# Paras 1 to 28

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: Supreme Court of Israel, *Public Committee against Torture in Israel v. Government of Israel*, Case No. HCJ 769/02, 13 December 2006, available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf, footnotes omitted]

**HCJ 769/02**

**1. The Public Committee against Torture in Israel**
**2. Palestinian Society for the Protection of Human Rights and the Environment**
**v.**
**1. The Government of Israel [*et al.*]**

The Supreme Court Sitting as the High Court of Justice
[…]

**JUDGMENT**

**President (Emeritus) A. Barak:**

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

## 1. Factual Background

[…]

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

[…]

## 5. The General Normative Framework

### A. International Armed Conflict

1. The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter “the area”) a continuous situation of armed conflict has existed since the first *intifada*. […]
   […]

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

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

   “An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict” […]

   This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *iue [sic] in bello*. From the humanitarian perspective, it is part of international humanitarian law. That humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be

supplemented by human rights law […]. Alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier "carries in his pack" and which go along with him wherever he may turn, may apply […].:

1. Substantial parts of international law dealing with armed conflicts are of customary character. That customary law is part of Israeli law, "by force of the State of Israel's existence as a sovereign and independent state" […].

   The international law entrenched in international conventions which is not part of customary international law (whether Israel is party to them or not), is not enacted in domestic law of the State of Israel […]. In the petition before us, there is no question regarding contradictory Israeli law. […]

1. International law dealing with the armed conflict between Israel and the terrorist organizations is entrenched in a number of sources […]. The primary sources are as follows: the fourth Hague convention. The provisions of that convention, to which Israel is not a party, are of customary international law status […]. Alongside it stands *The Fourth Geneva Convention*. Israel is party to that convention. It has not been enacted through domestic Israeli legislation. However, its customary provisions constitute part of the law of the State of Israel […]. As is well known, the position of the Government of Israel is that, in principle, the laws of belligerent occupation in *The Fourth Geneva Convention* do not apply regarding the area. However, Israel honors the humanitarian provisions of that convention […]. That is sufficient for the purposes of the petition before us. In addition, the laws of armed conflict are entrenched in 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, hereinafter *The First Protocol*). Israel is not party to that protocol, and it was not enacted in domestic Israeli legislation. Of course, the customary provisions of *The First Protocol* are part of Israeli law.
2. Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the area is the international law dealing with armed conflicts. […] According to that view, the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict […]. Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character. […]
3. The international law dealing with armed conflicts is based upon a delicate balance between two contradictory considerations […]. One consists of the humanitarian considerations regarding those harmed as a result of an armed conflict. These considerations are based upon the rights of the individual, and his dignity. The other consists of military need and success […]. The balance between these considerations is the basis of international law of armed conflict. […]
   […]

   The result of that balancing is that human rights are protected by the law of armed conflict, but not to their full scope. The same is so regarding the military needs. They are given an opportunity to be fulfilled, but not to their full scope. This balancing reflects the relativity of human rights, and the limits of military needs. The balancing point is not constant. "In certain issues the accent is upon the military

need, and in others the accent is upon the needs of the civilian population" […]. What are the factors affecting the balancing point?

1. A central consideration affecting the balancing point is the identity of the person harmed, or the objective compromised in armed conflict. That is the central principle of the distinction […]. Customary international law regarding armed conflicts distinguishes between combatants and military targets, and non-combatants, in other words, civilians and civilian objectives […]. According to the basic principle of the distinction, the balancing point between the State's military need and the other side's combatants and military objectives is not the same as the balancing point between the state's military need and the other side's civilians and civilian objectives. In general, combatants and military objectives are legitimate targets for military attack. Their lives and bodies are endangered by the combat. They can be killed and wounded. […] Opposite the combatants and military objectives stand the civilians and civilian objectives. Military attack directed at them is forbidden. Their lives and bodies are protected from the dangers of combat, provided that they themselves do not take a direct part in the combat. That customary principle is worded as follows:

   "Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

   Rule 6: Civilians are protected against attack unless and for such time as they take a direct part in hostilities.

   Rule 7: The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects" […] [**See** ICRC, Customary International Humanitarian Law]
   […]

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

**B. Combatants**

1. What makes a person a combatant? This category includes, of course, the armed forces. It also includes people who fulfill the following conditions […]:
   "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
   1. 1. To be commanded by a person responsible for his subordinates;
      2. To have a fixed distinctive emblem recognizable at a distance;
      3. To carry arms openly; and
      4. To conduct their operations in accordance with the laws and customs of war.

   . . ."

   Article 13 of The First and Second Geneva Conventions and article 4 of The Third Geneva Conventions

repeat that wording (compare also article 43 of The First Protocol). […] [T]he terrorist organizations from the area, and their members, do not fulfill the conditions for combatants […]. It will suffice to say that they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war. […]

1. The terrorists and their organizations, with which the State of Israel has an armed conflict of international character, do not fall into the category of combatants. They do not belong to the armed forces, and they do not belong to units to which international law grants status similar to that of combatants. Indeed, the terrorists and the organizations which send them to carry out attacks are unlawful combatants. They do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished. […]

   The Imprisonment of Unlawful combatants Law, […] authorizes the chief of the general staff of the IDF to issue an order for the administrative detention of an "unlawful combatant". That term is defined in the statute as "a person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force which commits hostilities against the state of Israel, who does not fulfill the conditions granting prisoner of war status in international humanitarian law, as determined in article 4 of III Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949." [**See also** Israel, Detention of Unlawful Combatants] Needless to say, unlawful combatants are not beyond the law. They are not "outlaws". […] [T]heir human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law […]. Does it follow that in Israel's conduct of combat against the terrorist organizations, Israel is not entitled to harm them, and Israel is not entitled to kill them even if they are planning, launching, or committing terrorist attacks? If they were seen as (legal) combatants, the answer would of course be that Israel is entitled to harm them. Just as it is permissible to harm a soldier of an enemy country, so can terrorists be harmed. Accordingly, they would also enjoy the status of prisoners of war, and the rest of the protections granted to legal combatants. However, as we have seen, the terrorists acting against Israel are not combatants according to the definition of that term in international law; they are not entitled to the status of prisoners of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army. Are they seen as civilians under the law? It is to the examination of that question which we now turn.

**C. Civilians**

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

"states must never make civilians the object of attack" […].

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

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

From that follows also the duty to do everything possible to minimize collateral damage to the civilian

population during the attacks on “combatants” […]. Against the background of that protection granted to “civilians”, the question what constitutes a “civilian” for the purposes of that law arises. The approach of customary international law is that “civilians” are those who are not “combatants” […].

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

**D. A Third Category: Unlawful combatants?**

1. In the oral and written arguments before us, the State asked us to recognize a third category of persons, that of unlawful combatants. These are people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. Thus, for example, they are not entitled to the status of prisoners of war. The State’s position is that the terrorists who participate in the armed conflict between Israel and the terrorist organizations fall under this category of unlawful combatants.
2. […] In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category. That is the case according to the current state of international law, both international treaty law and customary international law […]. It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*. It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law. However, new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality […]. In the spirit of such interpretation, we shall now proceed to the customary international law dealing with the status of civilians who constitute unlawful combatants.

# Paras 29 to 40

## 6. Civilians who are Unlawful combatants

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

1. Civilians enjoy comprehensive protection of their lives, liberty, and property. […] As opposed to combatants, whom one can harm due to their status as combatants, civilians are not to be harmed, due to their status as civilians. A provision in this spirit is determined in article 51(2) of *The First Protocol*, which constitutes customary international law:

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

[…] That protection is granted to all civilians, excepting those civilians taking a direct part in hostilities. Indeed, the protection from attack is not granted to unlawful combatants who are taking a direct part in the hostilities. […]

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

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

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

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

As is well known, Israel is not party to *The First Protocol*. Thus, it clearly was not enacted in domestic Israeli legislation. Does the basic principle express customary international law? The position of The Red Cross is that it is a principle of customary international law […]. That position is acceptable to us. It fits the provision Common Article 3 of *The Geneva Convention*s, to which Israel is party and which, according to all, reflects customary international law, pursuant to which protection is granted to persons "[T]aking no active part in the hostilities." […] According to the State's position, "all that is determined in customary international law is that it is forbidden to harm civilians in general, and it expressly determines that it is permissible to harm a civilian who 'takes a direct part in hostilities.' Regarding the period of time during which such harm is permitted, there is no restriction" […]. Therefore, according to the position of the State, the non-customary part of article 51(3) of *The First Protocol* is the part which determines that civilians do not enjoy protection from attack "*for such time*" as they are taking a direct part in hostilities. As mentioned, our position is that all of the parts of article 51(3) of *The First Protocol* express customary international law. What is the scope of that provision? It is to that question that we now turn.

**C. The Essence of the Basic Principle**

1. The basic approach is thus as follows: a civilian – that is, a person who does not fall into the category of combatant – must refrain from directly participating in hostilities […]. A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, e.g. those granted to a prisoner of war. True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack […].

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

1. We have seen that the basic principle is that the civilian population, and single civilians, are protected from the dangers of military activity and are not targets for attack. That protection is granted to civilians "unless and for such time as they take a direct part in hostilities" […]. That provision is composed of three main parts. The first part is the requirement that civilians take part in "hostilities"; the second part is the requirement that civilians take a "direct" part in hostilities; the third part is the provision by which civilians are not protected from attack "for such time" as they take a direct part in hostilities. We shall discuss each of those parts separately.

**D. The First Part: "Taking . . . part in hostilities"**

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

"Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces" […].

[…] It seems that acts which by nature and objective are intended to cause damage to civilians should be added to that definition. According to the accepted definition, a civilian is taking part in hostilities when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for the hostilities. Regarding taking part in hostilities, there is no condition that the civilian use his weapon, nor is their a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all. COMMENTARY ON THE ADDITIONAL PROTOCOLS discussed that issue:

“It seems that the word ‘hostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon” […].

As we have seen, that approach is not limited merely to the issue of “hostilities” toward the army or the state. It applies also to hostilities against the civilian population of the state […].

**E. Second Part: “Takes a Direct Part”**

1. Civilians lose the protection against military attack, granted to them by customary international law dealing with international armed conflict […], if “they take a direct part in hostilities”. That provision differentiates between civilians taking a direct part in hostilities (from whom the protection from attack is removed) and civilians taking an indirect part in hostilities (who continue to enjoy protection from attack). What is that differentiation? A similar provision appears in Common Article 3 of *The Geneva Conventions*, which uses the wording “active part in hostilities”. The judgment of the International Criminal Tribunal for Rwanda determined that these two terms are of identical content […]. What is that content? It seems accepted in the international literature that an agreed upon definition of the term “direct” in the context under discussion does not exist […].

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

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

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

“Civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party” […].

And what is the law in the space between these two extremes? On the one hand, the desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term “direct” part in hostilities. […]

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

"Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted" […]. [**See** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

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

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

In the international literature there is a debate surrounding the following case: a person driving a truck

carrying ammunition […]. Some are of the opinion that such a person is taking a direct part in the hostilities (and thus he can be attacked), and some are of the opinion that he is not taking a direct part (and thus he cannot be attacked). Both opinions are in agreement that the ammunition in the truck can be attacked. The disagreement regards the attack upon the civilian driver. Those who think that he is taking a direct part in the hostilities are of the opinion that he can be attacked. Those who think that he is not taking a direct part in the hostilities believe that he cannot be attacked, but that if he is wounded, that is collateral damage caused to civilians proximate to the attackable military objective. In our opinion, if the civilian is driving the ammunition to the place from which it will be used for the purposes of hostilities, he should be seen as taking a direct part in the hostilities […].

1. What is the law regarding civilians serving as a "human shield" for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities […].
2. We have seen that a civilian causing harm to the army is taking "a direct part" in hostilities. What says the law about those who enlist him to take a direct part in the hostilities, and those who send him to commit hostilities? Is there a difference between his direct commanders and those responsible for them? Is the "direct" part taken only by the last terrorist in the chain of command, or by the entire chain? In our opinion, the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take "a direct part". The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active) […].

**F. The Third Part: "For Such Time"**

1. […] A civilian taking a part in hostilities loses the protection from attack "for such time" as he is taking part in those hostilities. If "such time" has passed – the protection granted to the civilian returns. In respondents' opinion, that part of article 51(3) of The First Protocol is not of customary character, and the State of Israel is not obligated to act according to it. We cannot accept that approach. As we have seen, all of the parts of article 51(3) of The First Protocol reflect customary international law, including the time requirement. The key question is: how is that provision to be interpreted, and what is its scope?
2. […] With no consensus regarding the interpretation of the wording "for such time", there is no choice but to proceed from case to case. Again, it is helpful to examine the extreme cases. On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility […].
3. These examples point out the dilemma which the "for such time" requirement presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from

them (entirely, or for a long period) is not to be harmed. On the other hand, the "revolving door" phenomenon, by which each terrorist has "horns of the alter" […] to grasp or a "city of refuge" […] to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided […]. In the wide area between those two possibilities, one finds the "gray" cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case. In that context, the following four things should be said: first, well based information is needed before categorizing a civilian as falling into one of the discussed categories. Innocent civilians are not to be harmed […]. Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities […]. CASSESE rightly stated that –

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

The burden of proof on the attacking army is heavy […]. In the case of doubt, careful verification is needed before an attack is made. HENCKAERTS & DOSWALD-BECK made this point:
"[W]hen there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious" […].

Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed […]. Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force. […]

Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required […]. However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities […]. Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used. Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent […]. In appropriate cases it is appropriate to pay compensation as a result of harm

caused to an innocent civilian […]. Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test. We shall now proceed to the examination of that question.

# Paras 42 to 60

## 7. Proportionality

[**See also** ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territories, Part B., HCJ, Beit Sourik Village Council v. The Government of Israel, paras 36-85]

[…]

### B. Proportionality in an International Armed Conflict

1. The principle of proportionality is a substantial part of international law regarding armed conflict […]. That law is of customary character […]. The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate […]. Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as "human shields" from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, *inter alia*, the requirements of the principle of proportionality.
2. The principle of proportionality applies in every case in which civilians are harmed at such time as they are not taking a direct part in hostilities. […]
3. The requirement of proportionality in the laws of armed conflict focuses primarily upon what our constitutional law calls proportionality *"stricto senso" [sic]*, that is, the requirement that there be a proper proportionate relationship between the military objective and the civilian damage. […]

***Proper Proportion between Benefit and Damage***

1. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests […].

When the damage to innocent civilians is not proportionate to the benefit of the attacking army, the attack is disproportionate and forbidden.

1. That aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities

is endangering his life, and he might – like a combatant – be the objective of a fatal attack. That killing is permitted. However, that proportionality is required in any case in which an innocent civilian is harmed. Thus, the requirements of proportionality *stricto senso [sic]* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The proportionality rule applies in regards to harm to those innocent civilians […]. The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists […]. Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed […]. The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated […].

[…]

**Implementation of the General Principles in This Case**

1. […] The examination of the "targeted killing" – and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians – has shown that the question of the legality of the preventative strike according to customary international law is complex […]. The result of that examination is not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" […]. Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.

[…]

# Vice President E. Rivlin

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

[…]

The issue of the correct, proper classification of terrorist organizations and their members raises difficult questions. Customary international humanitarian law obligates the parties to the conflict to differentiate

between civilians and combatants and between military objectives and civilian objectives, and to refrain from causing extensive damage to enemy civilians. The question is whether *reality* hasn't created, *de facto*, an additional group, with a special legal status. Indeed, the scope of danger posed to the State of Israel and the security of her civilians by the terrorist organizations, and the fact that the means usually employed against lawbreaking citizens are not suitable to meet the threats posed by terrorist activity, make one uneasy when attempting to fit the traditional category of "civilians" to those taking an active part in acts of terrorism. They are not "combatants" as per the definition in international law. The way in which "combatants" were defined in the relevant conventions actually stemmed from the desire to deny "unlawful combatants" certain protections granted to legal combatants (especially protections regarding the issues of prisoner of war status and criminal prosecution). The latter are "unprivileged belligerents" […]. However, the very characteristics of the terrorist organizations and their members that exclude them from the category of "combatants" – lack of fixed distinctive emblems recognizable at a distance and noncompliance with the laws and customs of war – create difficulty. Awarding a preferential status, even if only on certain issues, to those who choose to become "unlawful combatants" and do not act according to the rules of international law and the rules of morality and humanitarianism might be undesirable.

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

"…a person is not allowed to wear simultaneously two caps: the hat of civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) […] specifically permits derogation from the rights of such a person (the derogation being less extensive in occupied territories, pursuant to the second Paragraph of Article 5)" […].

Elsewhere it was written that "if it is not proper to see terrorists as combatants, and as a result to grant them the protections to which combatants are entitled, they should even less be seen as civilians who are not combatants, and thus granted many more rights" […]. Those of the opinion that the third category of unlawful combatants exists emphasize that its members include those who wish to blur the boundaries between civilians and combatants […]. The difficulty intensifies when we take into account that those who differentiate themselves from legal combatants on the one hand, and from innocent civilians on the other, are not homogenous. They include groups which are not necessarily identical to each other in terms of the willingness to abide by fundamental legal and human norms. It is especially appropriate, in this context, to differentiate between unlawful combatants fighting against an army and those who purposely act against civilians.

It thus appears that international law must adapt itself to the era in which we are living. In light of the data

presented before us, President Barak proposes to perform the adaptation within the framework of the existing law, which recognizes, in his opinion, two categories – combatants and civilians. […]. As stated, other approaches are possible. I do not find a need to expand on them, since in light of the rules of interpretation proposed by President Barak, the theoretical distinction loses its sting.

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

1. Against the background of the differences between "legal" combatants and "international-law-breaking combatants", an analogy can be made between the means of combat permitted in a conflict between two armies, and "targeted killing" of terrorists […]. The attitude behind the "targeted killing" policy is that the weapons should be directed exclusively toward those substantially involved in terrorist activity. Indeed, in conventional war combatants are marked and differentiated from the civilian population. Those combatants can be harmed (subject to the restrictions of international law). Civilians are not to be harmed. Similarly, in the context of the fight against terrorism, it is permissible to harm international-law-breaking combatants, but harm to civilians should be avoided to the extent possible. The difficulty stems, of course, from the fact that the unlawful combatants, by definition, do not act according to the laws of war, often disguising themselves within the civilian population, in contradiction to the express provisions of *The First Protocol of The Geneva Conventions*. […]

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

[…]

**President D. Beinisch:**

I concur in the judgment of President (emeritus) Barak […].

[…]

Thus it is decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law. The law of targeted killing is determined in the

customary international law, and the legality of each individual such act must be determined in light of it.

Given today, 23 Kislev 5767 (13 December 2006)

# Discussion

## A. Qualification of the conflict and applicable law

1. *Paras 16 onwards*
    a. How does the High Court of Justice (HCJ) qualify the conflict between the State of Israel and Palestinian armed groups? Do you agree? (GC I-IV, Art. 2) Does the fact that it is occurring, at least partly, in occupied territory suffice to qualify it as an international one?
    b. Does it make a difference that part of the territory where the conflict is taking place is occupied? In such parts of the territory, should the law of belligerent occupation apply instead of the rules on the conduct of hostilities? Should the law applicable vary according to the area where the conflict takes place and to the degree of control of the Israeli forces (see the difference of status between the Gaza Strip and the West Bank)? What would the implications of such a distinction be in terms of the legality of targeted killings?
    c. Do you agree with the HCJ that any conflict which crosses the border of a State automatically becomes an international armed conflict *(para. 18)*? (GC I-IV, Art. 2)
    d. Would it have been possible for the Court to qualify the conflict as being of a non-international character? What would have been different in the Court's conclusion if it had done so?
    e. Does international human rights law apply to targeted killings? In occupied territory? In territory which is not occupied by Israel? In your opinion? In the opinion of the Court?
    f. What if both IHL and human rights law apply?

## B. Qualification of the persons

1. *Paras 24 onwards*
    a. According to the HCJ, what is the status of Palestinians involved in armed groups fighting against the State of Israel? To what protection are they entitled?
    b. Do you agree with President Barak's conclusion that there is currently no room for a third category of persons? Would the outcome of the decision have been the same if a category of "unlawful combatants" had been recognized?
    c. Do you think it is possible to have an international armed conflict with no combatants on one side? Is it possible for the enemy belligerents captured by one party to be granted prisoner-of-war status, but for that party's belligerents, when captured by the other party, to be denied it? What is the protection granted to Palestinian fighters captured by the IDF? According to the Court *(para. 25)*? Conversely, what should be the status of Israeli soldiers captured by Palestinians? Should they have POW status? Would it be realistic to say that they should?

## C. Direct participation in hostilities

1. *Paras 29 onwards*
    a. Does a civilian who directly participates in hostilities violate IHL?

b. When may civilians be legitimate targets of attack? Where does the HCJ draw the line between taking part in hostilities and not taking part in hostilities? Is it a clear threshold?
c. Which examples mentioned by the Court in paras 34-37 as cases of direct participation do you agree with, and which do you disagree with?
d. *(Para. 35)* Where does the Court draw the line between taking a direct and an indirect part in hostilities? Is it a clear threshold? In your opinion, is the functional approach (i.e. based on the idea that a civilian becomes a legitimate target as soon as he performs a combatant function) the right criterion to apply in order to qualify a civilian as an unlawful combatant? Is there any possibility for another criterion to be used?
e. Do you think that someone not carrying any weapon may still be considered as directly participating in hostilities? If so, in which circumstances?
f. Do you think the person driving a truck carrying ammunition is directly participating in hostilities? In which circumstances *(para. 35)*?
g. May any member of an armed group be targeted? Or is it necessary first and foremost to determine his role and status within the group? According to the Court? According to you?
h. Up to which level of command and responsibility is someone taking direct part in hostilities *(para. 37)*? Do you agree with the Court's assertion that armed groups' leaders who order attacks are legitimate targets, just as much as the persons who actually carry out the attacks? May any leader be targeted, regardless of whether he is a military or a political leader?
i. What is the conclusion of the HCJ regarding human shields *(para. 36)*? When may they be legitimate targets? Is it realistic to distinguish between voluntary and involuntary human shields? What is the legal basis for such a distinction? If voluntary human shields are legitimate targets, what is their contribution to hostilities that allows them to be considered as participating in such hostilities? To be a voluntary human shield, is the mere voluntary presence in a place that constitutes a military objective sufficient, or must the person have the intent to shield the objective against an attack? How can such intent be determined in the conduct of hostilities? (PI, Art. 51(7) and (8); CIHL, Rule 97)
j. *(Paras 38-39)* When does a civilian directly participating in hostilities cease to do so? Do you agree with the Court's conclusion that once a person enters a "terrorist" organization, he/she becomes a full-time fighter who may therefore be attacked at any time, even when not engaged in hostilities? If not, when do they stop being legitimate targets? What does such a distinction between occasional fighters and full-time fighters imply in terms of knowledge about the person targeted?
k. *(Paras 38-39)* Do you agree with the Court's assertion that a distinction should be made between the two types of civilians directly participating in hostilities, i.e. between occasional fighters and full-time fighters? What is the consequence for each group in terms of loss of protection? Does this distinction have any basis in IHL? (P I, Arts 50(1) and 51(3)) Is Art. 5 of GC IV relevant for our discussion?

## D. Conduct of hostilities

1. Is the deliberate killing of a protected person ever lawful? If that person is a civilian? If that person is a combatant? If that person was taking direct part in hostilities? Can a person taking direct part in hostilities be simultaneously in the power of the enemy and therefore a protected person? At least in an occupied territory? (GC IV, Arts 4 and 27)

2. *Para. 40*
    a. What is the four-fold test set by the HCJ in order to determine whether an attack targeting civilians is lawful? Does it have a basis in IHL? When, according to the Court, should this test be applied?
    b. What does the first condition of the test entail? Is it similar to the tests set in Arts 52(2) and 57 of P I? May Art. 52(2) be used to determine whether a person is a legitimate military target?
    c. Under IHL, does the proportionality principle protect combatants? Civilians while directly participating in hostilities? Is there any obligation to use non-lethal means when possible? Is there any obligation to arrest rather than kill a combatant? A civilian directly participating in hostilities? Does the least harmful means requirement, as set by the Court, have any basis in IHL? (HR, Art. 22; P I, Arts 35(1), 51(5)(b))
    d. Under IHL, is there any obligation to subsequently investigate attacks? If combatants are killed? If civilians directly participating in hostilities are killed? If other civilians are killed? Is there such an obligation under international human rights law? Is there an obligation under IHL to pay compensation to persons who have been affected by collateral damage caused by the attack? Under human rights law?
    e. When is an attack proportionate? Which factors should be taken into account? Whose loss is to be weighed against whose military advantage? According to the HCJ? According to you? (P I, Art. 51(5)(b); CIHL, Rule 14)
3. *(Para. 42 onwards)* Is the Court's definition of the principle of proportionality the same as that in P I, Art. 51(5)(b)?
4. Does the decision clarify whether any of the targeted killings opposed by the petitioners were unlawful? Does it give clear instructions to the IDF as to when targeted killings will be lawful in the future? As to the persons who may be targeted? As to the other conditions and requirements?