HCJ 769/02

1. Public Committee against Torture in Israel
2. LAW — Palestinian Society for the Protection of Human Rights and the Environment
v.
1. Government of Israel
2. Prime Minister of Israel
3. Minister of Defence
4. Israel Defence Forces
5. Chief of General Staff
6. Shurat HaDin — Israel Law Centre and 24 others

The Supreme Court sitting as the High Court of Justice
[14 December 2006]
Before President Emeritus A. Barak, President D. Beinisch and Vice-President E. Rivlin

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: In the armed conflict between the State of Israel and the terrorist organizations operating in the territories of Judaea, Samaria and the Gaza Strip the government of the State of Israel decided to adopt a policy of 'targeted killings' against terrorists. The petitioners asked the court to declare that this policy was illegal under international law and to order the respondents to desist from using the policy.

Held: Customary international law distinguishes between 'combatants' and 'civilians.' There is insufficient information for saying that a third category of 'unlawful combatants' has been recognized at this time by customary international law. Since terrorists do not satisfy the requirements of the definition of 'combatants' in international law, because *inter alia* they do not observe the laws and customs of war, they must be classified as civilians. Under article 51 of the First Additional Protocol to the 1977 Geneva Conventions, civilians may not in principle be targeted by armed forces. However, art. 51(3) of the First Protocol states that 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a

direct part in hostilities.' Therefore terrorists may be targeted by armed forces if 'they take a direct part in hostilities.' The targeting of terrorists by armed forces must satisfy the requirements of art. 51(3); the terrorists must 'take a direct part in hostilities' and the targeting of terrorists may be carried out 'for such time' as they do so. The principle of proportionality in carrying out these attacks should also be observed.

It cannot therefore be said that 'targeted killings' are prohibited by customary international law in every case, just as it cannot be said that they are permitted by customary international law in every case. Each case should be examined prospectively by the military authorities and retrospectively in an independent investigation, and the findings should be based on the merits of the specific case. These findings will be subject to the scrutiny of the court.

Petition denied.

Legislation cited:

Basic Law: Human Dignity and Liberty, s. 8.
Basic Law: the Army, s. 1.
Basic Law: the Government, s. 40(b).
Government and Justice Arrangements Ordinance, 5748-1948, s. 18.
Internment of Unlawful Combatants, 5762-2002, s. 2.
Penal Law, 5737-1977, s. 34M(1).

Israeli Supreme Court cases cited:

[1] HCJ 5872/01 *Barakeh v. Prime Minister* [2002] IsrSC 56(3) 1.
[2] HCJ 9255/00 *Al-Saka v. State of Israel* (unreported).
[3] HCJ 2461/01 *Canaan v. IDF Commander in Judaea and Samaria* (unreported).
[4] HCJ 9293/01 *Barakeh v. Minister of Defence* [2002] IsrSC 56(2) 509.
[5] HCJ 3114/02 *Barakeh v. Minister of Defence* [2002] IsrSC 56(3) 11; **[2002-3] IsrLR 39**.
[6] HCJ 3451/02 *Almadani v. Minister of Defence* [2002] IsrSC 56(3) 30; **[2002-3] IsrLR 47**.
[7] HCJ 8172/02 *Ibrahim v. IDF Commander in West Bank* (unreported).
[8] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.
[9] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.
[10] HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [2004] IsrSC 58(5) 385; **[2004] IsrLR 200**.

[11] HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(4) 785.
[12] CrimA 174/54 *Stampeper v. Attorney-General* [1956] IsrSC 10 5.
[13] CrimA 336/61 *Eichman v. Attorney-General* [1963] IsrSC 17(3) 2033.
[14] LCA 7092/94 *Her Majesty the Queen in Right of Canada v. Edelson* [1997] IsrSC 51(1) 625; **[1997] IsrLR 403**.
[15] HCJ 785/87 *Afu v. IDF Commander in Gaza Strip* [1988] IsrSC 42(2) 4.
[16] HCJ 69/81 *Abu Ita v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(2) 197.
[17] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
[18] HCJ 698/80 *Kawasma v. Minister of Defence* [1981] IsrSC 35(1) 617.
[19] HCJ 3278/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [2003] IsrSC 57(1) 385; **[2002-3] IsrLR 123**.
[20] HCJ 10356/02 *Hass v. IDF Commander in West Bank* [2004] IsrSC 58(3) 443; **[2004] IsrLR 53**.
[21] HCJ 72/86 *Zaloom v. IDF Commander in Judaea and Samaria* [1987] IsrSC 41(1) 528.
[22] HCJ 5591/02 *Yassin v. Commander of Ketziot Military Camp* [2003] IsrSC 57(1) 403.
[23] HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(2) 349; **[2002-3] IsrLR 173**.
[24] HCJ 1890/03 *Bethlehem Municipality v. State of Israel* [2005] IsrSC 59(4) 736; **[2005] (1) IsrLR 98**.
[25] HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* **[2005] (2) IsrLR 206**.
[26] HCJ 2967/00 *Arad v. Knesset* [2000] IsrSC 54(2) 188.
[27] HCJ 9593/04 *Morar v. IDF Commander in Judaea and Samaria* **[2006] (2) IsrLR 56**.
[28] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.
[29] HCJ 2847/03 *Alauna v. IDF Commander in Judaea and Samaria* (unreported).
[30] HCJ 9252/00 *El-Saka v. State of Israel* (unreported).
[31] HCJ 4219/02 *Gussin v. IDF Commander in Gaza Strip* [2002] IsrSC 56(4) 608.
[32] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* **[2006] (1) IsrLR 443**.
[33] HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* **[2006] (2) IsrLR 352**.

[34] HCJ 910/86 *Ressler v. Minister of Defence* [1988] IsrSC 42(2) 441; **IsrSJ 10 1**.
[35] HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [2001] IsrSC 55(4) 800.
[36] HCJ 9056/00 *Kleiner v. Knesset Speaker* [2001] IsrSC 55(4) 703.
[37] HCJ 652/81 *Sarid v. Knesset Speaker* [1982] IsrSC 36(2) 197; **IsrSJ 8 52**.
[38] HCJ 73/85 *Kach Faction v. Knesset Speaker* [1985] IsrSC 39(3) 141.
[39] HCJ 742/84 *Kahane v. Knesset Speaker* [1985] IsrSC 39(4) 85.
[40] HCJ 606/78 *Awib v. Minister of Defence* [1979] IsrSC 33(2) 113.
[41] HCJ 390/79 *Dawikat v. Government of Israel* [1980] IsrSC 34(1) 1.
[42] HCJ 4481/91 *Bargil v. Government of Israel* [1993] IsrSC 47(4) 210; **[1992-4] IsrLR 158**.
[43] HCJ 2117/02 *Physicians for Human Rights v. IDF Commander in West Bank* [2002] IsrSC 53(3) 26.
[44] HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* (not yet reported).
[45] HCJ 253/88 *Sajadia v. Minister of Defence* [1988] IsrSC 42(3) 801.
[46] HCJ 306/81 *Flatto-Sharon v. Knesset Committee* [1981] IsrSC 35(4) 118.
[47] HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [1993] IsrSC 47(1) 749.
[48] HCJ 3648/97 *Stamka v. Minister of Interior* [1999] IsrSC 53(2) 728.
[49] HCJ 399/85 *Kahane v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255.
[50] HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [1990] IsrSC 44(1) 536.
[51] HCJ 258/79 *Amira v. Minister of Defence* [1980] IsrSC 34(1) 90.
[52] HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [1995] IsrSC 49(5) 1.
[53] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.
[54] HCJ 168/91 *Morcus v. Minister of Defence* [1991] IsrSC 45(1) 467.
[55] HCJ 320/80 *Kawasma v. Minister of Defence* [1981] IsrSC 35(3) 113.
[56] HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [1996] IsrSC 50(1) 353.
[57] HCJFH 2161/96 *Sharif v. Home Front Commander* [1996] IsrSC 50(4) 485.
[58] HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [1999] IsrSC 53(4) 817; **[1998-9] IsrLR 567**.
[59] HCJFH 10739 *Minister of Defence v. Adalah Legal Centre for Arab Minority Rights in Israel* (not yet reported).

Israeli District Court cases cited:

[60] SFC 1158/02 (TA) *State of Israel v. Barghouti* (not yet reported).

Israeli Military Tribunal cases cited:

[61] *Military Prosecutor v. Kassem*, 42 *International Law Reports* 470 (1971).

American cases cited:

[62] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[63] *Ex Parte Quirin*, 317 U.S. 1 (1942).

[64] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

Canadian cases cited:

[65] Application under s. 83.28 of the *Criminal Code* (Re), [2004] 2 S.C.R. 248.

English cases cited:

[66] *Mohamed Ali v. Public Prosecutor* [1969] 1 A.C. 430 (PC).

European Court of Human Rights cases cited:

[67] *Banković v. Belgium*, 41 ILM 517 (2002).

[68] *Ergi v. Turkey*, 32 E.H.R.R. 388 (2001).

[69] *McCann v. United Kingdom*, 21 E.H.R.R. 97 (1995).

[70] *McKerr v. United Kingdom*, 34 E.H.R.R. 553 (2001).

Inter-American Court of Human Rights cases cited:

[71] *Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H. R. (series C, no. 4) (1988); 28 ILM 291 (1989).

International Criminal Tribunal for Rwanda cases cited:

[72] *Prosecutor v. Akayesu*, case no. ICTR-96-4-T (1998).

International Criminal Tribunal for the former Yugoslavia cases cited:

[73] *Prosecutor v. Tadić*, ICTY case no. IT-94-1.

[74] *Prosecutor v. Blaškić*, ICTY case IT-95-14-T (2000).

[75] *Prosecutor v. Strugar*, ICTY case IT-01-42 (2005)

[76] *Prosecutor v. Kupreškić*, ICTY case no. IT-95-16 (2000).

For the petitioners — A. Feldman, M. Sfard.

For respondents 1-5 — S. Nitzan.

For the sixth respondents — N. Darshan-Leitner, S. Lubrani.

JUDGMENT

President Emeritus A. Barak

The Government of Israel has adopted a policy of preventative attacks that cause the death of terrorists in Judaea, Samaria and the Gaza Strip. It brings about the death of those terrorists who plan, dispatch or carry out terror attacks in Israel and in the territories of Judaea, Samaria and the Gaza Strip, against both civilians and soldiers. Sometimes these attacks also harm innocent civilians. Does the state thereby act unlawfully? This is the question that is before us.

(1) Factual background

1. In September 2000 the second Intifadeh broke out. A fierce barrage of terrorism was directed against the State of Israel and against Israelis wherever they were. The barrage of terror does not distinguish between combatants and civilians, or between women, men and children. The terror attacks are taking place both in the territories of Judaea, Samaria and the Gaza Strip and in the State of Israel. They target civilian centres, shopping centres and marketplaces, cafés and restaurants. In the last five years thousands of acts of terrorism have been committed against Israel. In the course of these, more than one thousand Israelis have been killed. Thousands of Israeli civilians have been injured. Thousands of Palestinians have also been killed and injured during this period.

2. In its war against terrorism, the State of Israel has adopted various measures. As a part of the defence activity that is intended to deal with terrorist attacks, the state employs what it calls 'the targeted killing policy.' By means of this policy, the security forces operate in order to kill operatives in terrorist organizations who are involved in the planning, dispatching or commission of terror attacks against Israel. During the second Intifadeh, preventative attacks have been carried out throughout Judaea, Samaria and the Gaza Strip. According to figures provided by the petitioners, from the time when these operations began until the end of 2005 almost three hundred operatives in terrorist organizations were killed in these attacks. More than thirty targeted killing attempts failed. Approximately one hundred and fifty civilians who were near the location of the targets of these killings were killed in these operations. Hundreds of others were injured. The targeted killings policy is the focus of this petition.

(2) The petitioners' arguments

3. The petitioners' position is that the targeted killings policy is clearly illegal, contrary to international law, Israeli law and basic principles of human morality. It violates the human rights both of the targets of the attacks and of innocent bystanders who happen to be in the area of the attack, as these rights are recognized in Israeli and international law.

4. The petitioners' position is that the legal framework that governs the armed conflict between Israel and the terrorist organizations is not the laws of war but the laws that concern the enforcement of law and order in an occupied territory. The petitioners' position in this regard underwent changes in the course of the petition, of which some were the result of changes that occurred in the respondents' position. Originally it was argued that the laws of war mainly concern international conflicts, whereas the armed struggle between Israel and the Palestinians does not fall into the category of an international conflict. Therefore it is not the laws of war that apply to this dispute but the laws of policing and law enforcement. In their closing statement (of 1 September 2004) the petitioners agreed with the position that in our case we are dealing with an international conflict, but even in this framework there is no place for military operations that are governed by the laws of war. This is because Israel's right to carry out military operations of self-defence under article 51 of the United Nations Charter of 1945 does not apply to the dispute under discussion. The right of self-defence is given to a state in response to an armed attack of another state. The territories are subject to a belligerent occupation of the State of Israel, and therefore article 51 does not apply at all to our case. Just as the state is unable to claim self-defence against its own population, so too it cannot claim self-defence against inhabitants who are subject to the occupation of its army. Against an occupied civilian population there is no right of self-defence but only a right to enforce the law in accordance with the laws of belligerent occupation. Therefore our case is subject to the laws of policing and law enforcement within the framework of the laws of occupation, and not the laws of war. In this framework, there is no place for killing suspects without due process, and without arrest and trial. The targeted killings violate the basic right to life and this violation has no defence or justification. The prohibition of arbitrary killing that is not required for self-defence is enshrined in the customary norms of international law. A prohibition of this kind derives also from the duties of the occupying power in an occupied territory vis-à-vis the occupied population, which constitutes a protected population under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, and also according to the two additional protocols to the convention

that were signed in 1977. All these laws reflect norms of customary international law and they bind Israel. According to the petitioners, the practice of states that fight terrorism indicates unequivocally an international custom according to which members of terrorist organizations are treated as criminals, and the criminal law, sometimes with the addition of special emergency powers, is what governs the methods of combating terrorism. The petitioner state as examples for this purpose the British struggle against the Irish terrorist organizations, the Spanish struggle against the Basque terrorist organizations, the German struggle against the terrorist organizations, the Italian struggle against the Red Brigades organization and the Turkish struggle against the Kurdish terrorist organizations.

5. In the alternative, the petitioners claim that the targeted killing policy violates the rules of international law even if we apply the laws of war to the armed conflict between Israel and the Palestinians. These laws recognize only two statuses of persons — combatants and civilians. Combatants are legitimate targets for attack, but they also enjoy the rights that are granted in international law to combatants, including immunity against indictment and the right to a status of prisoners of war. Citizens enjoy protections and rights that are granted in international law to civilians in times of war. *Inter alia*, they are not a legitimate target for attacks. The status of civilians and the protection afforded to them are enshrined in common article 3 of the Geneva Conventions. This is a basic principle of customary international law. The petitioners' position is that this classification of combatants and civilians is an exhaustive classification. There is no intermediate status and there is no third category of 'unlawful combatants.' Every person who is not a combatant and every person with regard to whom there is a doubt as to whether he is a combatant automatically has the status of a civilian and is entitled to the rights and protections given to civilians in times of war. Even a civilian who collaborates in combat activities is not an 'unlawful combatant,' but only a criminal civilian, and therefore he retains his status as a civilian. The petitioners therefore reject the state's position that the terrorist organizations' operatives should be regarded as unlawful combatants. The petitioners discuss how the state itself refuses to give these operatives the rights and the defences given in international law to combatants, such as the right to a status of a prisoner of war. The result is that the state wishes to treat them according to the worse of both worlds: as combatants, to justify killing them, and as civilians, for the purpose of arresting them and bringing them to trial. This result is unacceptable. The operatives of the terrorist organizations, even if they take part in combat activities, are not thereby excluded from the

application of the rules of international law. The petitioners' position is therefore that the operatives of the terrorist organizations should be regarded as having the status of civilians.

6. The petitioners state that a civilian who takes part in combat may lose some of the protections given to civilians in times of war. But this is only when he takes a direct part in the combat activities, and only as long as this direct participation lasts. These two conditions are provided in article 51(3) of the First Additional Protocol to the 1977 Geneva Conventions (hereafter — the First Protocol). This article, with all of its conditions, reflects, according to the petitioners, a customary rule of international law. These conditions were adopted in international case law, and they are mentioned in additional international documents, as well as in the army manuals of most Western countries. In order to preserve the clear distinction between combatants and civilians, these conditions are given a narrow and precise interpretation. According to this interpretation, a civilian will lose his immunity against attack only when he actually takes a direct part in hostilities, and only during the time when this direct participation is continuing. Thus, for example, from the moment that the civilian returns home, and even if he intends to take part once again in hostilities at a later date, he is not a legitimate target for attack, although he can be arrested and brought to trial for his participation in the combat activities. The petitioners insist that the targeted killing policy, as it is implemented in practice and as the respondents expressly state, goes beyond these narrow limits. It targets civilians even when they are not participating directly in combat or hostile acts. The targeted killings are carried out in circumstances that do not satisfy the immediate and essential conditions which alone justify an attack on civilians. Therefore we are dealing with an illegal policy that constitutes a prohibited attack on civilian targets.

7. The petitioners attached an expert opinion from Prof. Cassese, an expert in international law, who was the first president of the International Criminal Tribunal for crimes committed in the former Yugoslavia. In his opinion Prof. Cassese discusses the fundamental distinction in international law between civilians and combatants, which is enshrined, *inter alia*, in the Regulations Concerning the Laws and Customs of War on Land, which are appended to the fourth Hague Convention of 1907. Someone who does not fall within the definition of combatant is automatically a civilian. There is no third category of 'unlawful combatants.' Therefore persons who participate in various hostile acts without satisfying the definition of combatants have the

status of civilians and are entitled to the protections granted to them by the laws of war. A civilian who participates in hostilities loses these protections and may become a legitimate target for an attack. But this is only if he is taking a direct part in hostilities, and only if the attack against him is carried out during the period of time when he is actually taking a direct part in the hostilities. This rule is enshrined in article 51(3) of the First Protocol, but it reflects a rule of customary international law. Prof. Cassese's position is that the expressions 'direct part' and 'period of time' should be interpreted strictly and narrowly. A civilian who takes part in hostilities loses the protections given to civilians only during the period of time when he actually takes part directly in hostilities, such as when he is shooting or laying a mine. Even a citizen who is making preparations to carry out hostile activity may be considered someone who is taking a direct part in hostile acts, provided that he is openly carrying a weapon. When he puts down his weapon, or when he is not carrying out hostilities he ceases to be a legitimate target for an attack. Therefore someone who only provides assistance in planning a hostile act, or someone who trains or sends others to carry out hostilities is not a legitimate target for an attack. Indirect assistance of this kind to hostile activities may expose the citizen to arrest and trial, but it does not make him a legitimate target for an attack.

8. The petitioners' position is that the targeted killing policy, as it is implemented in practice, also violates the requirements of proportionality that constitute a part of both Israeli law and customary international law. The principle of proportionality is a central principle of the laws of war. It prohibits attacking even legitimate targets if the attack is expected to result in an excessively serious attack on the lives of innocent persons relative to the military advantage of the operation. This principle is enshrined in article 51(5)(B) of the First Protocol, which is a customary rule of war. The targeted killing policy does not satisfy this condition. Its perpetrators are aware that it may, sometimes almost certainly, result in death and injury to innocents. And this is indeed what happens time after time. Because of the *modus operandi* adopted within the framework of this policy, many of the preventative killing attempts end in the death and injury of innocent civilians. Thus, for example, on 22 July 2002 a bomb weighing 1,000 kg was dropped on the home of Salah Shehada, a wanted person, in a dense residential area in the city of Gaza. The bomb and the shockwave caused the death of the wanted person, his wife, his daughter and also twelve additional persons who lived nearby. Dozens of people were injured. This case, as well as other cases, illustrates damage caused by the targeted killing policy, which does not distinguish

between terrorists and innocents. The petitioners' position is, therefore, that the targeted killing policy does not satisfy the test of proportionality in the narrow sense. Moreover, according to the petitioners the policy also does not satisfy the second test of proportionality, which concerns the least harmful measure. According to the petitioners, the respondents make use of the targeted killing measure on a frequent basis, including when there are also other measures available for apprehending the persons suspected of terrorist activity. The petitioners point to the fact that during the second Intifadeh the security forces have made hundreds of arrests in those parts of Judaea, Samaria and the Gaza Strip that are under the exclusive control of the Palestinian Authority. These figures show that the security forces have the operational ability to arrest suspects even in areas under the exclusive control of the Palestinian Authority and to bring them to arrest and interrogation facilities. In these circumstances, there is no justification for making use of targeted killings. Finally, the petitioners discuss how the targeted killings policy is not immune from serious mistakes. The targets of the killings are not given an opportunity to protest their innocence. The targeted killing policy works in a secret world where the public eye does not see the evidence on which basis the targets are chosen for the killings. There is no judicial review before or after the targeted killing operations. At least in one case there is a concern that a mistake of identity was made and a man who had a similar name to a wanted person and lived in the same village was killed.

(3) The respondents' reply

9. In their preliminary reply to the petition, the respondents stated that a petition that is identical to the petition before us, both in substance and with regard to the arguments that were raised in it, was considered and denied by the Supreme Court (HCJ 5872/01 *Barakeh v. Prime Minister* [1], judgment of 29 January 2002). In this judgment it was held that 'the choice of the method of combat that the respondents employ in order to prevent murderous terrorist attacks before they are committed is not one of the subjects in which this court will see fit to intervene.' The respondents' position is that this approach is a proper one. This petition, like its predecessor, seeks to bring the court into the battle zone in order to consider matters that are of a purely operational character, which are not justiciable. For these reasons the petition should be denied *in limine*. Notwithstanding, the respondents did not reiterate this argument in the supplementary pleadings that they filed.

10. On the merits, the respondents discuss the security background that led to the targeted killing policy. Since the end of September 2000, combat

activities against Israel have been occurring in the territories of Judaea, Samaria and the Gaza Strip. As a result of these, more than one thousand Israeli citizens were killed in the years 2000-2005. Thousands more were injured. The security forces carried out various operations in order to contend with the combat activities and terrorism. In view of the armed conflict, these operations are subject to the laws of war, or the laws of armed conflicts that constitute a part of international law. The respondents' position is that the court should reject the argument that Israel may only defend itself against terrorism by using law enforcement measures. There is no longer any dispute that a state may respond with military force to a terrorist attack against it, by virtue of its right to self-defence that is provided in article 51 of the United Nations charter, which allows a state to protect itself against an 'armed attack.' Even if there is a dispute among scholars with regard to the question of what is an 'armed attack,' there cannot be any doubt that the terrorist barrage against Israel satisfies the definition of an armed attack. Therefore Israel may use military force against the terrorist organizations. The respondents point to the fact that other countries have stopped regarding terrorist operations merely as criminal offences and have begun to make use of military measures against terrorist operations that are directed against them. This is especially the case when the terrorist acts are on a large scale and continue for a long period. The respondents' position is that the question whether the laws of belligerent occupation apply to all the territories is not relevant to the question before us, since the question whether the targeted killing policy is legal will be determined in accordance with the laws of war, which apply both to an occupied territory and to an unoccupied territory, provided that an armed conflict is taking place there.

11. The respondents' position is that the laws of war govern not only war in the classical sense, but also other armed disputes and conflicts. International law does not include an unambiguous definition of the concept of 'armed conflict.' But there is no doubt today that an armed conflict may take place between a state and groups or organizations that are not states, *inter alia* because of the military abilities and weapons in the possession of such organizations and their willingness to use them. The current dispute between Israel and the terrorist organizations is an armed conflict in which Israel is entitled to respond with military measures. This has also been upheld by the Supreme Court in a host of cases. With regard to the classification of the conflict, originally the respondents argued that it is an international conflict that is subject to the ordinary rules of war. In the closing reply (of 26 January 2004) the respondents said that the question of the conflict between

Israel and the Palestinians is a complex question, and it has diverse aspects. In any case, there is no need to decide this for the purpose of the petition, since according to each of the categories the laws of armed conflict will apply to the state's actions. These laws permit an attack on someone who is a party to the armed dispute and takes an active part in it, whether it is an international armed conflict or it is an armed conflict that is not international, and even if we are dealing with a new category of armed conflict that has developed in the last decade in international law, which concerns armed conflicts between states and terror organizations. According to each one of these categories, someone who is a party to the armed conflict and takes an active part in it is a combatant, and he may be attacked. The respondents' position is that the terrorist organizations' operatives are a party to the armed conflict between Israel and the terrorist organizations, within which framework they take an active part in the combat. Therefore they are legitimate targets for an attack as long as the armed conflict continues. Notwithstanding, they are not entitled to the rights of combatants under the Third Geneva Convention and the Hague Regulations since they do not distinguish themselves from the civilian population, and because they do not observe the laws of war. In view of this complex reality, the respondents' position is that a third category of persons should be recognized, namely the category of unlawful combatants. Persons who fall into this category are combatants, and therefore they constitute a legitimate target for an attack. Notwithstanding, they are not entitled to all the rights given to lawful combatants, since they do not themselves observe the requirements of the laws of war. The respondents' position is that the terror organizations' operatives in the territories fall into the category of 'unlawful combatants.' The status of the terrorists who participate actively in the armed conflict is not the status of civilians. They are a party to the armed conflict, and therefore it is permitted to attack them. They do not observe the laws of war, and therefore they do not enjoy the rights and protections given to lawful combatants, who observe the requirements of the laws of war. The respondents' position is therefore that according to each of the alternatives, 'the state is permitted to kill someone who is fighting against it, in accordance with the basic principles of the laws of war that govern every armed conflict' (para. 68 of the respondents' reply of 26 January 2004).

12. Alternatively, the respondents' position is that the targeted killing policy is lawful even if the court does not accept the argument that the terrorist organizations' operatives are combatants that are a party to the armed conflict, and even if the court regards them as persons who have a civilian

status. This is because the laws of armed conflict permit an attack on civilians who are taking a direct part in the combat activities. Indeed, as a rule the laws of war give civilians immunity from attacks. But a 'civilian' who takes a direct part in the hostilities loses his immunity and may be the target of an attack. This also means that it is permitted to attack civilians in order to frustrate intentions to carry out future or planned hostile activity. Any person who takes a direct part in the commission, planning or dispatching of hostilities that are intended against civilian or military targets is a legitimate target for attack. This exception reflects a customary rule of international law. The respondents' position is that the condition of simultaneity provided in article 51(3) of the First Protocol, according to which a civilian who takes a direct part in hostilities may only be attacked at the time when he is taking part in the hostilities, does not bind Israel since it does not reflect a rule of customary international law. In this regard the respondents state that Israel, like other countries, was not a party to the First Protocol. Therefore it is permitted to attack civilians who are taking a direct part in hostilities even when they are not carrying them out. There is nothing that prevents attacking terrorists at any time and place, as long as they have not laid down their weapons and left the cycle of combat. Finally, the respondents' position is that even if we regard art. 51(3) of the First Protocol, with all of its conditions, as a customary rule, the targeted killings policy satisfies its provisions. This is because they should be interpreted more broadly than the interpretation proposed by the petitioners. Thus the expression 'hostilities' should be interpreted to include acts such as the planning of terrorist attacks, the dispatching of terrorists and being in command of terrorist cells. There is no basis for Prof. Cassese's position that 'hostilities' should include the use of weapons or the carrying of weapons. The expression 'taking a direct part' should also be given a broad interpretation, so that anyone who plans, commits or sends another person to carry out a terrorist attack will be regarded as someone who takes a direct part in hostilities. Finally, the condition of simultaneity should also be interpreted broadly so that it will be possible to attack a terrorist at any time that he is systematically involved in acts of terror. The respondents' position is that the very restrictive interpretation of art. 51(3) that is proposed by the petitioners is unreasonable and outrageous. The petitioners' position and the opinion submitted on their behalf imply that terrorists have immunity from attack for as long as they are planning terrorist attacks and this immunity is removed for a short time only, when the attack is actually being carried out. After the attack has been carried out, the immunity returns to protect the terrorists, even if it is known and

clear that they are going home in order to plan and carry out the next attack. This interpretation allows someone who takes an active part in hostilities 'to change hats' as he wishes between a combatant's hat and a civilian's hat. This result is unthinkable. It is also inconsistent with the purpose of the exception, which is intended to allow the state to take action against civilians who take an active part in the struggle against it. The respondents' conclusion is that the targeted killings policy satisfies the laws of war even if we regard the terrorists as civilians, and even if we regard the conditions set out in art. 51(3) of the First Protocol as customary rules.

13. The respondents' position is that the targeted killings policy, as it is carried out in practice, satisfies the requirement of proportionality. The requirement of proportionality does not lead to the conclusion that it is prohibited to carry out military operations that may harm civilians. This requirement means that the harm to civilians should be proportionate to the security benefit that is likely to arise from the military operation. Moreover, the proportionality of the operation should be examined against the background of the uncertainty that inherently accompanies any combat activity, especially in view of the circumstances of the armed conflict between Israel and the terrorist organizations. The State of Israel satisfies the requirements of proportionality. Targeted killing operations are only carried out as an exceptional step, when there is no alternative to this activity. Its purpose is the saving of lives. It is considered at the highest levels of command. In every case an attempt is made to limit as much as possible the collateral damage that may be caused to civilians as a result of the targeted killing operation. In cases where the security establishment is of the opinion that there are other alternatives to the operation, these alternatives are implemented in so far as possible. Targeted killing missions have been postponed or cancelled on more than one occasion when it transpired that there was no possibility of carrying them out without endangering innocent persons disproportionately.

(4) The petition and the hearing thereof

14. The petition was filed on 24 January 2002, and after preliminary replies were filed it was set down for a hearing before a panel of three justices. After the first hearing on 18 April 2002 before Justices A. Barak, D. Dorner and I. Englard, the parties were asked to file supplementary statements that addressed a series of questions that were posed by the court. After the responses were filed, another hearing of the petition was held on 8 July 2003 before a panel of Justices A. Barak, T. Or and E. Mazza). During

this, we considered the petitioners' application for an interim order. The application was denied. At the request of the parties, additional time was given for the filing of supplementary statements. At the request of the petitioners, an additional hearing of the petition was held on 16 February 2005 before a panel of Justices A. Barak, M. Cheshin and D. Beinisch). During this the respondents submitted the prime minister's statement at the Sharm El-Sheik conference according to which the State of Israel was suspending the use of the targeted killings policy. In view of this statement, we decided to defer the hearing of the petition to another date, in so far as this would be required. In the month of July 2005 the state began to employ the targeted killings policy once again. In view of this, at the request of the parties an additional hearing of the petition was held on 11 December 2005, before a panel of Justices A. Barak, M. Cheshin and D. Beinisch. At the end of this, we held that judgment would be given after further supplementary statements were filed by the parties. Pursuant to the decision of President D. Beinisch on 22 November 2006, Vice-President E. Rivlin replaced Vice-President M. Cheshin who had retired.

15. After the petition was filed, two applications were filed to join it. First on 22 July 2003 an application was filed by counsel for the petitioners on behalf of the National Lawyers Guild and the International Association of Democratic Lawyers to join the petition and to file written pleadings as *amicus curiae*. The respondents opposed the application. Subsequently an application was filed on 23 February 2004 on behalf of Shurat HaDin — Israel Law Centre and 24 additional applicants to join them as respondents in the petition. The petitioners opposed the application. We are deciding to grant the two applications and to join the applicants as parties to the petition. The pleadings on behalf of the *amicus curiae* support the main arguments of the petitioners. They also argue that the killing of religious and political leaders is contrary to international law and is not legitimate, whether in times of war or in times of peace. In addition, no use should be made of the targeted killings policy against anyone who is involved in terrorist activities except in cases where there is an immediate danger to human lives, and even then only in the absence of any other means of averting the danger. The pleadings of Shurat HaDin support the main arguments of the respondents. They also argue that the targeted killings are permitted, and even necessary, according to the principle of Jewish law 'If someone comes to kill you, kill him first!' (Babylonian Talmud, *Berachot* 58a) and according to the law of 'Someone who is pursuing his fellow-man to kill him…' (Mishnah, *Sanhedrin* 8, 7).

(5) The general normative framework

A. An international armed conflict

16. The fundamental premise is that, since the Intifadeh began, a continuous state of armed conflict has existed between Israel and the various terrorist organizations that operate from Judaea, Samaria and the Gaza Strip (hereafter — the territories). The court has discussed the existence of this conflict in a host of judgments (see HCJ 9255/00 *Al-Saka v. State of Israel* [2]; HCJ 2461/01 *Canaan v. IDF Commander in Judaea and Samaria* [3]; HCJ 9293/01 *Barakeh v. Minister of Defence* [4]; HCJ 3114/02 *Barakeh v. Minister of Defence* [5]; HCJ 3451/02 *Almadani v. Minister of Defence* [6]; HCJ 8172/02 *Ibrahim v. IDF Commander in West Bank* [7]; HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [8]). In one case I said:

> 'Since the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle' (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [9], at p. 358 {87}).

This approach is consistent with the definition of an armed conflict in international literature (see O. Ben-Naftali and Y. Shani, *International Law Between War and Peace* (2006), at p. 142; Y. Dinstein, *War, Aggression and Self-Defence* (fourth edition, 2005), at p. 201; H. Duffy, *The 'War on Terror' and the Framework of International Law* (2005), at p. 219). It clearly reflects what has been occurring and is still occurring in the 'territories.' The situation was described in the supplementary closing arguments of the State Attorney's Office (of 26 January 2004) as follows:

> 'For more than three years the State of Israel has faced an unceasing, continuous and murderous barrage of attacks, which are directed against Israelis wherever they are, without any distinction between soldiers and civilians or between men, women and children. Within the framework of the current terror barrage, more than 900 Israelis have been killed from September 2000 until the present, and thousands of other Israelis have been injured. Thousands of Palestinians have also been killed and injured during this period. By way of comparison we should point out that the number of Israeli victims relative to the population of the State of Israel is several times greater than the percentage of victims who were killed in the United States in the events of September 11 relative to the population of the United States. As is well known, and as we have already pointed out,

> the events of September 11 were defined by the countries of the world and international organizations without any hesitation as an "armed attack" that justifies the use of force in reply.
>
> The terror attacks are taking place both in Judaea, Samaria and the Gaza Strip (hereafter — the territories) and in the State of Israel itself. They are directed both against civilians, civilian population centres, shopping centres and marketplaces, and also against IDF forces and bases and facilities of the security forces. In these attacks the terrorist organizations employ measures that are of a purely military character, and what all of these measures have in common is their lethalness and callousness. These measures include shooting attacks, suicide attacks, the firing of mortars, the firing of rockets, the use of car bombs, etc.' (at p. 30).

17. This armed conflict (or dispute) does not take place in a normative vacuum. It is subject to normative arrangements as to what is permitted and what is prohibited. I discussed this in one case where I said:

> '"Israel is not an island. It is a member of an international community...". The military operations of the army are not conducted in a legal vacuum. There are legal norms — some from customary international law, some from international law enshrined in treaties to which Israel is a party, and some from the basic principles of Israeli law — which provide rules as to how military operations should be conducted' (HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [10], at p. 391 {205-206}).

What are the normative arrangements that apply in the case of an armed conflict between Israel and the terrorist organizations that operate in the territories?

18. The normative arrangements that apply to the armed conflict between Israel and the terrorist organizations in the territories are complex. They focus mainly on the rules of international law concerning an international armed conflict (or dispute). The international character of an armed conflict between a state that is occupying a territory in a belligerent occupation and guerrillas and terrorists that come from that territory — including the armed dispute between Israel and the terrorist organizations in the territories — was discussed by Prof. Cassese, who said:

> 'An armed conflict which takes place between an Occupying Power and rebel or insurgent groups — whether or not they are terrorist in character — in an occupied territory, amounts to an international armed conflict' (A. Cassese, *International Law* (second edition, 2005), at p. 420).

These laws include the laws of belligerent occupation. But they are not limited to them alone. These laws apply to every case of an armed conflict of an international character — i.e., one that crosses the borders of the state — whether the place where the armed conflict is occurring is subject to a belligerent occupation or not. These laws constitute a part of the laws of the conduct of war (*ius in bello*). From the humanitarian viewpoint, they are a part of international humanitarian law. This humanitarian law is a special law (*lex specialis*) that applies in an armed conflict. Where this law has a lacuna, it can be filled by means of international human rights law (see the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep. 226, at p. 240; the advisory opinion of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) 43 ILM 1009; *Banković v. Belgium* [67]; see also Meron, 'The Humanization of Humanitarian Law,' 94 *Am. J. Intl. L.* 239 (2000)). In addition to the provisions of international law governing an armed conflict, the basic principles of Israeli public law are likely to apply. These basic principles are carried by every Israeli soldier in his backpack and they go with him wherever he goes (see HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 810; *Ajuri v. IDF Commander in West Bank* [9], at p. 365 {96}; *Marabeh v. Prime Minister of Israel* [8], at para. 14 of the judgment).

19. Significant parts of international law that deal with an armed conflict are of a customary nature. These customary laws are a part of Israeli law, 'by virtue of the fact that the State of Israel is sovereign and independent' (*per* Justice S.Z. Cheshin in CrimA 174/54 *Stampeper v. Attorney-General* [12], at p. 15; see also CrimA 336/61 *Eichman v. Attorney-General* [13]; LCA 7092/94 *Her Majesty the Queen in Right of Canada v. Edelson* [14], at p. 639 {416}, and the cases cited there; see also R. Lapidot, 'The Place of Public International Law in Israeli Law,' 19 *Hebrew Univ. L. Rev. (Mishpatim)* 809 (1990); R. Sabel, *International Law* (2003), at p. 29). This was well expressed by President Shamgar, who said:

> 'According to the consistent case law of this court, customary international law is a part of Israeli law, subject to Israeli legislation containing a contrary provision' (HCJ 785/87 *Afu v. IDF Commander in Gaza Strip* [15], at p. 35).

International law that is enshrined in international conventions (whether Israel is a party to them or not) and which does not involve the adoption of customary international law is not a part of the internal law of the State of Israel (see HCJ 69/81 *Abu Ita v. IDF Commander in Judaea and Samaria* [16], at p. 234, and Y. Zilbershatz, 'Incorporating International Law in Israeli Law — The Law As It Is and As It Should Be,' 24 *Hebrew Univ. L. Rev. (Mishpatim)* 317 (1994)). In the petitions before us, no question arises with regard to any conflicting Israeli legislation. Public law in Israel recognizes the Israel Defence Forces as 'the army of the state' (s. 1 of the Basic Law: the Army). The army is authorized 'to do all the lawful actions that are required for the defence of the state and in order to achieve its national security goals' (s. 18 of the Government and Justice Arrangements Ordinance, 5748-1948). The Basic Law: the Government recognizes the constitutionality of 'military operations that are required for the purpose of protecting the state and public security' (s. 40(b)). Naturally, these operations also include an armed conflict with terrorist organizations outside the borders of the state. We should also mention the defence against criminal liability provided in s. 34M(1) of the Penal Law, 5737-1977, according to which a person will not be liable under the criminal law for an act that 'he was obliged or competent to do according to law.' When the soldiers of the Israel Defence Forces operate in accordance with the laws of armed conflict, they are acting 'according to law,' and they have the defence of justification. By contrast, if they act contrary to the laws of armed conflict, they are likely to be liable, *inter alia* under the criminal law, for their actions. Indeed, the question before us should be considered within the framework of customary international law concerning an armed conflict. This is also the source for all the other laws that may be relevant under our internal law. Conventional international law that has no customary force is not a part of our internal law.

20. International law concerning the armed conflict between Israel and the terrorist organizations is enshrined in several legal sources (see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), at p. 5). The main source is the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907 (hereafter — the Hague Convention). The provisions of this convention, to which Israel is a party, have a status of customary international law (see *Jamait Askan Almalmoun*

Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria [11], at p. 793; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [17], at p. 827 {283}; *Ajuri v. IDF Commander in West Bank* [9], at p. 364 {95-96}). In addition to this there is the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter — the Fourth Geneva Convention). Israel is a party to this convention. It was not adopted in Israeli legislation. Notwithstanding, its customary provisions are a part of the law of the State of Israel (see the opinion of Justice H.H. Cohn in HCJ 698/80 *Kawasma v. Minister of Defence* [18], at p. 638). It is well known that the position of the Government of Israel is that in principle the laws of belligerent occupation in the Fourth Geneva Convention do not apply with regard to the territories. Notwithstanding, Israel observes the humanitarian provisions of this convention (see *Kawasma v. Minister of Defence* [18]; *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 194; *Ajuri v. IDF Commander in West Bank* [9], at p. 364 {95-96}; HCJ 3278/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [19], at p. 396 {136}; *Beit Sourik Village Council v. Government of Israel* [17], at p. 827 {283}; *Marabeh v. Prime Minister of Israel* [8], at para. 14 of the judgment). For the purposes of the petition before us this is sufficient. In addition, the laws concerning an international armed conflict are enshrined in the Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 ('the First Protocol'). Israel is not a party to this protocol, and it has not been adopted in Israeli legislation. Of course, the customary provisions of the First Protocol are a part of Israeli law.

21. Our premise is that the law that governs the armed conflict between Israel and the terrorist organizations in the territories is the international law that relates to an armed conflict or dispute. This is how this court has regarded the character of the dispute in the past, and this is how we are also continuing to regard it in the petition before us. According to this approach, the fact that the terrorist organizations and its members do not act on behalf of a state does not make the struggle merely an internal matter of the state (see Cassese, *International Law*, *supra*, at p. 420). Indeed, in today's reality a terrorist organization may have a considerable military capacity, sometimes exceeding even the capacity of states. Dealing with these dangers cannot be limited merely to the internal affairs of a state and its criminal law. Contending with the risk of terror constitutes a part of international law that

concerns armed conflicts of an international nature. Additional possibilities have been raised in legal literature (see Duffy, *The 'War on Terror' and the Framework of International Law*, *supra*, at p. 218; E. Gross, *Democracy's Struggle Against Terrorism: Legal and Moral Aspects* (2004), at p. 585; O. Ben-Naftali and K. Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' 36 *Cornell Intl. L. J.* 233 (2003); D. Jinks, 'September 11 and the Law of War,' 28 *Yale J. I. L.* 1 (2003)). According to the approach of Prof. Kretzmer, this armed dispute should be classified as a dispute that is not merely an internal-national dispute, nor should it be classified as being of an international character, but it has a mixed character, in which both international human rights law and international humanitarian law apply (see D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' 16 *Eur. J. Int'l L.* 171 (2000)); counsel for the state raised these possibilities before us and indicated the problems that they raise, without adopting any position with regard to them. As we have seen, the premise on which the Supreme Court has relied for years — and which also was always the premise of counsel for the state before the Supreme Court — is that the armed dispute is of an international character. In this judgment we are continuing with this approach. It should be noted that even those who think that the armed dispute between Israel and the terrorist organizations is not of an international character hold that it is subject to international humanitarian law or international human rights law (see Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 194; Ben Naftali and Shani, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 142, and *Hamdan v. Rumsfeld* [62]; *Prosecutor v. Tadić* [73], at para. 127; on non-international armed conflicts see: Y. Dinstein, C. Garraway, M. Schmitt, *The Manual On Non-International Armed Conflict: With Commentary* (2006)).

22. International law concerning armed conflicts is based on a delicate balance between two conflicting considerations (see *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 794; *Centre for Defence of the Individual v. IDF Commander in West Bank* [19], at p. 396 {136}; *Beit Sourik Village Council v. Government of Israel* [17], at p. 833 {290}). *One* concerns the humanitarian considerations that relate to anyone who is harmed as a result of the armed conflict. These considerations are based on human rights and dignity. The *other* concerns military considerations, which lie at the heart

of the armed conflict. These considerations are based on military necessity and success (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 16). The balance between these considerations is the basis for the international law of armed conflicts. This was discussed by Prof. Greenwood, who said:

> 'International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity' (Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* 32 (1995)).

In *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11] I said:

> 'The Hague Regulations revolve around two main focal points: one is ensuring the legitimate security interests of the occupier of a territory that is subject to a belligerent occupation; the other is ensuring the needs of the civilian population in the territory that is subject to a belligerent occupation' (*ibid*. [11], at p. 794).

In another case Justice A. Procaccia said that the Hague Convention authorizes the military commander to ensure two needs:

> 'The first need is a military need and the second is a civilian-humanitarian need. The first focuses on concern for the security of the military force that is occupying the area, and the second concerns the responsibility for preserving the welfare of the inhabitants. Within the latter sphere, the area commander is responsible not only for maintaining order and ensuring the security of the inhabitants but also for protecting their rights, especially their constitutional human rights. The concern for human rights lies at the heart of the humanitarian considerations that the area commander must consider' (HCJ 10356/02 *Hass v. IDF Commander in West Bank* [20], at p. 455 {65}).

In *Beit Sourik Village Council v. Government of Israel* [17] I added that:

> 'The laws of belligerent occupation recognize the authority of the military commander to maintain security in the area and thereby to protect the security of his country and its citizens, but it makes the exercising of this authority conditional upon a proper balance between it and the rights, needs, and interests of the local population' (*ibid.* [17], at p. 833 {290}).

Indeed —

> 'Indeed, like in many other areas of the law, the solution is not one of "all or nothing." The solution lies in finding the proper balance between the conflicting considerations. The solution is not to be found in giving absolute weight to one of the considerations; the solution lies in giving relative weight to the different considerations by balancing them in relation to the matter requiring a decision' (*Marabeh v. Prime Minister of Israel* [8], at para. 29 of the judgment).

The result of this balance is that human rights are protected by the laws of armed conflict, but not to their full extent. The same is true with regard to military necessity. It may be realized, but not to its full extent. This balance reflects the relativity of human rights and the limitations of military necessity. The proper balance is not fixed. 'In certain cases the emphasis is on military necessity whereas in other cases the emphasis is on the needs of the local population' (*Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 794). What, then, are the factors that affect the proper balance?

23. A main factor that affects the proper balance is the identity of the person who is harmed or the target that is harmed in the armed conflict. This is the basic principle of distinction (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 82; Ben-Naftali and Shani, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 151). Customary international law with regard to armed conflicts discusses a fundamental distinction between combatants and military targets, on the one hand, and non-combatants, i.e., civilians, and civilian targets on the other (see the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *supra*, at p. 257; art. 48 of the First Protocol). According to the basic principle of distinction, the proper balance between the military needs of the state as opposed to combatants and military targets of the other party is different from the proper balance between the military needs of the state as opposed to civilians and civilian targets of the other party. As a rule, combatants and military targets are legitimate targets for a military attack. Their lives and bodies are subject to the risks of combat. It is permitted to kill and injure them. Notwithstanding, not every combat activity is permitted against them, nor is every military course of action permitted. Thus, for example, it is permitted to shoot them and kill combatants. But there is a prohibition against the treacherous killing of combatants or harming them in a manner that amounts to perfidy (see Dinstein, *The Conduct of Hostilities*

under the Law of International Armed Conflict, at p. 198). Similarly the use of certain weapons is prohibited. A consideration of all this does not arise in the petition before us. Moreover, there are comprehensive laws that concern the status of prisoners of war. Thus, for example, prisoners of war may not be brought to a criminal trial because of their actual participation in the fighting, and they should be treated 'humanely' (art. 13 of the Third Geneva Convention). It is of course permitted to bring them to trial for war crimes that they committed during the hostilities. In contrast to the combatants and military targets there are the civilians and civilian targets. They may not be subjected to a military attack that is directed at them. Their lives and bodies are protected against the risks of combat, provided that they do not themselves take a direct part in the combat. This customary principle was formulated as follows:

> 'Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.
>
> Rule 6: Civilians are protected against attack unless and for such time as they take a direct part in hostilities.
>
> Rule 7: The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects' (J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (vol. 1, 2005), at pp. 3, 19, 25).

This approach, which protects the lives, bodies and property of civilians who do not take a direct part in an armed conflict, runs like a golden thread through the case law of the Supreme Court (see *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 794; HCJ 72/86 *Zaloom v. IDF Commander in Judaea and Samaria* [21], at p. 532; *Almadani v. Minister of Defence* [6], at p. 35 {53}; *Ajuri v. IDF Commander in West Bank* [9], at p. 365 {97}; *Centre for Defence of the Individual v. IDF Commander in West Bank* [19], at p. 396 {136}; HCJ 5591/02 *Yassin v. Commander of Ketziot Military Camp* [22], at p. 412; HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [23], at p. 364 {191}; *Hass v. IDF Commander in West Bank* [20], at p. 456 {65}; *Marabeh v. Prime Minister of Israel* [8], at paras. 24-29 of the judgment; HCJ 1890/03 *Bethlehem Municipality v. State of*

Israel [24], at para. 15; HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [25], at para. 23 of my opinion; I discussed this in *Physicians for Human Rights v. IDF Commander in Gaza* [10], which considered combat activity during the armed conflict in Rafah:

> 'The basic injunction of international humanitarian law applicable in times of combat is that the local inhabitants are "… entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof…" (art. 27 of the Fourth Geneva Convention; see also art. 46 of the Hague Convention)… What underlies this basic provision is the recognition of the value of man, the sanctity of his life and the fact that he is entitled to liberty… His life or his dignity as a human being may not be harmed, and his dignity as a human being must be protected. This basic duty is not absolute. It is subject to "… such measures of control and security in regard to protected persons as may be necessary as a result of the war" (last part of art. 27 of the Fourth Geneva Convention). These measures may not harm the essence of the rights… They must be proportionate' (*ibid.* [10], at p. 393 {208-209}).

Later in that case I said that:

> 'The duty of the military commander, according to this basic rule, is twofold. *First*, he must refrain from operations that attack the local inhabitants. This duty is his "negative" obligation. *Second*, he must carry out acts required to ensure that the local inhabitants are not harmed. This is his "positive" obligation… Both these obligations — the dividing line between which is a fine one —should be implemented reasonably and proportionately in accordance with the needs of the time and place' (*ibid.* [10], at p. 394 {209}).

Are terrorist organizations and their members combatants for the purpose of their rights in the armed conflict? Are they civilians who take part directly in the armed conflict? Or are they perhaps neither combatants nor civilians? What, then, is the status of these terrorists?

B. Combatants

24. Who are combatants? This category naturally includes the armed forces. It also includes persons who satisfy the following conditions (art. 1 of the Regulations appended to the Fourth Hague Convention of 1907):

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

This wording is repeated in art. 13 of the First and Second Geneva Conventions, and art. 4 of the Third Geneva Convention (cf. also art. 43 of the First Protocol). These conditions, together with additional conditions that are derived from the relevant conventions, have been examined in legal literature (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 39). We do not need to consider all of these, because the terrorist organizations from the territories and their individual members do not satisfy the conditions of combatants (see Gross, *Democracy's Struggle Against Terrorism: Legal and Moral Aspects*, at p. 75). It is sufficient it we point out that they do not have a fixed recognizable mark that makes it possible to distinguish them from afar and they do not conduct their activities in accordance with the laws and customs of war. In one case I said:

> 'The Lebanese detainees should not be regarded as prisoners of war. It is sufficient that they do not satisfy the provisions of art. 41(2)(d) of the Third Geneva Convention, which provides that one of the conditions that must be satisfied in order to fulfil the definition of "prisoner of war" is "that of conducting their operations in accordance with the laws and customs of war." The organizations to which the detainees belonged are terrorist organizations that operate contrary to the laws and customs of war. Thus, for example, these organizations deliberately attack civilians and shoot from amongst a civilian population, which they use as a shield. All of these are acts that are contrary to

> international law. Indeed, Israel's consistent position over the years has been to refuse to regard the various organizations, such as Hezbollah, as organizations to which the Third Geneva Convention applies. We have found no reason to intervene in this position' (HCJ 2967/00 *Arad v. Knesset* [26], at p. 191; see also SFC 1158/02 (TA) *State of Israel v. Barghouti* [60], at para. 35); *Military Prosecutor v. Kassem* [61]).

25. The terrorists and their organizations, against which the State of Israel is conducting an armed conflict of an international character, are not included in the category of combatants. They do not belong to the armed forces nor are they included among the units that are given a status similar to that of combatants by customary international law. Indeed, the terrorists and the organizations that send them are unlawful combatants. They do not enjoy the status of prisoners of war. It is permitted to bring them to trial for their participation in the hostilities, to try them and sentence them. This was discussed by Chief Justice Stone of the United States Supreme Court, who said:

> 'By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatant are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful' (*Ex Parte Quirin* [63], at p. 30; see also *Hamdi v. Rumsfeld* [64]).

The Internment of Unlawful Combatants, 5762-2002, authorizes the chief of staff to issue an order for the administrative detention of an 'unlawful combatant.' This concept is defined in s. 2 of the law as —

> 'A person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, and who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War.'

It need not be said that unlawful combatants are not outside the law. They are not outlaws. They too were created by God in His image; even their human dignity should be respected; they too enjoy and are entitled to the protection of customary international law, no matter how minimal this may be (see G.L. Neuman, 'Humanitarian Law and Counterterrorist Force,' 14 *Eur. J. Int'l L.* 283 (2003); G. Nolte, 'Preventive Use of Force And Preventive Killings: Moves Into a Different Legal Order,' 5 *Theoretical Inquiries in Law* 111 (2004), at p. 119). This is certainly the case when they are interned or when they are brought to trial (see art. 75 of the First Protocol, which reflects customary international law, and K. Dörmann, 'The Legal Situation of "Unlawful / Unprivileged Combatants",' 85 *IRRC* 45 (2003), at p. 70). Does it follow from this that within the framework of Israel's war against the terrorist organizations, Israel is not entitled to target them nor is it entitled to kill them even if they are planning, ordering or committing terrorist attacks? Were we to regard them as (lawful) combatants, the answer of course would be that Israel would be entitled to target them. Just as it is permitted to target a soldier of an enemy state, so too it would be permitted to target them. At the same time, they would enjoy the status of prisoners of war and the other protections given to lawful combatants. But, as we have seen, the terrorists operating against Israel are not combatants according to the definition of this expression in international law; they are not entitled to a status of prisoners of war; it is permitted to bring them to trial for their membership of terrorist organizations and for their actions against the army. Do they have the status of civilians? We will now turn to examine this question.

C. Civilians

26. Customary international law relating to armed conflicts protects 'civilians' from attacks against them as a result of the hostilities. This was discussed by the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, *supra*, where it said:

> 'States must never make civilians the object of attack' (p. 257).

This customary principle was given expression in art. 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.'

This also gives rise to the duty to do everything to minimize the collateral damage to the civilian population when carrying out attacks on 'combatants' (see E. Benvenisti, 'Human Dignity in Combat: The Duty To Spare Enemy Civilians,' 39 *Isr. L. Rev.* 81 (2006)). This protection that is given to

'civilians' gives rise to the question of who is a 'civilian' for the purpose of this rule. The approach of customary international law is that 'civilians' are persons who are not 'combatants' (see art. 50(1) of the First Protocol and Sabel, *International Law*, *supra*, at p. 432). In *Prosecutor v. Blaškić* [74] the International Criminal Tribunal for the former Yugoslavia said that civilians are:

> 'Persons who are not, or no longer, members of the armed forces' (*Prosecutor v. Blaškić* [74], at para. 180).

This definition is of a 'negative' character. It determines the concept of 'civilians' as the opposite of 'combatants.' Thus it regards unlawful combatants — who, as we have seen, are not 'combatants' — as civilians. Does this 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 relating to armed conflicts provides that a civilian who takes a direct part in the hostilities does not at the same time enjoy the protection given to a civilian who is not taking a direct part in those acts (see art. 51(3) of the First Protocol). Thus we see that the unlawful combatant is not a combatant but a 'civilian.' Notwithstanding, he is a civilian who is not protected against being targeted as long as he is taking a direct part in the hostilities. Indeed, the fact that a person is an 'unlawful combatant' is not merely a matter for national-internal criminal law. It is a matter for international law relating to international armed conflicts (see Jinks, 'September 11 and the Law of War,' *supra*). An expression of this is that civilians who are unlawful combatants are a legitimate target for attack, and therefore they do not enjoy the rights of civilians who are not unlawful combatants, provided that they are at that time taking a direct part in the hostilities. As we have seen, they also do not enjoy the rights given to combatants. Thus, for example, the laws relating to prisoners of war do not apply to them.

D. Is there a third category of unlawful combatants?

27. In its written and oral pleadings before us, the state requested that we recognize the existence of a third category of persons, namely the category of unlawful combatants. These are people who play an active and continuing part in an armed conflict, and therefore their status is the same as that of combatants in the sense that they constitute a legitimate target for attack and they are not entitled to the protections given to civilians. Notwithstanding, they are not entitled to all the rights and protections given to combatants, since they do not distinguish themselves from civilians and they do not

observe 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 into this category of unlawful combatants.

28. The literature on this subject is extensive (see R.R Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs,' 28 *Brit. Y. B. Int'l. L.* 323 (1951); K. Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and Struggle Over Legitimacy*, Harvard Program on Humanitarian Policy and Conflict Research, 'Occasional Paper' (Winter 2005, no. 2); J. Callen, 'Unlawful Combatants and the Geneva Conventions,' 44 *Va. J. Int'l L.* 1025 (2004); M.H. Hoffman, 'Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction With Implications for the Future of International Humanitarian Law,' 34 *Case W. Res. J. Int'l L.* 227 (2002); S. Zachary, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' 38 *Isr. L. Rev.* 378 (2005); Nolte, 'Preventive Use of Force and Preventive Killings: Moves Into a Different Legal Order,' *supra*; Dörmann, 'The Legal Situation of "Unlawful / Unprivileged Combatants",' *supra*). We will not adopt a position on the question whether this third category should be recognized. The question before us is not a question of what the law should be but of what the law is. In our opinion, in so far as the law as it actually stands is concerned, we do not have before us sufficient information that allows us to recognize the existence of this third category on the basis of the existing position of international law, whether conventional or customary (see Cassese, *International Law*, *supra*, at pp. 408, 470). It is hard for us to see how it is possible to recognize a third category within the framework of interpreting the Hague and Geneva Conventions. We do not think that we have been presented with sufficient information that allows us to say that this third category has been recognized, as of the present, in customary international law. Notwithstanding, a new reality sometimes requires a new interpretation. Rules that were developed against the background of a reality that has changed should be given a dynamic interpretation that will adapt them, within the framework of the accepted rules of interpretation, to the new reality (see *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 800; *Ajuri v. IDF Commander in West Bank* [9], at p. 381 {116}). In this interpretive spirit we shall now address the rules of customary international law that consider the status of civilians who are also unlawful combatants.

(6) The status of civilians who are unlawful combatants

A. The basic principle: civilians who take a direct part in hostilities are not protected at that time

29. Civilians enjoy comprehensive protection of their lives, bodies, liberty and property. '… the safety of the lives of the civilian population is a central value in the humanitarian laws…' (*Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [25], at para. 23 of my opinion). '…the right to life and physical integrity is the most basic right that lies at the heart of the humanitarian laws that are intended to protect the local population…' (*per* Justice D. Beinisch in HCJ 9593/04 *Morar v. IDF Commander in Judaea and Samaria* [27], at para. 14 of her opinion). As opposed to combatants, who may be targeted because they are combatants, civilians may not be targeted precisely because they are civilians. A provision in this vein is stipulated in art. 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…'.

In a similar vein, art. 8(2)(b)(i)-(ii) of the Rome Statute of the International Criminal Court provides, in its definition of war crimes, that if an order is given intentionally to direct attacks against civilians, it is a war crime. This crime is applicable to those civilians who are 'not taking a direct part in hostilities.' Similarly civilians may not be attacked indiscriminately, i.e., an attack that, *inter alia*, is not directed at a specific military target (see art. 51(4) of the First Protocol, which constitutes customary international law: see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 37). This protection is given to all civilians, except for those civilians who are taking a direct part in hostilities. Indeed, the protection against attack is not granted to unlawful combatants, who take a direct part in the hostilities. I discussed this in one case, where I said:

> 'Indeed, the military operations are directed against terrorists and persons carrying out hostile acts of terror. They are not directed against the local inhabitants' (*Physicians for Human Rights v. IDF Commander in Gaza* [10], at p. 394 {209}).

What is the source of this basic principle, according to which the protection of international humanitarian law is removed from someone who is currently taking a direct part in hostilities, and what is the scope of its application?

B. The source of the basic principle and its customary status

30. The basic principle is that civilians who take a direct part in hostilities are not protected at that time from being targeted. This principle is expressed in art. 51(3) of the First Protocol, which provides:

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

It is well known that Israel is not a party to the First Protocol. Therefore it has not been adopted in Israeli legislation. Does this basic principle reflect customary international law? The position of the Red Cross is that this is indeed a principle of customary international law (see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 20. We accept this position. It is consistent with the provisions of common article 3 of the Geneva Conventions, to which Israeli is a party and which everyone agrees reflect customary international law, according to which protection is given to —

> 'Persons taking no active part in the hostilities…'

The International Criminal Tribunal for the former Yugoslavia has held that article 51 of the First Protocol constitutes customary international law (*Prosecutor v. Strugar* [75], at para. 220). The military manuals of many countries, including Great Britain, France, the Netherlands, Australia, Italy, Canada, Germany, the United States (the air force) and New Zealand have copied this provision exactly or adopted its principles whereby civilians should not be targeted unless they are taking a (direct) part in the hostilities. Legal literature regards this provision as an expression of customary international law (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 11; Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 192; Ben-Naftali and Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 269; Cassese, *International Law*, *supra*, at p. 416; M. Roscini, 'Targeting and Contemporary Aerial Bombardment,' 54 *Int'l and Comp. L. Q.* 411 (2005), at p. 418; V-J. Proulx, 'If the Hat Fits Wear It, If the Turban Fits Run for Your Life: Reflection on the Indefinite Detention and Targeted Killings of Suspected Terrorists,' 56 *Hastings L.J.* 801 (2005), at p. 879; G.H. Aldrich, 'The Laws of War on Land,' 94 *Am. J. Int'l L.* 42 (2000), at p. 53). Counsel for the respondents pointed out to us that in the opinion of the State of Israel, not all of the provisions of art. 51(3) of the First Protocol reflect customary international law. According to the state's position, 'all that customary international law provides is that it is prohibited to target civilians

in general and also that it is permitted to target a civilian "who is taking a direct part in hostilities." There is no restriction on the period of time when such an attack is permitted' (supplementary closing arguments of the State Attorney's Office of 26 January 2004, at p. 79). It follows that according to the state's position the non-customary part of art. 51(3) of the First Protocol is that part that provides that civilians do not enjoy protection against being targeted 'for such time' as they are taking a direct part in the hostilities. As we have said, our position is that all the parts of art. 51(3) of the First Protocol reflect customary international law. What, then, is the scope of this provision? We shall now turn to this question.

C. The nature of the basic principle

31. The basic principle is therefore this: a civilian — namely someone who does not fall within the definition of combatants — should refrain from participating directly in hostilities (see Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, at p. 210). A civilian who breaches this rule and who carried out hostilities does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not at that time enjoy the protection given to a civilian. He is subject to the risks of an attack just like a combatant, but without enjoying the rights of a combatant, such as those given to him as a prisoner of war. Admittedly, his status is that of a civilian and he does not lose this status when he participates directly in carrying out hostilities. But he is a civilian who is carrying out the function of a combatant. As long as he is acting to realize this function, he is subject to the risks that this function entails and ceases to enjoy the protection given to a civilian against being attacked (see K. Watkin, 'Controlling The Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' 98 *Am. J. Int'l L.* 1 (2004)). This was discussed by H-P. Gasser in *The Handbook of Humanitarian Law in Armed Conflicts*, where he said:

> 'What are the consequences if civilians do engage in combat? … Such persons do not lose their legal status as civilians… However, for factual reasons they may not be able to claim the protection guaranteed to civilians, since anyone performing hostile acts may also be opposed, but in the case of civilians, only for so long as they take part directly in hostilities' (at p. 211, para. 501).

In a similar vein, the manual of the Red Cross states:

> 'Civilians are not permitted to take direct part in hostilities and are immune from attack. If they take a direct part in hostilities

> they forfeit this immunity' (*Model Manual on the Law of Armed Conflict for Armed Forces*, at para. 610, p. 34 (1999)).

This is the law with regard to the unlawful combatant. As long as he retains his status as a civilian — i.e., he does not become a part of the military forces — but he carries out combat activities, he ceases to enjoy the protection given to the civilian, and he is subject to the risks of being attacked like a combatant without enjoying the rights of the combatant as a prisoner of war. Indeed, guerrillas and terrorists who carry out hostilities are not entitled to the protection given to civilians. Admittedly, terrorists who carry out hostilities do not cease to be civilians, but by their actions they have deprived themselves of the benefit of being civilians that grants them protection from military attack. They also do not enjoy the rights of combatants, such as the status of prisoners of war.

32. We have seen that the basic principle is that the civilian population and individual civilians are protected against the dangers of military activity and are not a target for an attack. This protection is given to civilians 'unless and for such time as they take a direct part in hostilities.' (art. 51(3) of the First Protocol). This provision is made up of three main parts. The *first* part concerns the requirement that the civilians take part in hostilities; the *second* part concerns the requirement that the civilians take a 'direct' part in the hostilities; the *third* part concerns the provision that civilians are not protected against being attacked 'for such time' as they are taking a direct part in the hostilities. Let us discuss each of these parts separately.

D. First part: 'take a… part in hostilities'

33. Civilians lose the protection of customary international law concerning hostilities of an international character if they 'take a… part in hostilities.' What is the meaning of this provision? The accepted view is that 'hostilities' are all those acts that by their nature and purpose are intended to cause harm to armed forces. The Commentary on the Additional Protocols that was published in 1987 by the Red Cross states:

> 'Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces' (Y. Sandoz *et al*., *Commentary on the Additional Protocols* (1987), at p. 618).

A similar approach was adopted by the Inter-American Commission on Human Rights which is cited with approval by Henckaerts and Doswald-Beck (*Customary International Humanitarian Law*, *supra*, at p. 22). It would appear that to this definition we should add those acts that by their nature and

purpose are intended to cause harm to civilians. According to the accepted definition, a civilian takes part in hostilities when he uses weapons within the framework of the armed conflict, when he collects intelligence for this purpose or when he prepares himself for the hostilities. With regard to taking part in the hostilities, there is no requirement that the civilian actually uses the weapons that he has, nor is it a requirement that he carries weapons on him (openly or concealed). It is possible to take a part in hostilities without using weapons at all. This was discussed by the Commentary on the Additional Protocols as follows:

> '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' (at pp. 618-619).

As we have seen, this approach is not limited solely to 'hostilities' against the armed forces of a state. It applies also to hostilities against the civilian population of the state (see Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 192).

E. Second part: 'take a direct part'

34. Civilians lose their protection against the attack of armed forces that is given to them under customary international law relating to international armed conflicts ((as adopted in art. 51(3) of the First Protocol) if 'they take a direct part in hostilities.' The provision therefore distinguishes between civilians who are taking a direct part in hostilities (who lose the protection from attack) and civilians who take an indirect part in the hostilities (who continue to enjoy protection from attack). What is this distinction? A similar provision appears in common article 3 of the Geneva Conventions, which adopts the expression 'active part in hostilities.' A judgment of the International Criminal Tribunal for Rwanda held that these two expressions have the same content (see *Prosecutor v. Akayesu* [691]). What is this content? It would appear that it is accepted in international literature that there is no agreed definition of the word 'direct' in the context before us (see *Direct Participation in Hostilities under International Humanitarian Law*, Report Prepared by the International Committee of the Red Cross (2003); *Direct Participation in Hostilities under International Humanitarian Law* (2004)). Henckaerts and Doswald-Beck (*Customary International Humanitarian Law*, *supra*, at p. 23) rightly said:

> 'It is fair to conclude… that a clear and uniform definition of direct participation in hostilities has not been developed in state practice.'

In such circumstances, and in the absence of a complete and agreed customary criterion, there is no alternative to judging each case on its own merits, while limiting the scope of the dispute (cf. *Prosecutor v. Tadić* [73]). In this regard we should mention the following remarks in the *Commentary* of the Red Cross:

> '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' (*ibid.*, at p. 516).

Indeed, a civilian who bears arms (openly or concealed) and is on his way to the place where he will use them against the armed forces, or who is at the place of shooting itself, or who is on his way back from the place of shooting is a civilian who is taking a 'direct part' in the hostilities (see Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' *supra*, at p. 17). By contrast, a civilian who supports the hostilities against the armed forces in a general manner does not take a direct part in the hostilities (see Duffy, *The 'War on Terror' and the Framework of International Law*, *supra*, at p. 230). Similarly, a civilian who sells food or medicines to unlawful combatants also is taking a merely indirect part in the hostilities. This was discussed in the third report of the Inter-American Commission on Human Rights:

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

What is the law with regard to the area between these two extremes? *On the one hand*, the desire to protect innocent civilians leads in difficult cases to give a narrow interpretation to the expression 'taking a *direct* part in hostilities.' Prof. Cassese states:

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

On the other hand, it is possible to say that the desire to protect combatants and the desire to protect innocent citizens leads in difficult cases to giving a broad interpretation of the 'direct' character of the hostilities, since thereby civilians are encouraged to distance themselves from the hostilities as much as possible. As Prof. Schmitt says:

> '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' (M.N. Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' in H. Fischerr (ed.), *Crisis Management and Humanitarian Protection: Festshrift Fur Dieter Fleck*, 505 (2004), at p. 509).

35. Against the background of these considerations, the following cases should be included within the scope of taking a 'direct part' in hostilities: someone who collects information about the armed forces, whether in the spheres in which the hostilities are being carried out (see W. Hays Parks, 'Air War and the Law of War,' 32 *A. F. L. Rev*. 1, 116 (1990)) or whether outside these spheres (see Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 511); someone who leads unlawful combatants to or from the place where the hostilities are being carried out; someone who operates weapons being used by unlawful combatants or who supervises their operation or provides service for them, whatever the distance

from the battlefield may be. All of these are carrying out a function of combatants. The function determines the directness of the taking part in the hostilities (see Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' *supra*, at p. 17; Roscini, 'Targeting and Contemporary Aerial Bombardment,' *supra*). By contrast, someone who sells an unlawful combatant food products or medicines does not take a direct part, but merely an indirect one, in the hostilities. The same is true of someone who helps unlawful combatants with a general strategic analysis and grants them general logistic support, including financial support. The same is true of someone who disseminates propaganda that supports those unlawful combatants. If these persons are harmed, the state may not be liable for this if they fall within the scope 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… not 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' (Gasser, *The Handbook of Humanitarian Law in Armed Conflicts*, *supra*, at p. 232, paras. 517, 518).

In international literature there is a disagreement with regard to the following case: what is the law that applies to a civilian who drives a vehicle conveying ammunition? (see Parks, 'Air War and the Law of War,' *supra*, at p. 134; Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 507; A.P.V. Rogers, *Law on The Battlefield* (1996), at p. 8; L.L. Turner and L.G. Norton, 'Civilians At The Tip of the Spear,' 51 *Air Force L. Rev.* 1 (2001); J.R. Heaton, 'Civilians at War: Re-Examining The Status of Civilians Accompanying The Armed Forces,' 57 *Air Force L. Rev.* 171 (2005)). Some authorities hold that he is taking a direct part in the hostilities (and therefore he may be attacked), while others hold that he is not taking a direct part in the hostilities (and therefore he may not be attacked). The two opinions hold that the ammunition in the vehicle may be attacked. The disagreement is whether the civilian driver may be attacked. Those who believe he is taking a direct part in the hostilities hold that he may be attacked. Those who believe that he is not taking a direct part in the hostilities hold that he may not be attacked, but if he is harmed it is a case of collateral damage caused to a civilian who is in the vicinity of a military objective that may be attacked. In our opinion, if the civilian driver is taking the ammunition to the place where it will be used to carry out hostilities, he should be regarded as taking a direct part in the hostilities (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 27; Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 509; Rogers, *Law on the Battlefield*, at p. 7; A.P.V. Rogers and P. Malherbe, *Model Manual of the Law of Armed Conflict* (ICRC, 1999), at p. 29).

36. What is the law with regard to civilians who act as a human shield for terrorists who are taking a direct part in the hostilities? Certainly if they are acting in this way because they were compelled to do so, these innocent civilians should not be regarded as taking a direct part in the hostilities. They are themselves the victims of terrorism. But if they are acting in this way voluntarily because of their support for a terrorist organization, they should be regarded as persons who are taking a direct part in the hostilities (see Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 521, and M.N. Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,' 5 *Ch. J. Int'l Law* 511 (2004), at p. 541).

37. We have seen that a civilian who attacks armed forces is taking a 'direct part' in the hostilities. What is the law regarding the persons who recruit him to take a direct part in the hostilities and the persons who send

him to carry out hostilities? Is there a difference between his direct commanders and those who are more senior to them? Is it only the last terrorist in the chain of command who is responsible for taking a 'direct' part in the hostilities or is the whole chain of command responsible? In our opinion, the 'direct' character of taking part in the hostilities should not be limited only to someone who carries out the physical attack. Someone who sends him to carry out the attack also takes a 'direct' part. The same is true of someone who decides upon the actual attack, or who plans it. It cannot be said that all of these only take an indirect part in the hostilities. Their participation is direct (and active) (see Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 529).

F. Third part: 'for such time'

38. Article 51(3) of the First Protocol provides that civilians enjoy protection against the dangers arising from military operations and may not be a target for attacks unless 'and for such time' as they take a direct part in hostilities. The provisions of art. 51(3) of the First Protocol introduce a requirement of time. A civilian who takes part in hostilities loses the protection from being attacked 'for such time' as he is taking a part in those hostilities. When this time has passed, the protection afforded to the civilian is restored. In the respondents' opinion, this part of art. 51(3) of the First Protocol does not reflect customary international law, and the State of Israel is not obliged to act accordingly. We cannot accept this approach. As we have seen, all of the parts of art. 51(3) of the First Protocol reflect customary international law, including the requirement concerning time. The key question concerns the interpretation of this provisions and its scope of application.

39. Just as there is no consensus in international literature with regard to the scope of the expression 'take a direct part in hostilities,' there is also no consensus with regard to the scope of the expression 'for such time.' Indeed, these two concepts are closely related. But they are not identical. In the absence of a consensus as to the interpretation of the expression 'for such time,' there is no alternative to taking each case as it comes. Once again it is helpful to consider the extreme cases. At one extreme, a civilian who takes a direct part in hostilities on a single occasion or sporadically, and thereafter severs his connection with this activity, is a civilian who, when he severs his connection with the activity, is entitled to protection from an attack. He should not be attacked because of the hostilities that he carried out in the past. At the other extreme, a civilian who joins a terrorist organization that

becomes his home, and within the framework of his position in that organization he carries out a series of hostilities, with short interruptions between them for resting, loses his immunity against being attacked 'for such time' as he is carrying out the series of operations. Indeed, for such a civilian the rest between hostilities is nothing more than preparation for the next hostile act (see D. Statman, 'Targeted Killing,' 5 *Theoretical Inquiries in Law* 179 (2004), at p. 195).

40. These examples indicate the dilemma presented by the requirement of 'for such time.' *On the one hand*, a civilian who takes a direct part in hostilities on a single occasion or sporadically, but has severed his connection with them (whether entirely or for a lengthy period), should not be attacked. *On the other hand*, we must avoid a phenomenon of the revolving door, whereby every terrorist may invoke sanctuary or claim refuge while he is resting and making preparations, so that he has protection from being attacked (see Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 536; Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' *supra*, at p. 12; Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 193; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 29; Parks, 'Air War and the Law of War,' *supra*, at p. 118). In the considerable distance between these two extremes lie the 'grey' areas, where customary international law has not yet been formulated. There is no alternative, therefore, to examining each case on its merits. In this regard the following four issues should be addressed: *first*, reliable information is required before the civilian is classified as falling into one of the cases that we have discussed. Innocent civilians should not be harmed (see Cassese, *International Law*, *supra*, at p. 421). Properly verified information should exist with regard to the identity and activity of the civilian who is claimed to be taking a direct part in the hostilities (see *Ergi v. Turkey* [68]. Cassese rightly says that:

> '… if 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' (Cassese, *International Law*, at p. 421).

The burden of proof of the armed forces in this matter is a heavy one (see Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 203; Gross, *Democracy's Struggle against Terrorism: Legal and Moral Aspects*, at p. 606). In case of doubt, a careful examination is required before an attack is carried out. This was discussed by Henckaerts and Doswald-Beck:

> '… when 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' (*Customary International Humanitarian Law*, *supra*, at p. 24).

Second, a civilian should not be attacked at a time that he is taking a direct part in hostilities if it is possible to act against him by means of a less harmful measure. In our internal law this rule is derived from the principle of proportionality. Indeed, of the possible military measures one should choose the measure whose violation of the victim's human rights is the least. Therefore, if it is possible to arrest, interrogate and prosecute a terrorist who is taking a direct part in hostilities, these steps should be followed (see *Mohamed Ali v. Public Prosecutor* [66]). A trial is preferable to the use of force. A country governed by the rule of law resorts to the use of trials rather than the use of force. This question arose in *McCann v. United Kingdom* [69]. In that case, three terrorists from Northern Ireland who belonged to the I.R.A. were shot to death. They were shot in the streets of Gibraltar, where they were attacked by British agents. The European Court of Human Rights held that the United Kingdom unlawfully violated the victims' right to life (art. 2 of the European Convention on Human Rights). The court held:

> '… the use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk' (*ibid*. [69], at p. 148, para. 235).

Arrest, interrogation and trial are not measures that can always be adopted. Sometimes this possibility simply does not exist; sometimes it involves so great a risk to the lives of soldiers that there is no requirement to adopt it (see A. Dershowitz, *Preemption: A Knife that Cuts Both Ways* (2005), at p. 230). But it is a possibility that should always be considered. It is likely to be practical especially in conditions of a belligerent occupation where the

army controls the territory where the operation is being carried out, and arrest, interrogation and trial are possibilities that can sometimes be carried out (see art. 5 of the Fourth Geneva Convention). Naturally, in a specific case this possibility may not exist. Sometimes it may cause greater harm to the lives of innocent civilians in the vicinity. In such a case, it should not be adopted. *Third*, after carrying out an attack on a civilian who is suspected of taking a direct part at that time in hostilities, a thorough investigation should be made (retrospectively) to ascertain that the identity of the target was correct and to verify the circumstances of the attack on him. This investigation should be an independent one (see Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' *supra*, at p. 23; Duffy, *The 'War on Terror' and the Framework of International Law*, *supra*, at p. 310; Cassese, *International Law*, *supra*, at p. 419; C. Warbrick, 'The Principle of the European Convention on Human Rights and the Responses of States to Terrorism,' (2002) *E. H. R. L. R.* 287, at p. 292; *McCann v. United Kingdom* [69], at pp. 161, 163; *McKerr v. United Kingdom* [70], at p. 559). In appropriate cases there will be grounds for considering the payment of compensation for harming an innocent civilian (see Cassese, *International Law*, *supra*, at pp. 419, 423; art. 3 of the Hague Regulations; art. 91 of the First Protocol). *Finally*, if the attack is not only on the civilian who is taking a direct part in the hostilities but also on innocent civilians who are in the vicinity, the harm to them is collateral damage. This harm should satisfy the test of proportionality. Let us now turn to examine this question.

(7) Proportionality

A. The principle of proportionality and its application in customary international law

41. The principle of proportionality is a general principle in the law. It is a part of our legal approach to human rights (see s. 8 of the Basic Law: Human Dignity and Liberty; see also A. Barak, *A Judge in a Democracy* (2004), at p. 346). It is an important element in customary international law (see R. Higgins, *Problems and Process – International Law and How We Use It* (1994), at p. 219; J. Delbruck, 'Proportionality,' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), at p. 1144). It is an integral part of the law of self-defence. It is a major element in the protection of civilians in situations of armed conflicts (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 119; Gasser, *The Handbook of Humanitarian Law in Armed Conflicts*, *supra*, at p. 220;

Cassese, *International Law*, *supra*, at p. 418; Ben-Naftali and Shani, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 154; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 60; J.G. Gardam, 'Proportionality and Force in International Law,' 87 *Am. J. Int'l L.* 391 (1993); J.S. Pictet, *Development and Principles of International Humanitarian Law* (1985), at p. 62; W.J. Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare,' 98 *Mil. L. Rev.* 91 (1982); T. Meron, *Human Rights and Humanitarian Norms as Customary International Law* (1989), at p. 74). It has a central role in the law of belligerent occupations (see *Hass v. IDF Commander in West Bank* [20], at p. 461 {71}; *Bethlehem Municipality v. State of Israel* [24]; *Beit Sourik Village Council v. Government of Israel* [17], at p. 836 {309-310}; HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [28], at para. 102 of the majority opinion; *Marabeh v. Prime Minister of Israel* [8], at para. 30 of my opinion; see also Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 119; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 60). In a whole host of cases the Supreme Court has examined the authority of the military commander in the territories according to the criterion of proportionality. It has done so, *inter alia*, with regard to assigning residence (*Ajuri v. IDF Commander in West Bank* [9]); surrounding towns and erecting road blocks on access routes to and from them for the purposes of fighting terrorism (see HCJ 2847/03 *Alauna v. IDF Commander in Judaea and Samaria* [29]); damage to the property of protected inhabitants as a result of army operations (see HCJ 9252/00 *El-Saka v. State of Israel* [30]); upholding the rights to pray at holy sites and have access to them (*Hass v. IDF Commander in West Bank* [20]); demolishing houses for operational needs (HCJ 4219/02 *Gussin v. IDF Commander in Gaza Strip* [31]); imposing a blockade (*Almadani v. Minister of Defence* [6]); building the security fence (*Beit Sourik Village Council v. Government of Israel* [17]; *Marabeh v. Prime Minister of Israel* [8]).

B. Proportionality in an international armed conflict

42. The principle of proportionality plays a major role in the international law of armed conflicts (cf. arts. 51(5)(b) and 57 of the First Protocol; see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 46; Ben-Naftali and Shani, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 154). These laws are of a customary nature (see Henckaerts and

Doswald-Beck, *ibid*., at p. 53; Duffy, *The 'War on Terror' and the Framework of International Law*, *supra*, at p. 235; *Prosecutor v. Kupreškić* [76]). The principle of proportionality arises when the military activity is directed against combatants and military targets, or against civilians for such time as they take a direct part in hostilities, and in the course of this civilians are also harmed. The rule is that the harm to innocent civilians that is caused as collateral loss in the course of the combat activities should be proportionate (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 119). Civilians are likely to be harmed because of their presence inside a military target, such as civilians who work in a military base; civilians are likely to be hurt when they live, work or pass close to military targets; sometimes because of an error civilians are harmed even if they are not close to military targets; sometimes civilians are used, by means of coercion, as a 'human shield' against an attack on a military target, and they are hurt as a result. In all of these situations and others similar to them, the rule is that the harm to innocent civilians should, *inter alia*, satisfy the principle of proportionality.

43. The principle of proportionality applies in every case where civilians who are not taking a direct part in hostilities at the time are harmed. This was discussed by Justice Higgins in *Legality of the Threat or Use of Nuclear Weapons*, *supra*:

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

An expression of this customary principle can be found in the First Protocol, according to which indiscriminate attacks are prohibited (art. 51(4). The First Protocol goes on to provide (in art. 51(5)):

> '5. Among others, the following types of attacks are to be considered as indiscriminate:
>
> (a) …
>
> (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'

44. The requirement of proportionality in the law of armed conflicts focuses mainly on what in our constitutional law is called proportionality 'in the narrow sense,' i.e., the requirement that there is a proper proportionate correlation between the military objective and the civilian harm. Notwithstanding, the law of armed conflicts includes additional elements, which are also an integral part of the theoretical principle of proportionality in its broad sense. It would be proper to consider the possibility of concentrating all of these laws into one body of material, by formulating a comprehensive doctrine of proportionality, as has been done in the internal law of many countries. We cannot examine this matter within the framework of the petition before us. We will concentrate on the aspect of proportionality that is agreed by everyone to be relevant to our case.

Due proportion between the advantage and the damage

45. The test of proportionality stipulates that an attack on innocent civilians is not permitted if the collateral damage to them is not commensurate with the military advantage (in protecting combatants and civilians). In other words, the attack is proportionate if the advantage arising from achieving the proper military objective is commensurate with the damage caused by it to innocent civilians. This is an ethical test. It is based on a balance between conflicting values and interests (see *Beit Sourik Village Council v. Government of Israel* [17], at p. 850 {309-310}; HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [32], at para. 74 of my opinion). It is accepted in the national law of many countries. In Israel it constitutes a main normative test for examining government activity in general and army activity in particular. In one case I said:

> 'This subtest is in essence a vehicle for the constitutional outlook that the end does not justify the means. It is an expression of the idea that there is an ethical barrier that democracy cannot pass, even if the purpose that we wish to realize is a proper one' (HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [33], at para. 30 of my opinion); see also R. Alexy, *A Theory of Constitutional Rights* (2002), at p. 66).

As we have seen, this requirement of proportionality is found in customary international law concerning the protection of civilians (see Cassese, *International Law*, *supra*, at p. 418; Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of

Defence?' *supra*, at p. 200; Ben-Naftali and Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 278; Gardam, 'Proportionality and Force in International Law,' *supra*; art. 51(4)(c) of the First Protocol, which constitutes customary law). When the damage to innocent civilians is disproportionate to the advantage of the attacking army, the attack is disproportionate and prohibited.

46. Proportionality in this sense is not required with regard to an attack on a combatant or a civilian who is at that time taking a direct part in the hostilities. Indeed, a civilian who is taking part in hostilities endangers his life and he may, like a combatant, constitute a target for an attack that causes death. This is a permitted killing. By contrast, proportionality is required in any case where an innocent civilian is hurt. Therefore the requirements of proportionality in the narrow sense should be satisfied in a case where the attack on a terrorist causes collateral damage to innocent civilians in the vicinity. The rule of proportionality applies to the attack on these innocent civilians (see art. 51(5)b) of the First Protocol). The rule is that combatants or terrorists may not be attacked if the expected damage to innocent civilians in their vicinity is excessive in relation to the military benefit of attacking them (see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 49). Making this balance is difficult. Here too we need to proceed on a case by case basis, while limiting the area of the dispute. Take an ordinary case of a combatant or terrorist sniper who is shooting at soldiers or civilians from the balcony of his home. Shooting at him will be proportionate even if as a result an innocent civilian who lives next to him or who passes innocently next to his home is hurt. This is not the case if the house is bombed from the air and dozens of residents and passers-by are hurt (cf. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 123; Gross, *Democracy's Struggle Against Terrorism: Legal and Moral Aspects*, at p. 621). The difficult cases are those that lie in the area between the extreme examples. Here a careful examination of each case is required; the military advantage should be concrete and direct (see art. 57(2)(a)(iii) of the First Protocol). Indeed, in international law just as in internal law, the end does not justify the means. The power of the state is not unlimited. Not all the means are permitted. This was discussed by the Inter-American Court of Human Rights, which said:

> '… regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the state resort to any means to

attain its ends' (*Velásquez-Rodríguez v. Honduras* [71], at para. 154).

Notwithstanding, when there are hostilities, there are losses. A balance should be struck between the duty of the state to protect the lives of its soldiers and civilians and its duty to protect the lives of innocent civilians who are harmed when targeting terrorists. This balance is a difficult one, because it concerns human life. It gives rise to moral and ethical problems (see A. Kasher and A. Yadlin, 'Assassination and Preventive Killing,' 25 *SAIS Rev.* 41 (2005)). But despite the difficulty, the balance must be struck.

8. Justiciability

47. A large part of the initial reply of the State Attorney's Office (of 20 March 2002) was devoted to a preliminary argument. According to this, 'the combat activities of the IDF that are carried out within the framework of the combat activities taking place in the territories, which are of a purely operational character, are *not justiciable* — or at least are not institutionally justiciable — and this honourable court will not consider them' (para. 26, p. 7; emphasis in the original). In explaining this position, counsel for the respondents emphasized that in his opinion 'the predominant character of the matter is not legal and *judicial restraint* requires the court neither to enter the battlefield nor to consider the purely operational activities taking place on the battlefield' (*ibid*, at para. 36, p. 11; emphasis in the original). Counsel for the respondents emphasized that:

> 'It is obvious that the fact that a matter is "not justiciable" does not mean that no supervision or control is exercised on the part of the executive authority itself… The army authorities have been instructed by the attorney-general and the Chief Military Attorney to act in this area, as in others, solely in accordance with the provisions of international law that apply to the laws of war, and this instruction is observed by them' (*ibid*., para. 40, p. 13).

48. It is well known that we distinguish between a claim of no normative justiciability and a claim of no institutional justiciability (see HCJ 910/86 *Ressler v. Minister of Defence* [34]). A claim of no normative justiciability proposes that there are no legal criteria for deciding a dispute that is before the court. A claim of no institutional justiciability proposes that it is not fitting that a dispute should be decided according to the law by the court. The claim of no normative justiciability has no legal basis, either in general or in the case before us. A claim of no normative justiciability has no legal basis in

general because there is always a legal norm according to which a dispute may be decided, and the existence of a legal norm gives rise to the existence of legal criteria for it. Sometimes it is easy to recognize the norm and the criteria inherent in it and at other times it is difficult to do so. But ultimately a legal norm will always be found and legal criteria will always exist. This norm may be a general one, such as the norm that a person may do anything except what he has been prohibited from doing, and the government may do only what it has been permitted to do. Sometimes the norm is far more limited. Such is the position in our case. There are legal norms that address the question before us, and from these it is possible to derive criteria that determine what is permitted and what is prohibited. There is therefore no basis to the claim of a lack of normative justiciability.

49. The second type of non-justiciability concerns a lack of institutional justiciability. This non-justiciability concerns the question —

> '… whether the law and the court are the proper framework for deciding a dispute. The question is not whether it is possible to decide a dispute according to the law and in the court. The answer to this question is yes. The question is whether it is desirable to decide a dispute — which is normatively justiciable — according to legal criteria in the court' (*Ressler v. Minister of Defence* [34], at p. 489 {73}).

This type of non-justiciability is recognized in our legal system. Thus, for example, it has been held that as a rule questions of the day-to-day running of the affairs of the Knesset are not institutionally justiciable (see HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [35], at p. 812; HCJ 9056/00 *Kleiner v. Knesset Speaker* [36], at p. 708). Only if it is alleged that a breach of the rules concerning the internal proceedings undermines the fabric of parliamentary life and the foundations of the structure of our constitutional system will there be a basis for considering the claim in the court (see HCJ 652/81 *Sarid v. Knesset Speaker* [37]; HCJ 73/85 *Kach Faction v. Knesset Speaker* [38]; HCJ 742/84 *Kahane v. Knesset Speaker* [39]).

50. The scope of the doctrine of institutional non-justiciability in Israel is not extensive. There is no consensus with regard to its limits. My personal opinion is that it should only be recognized within very narrow limits (see Barak, *A Judge in a Democracy*, at p.275). Whatever the position is, the doctrine has no application in the petition before us, for four reasons: *first*, in the case law of the Supreme Court there is a clear policy that the doctrine of

institutional non-justiciability does not apply where recognizing it would prevent an examination of a violation of human rights. This was discussed by Justice A. Witkon in HCJ 606/78 *Awib v. Minister of Defence* [40]. That case considered the legality of a settlement in the territories. It was argued by the state that the question of the legality of a settlement in the territories was non-justiciable. In rejecting this argument, Justice A. Witkon said:

> 'I was not impressed by this argument at all… It is clear that in matters of foreign policy, like in several other matters, the decision is made by political authorities and not by the judiciary. But on the assumption… that a person's property has been harmed or taken away from him unlawfully, it is difficult to believe that the court will refuse to hear that person because his right may be the subject of political negotiations' (*Awib v. Minister of Defence* [40], at p. 124).

In HCJ 390/79 *Dawikat v. Government of Israel* [41] the question of the legality of a settlement in the territories was considered once again. Vice-President M. Landau said:

> 'A military government that wishes to violate the property rights of the individual should show a legal basis for doing so, and it cannot avoid judicial scrutiny of its actions by claiming non-justiciability' (*Dawikat v. Government of Israel* [41], at p. 15).

In *Marabeh v. Prime Minister of Israel* [8] the court considered the legality of the separation fence in accordance with the rules of customary international law. With regard to the justiciability of this question I said:

> '… the court is not prevented from exercising judicial scrutiny merely because the military commander acts outside Israel, and his actions have political and military ramifications. When the decisions or actions of the military commander violate human rights, they are justiciable. The doors of the court are open. The argument that the violation of human rights was the result of security considerations does not prevent the exercising of judicial scrutiny. 'Security considerations' and 'military necessity' are not magic words… This is required by the protection of human rights' (*ibid*. [8], at para. 31 {p. 140}).

The petition before us seeks to determine what is permitted and what prohibited in military operations that may violate the most basic of human rights, the right to life. The doctrine of institutional non-justiciability cannot prevent an examination of this question.

51. *Second*, justices who think that there is a place for the doctrine of institutional non-justiciability point out that the test is one of the predominant nature of the question in dispute. When this is political or military, there are grounds for refusing to hear the case. By contrast, when the nature of the question is predominantly legal, the doctrine of institutional non-justiciability does not apply (see HCJ 4481/91 *Bargil v. Government of Israel* [42], at p. 218 {166}). The questions in dispute in the petition before us are not questions of policy. Nor are they military questions. The question is not whether or not to adopt a policy of a preventative attack that causes the death of terrorists and sometimes also of innocent civilians in the vicinity. The question is a legal one, which can be seen from an analysis of our judgment; the question concerns the legal classification of the military dispute taking place between Israel and the terrorists who come from the territories; the question concerns the existence or non-existence of customary international law on the matter addressed by the petition; the question concerns the determination of the scope of application of this customary law, in so far as it is reflected in the provisions of art. 51(d) of the First Protocol; the question concerns the rules of proportionality that apply in this matter. The answer to all of these questions is predominantly a legal one.

52. Indeed, in a whole host of judgments the Supreme Court has considered the rights of the inhabitants of the territories. Thousands of judgments have been given by the Supreme Court, which, in the absence of any other competent judicial instance, has addressed these issues. These issues have concerned the powers of the army during combat and the restrictions imposed on it under international humanitarian law. Thus, for example, we have considered the rights of the local population to food, medicines and other needs of the population during the combat activities (*Physicians for Human Rights v. IDF Commander in Gaza* [10]); we have considered the rights of the local population when terrorists are arrested (*Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [25]); when transporting the injured (HCJ 2117/02 *Physicians for Human Rights v. IDF Commander in West Bank* [43]; when besieging a church (*Almadani v. Minister of Defence* [6]); during arrest and interrogation (*Centre for Defence of the Individual v. IDF Commander in West Bank* [19]; *Yassin v. Commander of Ketziot Military Camp* [22]; *Marab v. IDF Commander in Judaea and Samaria* [23]). More than one hundred petitions have examined the rights of the local inhabitants under international humanitarian law as a result of the construction of the separation fence (see *Beit Sourik Village Council v. Government of Israel* [17]; *Marabeh v. Prime*

Minister of Israel [8]; HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* [44]). In all of these the predominant character of the question in dispute was legal. Admittedly, the legal answer is likely to have political and military ramifications. But they did not determine the nature of the question. It is not the results that arise from the judgment that determine its nature, but the questions that are considered by it and the way in which they are answered. These questions have in the past been, and they remain today, predominantly of a legal nature.

53. *Third*, the types of question that were considered by us are considered by international courts. The international law that concerns the duties of armed forces to civilians during an armed conflict has been considered, for example, by the International Criminal Tribunals for war crimes in Rwanda and the former Yugoslavia (see paras. 26, 30 and 34 above). These courts have examined the legal aspects of the conduct of armed forces. Why cannot an Israeli court examine these matters too? Why should these questions, which are justiciable in international courts, not be justiciable in national courts?

54. *Finally*, the laws concerning the preventative operations of armed forces that cause the death of terrorists and innocent civilians in their vicinity require a retrospective investigation of the conduct of the armed forces (see para. 40 above). Customary international law provides that this investigation should be of an independent character. In order to enhance its objective nature and ensure the maximum possible objectivity, this investigation should be subject to judicial scrutiny. This judicial scrutiny is not a substitute for the ongoing scrutiny of army authorities, which exercise their scrutiny prospectively. 'Because of the court's structure and the scope of its functions, it cannot operate by way of ongoing scrutiny and supervision' (*per* President M. Shamgar in HCJ 253/88 *Sajadia v. Minister of Defence* [45], at p. 825). Moreover, this judicial scrutiny is not a substitute for an objective retrospective investigation after an event in which, it is alleged, innocent civilians who did not take a direct part in the hostilities were harmed. When a retrospective investigation has been made, judicial scrutiny of the decisions of the objective committee of investigation should be possible in appropriate cases. This will ensure that they function properly.

(9) The scope of judicial scrutiny

55. The Supreme Court, sitting as the High Court of Justice, exercises judicial scrutiny of the legality of the discretion of military commanders in the territories. This court has done this since the Six Day War. The premise

that has guided the court was that the military commanders and officers who are subject to its authority are civil servants who carry out public duties according to the law (*Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 809). This scrutiny ensures the legality of the discretion exercised by the military commander.

56. The scope of judicial review on a decision of a military commander to carry out a preventative attack that causes the death of terrorists in the territories, and sometimes the death of innocent civilians, varies according to the nature of the concrete question that is under discussion. At *one* end of the spectrum lies the question, which we are considering in the petition before us, concerning the content of the international law of armed conflicts. This is simply a question of determining the applicable law. According to our legal approach, this question lies within the purview of the judiciary. 'The final and decisive decision as to the interpretation of a statute, according to its validity at any given time, rests with the court' (*per* President M. Shamgar in HCJ 306/81 *Flatto-Sharon v. Knesset Committee* [46], at p. 141). The task of interpreting the law rests with the court. This is the case with regard to the Basic Laws, statutes and regulations. This is the case with regard to Israeli common law. It is certainly also the case with regard to customary international law that applies in Israel. The court is not permitted to shirk this authority. The question that the court should ask itself is not whether the executive understood the law in a reasonable manner. The question that the court should ask itself is whether the executive understood the law correctly (HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [47], at p. 762). It is the court that has expertise in interpreting the law (see HCJ 3648/97 *Stamka v. Minister of Interior* [48], at p. 743; HCJ 399/85 *Kahane v. Broadcasting Authority Management Board* [49], at p. 305). It follows that the judicial scrutiny of the content of customary international law with regard to the question before us is comprehensive and complete. The court asks itself what the international law is and whether the military commander's approach is consistent with that law.

57. At the *other* end of the spectrum of possibilities lies the professional-military decision to carry out a preventative operation which causes the death of terrorists in the territories. This is a decision that falls within the authority of the executive branch. It has the professional security expertise in this sphere. The court will ask itself whether a reasonable military commander would have made the decision that was actually made. The question is whether the decision of the military commander falls within the margin of

reasonable activity of a military commander. If the answer is yes, the court will not replace the security discretion of the military commander with the security discretion of the court (see HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [50], at p. 539; *Ajuri v. IDF Commander in West Bank* [9], at p. 375 {109}). In *Beit Sourik Village Council v. Government of Israel* [17], which concerned the route of the security fence, we said:

> 'We, the justices of the Supreme Court, are not experts in military matters. We shall not examine whether the military outlook of the military commander corresponds with ours, in so far as we have a military outlook concerning the military character of the route. This is how we act with regard to all questions of expertise, and this is how we act with regard to military matters as well. All we can determine is whether a reasonable military commander could have determined a route as the military commander determined it' (*ibid.* [17], at p. 843 {300}).

It follows that judicial scrutiny with regard to military measures that should be taken is an ordinary scrutiny of reasonableness. It is true that 'military considerations' and 'state security' are not magic words that prevent judicial scrutiny. But the question is not what I would have decided in the given circumstances, but whether the decision that the military commander made is a decision that a reasonable military commander was entitled to make. In this regard special weight should be given to the military opinion of the person who has the responsibility for security (see HCJ 258/79 *Amira v. Minister of Defence* [51]; *Dawikat v. Government of Israel* [41], at p. 25; *Beit Sourik Village Council v. Government of Israel* [17], at p. 844 {300}; *Marabeh v. Prime Minister of Israel* [8], at para. 32 of the judgment).

58. Between these two ends of the spectrum there are cases that lie in the middle ground. Each of these requires a careful examination of the character of the decision. In so far as it involves a legal perspective, it will approach one end of the spectrum. In so far as it involves a professional military perspective, it will approach the other end of the spectrum of possibilities. Take the question whether a decision to carry out a preventative attack that causes the death of terrorists falls within the framework of the conditions determined by customary international law in this regard (as stated in art. 51(3) of the First Protocol). What is the scope of the judicial scrutiny of a decision of the military commander that these conditions are satisfied in a specific case? Our answer is that the question whether the conditions

provided in customary international law for carrying out a military operation are satisfied is a legal question, with regard to which the court has the expertise. I discussed this in *Physicians for Human Rights v. IDF Commander in Gaza* [10]:

> 'Judicial review does not examine the wisdom of the decision to carry out military operations. The issue addressed by judicial review is the legality of the military operations. Therefore we presume that the military operations carried out in Rafah are necessary from a military viewpoint. The question before us is whether these military operations satisfy the national and international criteria that determine the legality of these operations. The fact that operations are necessary from a military viewpoint does not mean that they are lawful from a legal viewpoint. Indeed, we do not replace the discretion of the military commander in so far as military considerations are concerned. That is his expertise. We examine their consequences from the viewpoint of humanitarian law. That is our expertise' (*ibid.* [10], at p. 393 {207-208}).

A similar approach exists with regard to proportionality. The decision on a question whether the benefit that accrues from the preventative attack is commensurate with the collateral damage caused to innocent civilians who are harmed by it is a legal question, with regard to which it is the judiciary that have the expertise. I discussed this in *Beit Sourik Village Council v. Government of Israel* [17] with regard to the proportionality of the harm that the security fence causes to the local inhabitants' quality of life:

> 'The military commander is the expert on the military aspect of the route of the separation fence. We are experts on its humanitarian aspects. The military commander determines whether the separation fence will pass over the hills or in the plain. That is his expertise. We examine whether the harm caused by this route to the local inhabitants is proportional. That is our expertise' (*ibid.* [17], at p. 846 {304}; *Marabeh v. Prime Minister of Israel* [8], at para. 32 of the judgment).

Proportionality is not a precise criterion. Sometimes there are several ways of satisfying its requirements. A margin of proportionality is created. The court is the guardian of its limits. The decision within the limits of the margin of proportionality rests with the executive branch. This is its margin of appreciation (see HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture*

and Sport [52], at p. 12; HCJ 4769/95 *Menahem v. Minister of Transport* [53], at p. 280; *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [32], at para. 78 of my opinion).

59. Judicial scrutiny of military decisions to carry out a preventative attack that causes the death of terrorists and innocent civilians is by its very nature of limited scope. There are two reasons for this: *first*, judicial scrutiny cannot be exercised prospectively. Once we have determined in this judgment of ours what the provisions of customary international law that apply in the matter before us are, we naturally cannot examine its realization prospectively. The judicial scrutiny in this matter naturally occurs retrospectively. *Second*, the main investigation should be made by the investigatory committee which according to international law should carry out an objective investigation that is made retrospectively. The scrutiny of this court can naturally be directed only against the decisions of that committee, according to the accepted criteria in this regard.

(10) From general principles to the specific case

60. The order *nisi* that was issued at the request of the petitioners is this:

> 'To order respondents 1-3 to come and explain why the "targeted killing" policy should not be cancelled and why they should not refrain from giving orders to respondents 4-5 to carry out this policy, and also to order respondents 4-5 to come and explain why they should not refrain from carrying out operations of killing wanted persons in accordance with the aforesaid policy.'

A consideration of the 'targeted killing' — or, as we call it, a preventative attack that causes the death of terrorists, and sometimes also of innocent civilians — shows that the question of the legality of the preventative attack under customary international law is a complex one (for an analysis of the Israeli policy, see Y. Shany, 'Israeli Counter-Terrorism Measures: Are They "Kosher" under International Law,' in M.N. Schmitt and G. Beruto (eds.), *Terrorism and International Law: Challenges and Responses* 96 (2002); M. Gross, 'Fighting by Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy,' 51 *Political Studies* 360 (2003); S.R. David, 'Debate: Israel's Policy of Targeted Killing,' 17 *Ethics and International Affairs* 111 (2003); Y. Stein, 'Response to Israel's Policy of Targeted Killing: By Any Name Illegal and Immoral,' 17 *Ethics and International Affairs* 127 (2003); A. Guiora, 'Symposium: Terrorism on Trial: Targeted Killing as Active Self-Defense,' 36 *Case Western Res. J. Int'l L.* 319; L. Bilsky,

'Suicidal Terror, Radical Evil, and the Distortion of Politics and Law,' 5 *Theoretical Inquiries in Law* 131 (2004)). What emerges is not that a preventative attack is always permitted or that it is always prohibited. The approach of customary international law as it applies to armed conflicts of an international character is that civilians are protected against being attacked by the armed forces. But this protection does not exist with regard to those civilians 'for such time as they take a direct part in hostilities' (art. 51(3) of the First Protocol). Targeting these civilians, even if it results in death, is permitted, provided that there is no less harmful measure and provided that innocent civilians in the vicinity are not harmed. The harm inflicted upon them should be proportionate. This proportionality is determined in accordance with an ethical test which seeks to strike a balance between the military advantage and the harm to civilians. It follows that we cannot determine that a preventative attack is always legal, just as we cannot determine that it is always illegal. Everything depends upon the question whether the criteria of customary international law relating to international armed conflicts permit a specific preventative attack or not.

Conclusion

61. The State of Israel is fighting against ruthless terrorism that is inflicted on it from the territories. The means available to it are limited. The state determined that an essential measure from a military perspective is the preventative attack upon terrorists in the territories that causes their death. This sometimes causes innocent civilians to be injured or killed. This use of this preventative attack, notwithstanding its military importance, should be done within the law. The maxim 'When the cannons speak, the Muses are silent' is well known. A similar idea was expressed by Cicero, who said: *silent enim leges inter arma* (laws are silent in times of war). These statements are regrettable. They do not reflect the law either as it is or as it should be (see Application under s. 83.28 of the *Criminal Code* (Re) [65], at p. 260). It is precisely when the cannons speak that we need laws (see HCJ 168/91 *Morcus v. Minister of Defence* [54], at p. 470). Every struggle of the state — whether against terrorism or against any other enemy — is carried out in accordance with rules and laws. There always exists a law that the state is liable to follow. Black holes do not exist (see J. Steyn, *Democracy through Law: Selected Speeches and Judgments* (2004), at p. 195). In our case, the law is determined by customary international law relating to armed conflicts of an international character. Indeed, the struggle of the state against terrorism is not waged 'outside' the law. It is waged 'within' the law and with tools that the law makes available to a democracy.

62. The war of the state against terrorism is a war of the state against its enemies. It is also the war of the law against those who attack it (see HCJ 320/80 *Kawasma v. Minister of Defence* [55], at p. 132). In one case that considered the laws of war in an armed conflict, I said:

> 'This fighting is not carried out in a normative vacuum. It is carried out according to the rules of international law, which set out the principles and rules for waging war. The statement that "when the cannons speak, the Muses are silent" is incorrect. Cicero's aphorism that at a time of war the laws are silent does not reflect modern reality… The reason underlying this approach is not merely pragmatic, the result of the political and normative reality. The reason underlying this approach is much deeper. It is an expression of the difference between a democratic state that is fighting for its survival and the fighting of terrorists who want to destroy it. The State is fighting for and on behalf of the law. The terrorists are fighting against and in defiance of the law. The war against terror is a war of the law against those who seek to destroy it… But it is more than this: the State of Israel is a state whose values are Jewish and democratic. We have established here a state that respects law, that achieves its national goals and the vision of generations, and that does so while recognizing and realizing human rights in general and human dignity in particular; between these two there is harmony and agreement, not conflict and alienation' (*Almadani v. Minister of Defence* [6], at pp. 34-35 {52-53}; see also *Morcus v. Minister of Defence* [54], at p. 470; HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [56], at p. 369).

Indeed, in the struggle of the state against international terrorism, it is obliged to act in accordance with the rules of international law (see M. Kirby, 'Australian Law – After September 11, 2001,' 21 *Austl. Bar. Rev.* 253 (2001)). These rules are based on a balance. They are not a question of all or nothing. I discussed this in *Ajuri v. IDF Commander in West Bank* [9], where I said:

> 'In this balance, human rights cannot receive complete protection, as if there were no terror, and state security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of

> democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle' (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [6], at p. 383 {120}).

Indeed, the struggle against terrorism has turned our democracy into a 'defensive democracy' or a 'militant democracy' (see A. Sajo, *Militant Democracy* (2004)). But this struggle must not be allowed to deprive our system of government of its democratic character.

63. The question is not whether it is permitted to defend oneself against terrorism. Certainly it is permitted to do so, and sometimes it is also a duty to do so. The question is the manner in which one responds. In this regard, a balance should be struck between security needs and the rights of the individual. This balance imposes a heavy burden on those involved in the defence of the state. Not every effective measure is also a legal one. The end does not justify the means. The armed forces need to train themselves to act in accordance with the rules of law. This balance imposes a heavy burden on the justices, who need to determine, on the basis of existing law, what is permitted and what is prohibited. I discussed this in one case, where I said:

> 'The decision has been placed at our door, and we must accept it. We have a duty to preserve the legality of government even in hard cases. Even when the cannons speak and the Muses are silent, the law exists and operates, and it determines what is permitted and what is prohibited, what is legal and what is illegal. And where there is law, there is also a court that determines what is permitted and what is prohibited, what is legal and what is illegal. Some of the public will rejoice at our decision; the rest of it will criticize it. It is possible that neither the former nor the latter will read out reasoning. But we shall do our duty' (HCJFH 2161/96 *Sharif v. Home Front Commander* [57], at p. 491).

Indeed, the decision in the petition before us is not simple:

> 'We are members of Israeli society. Although we sometimes find ourselves in an ivory tower, that tower is in the heart of Jerusalem, which has on more than one occasion suffered from ruthless terror. We are aware of the killing and destruction that the terror against the state and its citizens brings in its wake. Like every other Israeli, we too recognize the need to protect the State and its citizens against the serious harm of terror. We are aware that, in the short term, this judgment of ours will not make

> the state's struggle against those that attack it any easier. But we are judges. When we sit in judgment, we ourselves are being judged. We act to the best of our conscience and understanding. As to the struggle of the State against the terror that besets it, we are convinced that, in the final analysis, its struggle in accordance with the law and its provisions strengthens its power and its spirit. There is no security without law. Upholding the requirements of the law is an element of national security (*Beit Sourik Village Council v. Government of Israel* [17], at p. 861 {323}).

64. In one case we considered the question whether the state was entitled to order its interrogators to adopt special interrogation measures that involved the use of force against terrorists in a situation of a 'ticking bomb.' Our answer to this question was no. I described in my opinion the difficult security reality that Israel faced, and I added:

> 'We are aware that this decision does not make it easier to deal with that reality. This is the destiny of a democracy — it does not see all means as acceptable, and the ways of its enemies are not always open to it. A democracy must sometimes fight with one hand tied behind its back. Even so, democracy has the upper hand. The rule of law and the liberty of the individual constitute important components in its understanding of security. In the final analysis, they strengthen its spirit and this strength allows it to overcome its adversities' (HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [58], at p. 845 {605}).

Let us pray that this is so!

It has therefore been decided that it cannot be determined *ab initio* that every targeted killing is prohibited under customary international law, just as it cannot be determined *ab initio* that every targeted killing is permitted under customary international law. The laws relating to targeted killings are determined in customary international law, and the legality of each individual attack needs to be decided in accordance with them.

Vice-President E. Rivlin

1. I agree with the important and comprehensive opinion of my colleague President A. Barak.

The increase in terrorism in recent years — an increase both in scope and intensity — has raised difficult questions concerning the manner in which a

democratic state should and may fight against the persons who rise up against it and its citizens to destroy them. Indeed, it is not disputed that a state may and should fight terrorism. It is also not disputed that not all means are permitted. It is difficult to map out the correct way of how to fight terrorism and defend oneself against it. The ordinary means whereby a state protects itself and its citizens are not necessarily effective against terrorist organizations and their members. Even policing and enforcement methods that characterize the fight against 'conventional' criminal activity are unsuited to the needs of fighting terrorism (see also D. Statman, 'Targeted Killing,' 5 *Theoretical Inquiries in Law* 179 (2004)). For these reasons, the State of Israel (like other states) has over the years employed and continues to employ various operations in order to deal with terrorism. This court, on various occasions, is called upon to consider the question of the delicate balances involved in making use of these courses of action.

The petition before us concerns the 'targeted killing' policy. In this policy, the State of Israel attacks persons that it identifies as being involved in the planning and execution of terror attacks. The goal, on the one hand, is to protect the civilians and armed forces of the State of Israel, and on the other hand, to prevent an attack upon, or to minimize collateral damage to, the Palestinian civilian population. My colleague President A. Barak is of the opinion that the question before us should be examined in light of the rules of international law relating to an armed conflict (or dispute) of an international character. I agree with this position (see also J. N. Kendall, 'Israeli Counter-Terrorism: "Targeted Killings" under International Law,' 80 *N.C.L. Rev.* 1069 (2002)). An armed dispute has existed for many years between Israel and the various terrorist organizations operating in the territories. This dispute, as my colleague the president says, does not exist in a normative vacuum. Two normative sets of laws apply. In the words of my colleague the president: 'In addition to the provisions of international law governing an armed conflict, the basic principles of Israeli public law are likely to apply. These basic principles are carried by every Israeli soldier in his backpack and they go with him wherever he goes.' Indeed, two normative systems require consideration in our case: one is the rules of international law, and the other is the legal rules and moral principles of the State of Israel, including the basic value of human dignity.

2. In his consideration of the normative system incorporated in the rules of international law, my colleague the president addresses the question of the correct classification of terrorist organizations and their members: should they be regarded as combatants or civilians, or perhaps as a separate group of

unlawful combatants? My colleague's conclusion is that, in so far as the law currently stands, 'we do not have before us sufficient information that allows us to recognize the existence of this third category' of unlawful combatants, and since such combatants do not satisfy the conditions for being included in the category of 'combatants,' they should be classified as civilians. He clarifies that this classification does not, within the framework of international law, grant protection to civilians who are taking a direct part in hostilities; these persons are therefore not protected against attack, when they are taking a direct part in terrorist operations.

The issue of the correct classification of terrorist organizations and their members gives rise to difficult questions. Customary international humanitarian law requires the parties to the dispute to distinguish between civilians and combatants, between military objectives and civilian objectives, and to refrain from causing excessive damage to enemy civilians. The question is whether *reality* has not created, *de facto*, an additional group that is subject to a special law. Indeed, the scope of the danger presented by the terrorist organizations to the State of Israel and the safety of its citizens, the unsuitability of the measures usually employed against civilian lawbreakers and the threat arising from terrorist activity all give rise to a feeling of discomfort when we try to adapt the traditional category of 'civilians' to those persons who are taking a direct part in acts of terrorism. The latter are not 'combatants' according to the definition of international law. The manner in which the term 'combatants' has been defined in the relevant conventions resulted precisely from a desire to deny 'unlawful combatants' certain protections that are given to 'lawful combatants' (especially protections concerning the status of prisoners of war and not being brought to trial). They are 'unprivileged belligerents' (see K. Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle Over Legitimacy*, Harvard Program on Humanitarian Policy and Conflict Research, 'Occasional Paper' (Winter 2005, no. 2); R.R. Baxter, 'So Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs,' 28 *British Year Book of International Law* 342 (1951)). But it is precisely the characteristics of terrorist organizations and their members that exclude them from the category of 'combatants' — the absence of recognizable emblems and the refusal to observe the laws and customs of war — that create a difficulty, in so far as this exclusion gives a better status, even if only in certain matters, to someone who chooses to become an 'unlawful' combatant, who acts contrary to the rules of international law and the rules of morality and humanitarianism.

The classification of members of terrorist organizations under the category of 'civilian' is not, therefore, self-evident. Dinstein wrote in this context that:

> '… a person is not allowed to wear simultaneously two caps: the hat of civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War specifically permits derogation from the rights of such a person (the derogation being less extensive in occupied territories, pursuant to the second Paragraph of Article 5)' (Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, 2004) at pp. 29-30).

It has also been said that: '… If it is not fitting to regard terrorists as combatants, and in consequence of this to give them the protections given to combatants, they should certainly not be regarded as civilians who are not combatants and be given far greater rights' (E. Gross, *Democracy's Struggle Against Terrorism: Legal and Moral Aspects* (2004), at p. 76; see also Y. Dinstein, 'Unlawful Combatancy,' 32 *Israel Yearbook on Human Rights* 249 (2002); Baxter, 'So Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs,' *supra*). Those who believe that a third category of lawbreakers exists emphasize that this includes those persons who seek to obscure the dividing line between civilians and combatants: J.C. Yoo and J.C. Ho, 'The New York University–University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists,' 33 *Virginia Journal of International Law* 217 (2003). The difficulty may become even greater if we take into account that those persons who do not satisfy the requirements either of lawful combatants or of innocent civilians are not homogeneous. They include groups that are not necessarily identical to one another from the viewpoint of their willingness to accept the basic legal and humanitarian norms. In particular, we should distinguish in this context between unlawful combatants who fight against armed forces and those who deliberately operate against civilians.

It would therefore appear that international law needs to be brought into line with the age in which we live. In view of the facts that were submitted before us, my colleague the president proposes that we adapt the law by interpreting the existing law, which in his opinion recognizes two categories — combatants and civilians (see also S. Zachary, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' 38 *Israel L. Rev.* 379 (2005)). As we have said, there may be other approaches. I see no need to expand upon them, since in view of the rules of interpretation proposed by my colleague the president, the fundamental difficulty loses much of its urgency.

The interpretation that my colleague President A. Barak proposes *de facto* creates an additional category, and rightly so. It is possible to derive this from the category of combatants ('unlawful combatants'), and it is possible to derive this from the category of civilians. My colleague the president follows the latter path. If we follow him, we will derive from this category the group of civilians who are international lawbreakers, whom I would call 'uncivilized civilians.' But whichever path we follow, there is no difference in the result, since the interpretation that my colleague the president proposes to give the provisions of international law adapts the rules to the new reality. I agree with this interpretation. It is a dynamic interpretation that rises above the limitations of a literal reading of the laws of war.

3. Against the background of the differences between 'lawful' combatants and 'international lawbreaking' combatants, it is possible to draw an analogy between the combat methods that are permitted in a struggle between two armed forces and the 'targeted killing' of terrorists (see also Statman, 'Targeted Killing,' *supra*). The approach underlying the 'targeted killing' policy is that only persons who are actually involved in terrorist activity should be targeted. Indeed, in a conventional war the combatants are identifiable and distinguishable from the civilian population. It is permitted to target these combatants (subject to the limitations of international law). Civilians may not be targeted. Similarly, within the framework of the struggle against terrorism, it is permitted to target international lawbreaking combatants, but harming civilians should be avoided in so far as possible. The difficulty arises of course from the fact that the unlawful combatants by definition do not act in accordance with the laws of war, which means, *inter alia*, that they very often operate from a concealed position among the civilian population, which is contrary to the express provisions of the First Additional Protocol to the 1977 Geneva Conventions. They do this in order

to obtain an advantage that arises from the fact that the opposing forces wish to respect the rules of international law (see J. Callen, 'Unlawful Combatants and the Geneva Conventions,' 44 *Va. J. Int'l L.* 1025 (2004)).

But even under the difficult conditions of fighting against terrorism, the distinction between lawbreaking combatants and civilians should be maintained. This, for our purposes, is the significance of the word 'targeted' in the expression 'targeted killings.' The significance is the requirement of proportionality that my colleague the president discusses at length.

4. In so far as the implementation of the requirement of proportionality is concerned, the proper premise emphasizes the rights of innocent civilians. The State of Israel has the duty to respect the lives of the civilians on the other side. It is liable to protect its own civilians while respecting the lives of the civilians who are not under its effective control. When we consider the rights of innocent civilians, we will find it easier to recognize the importance of the restrictions placed upon the manner in which the armed conflict is conducted. The duty to respect the civilians on the other side is clearly stated in the rules of international law (see E. Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians,' 39 *Israel L. Rev.* 81 (2006), at p. 96).

This duty is also a part of the other normative system that governs the armed conflict: it is a part of the moral code of the state and the supreme principle of preserving human dignity. I discussed this with regard to the issue of the use of the 'prior warning' procedure (also known as the 'neighbour' procedure):

> '… In one matter the lines are clear and sharp — the respect for human dignity as such. An army occupying a territory under a belligerent occupation has the duty of protecting the life of the local inhabitant. It also has the duty of protecting his dignity. Making such an inhabitant, who is caught in a battle zone, choose whether or not to agree to the army's request to convey a warning to a wanted person places him in an impossible situation. The choice itself is immoral. It violates human dignity' (HCJFH 10739 *Minister of Defence v. Adalah Legal Centre for Arab Minority Rights in Israel* [59]).

The two normative systems that govern armed conflicts are as one in regarding the principle of human dignity as central. This principle nourishes the interpretation of international law, just as it nourishes the interpretation of Israeli internal public law. It expresses a general value that gives rise to

various specific duties (on the importance of this principle in international law and its significance with regard to the treatment of civilians, see Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians,' *supra*; it should be noted that Benvenisti identifies two principles that are relevant to the implementation of the principle of respecting human dignity in the context under discussion: the principle of individualism, which states that every person is responsible solely for his own actions, and the principle of universalism, according to which all individuals are entitled to the same rights, irrespective of the group to which they belong. This principle is not expressly recognized in the law of armed conflicts. But this does not negate the duty relating to enemy civilians. The scope of the duty varies but not the existence of the duty itself (*ibid*., at p. 88)).

5. The principle of proportionality, which is a general principle that is enshrined in various provisions of international law, seeks to realize this duty. This principle does not allow disproportionate collateral damage to innocent civilians. Thus it demands that the benefit that arises from realizing the proper military objective should be commensurate with the damage caused to innocent civilians. It demands that the collateral damage should not be excessive in the circumstances of the case. There are some who regard the weighing of the benefit against the damage as a concretization of the requirement to refrain from harming civilians excessively. Although the connection between the two is clear, it would appear that there may be collateral damage to the civilian population that is so serious that even a military objective of real benefit will not justify causing it. After all, we are speaking of ethical requirements. 'This is an ethical test,' my colleague the president says. 'It is based on a balance between conflicting values and interests.' This ethical outlook is accepted in customary international law with regard to the protection of civilians (art. 51 of the First Additional Protocol to the 1977 Geneva Conventions). It is also accepted in the national legal systems of many countries. This test, as President Barak said in one case, 'seeks in essence to realize the constitutional outlook that the end does not justify the means. It is an expression of the concept that there is an ethical barrier that democracy cannot pass, even if the purpose that is being sought is a proper one (*Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [33]).

The duty to respect the lives of innocent civilians is therefore the premise. It gives rise to the requirement that the collateral damage to civilians should not be excessive and should be proportionate to the benefit arising from the

military operation. This ethical outlook logically imposes restrictions on attacks against the lawbreaking combatants themselves. The restrictions may relate to the type of weapon that is used during the targeted killing. The restrictions may also result in choosing a method that reduces the danger to the lives of innocent civilians. The restrictions may relate to the degree of care that should be taken in identifying the target for the killing. These are all restrictions that seek in essence to realize the duty to respect the lives of innocent civilians, and they will be interpreted accordingly.

The premise is therefore the rights of innocent civilians. It is the premise, but it is not the *only* premise. It does not detract from the human dignity of the lawbreaking combatants themselves. Admittedly, international law does not grant lawbreaking combatants equal rights to those given to lawful combatants or, conversely, to innocent civilians. But human dignity is a supreme principle that applies to every person, even in times of war and conflict. It is not conditional upon reciprocity. One of the consequences of this, which is not disputed by the state, is that whenever it is possible to arrest a terrorist who is taking a direct part in hostilities and bring him to trial, the state will do so. This is a possibility that should always be considered. But as my colleague the president says, sometimes this possibility may be completely impractical or may endanger soldiers excessively.

6. The principle of proportionality is easy to state, but hard to implement. When we consider it prospectively, under time constraints and on the basis of limited sources of information, the decision may be a difficult and complex one. Frequently it is necessary to consider values and principles that cannot be easily balanced. Each of the competing considerations is based upon relative variables. None of them can be considered as standing on its own. Proportionate military needs include humanitarian elements. Humanitarian considerations take into account existential military needs. As my colleague the president says, the court determines the law that governs the decision of the military commander. The professional military decision is the responsibility of the executive branch, and the court will ask itself if a reasonable military commander could have made the decision that was actually made, in view of the normative principles that apply to the case (cf. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, which was submitted to the International Criminal Tribunal for the former Yugoslavia in June 2000).

7. In conclusion, like my colleague the president, I too am of the opinion that it cannot be decided *ab initio* that a targeted killing operation is always illegal, just as it cannot be decided *ab initio* that it is legal and permitted in all circumstances. Such an operation — in order to be legal — must satisfy the rules of law, including the requirement of proportionality as explained above, from an outlook that places the main emphasis on the right of the State of Israel to protect itself and the lives of its civilians, but at the same time regards the principle of human dignity as a fundamental value.

I therefore agree with the opinion of my colleague President A. Barak.

President D. Beinisch

I agree with the judgment of President (Emeritus) Barak and would like to emphasize several aspects of the difficult subject that has been brought before us.

In the petition before us the petitioners requested us to order the respondents to cancel the 'targeted killing' policy and to refrain from carrying out any operations within the framework of that policy. This is therefore a petition for a general and broad relief that relies on the petitioners' claim that Israel's policy in this regard is 'manifestly illegal.' Among the other arguments from the field of international law and Israeli internal law, the petitioners also based their claims on specific examples from the past, which they believe show the illegality of the aforesaid policy. These specific examples indicate the problems and the risks involved in the 'targeted killing' policy, but they cannot decide the legal question of the legality of the policy in general.

For the reasons set out in the opinion of my colleague President Barak, I agree with the conclusion that the question before us is governed by the laws applying to international armed conflicts, and that the petitioners' sweeping position is not mandated by the rules of international humanitarian law. The conclusion reached by President Barak, with which I agree, is that it cannot be said that the aforesaid policy is always prohibited, just as it cannot be said that it is permitted in all circumstances at the discretion of the military commander. The legal question before us is complex and cannot be addressed in the broad and all-embracing manner as argued by the petitioners.

This court has held many times in the past that even combat operations are governed by the norms enshrined in both international law and internal law, and that military activity does not take place in a normative vacuum. The legal difficulties that we are required to confront derive first and foremost

from the fact that international law has not yet developed the laws of war in a manner that will make them suitable for war against terrorist organizations as opposed to a regular army. Therefore, we are required make use of interpretive tools in order to adapt existing humanitarian law to the needs of the cruel reality with which the State of Israel is contending. It should be noted that the spread of the scourge of terrorism in recent years is a concern of legal scholars in many countries and experts in international law, who seek to establish the norms of what is permitted and prohibited with regard to terrorists who do not comply with any law. Against this normative reality, I too agree that within the framework of existing law, terrorists and their organizations should not be classified as 'combatants' but as 'civilians.' In view of this, they are subject to art. 51(3) of the First Additional Protocol to the 1977 Geneva Conventions — an arrangement that is a part of customary international law — according to which:

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

In his opinion President Barak discussed at length the interpretation of the main elements of the aforesaid art. 51(3), in view of the need to define the expression 'civilians' that 'take a direct part in hostilities' and to clarify the meaning of 'for such time.' As can be seen from the interpretation given in the president's opinion, the power of the state to carry out 'targeted killing' operations is subject to restrictions and reservations. From these reservations we see that not every involvement in terrorist activity will constitute taking 'a direct part in hostilities' under art. 51(3) and that we are speaking of activity relating to actual hostilities — activity which, although is not limited merely to the physical attack, does not include activity of indirect assistance (see para. 35 of the president's opinion). I agree that the dilemmas that arise in view of the interpretation of the elements of the aforesaid art. 51(3) require a specific examination on a case by case basis. It should be remembered that the purpose of the 'targeted killing' is to prevent harm to human life as a part of the duty of the state to protect its armed forces and civilians. Since art. 51(3) is an exception to the duty to refrain from harming the lives of innocent civilians, great caution should be exercised when considering, in the appropriate circumstances, the possibility of endangering the lives of civilians. When exercising this caution, an examination should be made of the level of information required in order to classify a 'civilian' as someone who is taking a direct part in the hostilities. This information should be reliable, substantial and convincing with regard to the risk presented by the terrorist to human life — a risk that includes persistent activity that is not

limited to sporadic activity or a single concrete act. I would add that in appropriate circumstances information concerning the activity of the terrorist in the past may be used to examine the risk that he presents in the future. I would also add that when assessing the risk, the likelihood of the hostile activity that endangers human life should be considered. In this regard, a remote suspicion is insufficient; there should be a significant probability that such a risk exists. I agree of course with the finding that a thorough and independent (retrospective) investigation should be made with regard to the correctness of the identification and the circumstances of the attack. To all of the above I would add two points: first, no use should be made of 'targeted killings' when it is possible to arrest a terrorist who is taking a direct part in hostilities without any real risk to the lives of the armed forces. Second, the principle of proportionality as accepted in customary international law, according to which disproportionate collateral damage to innocent civilians should be avoided, should be observed. When the harm to innocent civilians is not proportionate to the benefit of the military operation (the test of 'proportionality in the narrow sense'), the 'targeted killing' will be disproportionate. This matter was also discussed in depth by my colleague Vice-President Rivlin, and I agree with him too. Ultimately, when a 'targeted killing' operation is carried out in accordance with the reservations that have been discussed and within the framework of the law relating to international armed conflicts in customary humanitarian law as we have interpreted it, we are not speaking of taking human life in an arbitrary manner, but of an action that is intended to save human life.

Therefore I too am of the opinion that in Israel's difficult war against terror that besets it, we cannot say in a sweeping manner that the use of the measure of 'targeted killings' as one of the strategies in the war against terrorism is prohibited, and thereby prevent the state from using a strategy which, in the opinion of those responsible for security, is essential for the protection of the lives of Israeli inhabitants. Notwithstanding, in view of the extreme nature of the 'targeted killing' strategy, it should only be used subject to the restrictions and reservations outlined in our judgment and in accordance with the circumstances and merits of each individual case.

Petition denied.

23 Kislev 5767.

14 December 2006.