# THE ISRAELI SUPREME COURT'S *TARGETED KILLINGS* JUDGMENT: A REAFFRIMATION OF THE RULE OF LAW DURING WAR

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## INTRODUCTION

On September 28, 2000, Ariel Sharon – the Likud party candidate for Israeli Prime Minister – entered Temple Mount[1] accompanied by 1,000 security guards.[2] The Palestinian population in Israel viewed this as an act of provocation and an intentional attempt by Israel to infringe on the Muslim presence on Temple Mount;[3] consequently, Sharon's visit was met with a violent riot that left ten Palestinian demonstrators and twenty-five Israeli policemen injured.[4] And with that, the Second Intifada[5] began.[6]

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1. This area is considered holy for both Muslims and Jews. Temple Mount is the Jewish name of the site, and Muslims call the site Haram al-Sharif. The site houses the al-Aqsa mosque. *Al-Aqsa Intifada Timeline*, BBC NEWS, http://news.bbc.co.uk/2/hi/middle_east/3677206.stm (last updated Sept. 29, 2004) [hereinafter *Al-Aqsa Intifada Timeline*].

2. *See* JAMES L. GELVIN, THE ISRAEL-PALESTINE CONFLICT: ONE HUNDRED YEARS OF WAR 243 (2007).

3. *Al-Aqsa Intifada Timeline*, *supra* note 1.

4. *Id.* Sharon is reported to have stated: "'Temple Mount is in our hands and will remain in our hands. It is the holiest site in Judaism and it is the right of every Jew to visit the Temple Mount.'" Suzanne Goldenberg, *Rioting as Sharon Visits Islam Holy Site*, THE GUARDIAN, Sept. 28, 2000, *available at* http://www.guardian.co.uk/world/2000/sep/29/israel.

5. *Al-Aqsa Intifada Timeline*, *supra* note 1 (the Second Intifada – or the "al-Asqa Intifada" – was a Palestinian uprising that lasted from September 2000 to February 2005. It is named after the Jerusalem mosque complex where the violence began).

6. Commentators are generally in agreement that Sharon's visit to Temple Mount/the al-Aqsa Mosque was the event that triggered the Second Intifada. *See* JEWISH POLITY AND AMERICAN CIVIL SOCIETY: COMMUNAL AGENCIES AND RELIGIOUS MOVEMENTS IN THE AMERICAN PUBLIC SQUARE 161 (Alan Mittleman, Jonathan D. Sarna & Robert Licht

The Second Intifada brought a wave of violence and destruction to Palestinians and Israelis,[7] as well as a resurgence of terrorist groups and terrorist acts in Israel.[8] In *The Public Committee Against Torture in Israel v. The Government of Israel*, the Israeli Supreme Court described the situation during the Second Intifada:

> In February 2000, the [S]econd *[I]ntifada* began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis. This assault of terrorism differentiates neither between combatants and civilians, nor between women, men, and children…[The terrorist attacks] are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. [From the years 2000-2005], thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed . . . Thousands of Palestinians have been killed and wounded during this period as well.[9]

It was against this background that the Israeli government implemented its current policy of targeted killings, in which the Israeli military assassinated those who "plan, launch, or commit terrorist attacks in Israel and in the [occupied territories] against both civilians and soldiers."[10] The first instance of a targeted killing under the current policy occurred on November 9, 2000, with the killing of Hussein Abayat.[11]

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eds., 2002) ("Then in late September, Ariel Sharon . . . visited the Temple Mount . . . . The next day, massive violence erupted in Jerusalem and Palestinian-controlled areas in the West Bank and Gaza Strip."); *Al-Aqsa Intifada Timeline*, *supra* note 1 ("Ariel Sharon, then the leader of Israel's opposition [party], paid a visit to the site in East Jerusalem known to Muslims as Haram al-Sharif, and to Jews as Temple Mount, which houses the al-Aqsa Mosque – and frustration boiled over into violence."); BUREAU OF NEAR EASTERN AFFAIRS, SHARM EL-SHEIKH FACT-FINDING COMMITTEE REPORT (Apr. 30, 2001); *The Al-Aqsa Intifada*, YNET NEWS (Mar. 19, 2009), http://www.ynetnews.com/articles/0,7340,L-3689276,00.html.

7. The Israeli and Palestinian casualties numbered in the thousands on both sides. *See* B'Tselem, *Statistics*, B'TSELEM http://old.btselem.org/statistics/english/Casualties.asp (last visited Dec. 12, 2012) [hereinafter *Statistics*].

8. *See* Gal Luft, *The Palestinian H-Bomb: Terror's Winning Strategy*, 81 FOREIGN AFF. 2 (2002). (militant groups involved in the fighting included Hamas, Palestinian Islamic Jihad, Popular Front for the Liberation of Palestine, and the Al-Aqsa Martyrs' Brigades).

9. HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel [2006] (Isr.) [hereinafter the *Targeted Killings* case].

10. *Id.*

11. Commentators are generally in agreement on this, concluding that the Abayat assassination was the first attack under the Israeli government's current policy. *See*, *e.g.*, Michelle Lesh, *The Public Committee Against Torture in Israel v. The Government of Israel: The Israeli High Court of Justice Targeted Killing Decision*, 8 MELB. J. INT'L L. 373, 373-74 (2007); Orna Ben-Naftali & Keren R. Michaeli, '*We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 233-34 (2003) [hereinafter *Scarecrow*]; David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUR. J. INT'L L. 171, 171-72 (2005). Abayat was driving his car on one of the crowded streets of his village

What is notable about the current policy is Israel's unapologetic stance regarding its use of targeted killings. This is a new development, as it represents a transformation from the norm. Generally, states that engage in such a practice usually deny it.[12] Indeed, before November 9, 2000, Israel denied allegations of such a practice, stating:

> [T]he I.D.F. wholeheartedly rejects this accusation. There is no policy, and there never will be a policy or a reality, of willful killings of suspects…the principle of the sanctity of life is a fundamental principle of the I.D.F. There is no change and there will not be a change in this respect.[13]

However, as of November 9, 2000 and the implementation of the current policy, Israel admits that it is engages in practice of targeted killings.[14] Despite this admission, the government nonetheless has sought to shield this activity from judicial review.[15]

Since the implementation of the current policy, it is estimated that 338 Palestinians have been killed, 128 of whom (including 29 children) were innocent bystanders.[16] These numbers illustrate the "policy's controversial nature."[17] Indeed, Israel's policy of targeted killing has received almost universal condemnation, being labeled as "contrary to international law" by former U.N. Secretary-General Kofi Annan,[18] "unlawful killings" by the UK Foreign Secretary Jack Straw,[19] and "summary execution[s] that violate

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when an Israeli Defense Forces helicopter fired three missiles at his car, killing Abayat as well as Aziza Muhammad Danun and Rahma Rashid Shahin, two women who were standing outside a house waiting for a taxi. *See* Yael Stein, *Israel's Assassination Policy: Extra-Judicial Executions*, ZOKLET.NET, http://www.zoklet.net/totse/en/politics/foreign_military_intelligence_agencies/164141.html (last visited Dec. 4, 2012).

12. *See* Orna Ben-Naftali, *A Judgment in the Shadow of International Criminal Law*, 5 J. INT'L CRIM. JUST. 322, 324 (2007) [hereinafter *A Judgment in the Shadow of International Criminal Law*].

13. *See* NA'AMA YASHUVI, ACTIVITY OF THE UNDERCOVER UNITS IN THE OCCUPIED TERRITORIES 90 (1992).

14. *A Judgment in the Shadow of International Criminal Law*, *supra* note 12.

15. *Id.* Indeed, in 2002, the Israeli Supreme Court ruled that the policy of targeted killings is non-justiciable: "[T]he choice of means of warfare, used by the Respondents to preempt murderous terrorist attacks, is not the kind of issue the Court would see fit to intervene in." *Id.* at 379 (quoting HCJ 5872/01 Barakeh v. Prime Minister 56(3) P.D. 1. [2002] (Isr.)) [hereinafter Barakeh].

16. *See Statistics*, *supra* note 7.

17. Orna Ben-Naftali & Keren Michaeli, *International Decisions: Public Committee Against Torture in Israel v. Government of Israel*, 101 AM. J. INT'L L. 459, 460 (2007).

18. Unofficial Transcript, United Nations Secretary-General Kofi Annan, Off the Cuff: Secretary-General's Press Encounter Upon Arrival at UNHQ (Mar. 22, 2004), http://www.un.org/sg/offthecuff/?nid=564.

19. Matthew Tempest, *UK Condemns 'Unlawful' Yassin Killing*, THE GUARDIAN (London) (Mar. 22, 2004), *available at* http://www.guardian.co.uk/politics/2004/mar/22/foreignpolicy.israel.

human rights" by Anna Lindh, former Foreign Minister of Sweden.[20] However, the Israeli government continues to justify the policy on grounds of national security. The government essentially describes targeted killings as a preventative measure, emphasizing the past actions attributed to the target and that each assassination "prevented a terrorist attack on Israeli civilians, underscoring the necessity and justification for action."[21]

It was in this context of controversy and contention[22] that the Israeli Supreme Court decided *The Public Committee Against Torture in Israel v. The Government of Israel* (the "*Targeted Killings* case"). This case expressly challenged the Israeli government's policy of targeted killings. In a unanimous opinion, the Court held that whether a targeted killing is prohibited according to customary international law would be determined on a case-by-case basis.[23] While some may find the Court's holding insufficient and lacking in specificity, the ruling is nonetheless significant and has powerful implications on the practice and legality of targeted killings – both in Israel and abroad. The Court's holding in the *Targeted Killings* case should be applauded for its reaffirmation of the role of the judiciary in a democracy, and its emphasis on maintaining the rule of law during times of war. Moreover, by outlining the circumstances in which targeted killings are legitimate, the Court created nuanced guidelines from abstract international law, and in so doing, helped further refine and specify the legality of targeted killings.

The remainder of this note will discuss and analyze the *Targeted Killings* opinion and its implications for the future. Part I provides a detailed summary of the Court's opinion and analysis, including a discussion of the legal issues involved in the case, how the Court framed those issues, the parties' arguments, the Court's conclusion as to the applicable normative framework to decide the case, the Court's holding and rationale, the Court's implementation of the four-prong test to determine the legality of targeted killings, and the Court's discussion of justiciability. Part II provides an analysis of selected issues concerning the Court's opinion. Specifically, Part II discusses two issues: (1) the Court's conclusion regarding the justiciability of targeted killings, and (2) the adequacy and importance of the Court's implementation of the four-prong test. Part IV concludes with an assessment of the opinion, focusing on the Court's affirmation of the importance of the rule of law during wartime and the adequacy of the four-

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20. Brian Whitaker & Oliver Burkeman, *Killing Probes the Frontiers of Robotics and Legality*, THE GUARDIAN (London) (Nov. 6, 2002), *available at* http://www.guardian.co.uk/usa/story/0,12271,834311,00.html.

21. *Scarecrow*, *supra* note 11, at 250.

22. *See* Lesh, *supra* note 11, at 375 ("The legality of this policy has been widely debated, both in Israel and internationally."); *see also* Kristen E. Eichensehr, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873, 1873 (2007) ("[The policy] has sparked vigorous debate among scholars about its lawfulness.").

23. *Targeted Killings* case, *supra* note 9, para. 60.

prong test to create more specific guidelines for targeted killings, in the hopes of ending the conflict in the future.

## I. THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL V. THE GOVERNMENT OF ISRAEL

In January 2002, the Public Committee Against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment (collectively, the "Petitioners") filed a petition against the State of Israel,[24] arguing that Israel's policy of targeted killings violated "international law, Israeli law, and basic principles of human morality."[25] On Thursday, December 14, 2006 – almost five years after the initial petition – the three-justice panel of the Israeli Supreme Court unanimously held that the question of whether every targeted killing is prohibited according to customary international law could not be determined in advance,[26] and in so doing, they rejected the Petitioners' claim that the policy of targeted killings is *per se* illegal under Israeli law and international law.[27]

President Barak, who authored the opinion for the Court, began the judgment by defining the issue as such:

> The Government of Israel employs a policy of preventative strikes that cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.[28]

He then proceeded to give a brief factual background, describing the onset of hostilities and violence since the beginning of the Second Intifada.[29] Barak wrote: "In February 2000, the [S]econd *[I]ntifada* began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis."[30] It was notable that the Court's description of the facts giving rise to this case is framed in terms of terrorism – that is, the discussion of the factual background touches on the

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24. Lesh, *supra* note 11, at 375.
25. *Targeted Killings* case, *supra* note 9, para. 2.
26. *Id.* para. 60.
27. *Id.* at President D. Beinisch *concurring* opinion. In his concurring opinion, President Beinisch echoed the sentiment of his fellow justices, rejecting Petitioners' argument that Israeli law and international law render targeted killings *per se* illegal, stating: "the sweeping stance of petitioners is not the necessary conclusion from international humanitarian law." *Id.*
28. *Id.* para 1.
29. *Id.*
30. *Id.*

Second Intifada, but emphasizes the increase in terrorist attacks committed by Palestinians against Israelis.[31] Thus, from the outset, the situation was framed in a manner of fighting terrorism. This is all the more evident as the Court continued its factual discussion, where Barak wrote: "In its war against terrorism, the State of Israel employs various means."[32] At this point in the opinion, the Court introduced the Israeli government's "policy of targeted frustration' of terrorism,"[33] describing it as a policy where "security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel."[34] The Court then discussed the statistics involved in the targeted killings policy,[35] and concluded by refining the Court's focus, saying: "The policy of targeted killings is the focus of this petition."[36]

The Court then moved on to a discussion of the parties' arguments. In arguing that the policy is "totally illegal, and contradictory to international law, Israeli law, and basic principles of human morality,"[37] Petitioners essentially asserted three arguments. The first argument dealt with the applicable law, which petitioners contended was the "legal system dealing with law enforcement in occupied territory."[38] Petitioners conceded that the conflict under discussion is an international conflict; however, they claimed that within its framework, "military acts to which the laws of war apply are not allowed"[39] because as codified in Article 51 of the Charter of the United Nations of 1945,[40] the "right to self-defensive military action . . . is granted to a state in response to an armed attack by another state," and the occupied territories are under belligerent occupation by the State of Israel.[41] As such, petitioners argued: "Since the State cannot claim self-defense against its own population, nor can it claim self-defense against persons under the occupation of its army," Article 51 does not apply and Israel has no right to self-defense.[42]

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31. *Id.*
32. *Id.* para. 2.
33. A synonym for "targeted killings."
34. *Targeted Killings* case, *supra* note 9, para. 2.
35. *Id.* ("According to the data relayed by petitioners, since the commencement of [the targeted killings policy], and up until the end of 2005, close to three hundred members of terrorist organizations have been killed [by targeted killings]. More than thirty targeted killing attempts have failed. Approximately one hundred and fifty civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded.").
36. *Id.*
37. *Id.* para. 3.
38. *Id.* para. 4. (nothing that the Court also uses the term "laws of policing and law enforcement" in describing this kind of legal system).
39. *Id.*
40. That article provides "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." U.N. Charter art. 51.
41. *Targeted Killings* case, *supra* note 9, para. 4.
42. *Id.*

Petitioners' second argument was that even if the laws of war apply, the Israeli policy is nonetheless illegal because the laws of war only recognize "combatants" and "civilians" and do not recognize "unlawful combatants."[43] Therefore, members of terrorist organizations should be seen as having the protected status of "civilians."[44] Petitioners contended that under the distinction of "combatants" and "civilians," combatants are valid targets for attack, but civilians "enjoy the protections and rights granted in international law to civilians during war . . . they are not a legitimate target for attack."[45] Petitioners conceded that an exception to this general protection occurs when a civilian participates in combat. However, petitioners construed this exception narrowly, arguing that a civilian participating in combat may lose some protection, but only when such a person takes direct part in combat, and only for such time as that direct participation continues.[46] Petitioners contended that the targeted killings policy strayed beyond the narrow and strict boundaries of this exception because it harmed civilians at a time when they were not taking a direct part in hostilities.[47] Thus, Petitioners argued that "[e]ven if they participate in combat activity, members of terrorist organizations are not thus removed from the application of the rules of international law. Therefore . . . terrorist organization members should be seen as having the status of civilians."[48]

Third, petitioners argued that the policy of targeted killings violates the proportionality requirements that are a part of Israeli law and customary international law.[49] The principle of proportionality "forbids striking even legitimate targets, if the attack is likely to lead to injury of innocent persons which is excessive, considering the military benefit stemming from the act."[50] Petitioners contended that the targeted killings policy violates this established principle because the government was aware that the policy "may, at times nearly certainly, lead to the death and injury of innocent persons . . . many of the targeted killing attempts end up killing and wounding innocent civilians."[51]

In response, the government argued that the targeted killing policy is legal and valid, and asserted five arguments to support its position. First, the government argued that the issues in the case were not justiciable because the Court should not second-guess military decisions.[52] The government

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43. *Id.* para. 5.
44. *Id.* (petitioners argued that the division between combatants and civilians is an exhaustive distinction: "[T]here is no third category of 'unlawful combatants.'").
45. *Id.*
46. *Id.* paras. 6, 7.
47. *Targeted Killings* case, *supra* note 9, paras. 6, 7.
48. *Id.*
49. *Id.* para. 8.
50. *Id.*
51. *Id.*
52. *Id.* para. 9.

relied heavily on the Court's holding in *Barakeh*,[53] where the Court determined that the "'choice of means of war employed by respondents in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene.'"[54] The government emphasized this precedent, pointing out that the *Barakeh* case presented "an essentially identical petition, with essentially identical arguments."[55] The government argued that the issue is not justiciable because it will require the court to decide appropriate military strategies, and that is an area that is "not justiciable."[56]

Second, the government pointed out that beginning in late September 2000, numerous acts of combat and terrorism have been committed against Israel, and in light of this armed conflict and Israel's right to self-defense, the laws of war apply.[57] The government contended that "a state is permitted to respond with military force to a terrorist attack against it. That is pursuant to the right of self defense determined in article 51 of the Charter of the United Nations, which permits a state to defend itself against an 'armed attack.'"[58]

Third, the government argued that the conflict between Israel and the terrorist organizations is an armed conflict, and a person who is a party to an armed conflict and takes active part should be considered an "unlawful combatant."[59] According to the government, an "unlawful combatant" is not entitled to the rights and protections of combatants because they do not differentiate themselves from the civilian population and do not obey the laws of war.[60] Essentially, the Israeli government urged the Court to recognize "unlawful combatants" as a third category of individuals under the laws of war.[61] The government asserted:

> [T]he members of terrorist organizations are party to the armed conflict between Israel and the terrorist organizations, and they take an active part in the fighting. Thus, they are legal targets for attack for as long as the armed conflict continues. However, they are not entitled to the rights of combatants according to the Geneva Convention Relative to the Treatment of Prisoners of War . . . and *The Hague Regulations*, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war.[62]

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53. Barakeh, *supra* note 15.
54. *Targeted Killings* case, *supra* note 9, para. 9 (quoting Barakeh, *supra* note 15).
55. *Id.*
56. *Id.*
57. *Id.* para. 10.
58. *Id.*
59. *Id.* para. 11.
60. *Targeted Killings* case, *supra* note 9, para. 11.
61. *Id.*
62. *Id.*

Thus, the government argued that in light of this complex reality, an additional category of "unlawful combatants" should be recognized. According to the government's argument, "[p]ersons in that category are combatants, and thus they constitute legitimate targets for attack. However, they are not entitled to all the rights granted to legal combatants, as they themselves do not fulfill the requirements of the laws of war."[63]

The government next argued that even if members of terrorist organizations are not considered "unlawful combatants," the targeted killings policy is nonetheless legal because the laws of armed conflict allow harming civilians taking a direct part in hostilities.[64] Generally, civilians are protected from harm under international law, but pursuant to the 1977 Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (the "First Protocol"), a civilian who takes a direct part in hostilities loses his immunity, and can be harmed.[65] Specifically, article 51(3) of the First Protocol provides: "[c]ivilians shall enjoy the protection afforded by this section, *unless and for such a time as they take a direct part in hostilities*"[66] (emphasis added). Thus, according to the government, "it is permissible to harm civilians in order to frustrate the intent to commit planned or future hostilities. Every person who takes a direct part in committing, planning, or launching hostilities directed against civilian or military targets is a legitimate target for attack."[67]

Finally, the government argued "that the targeted killings policy, as implemented in practice, fulfills the proportionality requirement."[68] The government pointed out that "the proportionality requirement does not lead to the conclusion that it is forbidden to carry out combat activities in which civilians might be harmed," and "the proportionality of the act is to be examined against the background of the inherent uncertainty which clouds all military activity, especially considering the circumstances of the armed conflict between Israel and the terrorist organizations."[69] Further, the government emphasized that targeted killings are done "only as an exceptional step, when there is no alternative,"[70] are "considered at the

63. *Id.*
64. *Id.* para. 12.
65. *Id.* (internal quotation marks omitted). Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (protocol I), pt. IV, art. 51(3), Jun. 8, 1977, *available at* http://www.icrc.org/ihl.nsf/full/470?opendocument [hereinafter First Protocol].
66. First Protocol, *supra* note 65 (emphasis added).
67. *Targeted Killings* case, *supra* note 9, para. 12.
68. *Id.* para. 13.
69. *Id.*
70. *Id.*

highest levels of command,"[71] and "[i]n every case, an attempt is made to minimize collateral damage . . . "[72]

After summarizing the parties' arguments, the Court began its analysis of the issues by first characterizing the situation between Israel and the terrorist groups as one of "armed conflict," saying "[t]he general, principled starting point is that between Israel and the various terrorist organizations . . . a continuous situation of armed conflict has existed since the [F]irst *[I]ntifada*."[73] The Court noted that "the State of Israel is under a constant, continual, and murderous wave of terrorist attacks,"[74] which "'are directed against civilians, in civilian population concentrations, in shopping centers and in markets, and against IDF soldiers, in bases and compounds of the security forces.'"[75] After the Court established that an "armed conflict" existed, it moved on to a discussion of the general normative framework in which to analyze this case. The Court was quick to note that the "armed conflict does not take place in a normative void. It is subject to the normative systems regarding the permissible and the prohibited."[76] This illustrates the Court's guiding principle that during times of war the rule of law must be upheld and obeyed.

The Court then addressed the first major issue: "What is the normative system that applies in the case of an armed conflict between Israel and the terrorist organizations acting in the [occupied territories]?"[77] The Court recognized that the armed conflict between Israel and the terrorist organizations is "complex" and somewhat unique in the armed conflict context.[78] The Court expanded on this, saying that the law of "international armed conflict" is at the center of the normative framework:[79] "'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.'"[80] Further, this law – the law of international armed conflict – applies in any case of an armed conflict of "international character,"[81] whether or not the place in

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71. *Id.*
72. *Id.*
73. *Targeted Killings* case, *supra* note 9, para. 16.
74. *Id.*
75. *Id.*
76. *Id.* para. 17. "Israel is not an isolated island. It is a member of an international system . . . The combat activities of the IDF are not conducted in a legal void. There are legal norms…which determine rules about how combat activities should be conducted." *Id.* (quoting HCJ 4764/04 Physicians for Human Rights v. The Commander of IDF Forces in Gaza [2004] (Isr.)).
77. *Id.*
78. *Id.* para. 18.
79. *Targeted Killings* case, *supra* note 9, para. 18.
80. *Id.* (quoting A. CASSESE, INTERNATIONAL LAW 420 (2d ed. 2005)).
81. *Id.* The Court specifies what is meant by an "armed conflict of international character," saying that it is one that "crosses the borders of the state." *Id.*

which the armed conflict occurs is subject to "belligerent occupation."[82] The Court also stated that if Israeli soldiers, in carrying out their military duties, act contrary to the laws of armed conflict, they may be "criminally liable for their actions."[83]

Thus, the Court established that the "starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the [occupied territories] is the international law dealing with armed conflicts."[84] It then discussed why the law of international armed conflict applies in this somewhat unique situation, where the terrorist organizations do not wear uniforms or represent one singular state or country: "[T]he fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict."[85] In rejecting Petitioners' argument that the laws of policing and law enforcement should apply,[86] the Court recognized the reality of the current situation:

> Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character.[87]

Therefore, the Court concluded, "for years the starting point of the Supreme Court . . . is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view."[88]

After establishing that the law of international armed conflict is applicable,[89] the Court moved on to its discussion of the other applicable normative framework – international humanitarian law.[90] The Court began this discussion by setting up a balancing test:

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82. *Id.*

83. *Id.* para. 19.

84. *Id.* para. 21. "So this Court has viewed the character of the conflict in the past, and so we continue to view it in the petition before us." *Id.*

85. *Targeted Killings* case, *supra* note 9, para. 21.

86. *Id.* para. 4.

87. *Id.* para. 21.

88. *Id.*

89. *See id*. The Court stated that international law dealing with the armed conflict between Israel and the terrorist organizations is entrenched of a number of sources, such as: the Fourth Hague Convention Respecting the Laws and Customs of War on Land [hereinafter Hague Convention IV]; the "IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)" [hereinafter Fourth Geneva Convention]. *Id.* para. 20. *See also*, First Protocol, *supra* note 65.

90. *See Targeted Killings* case, *supra* note 9, para. 22. "From the humanitarian perspective, it is part of international humanitarian law." *Id.* para. 18.

> The international law dealing with armed conflicts is based upon a delicate balance between two contradictory considerations . . . One consists of the humanitarian considerations regarding those harmed as a result of an armed conflict. These considerations are based upon the rights of the individual, and his dignity. The other consists of military need and success. The balance between these considerations is the basis of international law of armed conflict.[91]

In applying this dichotomy to international humanitarian law, the Court cited language from legal scholars and past opinions,[92] most notably concluding, "[i]nternational 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."[93] As such, the Court recognized that the result of this requisite balancing is that "human rights are protected by the law of armed conflict, but not to their full scope. The same is so regarding the military needs."[94] The *Targeted Killings* case, therefore, holds that there are two normative frameworks in which to analyze the policy of targeted killings: international humanitarian law and the law of international armed conflict. This hybrid type of normative framework can be thought of as "international humanitarian law in armed conflicts." Moreover, the Court appeared to say that in application, international humanitarian law and the law of international armed conflict will not offer the same amount of protection to civilians and military actors, respectively, as those legal systems would provide if applied individually. In other words, in the context of the Israeli policy of targeted killings, international humanitarian law and the law of international armed conflicts provides a "limited" source of protection for all individuals involved.

The Court then expanded on the framework it established. It stated that in applying the balancing test – between military needs and humanitarian concerns – the "central consideration . . . is the identity of the person harmed, or the objective compromised in armed conflict."[95] In customary

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91. *Id.* para. 22.

92. *See id.* "In *Jami'at Ascan*, I wrote: 'The *Hague Regulations* revolve around two central axes: one, the ensuring of the legitimate security interests of the occupier in the territory under belligerent occupation; the other, the ensuring of the needs of the civilian population in the territory under belligerent occupation.' In another case *Procaccia J.* noted that the *Hague Convention* authorizes the military commander to look after two needs: 'The one need is military, and the other is civilian-humanitarian.' In *Beit Sourik* I added that – 'The law of belligerent occupation recognizes the authority of the military commander to maintain security in the [occupied territories] and to thus protect the security of his country and its citizens. However, it imposes upon the use of this authority the condition of a proper balance between that security and the rights, needs, and interests of the local population.'" *Id.*

93. *Id.* (quoting THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 32 (Dieter Fleck ed., 1995)).

94. *Id.* para. 22.

95. *Id.* para. 23.

international law, this is known as the "principle of distinction."[96] Pursuant to this principle, international humanitarian law in armed conflicts distinguishes between: (1) combatants and military targets and (2) civilians and civilian objectives.[97] Echoing the concept of limited protection for civilians and military actors, the Court noted:

> According to the basic principle of . . . distinction, the balancing point between the State's military need and the other side's combatants and military objectives is not the same as the balancing point between the state's military need and the other side's civilians and civilian objectives.[98]

According to the principle of distinction, "combatants and military objectives are legitimate targets for military attack"[99] – they can be targeted, wounded, and killed – but not every act of combat against them is permissible, and not every military means is permissible.[100] In addition, combatants, as prisoners of war, cannot be put on criminal trial simply for their participation in combat,[101] and they are to be "humanely treated."[102]

Civilians and civilian objectives, on the other hand, are protected – military attack directed at them is forbidden.[103] As the Court put it: "Their lives and bodies are protected from the dangers of combat, *provided that they themselves do not take a direct part in the combat*"[104] (emphasis added). This aspect of the Court's opinion is notable because it illustrates that civilians are not absolutely protected under international humanitarian law, the law of international armed conflict, or domestic Israeli law. Essentially, while civilians are taking a direct part in hostilities, they can be harmed. This concept is reflected in international customary law:

> 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.

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96. *Targeted Killings* case, *supra* note 9, para. 23.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* "Thus, for example, they can be shot and killed. However, 'treacherous killing' and 'perfidy' are forbidden. Use of certain weapons is also forbidden." *Id.*
101. *Id.* "Combatants can still be tried for war crimes . . . [that] they committed during the hostilities." *Id. See also* Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].
102. *Targeted Killings* case, *supra* note 9, para..23 (2006). *See also* Third Geneva Convention, *supra* note 101.
103. *Targeted Killings* case, *supra* note 9, para. 23.
104. *Id.* (emphasis added).

> Rule 6. Civilians are protected against attack unless and for such time as they take a direct part in hostilities.[105]

Further, the Court noted that this principle is firmly entrenched in the Court's precedent,[106] specifically stating:

> [T]he central provision of international humanitarian law applicable in times of combat is that civilian persons are . . . "entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof."…This basic duty is not absolute. It is subject to' . . . such measures of control and security . . . as may be necessary as a result of the war." These measures may not affect the fundamental rights of the persons concerned . . . They must be proportionate.[107]

After elaborating on the "principle of distinction" and clarifying that civilians may in fact be attacked when they are taking a direct part in hostilities, the Court then considered whether the members of terrorist organizations are "civilians," "combatants," or "unlawful combatants." The Court thus framed the issue as: "Are terrorist organizations and their members combatants, in regards to their rights in the armed conflict? Are they civilians taking an active part in the armed conflict? Are they possibly neither combatants nor civilians? What, then, is the status of these terrorists?"[108] The Court discussed "combatants," "civilians," and the possibility of "unlawful combatants" as a third category, and concluded that the terrorist organizations and their members are "civilians," but that when they engage in terrorist attacks against the State of Israel, they are "civilians taking a direct part in hostilities" and may be targeted, provided certain conditions are satisfied.[109] In examining the Court's opinion, it is relevant to consider the Court's discussion of "civilians," "combatants," and "unlawful combatants."

In concluding that the terrorist organizations are not "combatants,"[110] the Court accepted the definition of "combatants" enunciated in the Second Hague Convention Respecting the Laws and Customs of War on Land:

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105. *Id.* (quoting J. I. HENCKAERTS & L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW (2005)). "This approach . . . protects the live, bodies, and property of civilians who are not taking a direct part in the armed conflict." *Id.*

106. *Id.* "This approach . . . passes like a thread throughout the caselaw of the Supreme Court." *Id.*

107. *Id.* (quoting Physicians for Human Rights v. IDF, HCJ 4764/04, Commander in Gaza [2004] (Isr.)).

108. *Id.*

109. *See Targeted Killings* case, *supra* note 9, paras. 25-26.

110. *Id.* para. 24. "[T]he terrorist organizations . . . and their members, do not fulfill the conditions for combatants." *Id.*

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> 2. To have a fixed distinctive emblem recognizable at a distance;
>
> 3. To carry arms openly; and
>
> 4. To conduct their operations in accordance with the laws and customs of war.[111]

Applying the conditions, the Court found that the terrorist organizations "have no fixed emblem recognizable at a distance,"[112] and that "they do not conduct their operations in accordance with the laws and customs of war."[113] The Court also noted that "[t]hey do not belong to the armed forces,"[114] and that "[t]hey do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished."[115] Thus, the Court concluded that the terrorists and their organizations "do not fall into the category of combatants."[116]

The Court was thus faced with a problem – since the terrorist organizations are not "legal combatants," it would logically follow that in Israel's conduct of combat against them, Israel is not entitled to harm them, and Israel is not entitled to kill them even if they are planning, launching, or committing terrorist attacks. This is a reality the Court refused to accept, saying: "Just as it is permissible to harm a solider of an enemy country, so can terrorists be harmed."[117] The next stage in the Court's analysis illustrates this proposition. The Court began its discussion of the category of "civilians" by giving a generalized definition, "[t]he approach of customary international law is that 'civilians' are those who are not 'combatants.'"[118] The Court explained that the definition of a civilian is "'negative' in nature. It defines the concept of 'civilian' as the opposite of 'combatant.'"[119]

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111. Second Hague Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, § 1, art. 1, Oct. 18, 1907, *available at* http://www.icrc.org/ihl.nsf/full/195.

112. *Targeted Killings* case, *supra* note 9, para. 24.

113. *Id.* para. 24. In discussing the issue of whether the terrorist organizations conducted their operations in accordance with the laws and customs of war, the Court noted that they "intentionally harm civilians, and shoot from within the civilian population, which serves them as a shield." *Id.* (quoting HCJ 2967/00 Arad v. The Knesset 54 PD(2) 188, 191 [2000] (Isr.)).

114. *Id.* para. 25.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Targeted Killings* case, *supra* note 9, para. 26.

119. *Id.*

The Court then applied customary international law and Article 51(3) of the First Protocol[120] to conclude that "a civilian taking a direct part in the hostilities does not, at such time, enjoy the protection granted to a civilian who is not taking a direct part in the hostilities."[121] This is the crux of the Court's opinion – terrorist organizations and their members are by definition "civilians," but they are "*not protected from attack as long as . . . [they are] taking a direct part in the hostilities . . . .*"[122] (emphasis added). The Court thus fully accepted the language from Article 51(3),[123] and called this rule the "basic principle."[124] The Court explained this "basic principle":

> [A] civilian – that is, a person who does not fall into the category of combatant – must refrain from directly participating in hostilities. *A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant* . . . True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack[125] (emphasis added).

In applying such a rule, the Court was able to hold that "terrorists who take part in hostilities are not entitled to the protection granted to civilians. True, terrorists participating in hostilities do not cease to be civilians, but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack."[126]

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120. *See generally* First Protocol, *supra* note 65, art. 51(3).

121. *Targeted Killings* case, *supra* note 9, para. 26. The Court uses this rule to reject the government's argument that the terrorist organizations are "unlawful combatants," saying that the result of the application of the rule is "that an unlawful combatant is not a combatant, rather a 'civilian.'" *Id.* The Court also rejects the government's "unlawful combatant" argument because there is not sufficient data or existing law to support the contention: "In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category . . . It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*. It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law." *Id.* para. 28.

122. *Id.* para. 26 (emphasis added). The Court states that the terrorist organizations "surely do not enjoy the rights of civilians . . . provided they are taking a direct part in the hostilities at such time." *Id.*

123. *See generally* First Protocol, *supra* note 65.

124. *Targeted Killings* case, *supra* note 9, para. 30. "The basic principle is that the civilians taking a direct part in hostilities are not protected from attack upon them at such time as they are doing so." *Id.*

125. *Id.* para. 31.

126. *Id.*

The Court then broke down the "basic principle" into three main parts: (1) the requirement that civilians take part in "hostilities;" (2) the requirement that civilians take a "'direct part'" in hostilities; and (3) the provision that "civilians are not protected from attack 'for such time' as they take direct part in hostilities."[127] The Court discussed each of these elements in turn.

The Court began by defining "hostilities" as "acts which by nature and objective are intended to cause damage to the army." The Court noted, "acts which by nature and objective are intended to cause damage to civilians should be added to that definition." Thus, a "civilian is taking part in hostilities when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for the hostilities."[128]

Regarding the second requirement – that civilians "'take a direct part in hostilities'" – the Court recognized that "an agreed upon definition of the term 'direct' in the context under discussion does not exist;"[129] therefore, the Court concluded that determining whether a civilian took a "direct part" in hostilities should be done on a case-by-case basis.[130] However, the Court provided additional guidance as to what would constitute taking a "direct part" in hostilities, and what would not. For example, "a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it, is a civilian taking 'active part' in the hostilities."[131] Further, "a person who collects intelligence on the army . . . a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them"[132] should be seen as taking direct part in hostilities because they "are performing the function of combatants,"[133] and "[t]he function determines the directness of the part taken in the hostilities."[134] On the other hand, a civilian "who generally

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127. *Id*. para. 32.

128. *Id*. para. 33. The Court added: "there is no condition that the civilian use his weapon, nor is there a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all." *Id.*

129. *Id.* para. 34.

130. *Targeted Killings* case, *supra* note 9, para. 34. "In that state of affairs, and without a comprehensive and agreed upon customary standard, there is no escaping going case by case." *Id.*

131. *Id.*

132. *Id.* para. 35.

133. *Id.*

134. *Id.* On the chain of command issue, the Court stated: "In our opinion, the 'direct' character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take a 'direct part.' The same goes for the person who decided upon the act, and the person who planned it . . . . Their contribution is direct." *Id.* para. 37.

supports the hostilities against the army,"[135] who "sells food or medicine to unlawful combatants,"[136] who "aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid"[137] or who "distributes propaganda supporting those unlawful combatants,"[138] "is not taking a direct part . . . in hostilities."[139]

The Court then addressed the third element of the "basic principle" – that civilians are not protected from attack "for such time" as they take direct part in hostilities. The Court characterized this provision as a "time requirement,"[140] explaining that a civilian taking a part in hostilities "loses the protection from attack 'for such time' as he is taking part in those hostilities. If 'such time' has passed – the protection granted to the civilian returns."[141] Similarly to the situation concerning "direct part" – that is, that there is no uniform definition as to what is meant by "direct" – the Court noted that there is "no consensus . . . regarding interpretation of the wording 'for such time.'"[142] As such, the Court concluded that defining "for such time" should "proceed from case to case."[143]

It is this part of the opinion – within the Court's discussion of the "for such time" provision – that one of the most significant aspects of the opinion emerges. In the context of determining the "for such time" provision on a case-by-case basis,[144] the Court established specific requirements for examining the legality of a targeted killing.[145] The Court held that for a targeted killing to be legal, it must satisfy four conditions: (1) "well-based information is needed" before the civilian is susceptible to attack, and the information must be "thoroughly verified . . . regarding the identity and activity of the civilian who is allegedly taking part in the

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135. *Id.* para. 34.
136. *Targeted Killings* case, *supra* note 9, para. 34.
137. *Id.* para. 35.
138. *Id.*
139. *Id.*
140. *Id.* para. 38.
141. *Id.*
142. *Targeted Killings* case, *supra* note 9, para. 39.
143. *Id.* The Court does provide some examples of the "extreme cases," stating: "[A] civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his 'home,' and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack 'for such time' as he is committing the chain of acts. Indeed regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility." *Id.*
144. *See id.* para. 40.
145. Assumingly, the discussion of these four prongs was an attempt to confront foreseeable disagreement over whether a person is a legitimate targeted according to article 51(3). *See* Lesh, *supra* note 11, at 386-87.

hostilities;"[146] (2) "if less harmful means can be employed," "a civilian taking a direct part in hostilities" should not be attacked;[147] (3) "after an attack . . . a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed";[148] and (4) any harm to "innocent civilians nearby" that results from the targeted killing "must withstand the proportionality test."[149]

The Court then addressed the government's argument that the case was not justiciable. In holding that the case was justiciable,[150] the Court stated that the doctrine of institutional non-justiciability does not apply in this case for four reasons:

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146. *Targeted Killings* case, *supra* note 9, para. 40. The Court stated: "[W]ell based information is needed before categorizing a civilian as falling into one of the discussed categories." *Id.* "The burden of proof on the attacking army is heavy . . . [and] [i]n the case of doubt, careful verification is needed before an attack is made." *Id.*. "The state must have strong evidence that the potential target meets the conditions of having lost their protected status." Lesh, *supra* note 11, at 386.

147. *Targeted Killings* case, *supra* note 9, para. 40. The Court stated: "[A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed . . . one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed." *Id.* The Court also recognizes that "[t]rial is preferable to use of force." *Id.* However, the Court also notes that "[a]rrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required." *Id.*. "If less drastic measures can be used to stop the potential target posing a security threat, such as arrest, the State must use them, unless this alternative poses too great a risk to the lives of its soldiers." Lesh, *supra* note 11, at 386.

148. *Targeted Killings* case, *supra* note 9, para. 40. The investigation is done retroactively and "must be independent," and when appropriate, the government may have to "pay compensation as a result of harm caused to an innocent civilian." *Id.* "An independent and thorough investigation must be conducted immediately after the operation to determine whether it was justified. In appropriate cases, the State should compensate innocent civilians for harm done." Lesh, *supra* note 11, at 387.

149. *Targeted Killings* case, *supra* note 9, para. 40. The proportionality test is a "general principle of law" and is part of the "legal conceptualization of human rights." *Id.* para. 41. Further, it is a "substantial part of international law regarding armed conflict." *Id.* para. 42. "The rule is that harm to innocent civilians caused by collateral damage during combat operations must be proportionate." *Id.* There must be a "proper proportionate relationship between the military objective and the civilian damage." *Id.* para. 44. The Court expanded on this, saying, "The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it." *Id.* para. 45. The rule is that "combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists . . . it is required that military advantage be direct and anticipated." *Id.* para. 46.

150. *Id.* para. 50.

> [F]irst, there is a clear trend in the caselaw of the Supreme Court, according to which there is no application of the institutional non-justiciability doctrine where recognition of it might prevent the examination of impingement upon human rights…The petition before us is intended to determine the permissible and the forbidden in combat which might harm the most basic right of a human being – the right to life. The doctrine of institutional non-justiciability cannot prevent the examination of that question. Second . . . when the character of the disputed question is . . . legal, the doctrine of institutional non-justiciability does not apply . . . The question…is legal; the question is the legal classification of the military conflict taking place between Israel and terrorists from the [occupied territories] . . . Third, the types of questions examined by this Court have also been decided by international courts . . . These courts have examined the legal aspects of the conduct of armies. Why can't an Israeli court perform the same examination? . . . Last, the law dealing with preventive acts on the part of the army which cause the deaths of terrorists and of innocent bystander requires *ex post* examination of the conduct of the army. That examination must…be of an objective character. In order to intensify that character, and ensure a maximum of that required objectivity, it is best to expose that examination to judicial review.[151]

The Court concluded the opinion the way it began – by framing it in terms of terrorism against the State of Israel[152] and the role of the judiciary during times of war. The Court recognized that the government determined that targeted killings "are a necessary means from the military standpoint,"[153] and that at times, they "cause harm and even death to innocent civilians."[154] However, the Court explicitly stated the targeted killings "must be made within the framework of the law."[155] Given that contextual underpinning, the Court reiterated the "basic principle" that the protection for civilians does not extend to civilians "'for such time as they take a direct part in hostilities'"[156] and summarized the four-prong test[157] before finally holding that the legality of targeted killings must be determined on a case-by-case basis,[158] saying: "[W]e cannot determine that

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151. *Id.* at paras. 50-51, 53-54.

152. "The State of Israel is fighting against severe terrorism, which plagues it from the [occupied territories]." *Id.* para. 61.

153. *Id.*

154. *Id.*

155. *Targeted Killings* case, *supra* note 9, para. 61.

156. *Id.* para. 60.

157. "Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between military advantage and the civilian damage." *Id.*

158. "The result of that examination [of targeted killings] is not that such strikes are always permissible or that they are always forbidden." *Id.*

a preventative strike is always legal, just as we cannot determine that it is always illegal."[159]

## II. ANALYSIS OF THE *TARGETED KILLINGS* OPINION: JUSTICIABILITY AND THE FOUR-PRONG TEST

Suffice it to say, the Court's opinion in the *Targeted Killings* case was significant and sparked legal debate regarding several aspects of the Court's holding as well as the legality of targeted killings in general. The remainder of this note will discuss two issues that emerged from the Court's opinion that will further refine and restrict the use of targeted killings: (1) the Court's conclusion that the issue was justiciable and (2) the implementation of a four-factor test.

### A. Justiciability

As previously mentioned, the government relied heavily on the Court's holding in *Barakeh* to argue that the case was not justiciable and therefore the targeted killings policy could not be challenged. Essentially, the government argued that the Court's conclusion in *Barakeh* was appropriate – that for the Court to determine the issues involved in the case, the Court would have to go "into the heart of the combat zone, into a discussion of issues which are operational *par excellence*, which are not justiciable."[160] The government elaborated on this point, arguing that the "'dominant character of the issue is not legal, and *the attribute of judicial restraint* requires that the Court refrain from stepping down into the combat zone and from judging the operational acts *par excellence* which are occurring in that zone.'"[161]

Yet, in the *Targeted Killings* case, the Court rejected the government's non-justiciability argument and ultimately held that the issue was justiciable.[162] In its discussion of the justiciability of targeted killings, the Court first differentiated between two types of non-justiciability: normative and institutional. According to the Court, "[a]n argument of normative non-justiciability claims that legal standards for deciding the dispute put before the Court do not exist,"[163] whereas "[a]n argument of institutional non-justiciability "claims that it is not proper that the dispute be decided in Court according to the law."[164] The Court quickly dismissed the normative non-justiciability argument, saying that such an argument "has no legal base,"[165]

159. *Id.*
160. *Id.* para. 9.
161. *Targeted Killings* case, *supra* note 9, para. 47.
162. *See id.* para. 50.
163. *Id.* para. 48.
164. *Id.*
165. *Id.*

since there is always a legal norm according to which the dispute can be solved, "and the existence of a legal norm provides the basis for the existence of legal standards for such decision."[166] According to the Court, in the present case "there are legal norms which deal with the case . . . from which we can derive standards which determine what is permitted and what is forbidden."[167]

Thus, the Court's remaining justiciability discussion concerned whether the issue was institutionally non-justiciable. The Court framed institutional non-justiciability as "whether the law and the Court are the appropriate framework for deciding the dispute."[168] At first glance, the Court's conclusion – that the issue is justiciable and thereby the doctrine of institutional non-justiciability does not apply – appears to be wholly inconsistent with the *Barakeh* opinion and existing precedent. The Court was able to reach this conclusion, however, by defining the institutional non-justiciability doctrine narrowly.[169] Moreover, the Court gave four reasons why the case was justiciable: (1) the doctrine of institutional non-justiciability does not apply "where recognition of it might prevent the examination of impingement upon human rights[;]"[170] (2) applying the "dominant character of the disputed question" test,[171] the Court concluded that the disputed questions concern the "legal classification of the military conflict taking place between Israel and terrorists from the [occupied territories]" and are not "questions of policy" or "military questions[;]"[172] (3) since the issues involved in the case have been decided by international courts, an Israeli court should perform the same examination;[173] and (4) since the law dealing with preventive acts by the military that cause the deaths of terrorists and/or innocent bystanders requires subsequent

166. *Id.*

167. *Targeted Killings* case, *supra* note 9, para. 48.

168. *Id.* para. 49. An example of institutional non-justiciability involves "questions of the day to day affairs of the legislature." *Id.*

169. "The scope of the institutional non-justiciability doctrine in Israel is not wide. There is not a consensus about its boundaries . . . it should be recognized only within very limited boundaries." *Id.* para 50

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

171. According to the "dominant character of the disputed question" test, when the character of the disputed question is political or military, it is appropriate to prevent adjudication; however, when the character is legal, the doctrine of institutional non-justiciability does not apply. *Id.* para. 51.

172. *Id.*

173. The Court points out that international law dealing with the army's duties toward civilians during an armed conflict has been discussed by the international criminal tribunals for the former Yugoslavia and Rwanda. The Court notes: "Why do those questions, which are justiciable in international courts, cease to be justiciable in national tribunals?" *Targeted Killings* case, *supra* note 9, para. 53.

examination of the conduct of the army,[174] the objectivity of that examination is best served by exposing it to judicial review.[175]

From a strict traditional standard, the Court's decision the *Barakeh* case may be appropriate; military decisions, including targeted killings, are outside the realm of the Court's expertise and jurisdiction. When dealing with matters of national security and the military, the Court should not be permitted to second-guess the decisions of military leaders. In the United States, we have seen this type of judicial deference to the military in the past.[176] Indeed, this type of judicial deference is also illustrated by the Israeli Supreme Court's decision in *Barakeh*. The *Targeted Killings* decision, however, rejects such blind judicial deference to the military.

Aside from the four explicit reasons given by the Court as to why targeted killings are justiciable, there are additional justifications for this conclusion implicit in the Court's justiciability analysis and discussion. One such justification is the role of the judiciary in a democracy[177] and the importance of the rule of law during times of war. Indeed, these are the underlying themes of the entire opinion. Nowhere is this more apparent than in the conclusion of the Court's judgment.[178] In summarizing the opinion, the Court noted: "Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with."[179] Further rejecting the notion of judicial deference to the military, the Court notes that it is especially in times of war that the army must conduct its operations within legal norms and the rule of law: "Regarding the State's struggle against the terror that rises up against her, we are convinced that at the end of the day, a struggle according to law (and while complying with the law) strengthens her and her spirit. There is no security without law. Satisfying the provisions of the law is a component of national security."[180] The Court thus refused to allow the military to operate in a vacuum, devoid of any judicial oversight:

> The saying "when the cannons roar, the muses are silent" is well known. A similar idea was expressed by Cicero, who said: "during war, the laws are silent" . . . Those sayings are regrettable. They reflect neither the existing

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174. *Id.* at para. 54 (referring to the third prong of the four-prong test, requiring a thorough investigation after a targeted killing occurs).

175. *Id.*

176. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (historically, the U.S. Supreme Court has refused to intervene in military issues, recognizing the military's unique and vital role in security and noting that certain rights that apply in civilian society may not necessarily apply in the military context).

177. *A Judgment in the Shadow of International Criminal Law*, *supra* note 12, at 324-25.

178. *See Targeted Killings* case, *supra* note 9, paras. 61-64.

179. *Id*. para. 61.

180. *Id.* para. 63 (quoting HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004](Isr.)).

> law nor the desirable law. . . . It is when the cannons roar that we especially need the laws.[181]

Therefore, by deeming targeted killings to be justiciable, the Court placed an additional level of oversight on the military. This is important, not because it ensures that targeted killings will never occur, but because it solidifies the rule of law in situations where laws are often ignored. Viewed another way, if the Court were to find that the issue of targeted killings was not justiciable, it would amount to an "abdication of judicial responsibility as it pertains to [the Court's] most important role, to vindicate the rule of law at the time when it is most vulnerable, when the guns are firing."[182] While there are those who claim that the *Targeted Killings* opinion is "no more than a collection of hollow words,"[183] the Court's determination that targeted killings are subject to judicial review proves that the Court has not abdicated its responsibility in the fragile context of war.

Moreover, these dual concepts of judicial oversight in a democratic system and the role of law in a state of war can be seen in the first explicit justification given by the Court for the justiciability of targeted killings. The Court stated that where military conduct impinges on human rights, the doctrine of institutional non-justiciability does not apply.[184] This is reasonable and based in sound legal judgment, from the viewpoint of both national and international law. From the standpoint of national law, the rule of law and the respect for human rights in a democratic system require that the conduct of the executive and the military be subject to oversight.[185] When fundamental rights are at stake, it is appropriate – indeed, it may even be necessary – that the oversight be judicial in nature.[186] Moreover, in the international law context, such judicial scrutiny is "fully consonant with, and indeed implicitly required by, the very purpose and object of international humanitarian law."[187] As courts continue to rule on the permissibility or impermissibility of military actions, preventive restraints on military behavior become more forceful,[188] and governmental and military actors become more accountable. This in turn results in greater

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181. *Id.* para 61.

182. Orna Ben-Naftali & Keren R. Michaeli, *Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings*, 1 J. INT'L CRIM. JUST. 368, 381 (2003) [hereinafter *Justice-Ability*].

183. Gideon Levy, *An Enlightened Occupier*, HAARETZ, Dec. 12, 2006, http://www.haaretz.com/misc/article-print-page/an-enlightened-occupier-1.207387?trailingPath=2.169%2C2.225%2C2.227%2C.

184. *Targeted Killings* case, *supra* note 9, para. 50.

185. Antonio Cassese, *On Some Merits of the Israeli Judgment on Targeted Killings*, 5 J. INT'L CRIM. JUST. 339, 340-41 (2007).

186. *Id.* at 341.

187. *Id.*

188. *Id.*

"effective protection of the basic values that international humanitarian law aims at safeguarding."[189]

Another implicit justification for the justiciability of targeted killings is the development in international criminal law of the justiciability of war crimes.[190] Specifically, this development has introduced an additional justification for the justiciability of security measures.[191] The development of the justiciability of war crimes – and thus by extension justiciability of security measures – is illustrated by the principle of complementarity,[192] which

> [I]nvites the courts of a state most concerned with a crime to exercise jurisdiction over the suspect; should that state fail to enforce the law, however, judicial institutions of either the international community or other states acting as agents for that community will rectify this failure and exercise jurisdiction over alleged perpetrators of crimes.[193]

This principle is illustrated in the third explicit reason given by the Court justifying the justiciability of targeted killings – the Court noted that "[i]nternational law dealing with the army's duties toward civilians during an armed conflict has been discussed, for example, by the international criminal tribunals for the former Yugoslavia and Rwanda. . . . these courts have examined the legal aspects of the conduct of armies. Why can't an Israeli court perform that same examination?"[194] Thus, the principle of complementarity – also known as "universal jurisdiction"[195] – serves as a supplement to a domestic judiciary that abdicates its responsibility.[196] Moreover, by allowing international courts to intervene, the principle of complementarity ensures accountability of government and military actors in a democratic system, further solidifying the oversight role of the judiciary in a democracy.

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189. *Id.* Examples of the "basic values" include "shielding life and limb of non-combatants from the devastations of war, and introducing a modicum of humanity into the conduct of hostilities." *Id.*

190. *A Judgment in the Shadow of International Criminal Law*, *supra* note 12, at 324. *See also* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 57-60 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

191. *A Judgment in the Shadow of International Criminal Law*, *supra* note 12, at 324.

192. *Id.*

193. *Id.* at 324-25. *See also* Rome Statute of the International Criminal Court, art. 10, U.N. Doc. A/CONF. 183/9 (July 17, 1998).

194. *Targeted Killings* case, *supra* note 9, para. 53. The Court recognizes that the "types of questions examined by this Court have also been decided by international courts" and that those questions, "which are justiciable in international courts" do not cease to be justiciable in national tribunals. *Id.*

195. *See Justice-Ability*, *supra* note 182, at 389.

196. *A Judgment in the Shadow of International Criminal Law, supra* note 12, at 325.

There are additional reasons supporting justiciability of targeted killings. For one, the issue is narrow and discrete; it does not require the Court to examine a broad policy issue, such as the legality of the peace process, the settlements, or the fight against terrorism.[197] Rather, the Court must determine the specific question regarding the particular means by which the broad policy of fighting terrorism is implemented.[198] Additionally, to borrow a term from United States constitutional jurisprudence, the issue of targeted killings does not present a "political question" – reviewing targeted killings does not "manipulat[e] the court into an inappropriate intervention in a political contest better resolved by the executive branch[.]"[199]

There are those who argue that it would be better if the Court concluded that targeted killings are not justiciable – that perhaps "[i]t would have been better had these rulings not been handed down"[200] and that in the future, "it is perhaps preferable that proponents of human rights no longer petition the High Court of Justice."[201] What these critics fail to realize, however, is that the conclusion that targeted killings are not justiciable would have far-reaching ramifications and substantive, material, institutional, and discursive effects.[202] A court that concludes an issue is not justiciable – and thereby declines to decide the merits – is not a court that merely does not make a decision.[203] Indeed, substantively, a finding of non-justiciability contributes to the "wholesale legitimation of the policy of targeted killings, in the eyes of the government, the legislature, the IDF, and the public."[204] Materially, the effect would be the continuation of targeted killings without clear limitations or state responsibility or personal accountability.[205] From an institutional standpoint, a finding of non-justiciability would be equivalent to "don[ning] a judicial mantle of approval on the flexed muscles of the body politic, rendering the court a silent accomplice . . . to the executive."[206] Further, the discursive effect would be the suppression of any critical public debate regarding the legitimate means of warfare in a democratic society.[207]

The underlying theme that results from all of this is the judiciary's role in a democratic society and the rule of law in times of war. The Court's conclusion that targeted killings are justiciable is a critical step in the democratization of warfare. In the global context of the war on terror – and

197. *Justice-Ability*, *supra* note 182, at 380.
198. *Id.* at 381.
199. *Id.*
200. Levy, *supra* note, at 183.
201. *Id.*
202. *Justice-Ability*, *supra* note 182, at 381.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*

particularly in Israel – the temptation exists to merely defer to the military's judgment. It is a lot like making sausage – we want the results, but we do not want to see how we achieved those results. It would be easy to turn a blind eye to the military's activities, so long as it achieves the desired results. Presumably, this same temptation existed for the Israeli justices; as Israeli citizens, they want to live in a society free of terrorist attacks. In this context, therefore, the justices are to be applauded for sticking to the vital role they play in a democratic society, as the Court is the ultimate check on the military's conduct, ensuring that the military acts in accordance with applicable laws and legal norms. Thus, by concluding that the issue of targeted killings is justiciable, the Court reaffirmed the role it plays in a democratic society and solidified the importance of the rule of law, thereby ensuring that the fight against terrorism is a legal one.

### B. The Four-Prong Test

The four-prong test implemented by the Court to determine the legality of targeted killings has been described as "the most striking part of the decision."[208] To summarize, the Court held that in order for a targeted killing to be legal, it must meet four conditions: (1) the state must possess well-based information that the potential target is a civilian taking part in hostilities;[209] (2) if less drastic measures can be employed, a civilian taking direct part in hostilities may not be attacked;[210] (3) an independent and thorough investigation must be conducted immediately after the attack to determine whether it was justified;[211] and (4) the state must assess prior to the attack whether the expected collateral damage to innocent civilians is greater than the anticipated military advantage and if it is, the state must not carry out the operation.[212]

Along with being the most "striking" part of the decision, the four-prong test is the most significant, as it attempted to define the legality of targeted killings. The implementation of the test has engendered debate and criticism, with proponents and opponents arguing over its legality and adequacy. While opponents attack the test as being ambiguous and "hollow,"[213] the four-prong test actually creates a set of legal conditions in an attempt to avoid harm to innocent civilians and create accountability. As

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208. Anthony Dworkin, *Israel's High Court on Targeted Killing: A Model for the War on Terror?*, CRIMES OF WAR PROJECT, Oct. 18, 2007.

209. *Targeted Killings* case, *supra* note 9, para. 40.

210. *Id.*

211. *Id.*

212. *Id.*

213. *See* Levy, *supra* note, at 183. "All the restrictions the High Court of Justice placed on targeted assassinations are no more than a collection of hollow words. A failed method of warfare, intended for thwarting 'ticking bombs,' has become unbridled and a matter of routine." *Id.*

such, it should be applauded for its creation of a nuanced standard by which the legality of targeted killings is examined.

Opponents of the four-prong test convey various arguments regarding the test's inadequacy and shortcomings. Criticisms of the test can be broken down into two general categories: (1) that the test is too broad and (2) that it does not go far enough to make targeted killings illegal.

Critics of the four-prong test attack the vague wording of the elements of the test. While the test may place restrictions on the military in theory, opponents argue that when implemented, the wording of the test grants too much discretion to military and governmental officials:

> The broad wording of key parts of the opinion leaves ample room for interpretation, and there is little reason to believe that the Israeli military will interpret it in a restrictive way. An indicator that the government does not believe that the ruling will require any change in IDF practices came just after it was issued, when a government spokesman announced that the IDF was already complying with the Court's stated rules.[214]

Those who advance this argument believe that while the Court's words are "inspiring,"[215] in practice they will be "nothing more than words"[216] until a real effort is made to ensure that the rules the Court prescribes are actually followed.[217]

Because the language is so broad, according to critics, the test places too much decision-making and reviewing authority with the government and military: "[W]ho will determine what is 'well-founded, strong and persuasive information?' The Shin Bet security services. And who will supervise the assassinations? The executioners . . . [t]he court is being disastrously – and typically – ambiguous and, is essentially passing the responsibility to the IDF and the Shin Bet."[218] In other words, since it is the government that conducts the investigation after the attack (pursuant to the third prong of the test), there is a concern that the government would fail to implement the test in good faith.[219] Moreover, implicit in this criticism is that the test fails because it effectively makes the government the judge,

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214. Joanne Mariner, *The Israeli Supreme Court Rules on "Targeted Killings": Part One of a Two-Part Series*, FINDLAW (Dec. 22, 2006), http://writ.news.findlaw.com/mariner/20061222.html.

215. *Id.*

216. *Id.*

217. *Id.*

218. Levy, *supra* note, at 183.

219. *See* Lesh, *supra* note 11, at 395. "The four-fold test proposed by the Court has been criticized for its lack of analytical depth. The wording of the requirements is vague, which could enable the IDF to decline to implement them in good faith. It has been argued that 'the reins were loosed too much.'" *Id.*

jury, and executioner – the test leaves total discretion of who is to be executed without trial in the hands of the security forces.[220]

There are those who also claim that the test does not go far enough. This criticism is somewhat related to the "vagueness" argument, because those who advance this argument would have liked the Court to expressly outlaw targeted killings, or at the very least narrow their legality to specifically defined circumstances.[221] Similarly, critics point to the fact that the Court implemented the four-prongs of the test without adequately explaining what they meant.[222]

These arguments, while not baseless, are nonetheless unpersuasive. It is important to examine the legality and adequacy of the four-prong test in the context of the Court's ultimate conclusion: that the legality of targeted killing should be assessed on a case-by-case basis.[223] Viewed in this context, the four-prong test works. The Court recognized the danger of creating a bright line rule that would make targeted killings *per se* legal or illegal, saying: "As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not."[224] Thus, viewed against this holding, the four-prong test is necessarily broad – any more specific and the case-by-case approach dictated by the Court would be rendered meaningless. In this sense, the four-prong test is more akin to a set of guidelines: it serves as a tool to be used by subsequent courts reviewing the legality of a targeted killing strike in a particular case.

Further, it is important to recognize that the Court was operating from an abstract starting point, as the rules of international humanitarian law and human rights law are often ambiguous and left to interpretation.[225] Article 51(3) of the First Protocol[226] – and specifically the "direct participation in hostilities" phrase – is vague, imprecise, and does not offer a great amount of certainty or guidance to combatants. As such, the four-prong test is a creative and innovative attempt by the Court to fill in the gaps left by the existing and applicable law. In the end, it is better that these requirements

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220. *See* Robert Mackey, *Israeli High Court: No Ban on Targeted Killing*, N.Y. TIMES, Dec. 14, 2006, http://thelede.blogs.nytimes.com/2006/12/14israeli-high-court-no-ban-on-targeted-killing/?pagemode=print.

221. "Instead of making clear and bold statements, that, for instance, assassination is permissible only in the case of terrorists en route to a terror attack, the court is being disastrously – and typically – ambiguous and, is essentially passing the responsibility to the IDF and the Shin Bet." Levy, *supra* note 183. *See also* Mariner, *supra* note 214; Avigdor Feldman, *Croaking Swan Song*, HAARETZ, Dec. 29, 2006, http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=807048.

222. *See* Lesh, *supra* note 11, at 396.

223. *Targeted Killings* case, *supra* note 9, para. 60.

224. *Id.*

225. *See* Lesh, *supra* note 11, at 396.

226. *See* First Protocol, *supra* note 65, art. 51(3).

are in the judgment and left open to interpretation – at the very least to provide baseline guidance to reviewing courts – than for them not to have been there at all.

## CONCLUSION

It is readily apparent that the *Targeted Killings* judgment was significant both within Israel and internationally. Notably, the judgment reaffirms the role of the judiciary in a democracy, and especially in times of war. It would have been easy for the Court to simply say: "Israel is in a state of war, and we are not in a position to second-guess the well-reasoned decisions of our military." The Court, however, held otherwise; it deemed the issue justiciable and subjected the military action to judicial review. In so doing, the Court not only reaffirmed and solidified the place of the courts in a democratic society, but also emphasized the prevalence of the rule of law in times of war. Specifically, the Court refused to allow the military to achieve its ends "by any means necessary" and rejected the Machiavellian proposition that the "ends justify the means." Indeed, the Court examined the means themselves to ensure that they were in line with applicable law.

The Court, through the four-prong test, also gave guidance to subsequent courts reviewing the legality of a targeted killing. While the judgment itself, and especially the four-prong test, speaks in broad terms and is at times vague, that vagueness is necessary; in the specific context, it is impossible to create a *per se*, bright-line rule. The situation is too varied, and the facts on the ground are always in flux. Moreover, the applicable law – specifically Article 51(3) of the First Protocol – is imprecise, and the four-prong test thus serves to fill in the gaps by providing a workable refinement and limitation on the usage of targeted killings. Thus, rather than creating ambiguity, the test reaffirms the applicability of the basic principles of international humanitarian law and the law of international armed conflict.

It is important to remember that the *Targeted Killings* judgment is not a wholesale endorsement of targeted killings. To be sure, it does not declare that targeted killings are illegal, and indeed approves of those targeted killings that meet the four-prong test. However, the inverse is also true – those targeted killings that do not satisfy the four-prong test are illegal under both Israeli law and customary international law. Thus, the opinion neither bans the practice altogether, nor completely legitimizes it. Instead, it reinforces the rule of law and serves as an innovative attempt to fill in the gaps created by the imprecise international law by providing guidelines that refine and restrict the legality of the practice of targeted killings. While there may be questions regarding the opinion's practical effectiveness, there is no doubt that the Court's reaffirmation of the rule of law – as seen through its justiciability analysis – and its creation of a four-prong test are vital steps in combating the war on terror and achieving a peaceful end to the conflict.