actual physical defense. Therefore, such voluntary shielding did not constitute DPH [Direct Participation in Hostilities] – but had to be weighed in the proportionality test. In land warfare, on the other hand, voluntary shielding could become an actual physical obstacle to military operations and would then have to be regarded as a defensive measure, which constituted DPH.' Ibid., at 7.
138. Additional Protocol I, *supra* note 30, Art. 51(2); Henckaerts and Doswald-Beck, *supra* note 66, Rule 1, at 3.
139. K. Watkin, 'Combatants, Unprivileged Belligerents and Conflicts in the 21st Century', Background Paper prepared for the Informal High-Level Export Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, 27–9 January 2003, at 17.
140. Ibid.

logistics, civil–military relations, and signals) to a non-state organization'.[141] According to his view, '[w]hile this would be more challenging to apply during the early development of a non-state identity, and therefore require some flexibility, it provides a structured basis for separating civilians and "combatants"'.[142] Furthermore, '[a]n advantage to using such a template is that it accounts for military planning as well as the activities of the actual operational forces'.[143]

Such an approach, however, has several inherent problems. As the author himself suggests, while this model allows the separation of political and military activities, 'distinguishing between the two will remain difficult when dealing with a non-state organization or a government that has integrated military command/political structure'. Furthermore, it does not acknowledge the problem of unorganized or sporadic civilian participation in hostilities.[144] It is also not clear to what extent both state and non-state parties to a conflict can be equated. This seems to depend upon the level of organization, control, and specialization,[145] which does not appear to be considered as part of this model. Finally, a functional methodology does not provide sufficient protection to civilians, as it allows a wide range of people to be targeted.

2.3.3.4. The requirement of a close link: a narrow interpretation. Chief Justice Barak did not explicitly consider to be necessary a close link or correlation between the act performed by civilians and the threat that it represents to the enemy. He stated that '[i]n our opinion, the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack'.[146] The ICRC Commentary to Article 43(2) of Additional Protocol I provides, however, that '[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place',[147] and it covers 'acts of war which are intended by their nature or their purpose to hit specifically the personnel and the "matériel" of the armed forces of the adverse Party'.[148] The ICRC Commentary to Article 51(3) of Additional Protocol I states that '"direct" participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces'.[149] In addition, the ICRC Commentary to Article 13(3) of Additional Protocol II provides that '[t]he term "direct part in hostilities" is taken from Common Article 3, where it was used for the first time. It implies that there is a sufficient causal

141. K. Watkin, 'Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict', in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in the 21st-Century Conflicts* (2005), 137–79, at 153.
142. Ibid.
143. Ibid.
144. Melzer, *supra* note 40, at 435.
145. Ibid.
146. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 37.
147. Sandoz et al., *supra* note 122, at 516, para. 1679.
148. Ibid.
149. Ibid., at 619, para. 1944.

relationship between the act of participation and its immediate consequences.'[150] This commentary suggests that a very close correlation should exist between the act performed by the civilian and the threat to the adverse party. Support for this stance can be found in the Report of the Third Expert Meeting co-organized by the ICRC and TMC Asser Institute, where experts appeared to agree that the identification of an act which constitutes 'direct participation in hostilities' requires 'some degree of causal relationship between the act and the ensuing harm to the adversary'.[151] The prevailing opinion was that an act needed more than just a remote causal link to harmful consequences. The difficulty, however, was that a 'sufficient' causal link could not be objectively measured.[152]

In this context, Cassese argues that civilians can only be targeted when they carry arms openly before and during an armed action (Article 44 (3) of Additional Protocol I).[153] Otherwise, 'belligerents would be authorized to shoot at any civilian, *on the mere suspicion* of their being potential or actual unlawful combatants'.[154] However, within the framework of the present conflict, he makes an allowance for targeting a civilian, if he or she does not respond to summons:

> It would seem that a proper way of accommodating the military and security requirements of Israel with the demands of international humanitarian law may consist in requiring Israeli authorities, when they suspect that a civilian may carry on his or her body explosives destined to blow up Israeli targets, to summons the civilian to show that he or she is not carrying explosives. Only if the civilian refuses to comply, may the military open fire against him or her.[155]

This kind of approach constitutes a narrow interpretation of 'direct participation in hostilities'. It only allows the targeting of a civilian who poses an immediate military threat and when there is a direct causal link between the act and the harm for the adversarial party.[156]

It is nonetheless questionable whether this approach is really practicable and effective. It may be very difficult for a military commander or soldiers to identify an immediate military threat. It is close to impossible to know, as a matter of certainty, that a civilian has concealed explosives upon his/her person. There is an inevitable element of risk involved in such circumstances. This approach also seems to be more adequate for situations involving unorganized civilians and not major operations against organized armed groups.[157] In addition, it does not offer practical guidelines for situations where a civilian's status is not immediately apparent.[158]

2.3.3.5. Will the narrow interpretation prevail in the end? Despite these lacks, the interpretation of 'direct participation in hostilities' that requires a direct link is more

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150. Ibid., at 1453, para. 4787.
151. ICRC/TMC Asser Institute, 'Third Expert Meeting', *supra* note 113, at 28.
152. Ibid., at 34.
153. Cassese, *supra* note 87, at 8, para. 15.
154. Ibid. (emphasis in original).
155. Ibid., at 9, para. 16.
156. Melzer, *supra* note 40, at 432.
157. Ibid., at 433.
158. Ibid.

compliant with the ICRC Commentary and Additional Protocol I. It permits some assurance that those taking part in hostilities are effectively connected to them. This is not the case for the approach adopted by the Chief Justice, which allows the targeting of civilians whose behaviour is similar to that of the combatants, without explicitly requiring a close correlation. The use of this approach could lead to an absurd result where civilians acting in self-defence could be considered as performing a combatant-like function and could be targeted. In addition, it could also allow a wide margin of error, precisely what the narrow approach attempts to avoid. Given the increasing civilian involvement in hostilities and the complexity of modern armed conflict, the need to define the notion of 'direct participation in hostilities' more specifically has never been more pressing. The application of this vague rule will become less equivocal once the ICRC releases the final interpretation guidelines.

2.3.4. 'For such time . . .'

The concept of 'direct participation in hostilities' involves a temporal element which regulates the period during which a civilian loses his or her protection. As stated earlier, according to Article 51(3) of Additional Protocol I and Article 13(3) of Additional Protocol II, civilians are immune from attack, 'unless and for such time as' they participate directly in hostilities. Nonetheless, they can regain their immunity as soon as they disengage from the hostilities. The exact meaning of the expression 'and for such time' is unclear, and it is not defined in international humanitarian law. The ICRC Commentary to Article 13(3) clarifies that once a civilian 'no longer presents any danger for the adversary, he may not be attacked; moreover, in case of doubt regarding the status of an individual, he is presumed to be a civilian'.[159] This clarification is, however, vague and does not allow a precise identification of the duration of the loss of immunity from attack.

Chief Justice Barak acknowledged that there is no consensus in international literature regarding the scope of the wording 'and for such time'. He considered that the current legal situation could lead to a 'revolving door' phenomenon of protection,[160] entailing that a civilian directly participating in hostilities would lose his/her protection from attack for the duration of a specific military operation, and would regain it between military operations, regardless of how often and how regularly they take a direct part in hostilities.[161] In his view, this situation is to be avoided, as it allows terrorists to carry out attacks and then quickly regain civilian status, when they rest and plan further attacks. However, as pointed out during the Third Expert Meeting, the 'revolving door' mechanism of civilian protection is inevitable[162] and is not a malfunction of international humanitarian law.[163] The period of the loss of protection corresponds to the period during which a civilian participates directly

159. Sandoz et al., *supra* note 122, at 1453, para. 4789.
160. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 40.
161. ICRC/TMC Asser Institute, 'Second Expert Meeting', *supra* note 113, at 22.
162. ICRC/TMC Asser Institute, 'Third Expert Meeting', *supra* note 113, at 59.
163. Melzer, *supra* note 40, at 442.

in hostilities. More precisely, 'the duration of loss of protection against direct attack depend[s] directly on the beginning and end of "direct participation in hostilities"'.[164] As a result, this characteristic is an integral part of international humanitarian law.

In delineating the contours of the 'for such time' doctrine, Chief Justice Barak again looked at two extreme situations. First, he established that 'a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is entitled to protection from attack'.[165] That person would not be attacked for hostilities that he or she committed in the past. Second, he considered that

> [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.[166]

He found that, between the two extreme examples presented, there is a 'grey zone', which has not been satisfactorily addressed by customary international law. There was no further examination of the content of either one of these extreme situations, and the judgment focuses (due to the nature of the question before the Court) on only one end of the spectrum, namely on the situation of civilians who are members of a terrorist organization and who are continuously engaged in combatant-like activities directed against civilians.[167]

Furthermore, as part of this reasoning, Barak seems to have resorted to two of the approaches to the temporal element of 'direct participation in hostilities' discussed during the Third Expert Meeting. There, three possible doctrines were considered, namely the 'Specific Acts Approach', the 'Affirmative Disengagement Approach' and the 'Membership Approach'.[168] Pursuant to the 'Specific Acts Approach', the loss of civilian protection against direct attack lasts as long as the specific acts amounting to direct participation in hostilities. According to the 'Affirmative Disengagement Approach', the loss of protection occurs when the first act amounting to 'direct participation in hostilities' is perpetrated and it lasts until the civilian disengages in a manner objectively recognizable to the adversary. The 'Membership Approach' combines both of these approaches: the 'Affirmative Disengagement Approach' is applied to members of armed groups, whereas the 'Specific Acts Approach' applies to unorganized civilians.[169] During the meeting most experts agreed that this approach should be limited, so that it does not permit the targeting of all members of an organized armed group.[170] This could be achieved as part of a 'Restricted Membership Approach', which would only allow the attacking of an easily identifiable

164. ICRC/TMC Asser Institute, 'Third Expert Meeting', *supra* note 113, at 59.
165. *Public Committee Against Torture in Israel v. Government of Israel, supra* note 1, Opinion of Chief Justice Barak, para. 39.
166. Ibid.
167. There is, however, a need to explore further the meaning of these notions. Fenrick, *supra* note 1, at 337–8.
168. ICRC/TMC Asser Institute, 'Third Expert Meeting', *supra* note 113, at 59.
169. Ibid.
170. Ibid., at 64; Melzer, *supra* note 40, at 447.

organized armed group and its 'fighting' members.[171] It was argued that the 'Restricted Membership Approach' would only be relevant in non-international conflicts, given that armed groups under a command responsible to a party to an international armed conflict could fulfil the requirements of privileged combatancy, and groups conducting hostilities on their own behalf would become independent parties to a separate non-international armed conflict.[172]

It appears that, in the first extreme example mentioned, Chief Justice Barak relied on a version of the 'Specific Acts Approach', which has its advantages and disadvantages. Experts have criticized it for allowing civilians to abuse the 'revolving door' of protection and for rendering the operation of armed forces virtually impossible.[173] Furthermore, it was also found that it would only be practicable in a limited array of situations where civilians attacked the armed forces directly, without being part of an organized armed group.[174] However, it can also be argued that this approach avoids mistaken or arbitrary targeting of civilians to the greatest extent possible, while limiting the abuse of the 'revolving door' phenomenon by unorganized civilians who take direct part in hostilities sporadically and do not constitute a significant military threat.[175]

Subsequently, in the second extreme example presented, Barak relied on the 'Affirmative Disengagement Approach'. He considered in that example that the time between hostilities constitutes preparation for the next hostility. This seems to entail that in order to regain civilian status, the person concerned would have to disengage unambiguously from the group. Such a reasoning incorporates the difficulties inherent in the application of the 'Affirmative Disengagement Approach'. First, the second example provided by the Court is ambiguous and difficult to apply in practice. Second, during the Third Expert Meeting it was questioned whether individuals can affirmatively disengage and whether this requires a positive action.[176] If the individual declaration of 'affirmative disengagement' were to be adopted, the approach would not be practicable in situations where thousands of civilians were involved in hostilities.[177] Third, as rightly observed during the same meeting, civilians may choose not to disengage openly, fearing reprisals from the formerly supported group.[178] It should be emphasized that the 'Affirmative Disengagement Approach' was not the approach preferred by most experts attending the meeting. Hence the reliance on this doctrine in the last example is problematic and it is not representative of the current trend in the interpretation of the expression 'for such time'. It is, however, important to note that Barak distinguished between two different cases and that he did not rely exclusively on the 'Affirmative Disengagement Approach'.

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171. ICRC/TMC Asser Institute, 'Third Expert Meeting', *supra* note 113, at 64.
172. Melzer, *supra* note 40, at 446.
173. ICRC/TMC Asser Institute, 'Third Expert Meeting', *supra* note 113, at 60.
174. Ibid.; see also Melzer, *supra* note 40, at 443.
175. Melzer, *supra* note 40, at 443.
176. ICRC/TMC Asser Institute, 'Third Expert Meeting', *supra* note 113, at 62.
177. Ibid.
178. Ibid.

In spite of this, the Court should have relied on the 'Limited Membership Approach', which – as we would submit – could apply to situations of international armed conflict where an armed group does not qualify for combatant status.[179] It is not certain which approach the Court will use in future cases. Perhaps it will follow the practice initiated by Barak, which consists in proceeding on a case-by-case basis and according to the circumstances specific to each situation.

2.3.5. Proportionality

2.3.5.1. Requirements to be fulfilled prior to and following a targeted killing. A fundamental development flowing from the decision is the requirement that the following principles be respected in each case where a targeted killing is envisaged: (i) 'well based information is needed before categorizing a civilian as falling into one of the discussed categories'; (ii) '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'; (iii) '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)'; and (iv) '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'.[180]

These requirements provide an important safety net that serves to ensure that all targeted attacks are carried out cautiously and with the smallest margin of error possible. They also limit the discretion granted to the state and represent a considerable improvement in the situation of innocent civilians. They require that other less harmful means be exhausted prior to a targeted killing. Furthermore, they render the state accountable for its actions by requiring an investigation. The room for manoeuvre is also restricted by the fact that the harm to innocent civilians must be proportional to the military advantage gained from the attack. While these requirements are broad and difficult to implement in practice, they undoubtedly represent an important and unprecedented development in limiting the legality of targeted killing.[181] Also, although the judgment focuses on state responsibility, it is possible, according to Cassese, that these requirements could be used in the future to prosecute individuals for targeted killing.[182]

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179. This view was also submitted by an expert during the Third Expert Meeting, ibid., at 58.

180. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 40. It has been rightly suggested that the requirement of *ex ante* and *ex post* examinations, used within the framework of direct participation in hostilities by Barak, should *a fortiori* also apply to innocent civilians. See Cohen and Shany, *supra* note 1, at 317–18.

181. Several authors have welcomed this improvement and have found these requirements useful and helpful. Cassese, *supra* note 1, at 339; Fenrick, *supra* note 1, at 332, 337, 343–5; Cohen and Shany, *supra* note 1, at 310, 317–18.

182. Cassese observed that the rules of international humanitarian law on the conduct of hostilities, 'which only minimally regulate states' conduct and in effect serve only to prevent extreme cases, may not be amenable to serving as parameters for an assessment of the criminality of the conduct of individual combatants. In other words, those rules may serve for the purpose of establishing state responsibility in the most glaring instances of their violation, but may not serve as criminal rules: criminalization of conduct contrary to those rules might be contrary to the principle of specificity prevailing in international criminal law.' Cassese, *supra*

2.3.5.2. The interpretation of proportionality. Following this statement of limitations, Barak evaluated the content of the last principle – the principle of proportionality. The Chief Justice set a confused tone in this part of the opinion by announcing at the outset that the principle of proportionality 'is part of our legal conceptualization of human rights'.[183] However, he evaluated, in effect, the principle of proportionality as enshrined in international humanitarian law. This confusion may be one of the consequences of the phenomenon of fragmentation prevalent in international law.[184]

The principle of proportionality as enshrined in international humanitarian law is subject to intense debate, and its specific meaning is unclear. As a consequence, Barak's analysis of the principle was sketchy and general. However, it can be argued that he should have taken into greater account the requirements mentioned in the ICRC Commentary.

The principle of proportionality is applicable in international and non-international conflicts. The general rule is formulated as a matter of customary law, and various applications of it are made in conventional law.[185] Referring to the relevant provisions, Barak clarified that civilians could be harmed if they are present inside a military target, when they live or work in or pass by military targets, and even if they are far from them.[186] In all these cases, the harm to the innocent civilians must fulfil the requirements of the principle of proportionality. Otherwise, a legitimate military target may not be attacked if civilian casualties would be disproportionate to the concrete military advantage. It was further specified that the principle of proportionality in international humanitarian law focuses on proportionality *senso strictu*, namely the 'requirement that there be a proper proportional relationship between the military objective and civilian damage',[187] as provided in Israeli constitutional law. His approach was therefore grounded in international humanitarian law, but reinforced and informed by Israeli law.

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note 1, at 341. He emphasized, however, that the judgment has narrowed down these very broad standards, which may serve in the future 'to turn some unclear international rules into workable standards of conduct, and also to open the way to the possible prosecution of individuals (superiors and subordinates)'. Ibid., at 339. See also Cohen and Shany *supra* note 1, at 310, 317–20; Ben-Naftali, *supra* note 1 at 322, 328–31.

183. Ibid., para. 41.
184. See for further details Part II, Section 2.1.5.
185. The customary principle is enunciated in Rule 14 of the International Customary Law Study. It provides that '[l]aunching 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, is prohibited.' See Henckaerts and Doswald-Beck, *supra* note 66, at 46. In conventional law, Art. 51(5)(b) of Additional Protocol I prohibits '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'. Similarly, Art. 57(a)(iii) of the same instrument provides that those who plan or decide upon an attack shall 'refrain from deciding to launch any 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'. In addition, Art. 57(b) stipulates that 'an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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'. See Additional Protocol I, *supra* note 30.
186. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 42.
187. Ibid., para. 44.

Chief Justice Barak conceded that

> [T]he 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.[188]

Indeed, his analysis of the principle of proportionality did not carry the general discussion further.

2.3.5.3. Examples. In Barak's view, there are two clear-cut and extreme examples which illustrate the application of this principle: (i) it is proportional to shoot at a combatant or at a terrorist sniper shooting at civilians and soldiers from his porch, even if as a result an innocent neighbour or bystander is harmed; and (ii) it is not proportional to bomb a building from the air, if it is apparent that scores of residents and bystanders will be harmed. In this last example, Chief Justice Barak seems to be referring to the killing of Sheikh Salah Shehadeh, one of the founders of Hamas's Izzedine al-Qassem Brigades. On 22 July 2002, an Israeli F-16 dropped a 1-ton bomb on Shehadeh's house, thereby killing him and 16 others, of whom 15 were civilians, including nine children, Shehadeh's wife, and their child.[189] It is estimated that more than 100 others were injured in the attack.[190] A petition requesting the Court to order a criminal investigation against the former IDF chief of general staff, Lieutenant-General Dan Halutz, for his role in this operation was deferred until a judgment in the case at hand is given.[191] Following Barak's reasoning, it appears that the Israel Defense Forces will no longer be able to carry out this type of targeted killing, as it will now constitute a war crime.[192] The petition against Halutz is, however, still pending and one can only speculate about its outcome.

Between the two extremes mentioned by Barak, there are hard cases and 'one must proceed case by case, while narrowing the area of disagreement'.[193] As mentioned earlier, the Chief Justice used this type of reasoning throughout the judgment whenever he encountered a question as yet unsettled in international humanitarian law. Given the ambiguity of the subject treated, this effort was remarkable and it provided useful examples that effectively limit the legality of targeted killing. Nonetheless, it remains that the judgment enunciated very broad restrictions and did not further specify the criteria applicable in the margins between extreme and clear-cut examples.

188. Ibid.
189. A. Meyerstein, 'Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh', Crimes of War Project, 22 September 2002, available at http://www.crimesofwar.org/onnews/news-shehadeh.html.
190. See also Ben-Naftali, *supra* note 1, at 330.
191. Ibid., at 325 and 330; HC 8794/03 *Hess. v. Chief of Military Staff.* See also BBC News, 'Israel's Military Chief Resigns', available at http://news.bbc.co.uk/2/hi/middle_east/6269353.stm.
192. Ben-Naftali, *supra* note 1, at 330.
193. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 46.

2.3.5.4. Further requirements according to the ICRC Commentary. A weakness in the Chief Justice's opinion becomes apparent when his reasoning is compared with the standards set by the authoritative ICRC Commentary. The Commentary narrows down the scope of the principle of proportionality, as it provides that '[t]here is no implicit clause in the Conventions which would give priority to military requirements'.[194] The expression 'concrete and direct' is intended to show that the military advantage should be substantial and relatively close, and that hardly perceptible advantages or those that would only appear in the long term should be disregarded.[195] Whenever an attack could hit civilians incidentally, the following criteria must be taken into account:

> The danger incurred by the civilian population and civilian objects depends on various factors: their location (possibly within or in the vicinity of a military objective), the terrain (landslides, floods etc.), accuracy of the weapons used (greater or lesser dispersion, depending on the trajectory, the range, the ammunition used etc.), weather conditions (visibility, wind etc.), the specific nature of the military objectives concerned (ammunition depots, fuel reservoirs, main roads of military importance at or in the vicinity of inhabited areas etc.), technical skill of the combatants (random dropping of bombs when unable to hit the intended target).[196]

Finally, in complex cases without a clear-cut answer, '[t]he golden rule to be followed . . . is . . . the duty to spare civilians and civilian objects in the conduct of military operations.'[197]

2.3.5.5. Difficulties inherent in the process of interpretation. Although a certain criticism of the Chief Justice's reasoning seems to be justified, it must be emphasized that there are many inherent difficulties in defining the proportionality principle more specifically. As accurately explained in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, '[i]t is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values'.[198] The evaluation of proportionality is to some extent subjective, and ultimately it needs to be based on the common sense and good faith of military commanders.[199] There are no set criteria to determine in a court as a matter of certainty that an attack is disproportionate. In fact, despite the considerations mentioned above, the principle provides a fairly broad margin of judgment to military commanders.[200] Barak probably intended to avoid placing limitations on state powers in a situation of continuous conflict with no prospective end. Indeed, he clarified in the section on the scope of judicial review, stating that '[p]roportionality is not a standard of precision. At times there

194. Sandoz et al., *supra* note 123, at 683, para. 2206.
195. Ibid., at 684, para. 2209.
196. Ibid., at 684, para. 2212.
197. Ibid., at 684, para. 2215.
198. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Press Release, 13 June 2000, available at http://www.un.org/icty/pressreal/nato061300.htm.
199. Sandoz et al., *supra* note 123, at 683–4, para. 2208.
200. Ibid., at 684, para. 2210.

are a number of ways to fulfil 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'.[201] Thus, although it could have been more informed by the requirements mentioned in the ICRC Commentary, the Court's interpretation falls within the acceptable ambit of international humanitarian law.

2.4. *Ex post* examination of the action

An important aspect of the decision lies in the definition of the Court's role in this case as well as in its perception of the separation of powers in this field. In cases concerning war powers or military issues, national courts often defer to the decisions made by the executive. This has been the case of the US Supreme Court, which for a long period refused to interfere in a wide range of executive decisions relating to security issues. Although this period now seems to be drawing to an end, there was a long-standing tradition of judicial deference among US judges.[202] Fortunately, judicial deference was not the approach adopted by Chief Justice Barak, who determined that it was his duty to rule in this case.

The starting point of his reasoning was the finding that military commanders and officers posted in Gaza and the West Bank were public officials who fulfil their duties under the law. Although judicial review preserves the existence of their discretion, the Court can review the legality of the use of this discretion.[203] The level of review varies according to the questions raised. At one end of the spectrum – with the highest standard of review – there are questions (such as the one in the present case) relating to the content of international armed conflict law and the determination of the applicable law.[204] It is the Court's duty to rule in such cases and to determine whether the executive has applied the law correctly. At the other end of the spectrum – with the lowest standard of review – there are the decisions, made on the basis of knowledge of the military profession, to perform a preventive act that causes the death of terrorists.[205] According to Barak, these decisions belong to the executive and the Court may only review whether a reasonable military commander would have made such a decision.

In between these two extremes, there are intermediate situations. In Chief Justice Barak's view, every situation requires a thorough examination, and '[t]o the extent that it has a legal aspect, it approaches to one end of the spectrum. To the extent that it has a professional military aspect, it approaches to the other end of the spectrum'.[206] He found that the question in the case at hand is a legal question and that the Court has the expertise required to address it. Quoting a passage from the decision *Physicians for Human Rights*, the Chief Justice reminded the Court that

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201. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 58.
202. H. Keller and M. Forowicz, 'A New Era for the Supreme Court after *Hamdan v. Rumsfeld*?', (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1.
203. *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 56.
204. Ibid.
205. Ibid., para. 57.
206. Ibid., para. 58.

> 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.[207]

Despite this, Chief Justice Barak warned that judicial review as performed by the Court has its inherent limits. He noted that the level of judicial review of military decisions is by nature low because it cannot be performed in advance (and is performed retroactively). Furthermore, the main evaluation is conducted by the examination committee and the review of the Court is 'directed only against the decisions of that committee, and only according to the accepted standards regarding such review'.[208]

Although the Chief Justice's interpretation of the limitations imposed on targeted killing could have been more stringent, his reasoning with regard to the scope of judicial review should be commended for its courage, accuracy, and transparency. Chief Justice Barak attributed to the Court a significant role in military matters and made the issue of targeted killing 'justiciable'. In this sense, the judgment constitutes an important advancement for the safety of innocent civilians and an important stumbling block for future decisions. Undoubtedly, more cases will be decided on its basis, and that will further develop the limitations to targeted killing.

3. Conclusion

The *Committee Against Torture in Israel v. Government of Israel* case is a judgment of great quality, one that will go down in history and upon which numerous others are bound to be based. With this landmark decision, Chief Justice Barak laid the last stone of his 'judicial monument'. In an extremely polarized political situation, he took a brave and admirable stand on a controversial question. Barak used a careful and balanced reasoning, in which he applied the relevant legislation and referred to authoritative sources. He also resorted to innovative interpretation techniques to adapt the legislation to changing circumstances. In many of the issues that he considered, the law does not offer concrete solutions. Most of the questions encountered are subject to an intense debate in legal literature. Despite these complexities, the method applied by Barak in the case was very open and receptive. This was especially apparent in the wide range of literature, decisions, and judgments on which the decision was based. Most of the application of the legislation in this case appears to be accurate. It also provides a fairly clear statement of the law where it runs into a 'grey zone'. Thus the decision is situated well within the acceptable ambit of international humanitarian law and custom.

In addition, the judgment should be commended for the clarification and limitation of the legality of targeted killing. While the Court initially refused to rule on

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207. *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, HCJ 4764/04, 58(5) PD 385, 30 May 2004, 393.
208. *Public Committee Against Torture in Israel v. Government of Israel, supra* note 1, Opinion of Chief Justice Barak, para. 59.

this issue, it has now fully recognized its justiciability.[209] The Court's approach in interpreting its own role and in assuming its duty to decide the case is admirable. Numerous other domestic courts should follow this example. It is now clearer for the armed forces, organized armed groups, and innocent civilians which behaviour can be subject to an attack. This improvement also translates into greater legal certainty. Furthermore, certain types of targeting now officially constitute war crimes, and such limitations did not previously exist. Up to the time of this decision, carrying out a wide range of targeted killings seemed to be tolerated and allowed. Overall, the decision represents a tremendous development in the field of state responsibility and, possibly, also in relation to criminal responsibility for targeted killing.[210]

Nonetheless, there are also numerous limitations and issues that require further consideration with respect to the decision discussed. One of the greatest difficulties of the reasoning lies in the fact that Chief Justice Barak did not pay further attention to the application of the law of belligerent occupation. Situations in which the Fourth Geneva Convention[211] – as well as the rights enshrined therein – would be applicable seem to fall outside the scope of the decision. It is also uncertain whether the entire Convention or only parts of it would apply to a particular situation where targeted killing is contemplated.

In general, the judgment does not appear to contribute to the clarification of the content of the law concerning 'direct participation in hostilities'. Rather, it seems to replicate the existing legal framework, together with its uncertainties. Chief Justice Barak's interpretation of the limitations imposed on the targeted killing of civilians participating directly in hostilities was too broad and needs to be specified further in future decisions as well as in international humanitarian law.

This improvement could be made in four concrete areas. First, the Chief Justice adopted a wide interpretation of the 'direct participation' concept by applying the functional approach versus the approach requiring a close link to a situation of hostilities. It is this latter, narrower approach that is more appropriate to follow in future cases. Second, in interpreting the requirement of 'for such time', Chief Justice Barak used the 'Affirmative Disengagement Approach' and a version of the 'Specific Acts Approach', whereas the trend in international humanitarian law would have commended resorting to the 'Limited Membership Approach'. Third, his interpretation of the concept of proportionality could have been more in tune with the clarifications of the ICRC Commentary. Finally, the four requirements stated, which must be followed in each case before a targeted killing is carried out, are quite general and it is not exactly clear how they will apply in practice. Further steps should be taken in order to ensure that they are respected and followed.

In analysing these requirements, Barak exclusively considered clear-cut cases and he did not indicate which approach should be taken in the margin between. A partial reason for this is that on these issues international humanitarian law is unclear

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209. This finding may have been prompted, among others, by the fact that the judgment could have repercussions on the conduct of targeted-killing proceedings initiated abroad. See Cohen and Shany, *supra* note 1, at 319; Ben-Naftali, *supra* note 1, at 325–6.
210. Section 2.3.5.1 *supra*, n. 182.
211. Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 33.

and provides no reliable judicial guidelines. However, the fact remains that Barak's reasoning left to Israeli military commanders major discretion in targeting terrorists. On the one hand, given that military commanders need to have room for manoeuvre when taking such decisions, this is justified. They have more experience than the judiciary in military affairs and it is their duty under the law to decide whether such measures should be taken in cases of necessity. On the other hand, the broad definition of these conditions is dangerous for the civilian population, since granting an important discretion to the state increases the risk of arbitrary targeted killing. The likelihood of injuring or killing persons other than the target is also greater in those circumstances. It should be noted that the Palestinian territories are densely populated, and that most operations can only take place within these territories.[212] Furthermore, the generality and ambiguity of the requirements applicable in a case of targeted killing can be interpreted to the advantage of those carrying them out, or misinterpreted in a situation of emergency.

The most fundamental criticism that can be addressed to the Chief Justice's reasoning concerns his theoretical starting point: as a general rule, he considered that the targeted killing of terrorists is legal.[213] His reasoning does, in effect, seem to acknowledge, albeit implicitly, that a policy of targeted killing is acceptable.[214] Nonetheless, the targeted killing of civilians who take a direct part in hostilities should be treated as an *exception*, and as a result the concept of 'direct participation in hostilities' should be construed narrowly for the benefit of the innocent bystanders.[215] Such an interpretation is consistent with the presumption of protection of the civilian population enshrined in international humanitarian law. This presumption requires that '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian'.[216] Civilians are protected from attack for such time as they do not take a direct part in hostilities.[217] During this time they benefit from the presumption and any measures affecting them should be adapted and interpreted in light of this requirement. This is not merely an ideal of the *lege ferenda*; it is also firmly entrenched in the existing framework of international humanitarian law. Hence, during operations that represent a risk for civilians, the balance of interest should shift in favour of the protection of the Palestinian population.[218] The duty to protect civilians should then outweigh the military advantage to be gained from a given

212. Ben-Naftali and Michaeli, *supra* note 8, at 291.
213. However, a different and interesting view has been recently formulated in relation to this question. Ben-Naftali found that 'the "inconclusive conclusion" of the Court is quite significant: it appears that the Court cannot determine whether *the policy* of targeted killings is permissible or impermissible. Appearances, however, are notoriously deceptive: the Court neither outlawed the policy nor did it legitimize targeted killings as a policy *ab initio*. It is quite possible that it attempted to preclude it from the ambit of Article 7 of the ICC Statute, which requires the establishment of a governmental policy as an element of crimes against humanity' (emphasis in original); *see* Ben-Naftali, *supra* note 1, at 330.
214. If a targeted killing fulfils the criteria for *ex ante* and *ex post* verification, then it can be considered as being legal. These requirements are discussed in section 2.3.5.1 *supra*, at 213 et seq. See *Public Committee Against Torture in Israel v. Government of Israel*, *supra* note 1, Opinion of Chief Justice Barak, para. 40. For a similar line of argument, see Fenrick, *supra* note 1, at 338.
215. Ibid., at 278–9.
216. Additional Protocol I, *supra* note 30, Art. 50(1).
217. Ibid., Arts. 51(2) and 51(3).
218. Ben-Naftali and Michaeli, *supra* note 8, at 278–9.

operation. In this context, if the presumption was strictly followed, targeted killing would constitute a rare exception, and the conditions imposed thereon would need to be strictly interpreted.[219] Although the Court under the presidency of Chief Justice Barak did not fully follow this pattern in the case, there is hope that targeted killing will be limited further in future decisions and that instances where it is considered a war crime will increase.

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219. This should constitute an additional explicit limitation to targeted killing.