# CASE NOTES

# THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL v THE GOVERNMENT OF ISRAEL*

# THE ISRAELI HIGH COURT OF JUSTICE TARGETED KILLING DECISION

CONTENTS



## I INTRODUCTION

### A *Israel's Policy of Targeted Killing*

On 9 November 2000, Hussein 'Abayat, a senior Fatah Tanzim activist, was driving his car on a busy street in his village in the West Bank. An Israel Defence Forces ('IDF') helicopter fired three missiles at him, killing him and two women, Rahma Shahin and 'Aziza Muhammad Danun, who were standing outside a house.[1] 'Abayat's killing, less than two months after the al-Aqsa

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* *The Public Committee Against Torture in Israel v The Government of Israel* (2006) HCJ 769/02 ('*PCATI*'), available in English from <http://elyon1.court.gov.il/eng/home/index.html> at 18 October 2007.

1 Yael Stein, *Israel's Assassination Policy: Extra-Judicial Executions* (B'Tselem Position Paper, January 2001) (Maya Johnston trans, 2001) 1.

Intifada began, marked the start of Israel's policy of targeted killings.[2] Israel has since publicly confirmed that the practice of targeted killings occurs under government orders. It can therefore be taken to be state policy.[3] According to

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[2] Ibid. For articles published on Israel's targeted killing policy, see: Orna Ben-Naftali and Keren 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; Orna Ben-Naftali and Keren Michaeli, 'Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings' (2003) 1 *Journal of International Criminal Justice* 368; Leora Bilsky, 'Suicidal Terror, Radical Evil, and the Distortion of Politics and Law' (2004) 5 *Theoretical Inquiries in Law* 131; Daniel Byman, 'Do Targeted Killings Work?' (2006) 85 *Foreign Affairs* 95; Steven R David, 'Fatal Choices: Israel's Policy of Targeted Killing' (2003) 2(3) *Review of International Affairs* 138; Steven R David, 'Israel's Policy of Targeted Killing' (2003) 17(1) *Ethics & International Affairs* 111; Steven R David, 'If Not Combatants, Certainly Not Civilians' (2003) 17(1) *Ethics & International Affairs* 138; Emanuel Gross, 'Thwarting Terrorist 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 and Comparative Law Journal* 195; Emanuel Gross, 'The Laws of War Waged between Democratic States and Terrorist Organizations: Real or Illusive?' (2003) 15 *Florida Journal of International Law* 389; Michael L Gross, 'Fighting by Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy' (2003) 51 *Political Studies* 350; Amos Guiora, 'Targeted Killing as Active Self-Defense' (2004) 36 *Case Western Reserve Journal of International Law* 319; Asa Kasher and Amos Yadlin, 'Assassination and Preventive Killing' (2005) 25(1) *SAIS Review* 41; J Nicholas Kendall, 'Israeli Counter-Terrorism: "Targeted Killings" under International Law' (2002) 80 *North Carolina Law Review* 1069; David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 *European Journal of International Law* 212; Georg Nolte, 'Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order' (2004) 5 *Theoretical Inquiries in Law* 111; Yuval Shany, 'Israeli Counter-Terrorism Measures: Are They "Kosher" under International Law?' in Michael N Schmitt and Gian Luca Beruto (eds), *Terrorism and International Law: Challenges and Responses* (2003) 96; Daniel Statman, 'Targeted Killing' (2004) 5 *Theoretical Inquiries in Law* 179; Yael Stein, 'By Any Name Illegal and Immoral' (2003) 17(1) *Ethics & International Affairs* 127. For articles specifically on the targeted killing judgment, see: Orna Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law' (2007) 5 *Journal of International Criminal Justice* 322; Antonio Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings' (2007) 5 *Journal of International Criminal Justice* 339; Amichai Cohen and Yuval Shany, 'A Development of Modest Proportions: The Application of the Principle of Proportionality in the *Targeted Killings* Case' (2007) 5 *Journal of International Criminal Justice* 310; William J Fenrick, 'The *Targeted Killings* Judgment and the Scope of Direct Participation in Hostilities' (2007) 5 *Journal of International Criminal Justice* 332; Roy S Schondorf, 'The Targeted Killings Judgment: A Preliminary Assessment' (2007) 5 *Journal of International Criminal Justice* 301; Orna Ben-Naftali and Keren Michaeli, '*Public Committee Against Torture in Israel v Government of Israel*' (2007) 101 *American Journal of International Law* 459.

[3] The IDF contingency plan presented to Cabinet to counter the firing of Qassam rockets at Israel from Gaza reflects existing IDF guidelines about Israel's use of targeted killing. One of the components of the plan included '[t]he renewal of aerial assassinations of high-ranking terrorists as well as Palestinians responsible for firing Qassam rockets and arms smuggling': Aluf Benn et al, 'IDF Unveils Plan to Counter Gaza Militants; Rocket Strikes Sderot', *Ha'aretz* (Israel) 8 May 2007 <http://www.haaretz.com/hasen/spages/856795.html> at 18 October 2007. For government statements defending a series of targeted killings in May 2007 which were in response to Qassam rockets, see Aluf Benn, Avi Issacharoff and Amos Harel, 'PM Approves "Severe and Harsh" Response to Qassam Rocket Fire', *Ha'aretz* (Israel) 16 May 2007 <http://www.haaretz.com/hasen/spages/860045.html> at 18 October 2007; Aluf Benn et al, 'IDF Troops, Tanks Enter Gaza: 6 Dead, Including 4 Hamas Men, in IAF Strikes', *Ha'aretz* (Israel) 18 May 2007 <http://www.haaretz.com/hasen/spages/860522.html> at 18 October 2007; Avi Issacharoff, Amos Harel and Barak Ravid, 'Palestinians: Three Killed in IAF Strike on Vehicle in Gaza', *Ha'aretz* (Israel) 20 May 2007 <http://www.haaretz.com/hasen/spages/860932.html> at 18 October 2007.

B'Tselem, by 31 August 2007, 367 Palestinians had been killed as a result of Israel's policy of targeted killing.[4] Of those casualties, 218 were objects of the targeted killings and 149 were innocent bystanders.[5] The legality of this policy has been widely debated, both in Israel and internationally. The decision in *The Public Committee Against Torture in Israel v The Government of Israel* ('*PCATI*')[6] sought to address this issue.

### B *Background to the Case*

On Thursday 14 December 2006, the High Court of Justice ('HCJ')[7] handed down a decision that it had taken five years to reach.[8] In January 2002, the Public Committee Against Torture in Israel ('PCATI') and the Palestinian Society for the Protection of Human Rights and the Environment ('LAW') filed a petition against the State of Israel.[9] The petitioners argued that Israel's assassination

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4 B'Tselem, *Statistics: Fatalities* (2007) <http://www.btselem.org/English/Statistics/Casualties.asp> at 18 October 2007.

5 Ibid.

6 (2006) HCJ 769/02.

7 Yaacov Zemach explains the function of the High Court of Justice:

> As the High Court of Justice, the Supreme Court rules as a court of first instance, primarily regarding the legality of decisions of State authorities: Government decisions, those of local authorities and other bodies and persons performing public functions under the law. It rules on matters in which it considers it necessary to grant relief in the interests of justice, and which are not within the jurisdiction of another court or tribunal.

Yaacov S Zemach, *The Judiciary of Israel* (3rd ed, 2002) 48.

8 In February 2005, the Court accepted the argument of the State that the petition was no longer relevant following the joint declaration at Sharm-el-Sheik (by then Prime Minister Ariel Sharon and Palestinian Authority Chairman Mahmoud Abbas) of a ceasefire and an end to targeted killings. The Court therefore decided to 'freeze' the petition. In November 2005, deliberations resumed following the recommencement of targeted killings by the IDF: see PCATI, 'The Deputy State Attorney: The State Has Ceased the Assassinations Policy following the Understandings Reached at Sharm-a-Sheik' (Press Release, 17 February 2005), available from <http://www.stoptorture.org.il> at 18 October 2007. In November 2006, intellectuals including Nobel Prize winners, former military staff and human rights organisations submitted a petition to the Court in an attempt to compel the justices to rule on the legality of targeted killings so as to not 'delay further' the judgment. The petition stated that 'due to the fact that until today, no one in the High Court spoke over the issue of the petitions against targeted killings, Israeli governments in the past four years address the issue as something that High Court judges do not oppose'. This petition was filed after 19 Palestinian civilians were killed and 55 were wounded in Beit Hanoun. It stated: 'If a ruling is not handed immediately, this will cause the death of more innocent people, as was the case several days ago in Beit Hanoun': Aviram Zino, 'Left-Wingers Demand Ruling on Targeted Killings', *Ynetnews* (Israel) 13 November 2006 <http://www.ynetnews.com/articles/0,7340,L-3327563,00.html> at 18 October 2007.

9 The Court allowed amici curiae to join the petitioners and respondents. In July 2003, the National Lawyers' Guild and the International Association of Democratic Lawyers submitted an amicus curiae brief supporting the petition and arguing that extra-judicial killing clearly violates international law. They attempted to convince the Court that a policy of targeted assassination has no place in a 'society of laws'. In February 2004, Shurat ha-Din — Israel Law Center and 24 applicants submitted an amicus curiae brief supporting the respondents' arguments and demanding that the Court consult traditional Jewish law on determining the legality of targeted killing, in light of the fact that Israeli law does not directly address the issue: *PCATI* (2006) HCJ 769/02 (Amicus Curiae Brief: National Lawyers' Guild and International Association of Democratic Lawyers) <http://www.nlg.org/news/statements/Israeli_Supreme_Court.pdf> at 18 October 2007; *PCATI* (2006) HCJ 769/02, [15].

policy is unlawful. Assassination, they claimed, is illegal according to the standards of domestic law enforcement in occupied territory which forbid use of lethal force unless it is necessary to protect against an imminent threat of death or serious bodily injury.[10] Avigdor Feldman and Michael Sfard, the petitioners' attorneys, argued that military force can only be used in the context of self-defence according to art 51 of the *Charter of the United Nations*. Article 51 permits a state to respond to an attack by another state and therefore is not applicable to the conflict between Israel and individuals from the occupied territories.[11] The petitioners argued that targeted assassinations deny the right to due process and violate the fundamental right to life protected under international human rights and international humanitarian law. They qualified this argument by claiming that even if an international armed conflict exists in the context of Israel's belligerent occupation, the targets must be regarded as civilians and therefore protected from military attack.[12] According to the petitioners, art 51(3) of *Additional Protocol I*[13] to the *Geneva Conventions*[14] reflects customary international law.[15] When a 'criminal civilian'[16] participates in combat, they lose their immunity 'during (and only when) [they are] … participating in combat that directly endangers human life'[17] and they can be tried retroactively.[18] The petitioners concluded that '[t]he policy of assassinations harms these civilians when they are not taking part directly in combat or in hostilities, and as such, it is not legal and constitutes a prohibited strike against civilian targets that constitutes a war crime'.[19] They also claimed that the targeted killing policy often causes harm to civilian bystanders, violating

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10 *PCATI* (2006) HCJ 769/02, Petition for a Conditional Order (Order Nisi) and for an Interim Order (24 January 2002), available from <http://www.stoptorture.org.il> at 18 October 2007 ('Petition for a Conditional Order'); *PCATI* (2006) HCJ 769/02, Petitioners' Response to the Supplemental Brief on Behalf of the State Attorney's Office (26 January 2004), available from <http://www.stoptorture.org.il> at 18 October 2007 ('Petitioners' Response to the Supplemental Brief').

11 *PCATI* (2006) HCJ 769/02, [4] (President Barak).

12 *PCATI* (2006) HCJ 769/02, Reply Brief on Behalf of the Appellants (8 July 2003) [37]–[77], available from <http://www.stoptorture.org.il> at 18 October 2007 ('Appellants' Reply Brief').

13 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*').

14 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

15 Appellants' Reply Brief, above n 12, [138].

16 Ibid [23].

17 Ibid [23], [181]–[193]. See also Petitioners' Response to the Supplemental Brief, above n 10, [60]–[133].

18 Appellants' Reply Brief, above n 12, [27].

19 Ibid [32].

the principle of proportionality.[20] Finally, the petitioners argued that the targeted individuals are not given the opportunity to prove their innocence, and there is no independent judicial review of the operations.[21]

The State of Israel,[22] against whom the case was petitioned, argued that there has been, and it remains embroiled in, a 'new kind of conflict' with terrorist organisations.[23] The respondents argued that since September 2000, Israel has been confronted with 'acts of combat and terrorism' and the applicable legal framework is therefore the laws of armed conflict.[24] These terrorist attacks are, according to the respondents, 'armed attacks' against which Israel can defend itself according to the right to self-defence under art 51 of the *UN Charter*. The respondents also argued that the law of occupation is not relevant to determining the legality of targeted killing.[25]

According to the State, the members of the terrorist organisations that Israel targets are party to the conflict and take an active part in hostilities. They are therefore legitimate targets. Shai Nitzan, the State attorney, argued that because the terrorists' conduct violates the laws of war, they belong to a third category known as 'unlawful combatants'.[26] As such, they do not enjoy the privileges of combatants according to *Geneva Convention III* and can be targeted at all times.[27] The State qualified its argument by stating that even if terrorists were defined as civilians rather than combatants according to the laws of war, civilians lose their immunity when they take an active part in hostilities.[28] The State argued that the restrictions against attacks on civilians directly participating in hostilities set out in art 51(3) of *Additional Protocol I* are not binding upon Israel. According to the respondents, this article has not attained the status of customary international law, therefore Israel rejects the time limitation in art 51(3) (attacking civilians 'for such time').[29] Consequently, it considers the planning, launching and commanding of terrorist attacks to be direct participation in hostilities. It therefore believes that its policy of targeted killing complies with art 51(3).[30] Finally, the respondents rejected the petitioners' claim that the targeted killing policy violates the proportionality requirement. The State argued that targeted killing is only performed as 'an exceptional step, when there is no alternative'.[31]

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20 Ibid [206].

21 *PCATI* (2006) HCJ 769/02, [4] (President Barak).

22 This included the Government of Israel, the Prime Minister of Israel, the Minister of Defence, the IDF and the Chief of the General Staff of the IDF.

23 *PCATI* (2006) HCJ 769/02, Supplemental Response on Behalf of the State Attorney's Office, [127]–[137], available from <http://www.stoptorture.org.il> at 18 October 2007 ('State Attorney's Supplemental Response').

24 *PCATI* (2006) HCJ 769/02, [10] (President Barak).

25 Ibid.

26 State Attorney's Supplemental Response, above n 23, [138].

27 *PCATI* (2006) HCJ 769/02, [11] (President Barak).

28 State Attorney's Supplemental Response, above n 23, [11].

29 Ibid [216].

30 *PCATI* (2006) HCJ 769/02, [12] (President Barak).

31 Ibid [13].

### C *Main Focus and Structure of the Note*

The targeted killing judgment is significant because it establishes international humanitarian law as the appropriate normative framework for ruling on the legality of targeted killing. Specifically, the Court's analysis of the meaning of 'civilians' and 'direct participation in hostilities' breaks new legal ground. This case note examines the judgment with an emphasis on its discussion of what, legally, can be classified as civilians taking a direct part in hostilities. The judgment begins by setting out the factual background to the case, and then establishes the normative framework for assessing the legality of targeted killing. In resolving the substantive legal issues according to that framework, the Court addressed the justiciability of targeted killing and the scope of judicial review. The Court then drew its conclusions. Part II of this case note summarises and examines the targeted killing judgment and outlines the findings and legal reasoning provided by the Court. Part III critiques a particular aspect of the judgment relating to the forfeiture of civilian immunity, which is determined by four requirements imposed by the Court. Are these requirements helpful in regulating targeted killings? Or does the wording of the requirements leave the judgment open to criticism for failing to set stringent restrictions? These questions, this case note argues, call for closer analysis. Part IV concludes with an assessment of the judgment focusing on what it means to forfeit civilian immunity, and in particular, whether the Court's analysis of the meaning of civilians directly participating in hostilities contributes to and clarifies this vague area of international humanitarian law.

## II SUMMARY OF JUDGMENT

The three-justice panel[32] unanimously held that the question of whether every targeted killing is prohibited according to customary international law could not be determined in advance.[33] In so doing, they rejected the petitioners' claim that the policy of targeted killings must cease on the grounds that it violated both Israeli and international law. The petitioners' argument that the policy is 'totally illegal' was, according to President Beinisch, a 'sweeping stance'.[34] However, the judgment does not simply legitimise targeted killings: it delivers a nuanced account of the circumstances in which they are legitimate, as well as the circumstances in which they are not. Therefore, the ruling does not endorse the State's approach to targeted killing, but rather imposes restrictions on State policy.

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32 In 2002, when the PCATI and LAW petitioned the State over its policy of targeted killing, the case was heard before the then three most senior judges of the Court: President Aharon Barak and Justices Theodore Or and Eliyahu Matza. In 2005, the panel of justices appointed to hear the petition was President Barak, Vice-President Mishael Cheshin and Justice Dorit Beinisch. The three-justice panel that wrote the verdict was comprised of President (Ret) Barak, President Beinisch and Vice-President Eliezer Rivlin. Vice-President Rivlin replaced Vice-President Cheshin who had since retired. Upon President Barak's retirement in September 2006, Justice Beinisch became the President of the Court. This judgment was written in the three month period following President Barak's retirement during which time he could complete writing some of his judgments.

33 *PCATI* (2006) HCJ 769/02, [60] (President Barak); [7] Vice-President Rivlin; 48 (President Beinisch).

34 Ibid 48 (President Beinisch).

### A *Factual Background*

President Barak, who authored the main ruling, opened his judgment by setting out the question presented to the Court: does the State act illegally when it employs a policy of preventative strikes? He then examined this question in the context of the current hostilities, providing a narrative of the factual background. He described the 'massive assault of terrorism' that has been directed against the State of Israel since the outbreak of the second Intifada in 2000.[35] During the second Intifada Israel has employed what he called '"the policy of targeted frustration" of terrorism' by ordering the killing of

> 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.[36]

President Barak's judgment began by clearly delineating the parameters of the issue before the Court and the circumstances within which the disputed practice occurs. In his introduction, he also described the effect of terrorism on Israeli society:

> They [terrorist attacks] are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed. Thousands of Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.[37]

### B *The General Normative Framework*

#### 1 *International Armed Conflict*

One of the significant findings of the judgment is that international humanitarian law is the correct framework within which to determine the legality of targeted killing.[38] The Court rejected the petitioners' argument that targeted killing should be regulated according to law enforcement rules and human rights law.[39] Instead, the Court held that an international armed conflict exists.[40] The decision to choose the law of armed conflict model over the law enforcement model has important ramifications in determining the legality of targeted killing.[41]

President Barak affirmed the importance of international law in the decision-making of the Court by ruling that the appropriate normative framework in determining the legality of targeted killing is customary international law

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35 Ibid [1] (President Barak).
36 Ibid [2].
37 Ibid [1].
38 Ibid [18].
39 Petitioners' Response to the Supplemental Brief, above n 10, [5].
40 *PCATI* (2006) HCJ 769/02, [18] (President Barak).
41 The use of force is much more limited in the law enforcement paradigm, as compared to the law of armed conflict paradigm.

applicable to international armed conflict.[42] It is significant that a domestic court relied so heavily on international law, but this is consistent with the jurisprudence of the Court during the last six years of the Intifada because many of the petitions during this period were concerned with military operations.[43] The many references to international legal authorities throughout the judgment demonstrate that 'the Israeli HCJ engages in … international legal discourse and that international legal standards apply to Israel'.[44]

The Court held that an international armed conflict exists between Israel and terrorist organisations.[45] President Barak explained that a conflict between an occupying state in an area subject to belligerent occupation, and terrorists who come from that occupied territory, is an international armed conflict.[46] President Barak quoted former International Criminal Tribunal for the Former Yugoslavia ('ICTY') President Antonio Cassese to support his position.[47] The Court then expanded its reasoning, ruling that an armed conflict is of international character if it 'crosses the borders of the state — whether or not the place in which the armed conflict occurs is subject to belligerent occupation'.[48]

By ruling that the conflict between Israel and terrorist organisations is international, the Court clearly diverged from the traditional understanding that international armed conflicts are between sovereign states.[49] Additional support for this aspect of the ruling was provided by the Court when it considered the capacity of terrorists to inflict harm. As President Barak explained:

> 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. …

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42 *PCATI* (2006) HCJ 769/02, [19], [21] (President Barak).

43 This is not the first instance where a judgment by the HCJ was based on international humanitarian law. In 2002, in *Ajuri v The Commander of IDF Forces in the West Bank*, the judgment was based entirely on international humanitarian law: (2002) HCJ 7015/02.

44 Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law', above n 2, 328.

45 *PCATI* (2006) HCJ 769/02, [21] (President Barak).

46 Ibid [18]. Despite this discussion of belligerent occupation, the Court chose not to discuss whether the law of belligerent occupation, embodied in *Geneva Convention IV*, is applicable to the territories: at [20]. The HCJ has never tackled this issue and has always accepted the State's position that it is not applicable: Schondorf, above n 2, 305.

47 Cassese states: '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': Antonio Cassese, *International Law* (2nd ed, 2005) 420. President Barak's decision to quote Cassese is pertinent because it is an implicit rejection of the State's position that a 'new kind of conflict' exists. Cassese's comments were part of his criticism of Israel's policy of the 'so-called targeted killing of enemy "unlawful combatants"': at 420.

48 *PCATI* (2006) HCJ 769/02, [18] (President Barak).

49 For a critique of this aspect of the judgment, see Ben-Naftali and Michaeli, '*Public Committee Against Torture in Israel v Government of Israel*', above n 2, 463–4. There are good reasons to believe that the concepts that inform the traditional categories of armed conflict under international law distort, rather than clarify, the nature of the Israeli-Palestinian conflict. By introducing the concept of crossing the borders of a state, President Barak appeared to be responding to what he saw to be shortcomings in the law. There are, to be sure, serious problems with the way he does this. Apparently, Ben-Naftali and Michaeli believe the concepts that inform the traditional categories of international law are adequate. Their criticism of the Court's ruling therefore does not engage with what President Barak took to be at issue.

> Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character.[50]

It appears that in the Court's opinion, less rigid rules regulating the means of warfare for international armed conflict — rules which allow for legitimate attacks during the entire hostilities, rather than the limited use of military force by the State in non-international armed conflicts — are more appropriate for the kind of enemy Israel is facing.[51]

The Court, however, failed to elaborate any further reasons for characterising the conflict as international. President Barak, aware that the judgment provides little legal explanation to support that position, justified his characterisation of the conflict by stating that it is an established position of the Court, based on precedent. He stated:

> for years the starting point of the Supreme Court — and also of the State's counsel before the Supreme Court — is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view.[52]

### 2 *Combatants*

In assessing whether the individuals that Israel strikes in its targeted killing policy are legitimate targets, the Court outlined the fundamental principle of distinction in international humanitarian law; that is, that combatants and civilians must be distinguished during the conduct of hostilities, as only the former are lawful targets.[53] President Barak rather quickly dismissed the possibility of the targets falling within the legal category of combatant. His reason for this was that the targets fail to meet the conditions necessary for combatant status to apply which are set out in chapter 1 of the *Hague Regulations*[54] and repeated in art 13 of *Geneva Conventions I* and *II* and art 4 of *Geneva Convention III*.[55] President Barak's position is premised on the logic that

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50 *PCATI* (2006) HCJ 769/02, [21] (President Barak).

51 The Court's reasoning contrasts with the US Supreme Court's ruling that the conflict with al Qaeda is a conflict not of an international character under Common Article 3 to the *Geneva Conventions*. According to the US Supreme Court, the phrase 'not of an international character' was used 'in contradistinction to a conflict between nations': *Salim Ahmed Hamdan, Petitioner v Donald H Rumsfeld, Secretary of Defense*, 548 US __ (2006) 1, 6.

52 *PCATI* (2006) HCJ 769/02, [21] (President Barak).

53 *Additional Protocol I*, above n 13, art 48; *PCATI* (2006) HCJ 769/02, [23] (President Barak).

54 *Hague Convention (IV) respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, (1910) UKTS 9 (entered into force 26 January 1910) ('*Hague Regulations*').

55 President Barak concluded his position by simply stating: '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': *PCATI* (2006) HCJ 769/02, [24]. He did not discuss the less stringent definition of combatants in art 43(1) of *Additional Protocol I* because Israel is not a state party to *Additional Protocol I* and does not accept it as customary international law.

since the targets employ terrorist methods they cannot be classified as combatants.[56]

*(a) Unlawful Combatants*

The Court rejected the State's position that international law must recognise the status of 'unlawful combatant'. The Court held that

> [i]t 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 category has been recognized in customary international law.[57]

President Barak explicitly rejected the idea that suspected terrorists are beyond the protection of the law and that terrorism should exist in a normative void. Suspected terrorists, according to President Barak, should not be denied their legal protections. He wrote:

> unlawful combatants are not beyond the law. They are not 'outlaws'. God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law.[58]

This is an implicit rebuttal of the arguments espoused by the Bush Administration in its 'war on terror'. President Barak's rebuke to the legal approach of the United States is further revealed in a thinly veiled reference to Guantánamo Bay. In one of the concluding paragraphs in his judgment, President Barak stated that there are no '"black holes"' in the law.[59] He was quoting Lord Steyn, who used the phrase 'a legal black hole' to describe the situation of 'unlawful combatants' held in Guantánamo Bay.[60] Thus, President Barak, a judge whose country is more experienced than any other in fighting terrorism, has refused to adopt a legal stance that the US regards as crucial to fighting its 'war on terror'.

Vice-President Rivlin, in his concurring opinion, was more open to the recognition of the third category known as 'unlawful combatant'. He proposed that there may be a foundation for concluding that the category exists.[61] He did not, however, find the need to explicitly reject President Barak's approach in favour of the third category approach because, for the purposes of this case, the outcome was the same — the targets are legitimate targets.

Notwithstanding President Barak's rejection of the legal category 'unlawful combatants', he invited confusion by using the term 'unlawful combatant' to describe the targets.[62] For President Barak, 'unlawful combatant' is a way to

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56 Ibid [24]–[25].

57 Ibid [28].

58 Ibid [25].

59 Ibid [61].

60 Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments* (2004) 195.

61 *PCATI* (2006) HCJ 769/02, [2] (Vice-President Rivlin).

62 See Ben-Naftali and Michaeli, '*Public Committee Against Torture in Israel v Government of Israel*', above n 2, 464–5. Ben-Naftali and Michaeli argue that this confusion stems from the Court's inconsistent application of the *Geneva Conventions* and *Additional Protocol I* to define combatants and civilians. The result of that confusion, they claim, is the creation of a third category. Ben-Naftali and Michaeli argue that

distinguish the targets from the category of combatant (that is, lawful combatant) rather than to refer to a *new* status under the law.[63] He wrote that 'an unlawful combatant is not a combatant, rather a "civilian"'.[64] By this the Court means those civilians who have taken a direct part in hostilities and have taken on combatant functions, and in so doing, have forfeited their protected civilian status.[65]

### 3 *Civilians*

In finding that the Palestinian militants whom Israel targets are not combatants under international humanitarian law, the Court held that they must be civilians and should be treated in accordance with the rules governing civilians.[66] According to international humanitarian law, civilians are protected persons and therefore cannot be attacked.[67] However, they forfeit this protection if they choose to take part in fighting.[68]

In order to assess the legality of targeted killing, the Court analysed the concept of direct participation in hostilities under international humanitarian law. Article 51(3) of *Additional Protocol I* expresses this concept: 'Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'. The Court recognised art 51(3) as part of

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> [b]y simultaneously giving a narrow interpretation to combatants entitled to privileges under the *Geneva Conventions* and a broad interpretation to the category of civilians who lose immunity under Article 51(3) of Protocol I, the Court has, in effect, created a broad category of 'unlawful combatants' who are not entitled either to the privileges of combatants or to the immunities of civilians. This category is recognized by neither instrument, defies the humanitarian purpose of both, and is rejected by the *Targeted Killings* judgment itself.

63 Other commentators also use the term 'unlawful combatants' in this descriptive manner. Cassese explains in his Expert Opinion for the Court that

> '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. It may not be used as proving or corroborating the existence of a third category of persons …

*PCATI* (2006) HCJ 769/02 (Expert Opinion of Antonio Cassese, 'On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law') [26], available from <http://www.stoptorture.org.il> at 18 October 2007 (emphasis in original) ('Expert Opinion'). See also PCATI, 'Opinion of the First President of the International Criminal Tribunal for the Former Yugoslavia and World Renowned Expert on International Humanitarian Law, Professor Antonio Cassese Determines: The Assassinations Are War Crimes' (Press Release, 17 July 2003), available from <http://www.stoptorture.org.il> at 18 October 2007.

64 *PCATI* (2006) HCJ 769/02, [26] (President Barak).

65 Ibid.

66 *Additional Protocol I*, above n 13, arts 50–1. President Beinisch agreed with President Barak: 'Against the background of this normative reality, I also accept that in the framework of the existing law, terrorists and their organizations are not to be categorized as "combatants", rather as "civilians"': *PCATI* (2006) HCJ 769/02, 49 (President Beinisch).

67 *Additional Protocol I*, above n 13, art 51(2).

68 *PCATI* (2006) HCJ 769/02, [31] (President Barak). President Barak depicted the behaviour of these individuals:

> 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.

customary international law.[69] President Barak supported this position by relying on the study of customary law by the International Committee of the Red Cross ('ICRC'), the jurisprudence of the ICTY, military manuals, and academic scholarship.[70]

The core of the judgment thus became focused on art 51(3). President Barak's elaboration clarified an ambiguous area of law. In order to understand and define the meaning of 'unless and for such time as they take a direct part in hostilities', President Barak explained each of the terms.[71] The weight of the judgment is therefore in its technical explanation of the meaning of art 51(3). Numerous examples, distinctions and hypotheses are included in this explanation.

President Barak adopted a broad approach to the interpretation of art 51(3) and looked at the whole chain of command involved in an attack. He concluded: 'Those who have sent him [the perpetrator of an attack], as well, take "a direct part". The same goes for the person who decided upon the act, and the person who planned it'.[72] This goes to the heart of the policy of targeted killing because the people thus identified are the figures that Israel generally targets. President Barak's interpretation that commanders and those who plan, recruit and guide terrorist attacks should be counted as direct participants in hostilities marks the cornerstone of his approach to the legality of targeted killing. His interpretation of the concept of direct participation in hostilities is in stark contrast to that of Professor Antonio Cassese who testified for the petitioners.[73] President Barak explicitly rebutted Cassese's narrow interpretation of 'direct participation' and chose instead to support a more expansive definition, as adopted by legal scholars such as Professor Michael N Schmitt.[74]

According to the judgment, determining whether a civilian has directly participated in hostilities and therefore has become a legitimate target for attack can only be decided on a case-by-case basis. President Barak's analysis of this vague provision of *Additional Protocol I* is sensitive to the realities of the Israeli-Palestinian conflict. He rejected a narrow, black-letter reading of the law

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69 Ibid [30].

70 Ibid. President Barak supported his position regarding the customary nature of art 51(3) by citing: ICRC, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law — Volume I: Rules* (2005) 20; Common Article 3 of the *Geneva Conventions*, above n 14; *Prosecutor v Strugar* (*Trial Chamber Judgment*) Case No IT-01-42-T (31 January 2005); military manuals of countries including England, France, Holland, Australia, Italy, Canada, Germany, the US (Air Force) and New Zealand; and selected legal literature.

71 *PCATI* (2006) HCJ 769/02, [32], [34]–[40] (President Barak).

72 Ibid [37].

73 In his Expert Opinion, above n 63, submitted to the Court in July 2003, Cassese argued that

> [a] person who is engaged in armed action (for instance, firing upon enemy civilians or combatants, planting a bomb in a coffee shop, launching a missile against an enemy tank or other military objective) is certainly taking a direct part in combat. … A civilian who, after carrying out military operations, is in his house or is going to a private home or to a market, may not be the object of attack, but may be arrested and prosecuted … : at [12]–[14].

Cassese determined that Israeli targeted killings could be included within the legal definition of war crimes: at [37].

74 *PCATI* (2006) HCJ 769/02, [34] (President Barak); Michael N Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict' in Horst Fischer et al (eds), *Crisis Management and Humanitarian Protection: In Honour of Dieter Fleck* (2004) 505 [trans of: *Krisensicherung und humanitärer Schutz: Festschrift für Dieter Fleck*].

because such a reading is inadequately sensitive to the type of enemy Israel is fighting.

President Barak's careful and thoughtful analysis is invaluable to international law jurisprudence and is the first of its kind. It illuminates an area of law that is a quintessential hard case involving grey areas that have not been substantially addressed or articulated.

## 4 *Review by the Court*

### *(a) Justiciability*

Only when the Court delivered its legal analysis concerning the lawfulness of targeted killing did it discuss questions relating to judicial review. The Court ruled that targeted killing is justiciable.[75] In its preliminary response to the petition, the State relied upon the success of the argument it made in the *Barakeh* case — that targeted killing is not justiciable.[76] In that case, the Court concluded that '"the choice of means of war employed by respondents in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene"'.[77] In dismissing the respondents' argument, President Barak made a distinction between normative and institutional non-justiciability, concluding that the issue was justiciable from both a normative and institutional perspective.[78]

Normative justiciability, according to the judgment, is based on the legal norms 'from which we can derive standards which determine what is permitted and what is forbidden'.[79] In this case, the norms employed were those of international humanitarian law, and, more specifically, those of the customary law of international armed conflict. President Barak articulated four reasons for rejecting the position of the State from an institutional viewpoint. First, institutional non-justiciability does not apply where there is an infringement on human rights, in particular the right to life.[80] Second, the question of Israel's policy of targeted killing is a legal question.[81] Third, international courts examine these types of questions; therefore, '[w]hy can't an Israeli court perform that same examination? Why do those questions, which are justiciable in international courts, cease to be justiciable in national tribunals?'[82] Fourth, the *ex post* investigation of the conduct of the army includes judicial supervision to ensure the 'proper functioning' of the investigation.[83] The role of the Court in the investigation process further supports the justiciability of targeted killing.

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75 *PCATI* (2006) HCJ 769/02, [48]–[50] (President Barak).
76 Ibid [9].
77 See ibid.
78 Ibid [48]–[54].
79 Ibid [48].
80 Ibid [50].
81 Ibid [51]. President Barak explained in the judgment that '[w]hen the character of the disputed question is political or military, it is appropriate to prevent adjudication. However, when that character is legal, the doctrine of institutional non-justiciability does not apply'.
82 Ibid [53].
83 Ibid [54].

*(b) The Scope of Judicial Review*

In addition to finding that targeted killing is justiciable, the Court ruled that it has judicial review over military operations including targeted killing.[84] The scope of judicial review over the decision of the military commander to perform targeted killings was explained in the judgment. According to the judgment, the role of the Court in reviewing military questions is to 'ask itself if a reasonable military commander could have made the decision which was made'.[85] If the answer is in the affirmative, the Court will not intervene. Therefore, review is determined by the reasonableness of the military commander's conduct.[86] Whether a question is in the domain of the executive or judicial branch is dependent upon whose expertise would best answer that question.[87]

## III CRITIQUE OF SELECTED ISSUES

### A *Four-Fold Test*

The Court's intricate analysis of targeted killing according to the customary rules of international law regarding international armed conflict led the justices to conclude that 'we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal'.[88] Critics may argue that the Court's finding is disappointing because of its failure adequately to specify when this controversial policy is justified and when it is not. Had the judgment gone no further than ruling that the legality of targeted killing must be assessed case-by-case then the critics' argument would have been more convincing. But it does go further by setting out a four-fold test.[89] That test provides a very helpful structure to apply to a case-by-case approach.

President Barak raised the threshold of the legality of targeted killing by subjecting it to significant restrictions. In his examination of the phrase 'for such time' in his analysis of art 51(3) of *Additional Protocol I*, he discussed certain requirements which, it can be assumed, were an attempt to confront foreseeable disagreement over whether a person is a legitimate target according to art 51(3).[90]

The Court held that for a targeted killing to be legal, it must satisfy four conditions:

(1) The State must have strong evidence that the potential target meets the conditions of having lost their protected status;

(2) If less drastic measures can be used to stop the potential target posing a security threat, such as arrest, the State must use them, unless this alternative poses too great a risk to the lives of its soldiers;

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84 Ibid [55]–[58].
85 Ibid [57].
86 Ibid.
87 Ibid [58].
88 Ibid [60]; [7] (Vice-President Rivlin); 48 (President Beinisch).
89 Ibid [40] (President Barak).
90 Ibid [38]–[40].

(3) An independent and thorough investigation must be conducted immediately after the operation to determine whether it was justified. In appropriate cases, the State should compensate innocent civilians for harm done;

(4) The State must assess in advance whether the expected collateral damage to innocent civilians involved in a targeted killing is greater than the anticipated military advantage to be gained by the operation. If it is, the State must not carry out the operation.[91]

These requirements have been described as 'the most striking part of the decision'.[92] Some commentators have argued that these restrictions are based on human rights principles.[93] It is true that throughout the judgment President Barak emphasised the importance of the role of international human rights law.[94] However, in my opinion, President Barak's discussion of these requirements reflects both human rights and international humanitarian law principles. He referred to both these bodies of law as part of the normative framework, international humanitarian law being the *lex specialis.*[95] This approach is embodied in the four requirements. A number of these requirements clearly reflect the basic principles of international humanitarian law, yet the least harmful measure requirement is an example of the way human rights law is filling the gaps left by international humanitarian law. A closer examination of the requirements is necessary.

1 *Well-Based Information*

The Court held that before a targeted killing can occur, there must be confirmed and reliable evidence to justify the denial of civilian protection to the potential target.[96] This requirement relates to the intelligence gathering aspect of the targeted killing process. The potential target must be studied carefully. President Barak explained that '[i]nformation which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities'.[97] This criterion reflects the general targeting provisions in international humanitarian law, particularly what it means to be a legitimate target.[98] Thus, the criterion is based on respecting the rule of civilian immunity, which underpins the entire framework of international humanitarian law. Because targeted killing is an exception to this principle, the judgment seeks to ensure that a departure from it should not be taken lightly. This places a heavy onus on the IDF.

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91 Ibid [40].

92 Anthony Dworkin, Crimes of War Project, *Israel's High Court on Targeted Killing: A Model for the War on Terror?* (2006) <http://www.crimesofwar.org/onnews/news-highcourt.html> at 18 October 2007.

93 See, eg, ibid.

94 *PCATI* (2006) HCJ 769/02, [18], [21], [22], [50] (President Barak).

95 Ibid [18].

96 Ibid [40].

97 Ibid.

98 *Additional Protocol I*, above n 13, arts 52–56.

Gideon Levy, an Israeli journalist and a severe critic of Israeli actions in the occupied territories, is critical of this requirement because it leaves the decision about whether enough information has been gathered to Israeli intelligence. According to Levy, it is a farce that the 'executioners' are the ones who judge the application of this vague and ambiguous requirement.[99] It is not clear, however, who else could make this judgment. The problem with targeted killing operations is that they are based on classified information; it is unrealistic to require an independent body to determine whether enough information has been received to justify an attack. Circumstances on the ground constantly change when dealing with a target that operates amongst a civilian population. It is for this reason that the Court ruled that an independent institution such as the Supreme Court cannot decide in advance whether all targeted killings are legal or illegal.

### 2 *Less Drastic Measures*

The second condition set out in the judgment is that if less drastic measures can be used to stop a potential target posing a security threat (for example, arrest, interrogation, trial) the State must use them, unless the risk they pose to the lives of the soldiers is too great.[100] This condition relates to the provisions in international humanitarian law dealing with precautions for and limitations on attacks.[101] However, there is no specific requirement under international humanitarian law to arrest a person who is a legitimate military target. In this respect, the judgment may be drawing a distinction between measures taken in attacks against combatants, and measures against civilians taking a direct part in hostilities.[102] This precondition on the legality of targeted killing — that there must be no alternative less harmful means available — reflects the way the Court's ruling has been influenced by the human rights framework. One of the main criticisms of targeted killing is that it denies individuals a right to a fair trial and due process.[103] The Court may have been attempting to address that concern:

> 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.[104]

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99 Gideon Levy, 'An Enlightened Occupier', *Ha'aretz* (Israel) 17 December 2006 <http://www.haaretz.com/hasen/spages/801781.html> at 18 October 2007.

100 Vice-President Rivlin and President Beinisch agreed with President Barak that, where possible, the State should arrest and prosecute the target: *PCATI* (2006) HCJ 769/02, [5] (Vice-President Rivlin); 50 (President Beinisch).

101 *Additional Protocol I*, above n 13, art 57.

102 There is nothing explicit in the judgment to support this, but in characterising the targets as civilians who have forfeited their status, it appears that President Barak wanted to afford the targets greater protection from attack than is provided for combatants under the law.

103 The petitioners argued that the targeted killing policy violates the right to a fair trial: see Petition for a Conditional Order, above n 10, [95], [114]–[122].

104 *PCATI* (2006) HCJ 769/02, [40] (President Barak).

This requirement also brings into play the importance of the law of occupation in assessing the legality of targeted killing. Article 5 of *Geneva Convention IV*, as the judgment notes, states that members of an occupied population who pose a security threat can be detained without prisoner of war status but still have minimum rights. Acknowledgment of these rights permits the arrest of suspects but not targeting of suspects.

In most circumstances, arrest is preferable to killing. Whenever possible, less harmful means should be employed. The Court placed limits on this requirement: it cannot be applied if it exposes soldiers' lives to a great risk and it must be abandoned if the harm caused to innocent civilians 'might be greater than that caused by refraining from it'.[105] The Court also recognised that the requirement may at times not be available even in situations of belligerent occupation.[106] At present, it is unclear when the IDF decides to arrest and when it decides to target, and whether its decision is based on the risk posed to the lives of soldiers or innocent civilians, or both.[107] Responding to the petitioners' claims in this case, the State argued that targeted killings only occur when it has proven impossible to arrest the target.[108] The Court failed to elaborate upon arrest options. This leaves the limitation it imposed on the requirement to arrest susceptible to abuse by the IDF, who can almost always feign seriously considering arrest.

Nor did the Court discuss the details of prosecution or with what crimes the accused would be charged. If the State arrests suspects, will the acts they are suspected of committing be considered acts of war, or simply crimes for which individuals are liable and subject to criminal prosecution (whether under domestic or international jurisdiction)? Could they be charged with crimes against humanity or would they be charged within a domestic law framework?

### 3 *Investigations*

The third requirement the judgment outlines is that a retrospective, independent investigation must occur 'regarding the precision of the identification of the target and the circumstances of the attack upon him'.[109] At present, the IDF conducts retrospective internal investigations. In October 2003, the Association for Civil Rights in Israel and B'Tselem filed a petition to the HCJ against the Military Judge Advocate General ('JAG').[110] The petition requested that the JAG open military investigations into all cases in which IDF soldiers killed Palestinian civilians who were not involved in the combat, as it

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105 Ibid.

106 Ibid.

107 Ronen Shnayderman, *Take No Prisoners: The Fatal Shooting of Palestinians by Israeli Security Forces during 'Arrest Operations'* (B'Tselem Report, May 2005) (Shaul Vardi trans) 21–2.

108 *PCATI* (2006) HCJ 769/02, Supplemental Statement by the State Attorney's Office (2 February 2003) [200], available from <http://www.stoptorture.org.il> at 18 October 2007 ('State Attorney's Supplemental Statement'); State Attorney's Supplemental Response, above n 23, [19].

109 *PCATI* (2006) HCJ 769/02, [40] (President Barak). See also the separate opinion of President Beinisch: 'I of course accept the determination that a thorough and independent (retrospective) examination is required, regarding the precision of the identification of the target and the circumstances of the damage caused': at 49–50.

110 *B'Tselem v Judge Advocate General*, HCJ 9594/03.

did during the first Intifada.[111] The petition is still pending and it is therefore likely that President Barak had this case in mind when making these comments about the investigations. Obviously he can no longer write the judgment for that decision. In light of the response submitted to the HCJ by the State Attorney's Office in the petition, it seems unlikely that the IDF will set up a criminal investigation by the Military Police for every case of targeted killing.[112] A Military Police investigation is only ordered by the JAG's office on the basis of an internal debriefing.[113]

B'Tselem notes that the Court failed to outline what constitutes an independent investigation. This omission leaves open the possibility of stretching the meaning of 'independent': 'clearly, officials subordinate to the persons responsible for the targeted killing are not independent for purposes of conducting the investigation'.[114] The vagueness of the judgment regarding the meaning of 'independent investigation' gives the IDF some leeway in its response to this recommendation. The Court did state, however, that the investigation process may eventually be subject to judicial review, to 'ensure a maximum of [the] … required objectivity'.[115]

This third procedural requirement attempts to create accountability and provide clarity to the circumstances of every attack. The existence of regular retrospective investigations will undoubtedly be of great value and the lessons learnt from examining previous attacks will aid in the accuracy and legality of future attacks.

Recent developments indicate that the Court is implementing this requirement. On 17 June 2007, the HCJ ordered that the State had 45 days to inform the Court whether it will establish an independent committee to investigate the July 2002 targeted killing of Saleh Shehadeh, 'including the question of whether a criminal probe is justified'.[116] The three-justice ruling was made in response to a 2003 petition by a human rights organisation.[117] The State Prosecution agreed to set up an independent commission to investigate those involved in the decision to target Shehadeh. Ha'aretz newspaper reported deputy

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111 *B'Tselem v Judge Advocate General*, HCJ 9594/03, Petition for Order Nisi, available from <http://www.btselem.org> at 18 October 2007.

112 *B'Tselem v Judge Advocate General*, HCJ 9594/03, Response on Behalf of the State Attorney's Office (23 December 2003), available from <http://www.btselem.org> at 18 October 2007.

113 Shnayderman, above n 107, 23.

114 B'Tselem, *Use of Firearms: 19 Dec. 06: High Court of Justice Imposes Limitations on Israel's Targeted-Killing Policy* (2006) <http://www.btselem.org/english/Firearms/20061219_Targeted_killing_Ruling.asp> at 18 October 2007.

115 *PCATI* (2006) HCJ 769/02, [54] (President Barak).

116 Yuval Yoaz, 'C'tee Might Probe 2002 Killing of Hamas Commander Shehadeh', *Ha'aretz* (Israel) 18 June 2007 <http://www.haaretz.com/hasen/spages/871961.html> at 18 October 2007.

117 The three-justice panel comprised President Beinisch, Vice-President Rivlin and Justice Avala Procaccia, two of whom were members of the panel that handed down the targeted killing judgment.

State Prosecutor Shai Nitzan's response to the Court:

> Despite the fact that the regulations determined by the High Court's verdict on the policy of targeted assassinations are not applicable to the incident in question … the state agrees that the circumstances under which innocent civilians were hurt in the course of the action against Shehadeh will be examined by an objective investigative committee that will be appointed for this purpose by state authorities.[118]

The Court also ruled that in appropriate cases, compensation should be awarded as a result of harm caused to an innocent civilian if the attack is found to be excessive.[119] Cassese argues that the obligation of paying compensation for violations of international humanitarian law 'has now acquired customary law nature'.[120] He is of the opinion that even if this obligation was not customary, in interpreting vague legal standards 'one should shun taking what we might call a typically "common law" approach to legal interpretation, always searching for cases or precedents'.[121] Rather, Cassese embraces President Barak's approach which he finds 'fully warranted by the very spirit and demands of international humanitarian law, although unsupported by state practice or case law'.[122]

The Court held that compensation should be paid in 'appropriate cases'.[123] An examination of the application of the principle of proportionality (discussed below) can be helpful in assessing what the Court meant by 'appropriate cases' to award compensation. Perhaps the Court intended compensation to be awarded in cases where the targeted killing was disproportionate. In that case, innocent civilians killed and injured in the attack (or their families) would be entitled to compensation. Targeted killings of that kind would be illegal and also constitute war crimes.[124] In regards to such events, compensation may be one of the more

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118 Yuval Yoaz, 'Panel to Look into Civilian Deaths in 2002 IAF Attack on Shehadeh', *Ha'aretz* (Israel) 17 September 2007 <http://www.haaretz.com/hasen/spages/904481.html> at 18 October 2007.

119 *PCATI* (2006) HCJ 769/02, [40].

120 Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings', above n 2, 345. He points to art 3 of the *Hague Regulations* which,

> although it laid down the obligation to pay compensation only with regard to breaches of the Convention, has now turned into customary international law. A general principle has evolved, which arguably also extends to the whole body of international humanitarian law applicable in modern times. The 2004 *British Manual of the Law of Armed Conflict* authoritatively confirms this trend.

121 Ibid 344.

122 Ibid 345.

123 *PCATI* (2006) HCJ 769/02, [40] (President Barak).

124 A disproportionate attack is a war crime according to art 8(2)(b)(iv) of the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002):

> 2. For the purpose of this Statute, 'war crimes' means:
>
> (b) …
>
> (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

minor problems that the IDF would have to confront. Alternatively, or perhaps additionally, when a targeting is deemed to be proportionate despite the fact that it caused 'collateral damage', the judgment could be taken to mean it is appropriate that those victims be compensated. Proportionality, according to international humanitarian law, is examined *ex ante*. Therefore, there could be targeted killings that are proportionate because of the anticipated 'collateral damage' but which, it becomes clear after the fact, are excessive. There are precedents to support this approach.[125]

### 4 *Proportionality*

The last requirement that the Court set out relates to the principle of proportionality, a key principle in international humanitarian law. This doctrine establishes a limitation on the conduct of hostilities. 'Collateral damage' is the legal term used to refer to incidental civilian injury or damage to civilian property arising from a military attack against a legitimate target. The judgment explains that this damage 'must withstand the proportionality test'.[126]

The Court recognised that the principle of proportionality reflects customary international law.[127] A balance must be achieved, President Barak explained, between conflicting values. He called this 'a values based test'.[128] The balance is between military necessity and humanity. President Barak acknowledged that '[p]erforming [the] balance is difficult' and should therefore 'proceed case by case'.[129] He also recognised that there are many 'hard cases'.[130] Problems exist because of the apparently subjective nature of judgments of proportionality which requires one to weigh the factors that will determine whether or not an attack is excessive. Inevitably, such weightings express value judgements which appear inherently contestable to a significant degree. A margin of appreciation is deliberately built into the law.

President Barak attempted to provide some direction for assessing the difficult cases by articulating the rule in international humanitarian law that the military advantage must be 'direct and anticipated' and that there must be a 'meticulous examination' of every case.[131] The army must perform regular monitoring in

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125 On 3 July 1988, the *USS Vincennes*, operating in the Southern Arabian Gulf, mistakenly shot down a commercial airliner, Iran Air Flight 655, on a regularly scheduled flight from Bandar Abbas to Dubai. Two hundred and ninety passengers were killed. Iran and the US settled the dispute through an agreement. The US recognised that the incident resulted in a terrible tragedy and agreed to a US$131 800 000 settlement. On 22 February 1996, Iran and the US jointly notified the ICJ that they had agreed to discontinue *Case concerning the Aerial Incident of 3 July 1988* (*Iran v US*) [1996] ICJ Rep 9 (discontinued 22 February 1996). See *Settlement Agreement on the Case concerning the Aerial Incident of 3 July 1998 before the International Court of Justice* (signed and entered into force 9 February 1996) <http://www.icj-cij.org/docket/files/79/11131.pdf> at 18 October 2007.

126 *PCATI* (2006) HCJ 769/02, [40] (President Barak).

127 Ibid [42]. The case supports this claim with: ICRC, above n 70, 53; ICTY jurisprudence; and academic literature.

128 *PCATI* (2006) HCJ 769/02, [45] (President Barak).

129 Ibid [46].

130 Ibid.

131 Ibid.

advance.[132] President Barak also emphasised that the customary rule protecting civilians is central to the principle of proportionality.[133] This emphasis is echoed in the concurring opinion of Vice-President Rivlin, who devoted a large part of his opinion to discussing the principle of proportionality. The obligation upon the State to honour the lives of civilians and the principle of human dignity is integral to his discussion.[134] Regarding the conflict between '[t]he [S]tate's duty to protect the lives of its soldiers and civilians' and 'its duty to protect the lives of innocent civilians harmed during attacks on terrorists',[135] President Barak offered no simple formula. He concluded that '[d]espite the difficulty of that balancing, there's no choice but to perform it'.[136] Vice-President Rivlin similarly warned that 'the decision is likely to be difficult and complex'.[137]

The Court explained this principle by means of a scenario. In that scenario, the target shoots at soldiers or civilians from the porch of his home: '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'.[138]

Orna Ben-Naftali points out that this example is 'particularly telling' because it is not hypothetical.[139] In July 2002, an Israeli fighter plane that dropped a one-ton bomb to kill the leader of the Hamas military wing, Shehadeh, also killed 14 bystanders, nine of whom were children, and injured more than 70 others. The bomb landed with precision, but caused a huge crater and tremendous destruction.[140] Ben-Naftali concludes:

> The devastating impact of the operation, which could have reasonably been foreseen, clearly fails to meet the proportionality standard. This is what the judgment says explicitly. It is a war crime. This is what the judgment says implicitly.[141]

Major General Dan Halutz was the Air Force Commander at the time of that targeted killing. In January 2005, the Court rejected a petition seeking to prohibit the appointment of Halutz as Deputy IDF Chief of Staff because of his role in the

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132 Ibid [54]. Cohen and Shany praise the requirement of *ex ante* review and view it as part of the 'institutional conditions' set out in the judgment. This relates to the *ex post* review set out as one of the four requirements discussed above. They argue that '[r]obust institutional requirements could compensate for the inevitable ambiguity of the substantive contents of the proportionality tests and provide courts with objective criteria for judicial review': Cohen and Shany, above n 2, 320.

133 *PCATI* (2006) HCJ 769/02, [45] (President Barak); *Additional Protocol I*, above n 13, art 51(2).

134 *PCATI* (2006) HCJ 769/02, [4]–[5] (Vice-President Rivlin).

135 Ibid [46] (President Barak).

136 Ibid.

137 Ibid [6] (Vice-President Rivlin).

138 Ibid [46] (President Barak).

139 Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law', above n 2, 330.

140 See, eg, Amos Harel, 'The Air Force Spreads its Wings', *Ha'aretz* (Israel) 15 September 2004 <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=478381&contrassID=13> at 18 October 2007; Ariel Meyerstein, Crimes of War Project, *Case Study: The Israeli Strike against Hamas Leader Salah Shehadeh* (2002) <http://www.crimesofwar.org/onnews/news-shehadeh.html> at 18 October 2007.

141 Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law', above n 2, 330.

incident.[142] There was a petition which requested the Court to order a criminal investigation against Halutz in relation to this targeted killing.[143] On 17 June 2007, as mentioned earlier, the Court ordered the State to inform the Court whether it is willing to establish an independent investigation into the targeted killing of Shehadeh.[144] On 16 September 2007, the State Prosecution agreed to set up an independent commission.[145] Ben-Naftali views President Barak's reference as an invitation to the Court to initiate criminal proceedings, and argues that '[t]he post-Barak court should accept this invitation ... [and] [b]y doing so ... put concrete content into the framework advanced in the *Targeted Killings* judgment'.[146]

### B *Adequacy of the Four-Fold Test*

The four procedural and substantive requirements imposed by the Court support the view underlying international humanitarian law that during war not all means are permissible.[147] This message is emphasised in the judgment. President Barak explicitly rejected Cicero's maxim that 'during war, the laws are silent'.[148] 'It is when the cannons roar', he said, 'that we especially need the laws'.[149] President Barak has pressed this principle in many of his judgments

142 *Yesh Gvul v The Government of Israel* (2005) HCJ 5757/04. On 23 May 2004, 27 writers, pilots, peace and human rights organisations, scholars and public figures appealed to the Court for an interim injunction to stop the appointment of Major General Dan Halutz as Deputy IDF Chief of Staff (the second highest ranking position in the IDF). The petitioners did not think that Halutz was worthy of a senior command position in the IDF. They drew on Halutz's comments to the *Ha'aretz* newspaper after the Shehadeh targeting, where he spoke of a successful operation that passes his 'moral test' and that he now sleeps well at night. When asked how he felt about dropping the bomb, he said, 'I feel a slight bump to the airplane as a result of the bomb's release. A second later it's gone, and that's all. That is what I feel'. On 26 January 2005, the HCJ handed down its decision, rejecting the petition, although the judges expressed their dissatisfaction with the statements made by Halutz relating to the targeting of Shehadeh. Justice Edmund Levy said: 'it would have been best if these statements had not been made, particularly by a senior IDF officer serving as the commander of the Israeli Air Force'. However, the Court held that there was nothing 'morally besmirching' in what Halutz said that would require his suspension. See Vered Levy-Barzilai, 'The High and the Mighty', *Ha'aretz* (Israel) 21 August 2002 <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=200053&contrassID=1> at 18 October 2007; Ze'ev Segal, 'The High Court's Limited Horizons', *Ha'aretz* (Israel) 31 January 2005 <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=533855> at 18 October 2007; PCATI, 'In Their Decision on the Petition Filed by "Yesh Gvul", PCATI, the Justices of the High Court of Justice State That It Would Have Been Best if Dan Halutz's Statement on the Results of the Assassination of Salah Shehade Had Not Been Made' (Press Release, 26 January 2005), available from <http://www.stoptorture.org.il> at 18 October 2007.

143 *Yoav Hess v IDF Judge Advocate General*, HCJ 8794/03.

144 Yoaz, 'C'tee Might Probe 2002 Killing of Hamas Commander Shehadeh', above n 116.

145 Yoaz, 'Panel to Look into Civilian Deaths in 2002 IAF Attack on Shehadeh', above n 118.

146 Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law', above n 2, 331.

147 *Additional Protocol I*, above n 13, art 35(1). See also Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 39.

148 *PCATI* (2006) HCJ 769/02, [61] (President Barak).

149 Ibid.

during the second Intifada.[150] In adopting the armed conflict paradigm in this context, and providing additional structured limitations, President Barak made clear his belief that the law always applies, even in times of war.

The four-fold test proposed by the Court has been criticised for its lack of analytical depth. The wording of the requirements is vague, which could enable the IDF to decline to implement them in good faith. It has been argued that 'the reins were loosened too much'.[151] Levy argues that

> [a]ll the restrictions the High Court of Justice placed on targeted assassinations are no more than a collection of hollow words. A failed method of warfare, intended for thwarting 'ticking bombs,' has become unbridled and a matter of routine.[152]

Levy's concern, that the failure to set out stringent guidelines means there is nothing to restrain the IDF from further broadening its actions, is shared by other commentators.[153]

Is this aspect of the judgment disappointing because, despite raising an important issue, its analysis is rather cursory? That is one view. One might, however, argue that precisely because President Barak ruled that the legality of targeted killing should be assessed on a case-by-case basis, qualified by rigorously defined restrictions, he anticipated the criticism that the adoption of these requirements is beyond the scope of international humanitarian law. According to the critics, 'the restrictions [the judgment] imposed on the Israeli government go beyond what is commonly considered to be mandated under this body of law' and 'it is difficult to find support for them in state practice or in less recent academic literature interpreting the laws of international armed conflict'.[154] President Barak raised these novel and innovative requirements but did not adequately explain what he meant by them. That, it must be conceded, is a flaw of the judgment. Nonetheless, it is better that the requirements are in the

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150 See, eg, *Barake v The Minister of* Defense (2002) HCJ 3114/02; *Tibi v The Prime Minister* (2002) HCJ 3115/02; *Adalah v The Commander of IDF Forces in the West Bank* (2002) HCJ 3116/02; *Almandi v The Minister of Defense* (2002) HCJ 3451/02; *Ajuri v The Commander of IDF Forces in the West Bank* (2002) HCJ 7015/02; *Physicians for Human Rights v The Commander of IDF Forces in the Gaza Strip* (2004) HCJ 4764/04; *Beit Sourik Village Council v The Government of Israel* (2004) HCJ 2056/04.

151 Gidi Weitz, 'The Kremnitzer Brief', *Ha'aretz* (Israel) 14 July 2007 <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=881349&contrassID=2&subContrassID=14> at 18 October 2007.

152 Levy, above n 99.

153 For example, Avigdor Feldman, 'Croaking Swan Song', *Ha'aretz* (Israel) 29 December 2006 <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=807048> at 18 October 2007. See also Joanne Mariner, FindLaw, *The Israeli Supreme Court Rules on "Targeted Killings": Part One of a Two-Part Series* (2006) <http://writ.news.findlaw.com/mariner/20061222.html> at 18 October 2007; Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council': Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, John Dugard*, 4th sess, Agenda Item 2, UN Doc A/HRC/4/17 (29 January 2007) [47]; Ze'ev Segal, 'Everything Is Justiciable', *Ha'aretz* (Israel) 19 December 2006 <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=802175&contrassID=2&subContrassID=4> at 18 October 2007; PCATI, 'Response of the Public Committee Against Torture in Israel to Today's Decision by the High Court of Justice Regarding the Policy of Assassinations of the State of Israel' (Press Release, 14 December 2006), available from <http://www.stoptorture.org.il> at 18 October 2007.

154 Schondorf, above n 2, 308–9.

judgment and are left open to interpretation than for them not to have been there at all. This set of legal conditions attempts to avoid harm to innocent civilians and create accountability. It seems to reflect the basic principles of international humanitarian law, at times complemented by human rights law. Rather than creating ambiguity, the test reaffirms the applicability of these basic principles even to the policy of targeted killing.

## IV CONCLUSION

Targeted killing has been analysed according to various normative frameworks in attempts to justify its legality or prove its illegality.[155] President Barak chose this important ruling to be his last before retirement. He ruled according to a specific framework, clarified the applicable law, and set out the customary law of targeted killing. The Court explored an uncharted area of law and its observations should be valued as fertile ground for further thinking rather than condemned as a source of confusion. But Joanne Mariner is right to observe that '[u]nless a real effort is made to ensure that the rules the Court prescribes are actually followed, the Court's inspiring words will still be nothing more than words'.[156] The degree and manner of the judgment's implementation should be easily assessable because it concerns events that occur in 'real time'.

The four requirements set out in the judgment are an innovative approach to translating the abstract rules of international humanitarian law into legal conditions applicable to the current situation between Israel and the Palestinians. The requirements are a creative attempt by the Court to respond to the vagueness of the meaning of direct participation in hostilities by civilians set out in art 51(3) of *Additional Protocol I*. Although the immediate impact of the ruling will be on the Israeli domestic setting, its great and more general importance lies in its attempt to firmly institute the rule of law in a state's fight against terrorism:

> In this case, the law was determined by customary international law regarding conflicts of an international character. Indeed, the State's struggle against

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155 Critics who call Israel's practice 'extra-judicial killing' or 'execution' view it as a violation of the fundamental right to life under international human rights law. Other critics call it 'assassination', thereby summoning the legal connotations that imply the practice is totally illegal. Israel uses terms like 'targeted pre-emptive actions' or 'targeted counter-terrorist operations', designed to present her actions as legitimate within the laws of war. See, eg, *Israeli Practices affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*, GA Res 59/124, UN GAOR, 59th sess, 71st plen mtg, UN Doc A/RES/59/124 (10 December 2004); Commission on Human Rights, *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*, 57th sess, Agenda Item 8, UN Doc E/CN.4/2001/121 (16 March 2001); Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings* (February 2001); ICRC, 'Implementation of the Fourth Geneva Convention in the Occupied Palestinian Territories: History of a Multilateral Process (1997–2001)' (2002) 847 *International Review of the Red Cross* 661; UN Security Council, 'Security Council Urged to Condemn Extrajudicial Executions Following Israel's Assassination of Hamas Leader: Keep Focus on Palestinian Terrorism, Not Acts of Self-Defence, Says Israel's Representative', UN Doc SC/8063, 4945th mtg (Press Release, 20 April 2004) (Statement of Dan Gillerman).

156 Mariner, above n 153.

> terrorism is not conducted 'outside' of the law. It is conducted 'inside' the law, with tools that the law places at the disposal of democratic states.[157]

This landmark judgment is, however, sure to be controversial. Critics will regard it as providing a legal framework that justifies killing Palestinians and as establishing only weak limitations that will fail to restrict those killings. Others will go further and claim that the judgment shows how inadequate the courts of an occupying power are in ensuring legal protection of the occupied population. Supporters, on the other hand, will praise the judgment for its attempt to interpret the often vague rules of international humanitarian law in their application to legal, political and moral realities. To summarise those realities: though they dress as civilians, and in most respects behave like civilians, some of the individuals whom Israel targets function as military commanders, and indeed describe themselves as belonging to the military wings of their respective political organisations, such as Fatah and Hamas. They function as military commanders by planning and directing attacks against Israeli civilian targets. Some of them say the purpose of those attacks is to liberate the West Bank (and previously Gaza) from Israeli occupation. Others say that the purpose of the attacks is part of a broader campaign to destroy the State of Israel. Because they dress and live like civilians, these people are hard to target without causing the deaths of many innocent civilian bystanders. There is reason to believe that this is a deliberate strategy on the part of the people Israel targets, because such collateral damage encourages political and moral hostility to Israel, not only amongst the Palestinians but also amongst the peoples of the world. Israel's other targets are those who gather intelligence and who provide weapons, effectively supporting those targets who are for all intents and purposes military commanders. For these reasons, the State wished to describe the conflict between Israel and the Palestinians, whose military activities are directed and supported by the people Israel targets, as a 'new kind of conflict'. Fearing this might illegitimately release Israel from the restrictions of international law, especially international humanitarian law, the Court interpreted that law in new ways, while remaining true to its spirit.

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157 *PCATI* (2006) HCJ 769/02, [61] (President Barak).

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