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‘We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings

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*"We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch, and not their terror!"¹*

Introduction

On November 9, 2000, at around 11:00 a.m., Hussein 'Abayat, aged 37, drove his car on one of the crowded streets of his village, Beit Sahur, in area A in the West Bank,² when an Israeli Defense Forces (IDF) helicopter circling above went into a dive and fired three missiles at him, killing him as well as two women, Rahmeh Shahin and 'Aziza Muhammad Danun, both in their fifties, who were standing outside a house awaiting a taxi. A few other people were injured.³ Hussein 'Abayat was the first of at least 119 Palestinians killed thus far (end of September, 2002) by Israel pursuing an official, publicly stated, policy of targeted killing, including 39 killed as bystanders.⁴

1. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, sc. 1.

2. Under the terms of the Interim Agreement on the West Bank and Gaza Strip an incremental transfer of authority from Israel to the Palestinian Authority was delineated. See Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-P.L.O., 36 I.L.M. 557 [hereinafter Oslo II]. Under the terms of Oslo II, Area A was transferred to a full Palestinian civilian and military authority. See *id.*; see also *infra* notes 37-38 and accompanying text.

3. See AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: STATE ASSASSINATIONS AND OTHER UNLAWFUL KILLINGS 9 (2001), available at <http://www.amnesty.org> [hereinafter STATE ASSASSINATIONS].

4. See B'TSELEM, The Israeli Information Center for Human Rights in the Occupied Territories, List of Person (sic) Killed in the al-Aqsa Intifada, http://www.btselem.org/English/Statistics/Fatalities_Lists/index.asp [hereinafter B'TSELEM]. According to the information provided in this website at least 1540 Palestinians were killed by Israelis and at least 401 Israeli civilians and 179 Israeli soldiers were killed by Palestinians. According to the Israel Defense Forces (IDF), 451 Israeli civilians and 189 Israeli soldiers have been killed so far. See Israel Defense Forces, Casualties during "Ebb and Flow" since 29.09.00 updated 25.11.02 available at http://www.idf.il/daily_statistics/english/6.gif (last visited Jun. 10, 2003). See AMNESTY INTERNATIONAL, WITHOUT DISTINCTION - ATTACKS ON CIVILIANS BY PALESTINIAN ARMED GROUPS (2002), <http://www.amnesty.org> [hereinafter WITHOUT DISTINCTION] for information on the Palestinian attacks on Israeli civilians.

"Targeted preemptive killings" is the term used by Israel⁵ to describe one of the means it uses to combat what it labels as terrorist attacks directed against its citizens, and what the Palestinians refer to as their uprising against the Israeli occupation.⁶ While the "war against terror," especially in the horrific light of the burning twin towers of the World Trade Center, is the banner behind which the well-defined forces of the "good" unite against an imminently threatening, invisible and irrational evil enemy, it does not follow that all means justify the end. Indeed, one of the dangers inherent in uniting behind clichés is an ideological mystification of reality, a reductive understanding of the latter and a consequent loss of reflexivity. Self-criticism, however, much like the notion that the end may well define means, but should never be confused with them, is an essential component of the democratic discourse. Law contributes to this discourse by providing normative grounds for claims of authority and by delimiting the lines between permissible and impermissible behavior. The legality of the policy of "targeted preemptive killings" and of specific acts undertaken in its pursuit, is the subject matter of this article.

It is interesting to note in this context that while the Supreme Court of Israel, operating in its capacity as a High Court of Justice (HCJ),⁷ exercised its jurisdiction to review various means of warfare used by Israel as part of its security policy,⁸ it declined to subject the policy of "targeted preemptive killings" to its judicial review, deeming it to be non-justiciable.⁹ This deci-

5. See, e.g., STATE ASSASSINATIONS, *supra* note 3.

6. Wars are being fought, *inter alia*, on rhetorical fronts intertwined with substantive positions. The decision to use the term "targeted State killings" in the present article was made in order to differentiate it both from the term "targeted preemptive actions" used by Israel and designed to present the issue, *a priori*, as a legitimate act of self-defense within the laws of war, and the term "extra-judicial killings/executions" used by human rights organizations, and equally designed to prejudice the issue as an illegal violation of the most basic human right. In the Israeli terminology, a Palestinian is forever a terrorist, never a combatant, even if the objects of his attack are Israeli soldiers advancing into his hometown. On the legal meaning of these terms see notes 215-23 and accompanying text.

7. The Supreme Court of Israel may also sit as a High Court of Justice, and "when so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court." See, Basic Law: Judiciary, 1984, 38 L.S.I. 101, 104 (1983-84).

8. See, e.g., F.H.H.C. 4110/92, Hess v. Minister of Def., 48(2) P.D. 811; H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of State of Israel, 53(4) P.D. 817 [hereinafter Torture case]; Cr.F.H. 7048/97, Anonymous Persons v. Minister of Defense, 54(1) P.D. 721 [hereinafter Bargaining Chips case]; H.C. 3022/02, LAW v. Commander of the IDF in the W. Bank, 56(3) P.D. 9; H.C. 2977/02, Adallah v. Commander of the IDF in the W. Bank, 56(3) P.D. 6 [hereinafter Adallah]; H.C. 2936/02, Med. Doctors for Human Rights Ass'n. v. Commander of the IDF in the W. Bank, 56(3) P.D.3; H.C. 727/02, Medic. Doctors for Human Rights Ass'n. v. Commander of the IDF in the Gaza Strip, 56(3) P.D. 39; H.C. 2117/02, Med. Doctors for Human Rights Ass'n. v. Commander of the IDF in the W. Bank, 56(3) P.D. 26; H.C. 7015/02, Ajuri v. IDF Commander in Judea & Samaria (judgment of Sept. 3, 2002, not yet published), available at <http://court.gov.il> [hereinafter Assigned Residence case].

9. See H.C. 3114/02, Barakeh v. Minister of Def., 56(3) P.D. 11 [hereinafter Barakeh case]. The bench consisted of Justices Matza, Cheshin and Levi and the decision was reached unanimously. Mr. Barakeh is the Chairman of the *Hadash* Party (The

sion is not only inconsistent with the jurisprudence and practice of the Court, but further forfeits the role it carved for itself as the guardian of the rule of law in Israel, at the time when it is most vulnerable.¹⁰ It does not follow, however, that either the HCJ¹¹ or other judicial instances, both within¹² and outside¹³ Israel, would not, in the future, subject said policy

Democratic Front for Peace and Equality). The *Hadash* Party is an Arab-Jewish socio-political movement.

10. See e.g., Aharon Barak, *When the Guns are Shooting the Muses Should Not be Silent*, YEDIOT ACHARONOT, Oct. 10, 2000, at 8.

11. An appeal by the Public Committee Against Torture in Israel and LAW - Palestinian Society for the Protection of Human Rights and the Environment Against the Government of Israel, the Prime Minister, the Minister of Defense, the IDF and the Chief of Staff requesting an order nisi and an interim injunction against the policy of targeted preemptive actions, currently awaits a judicial determination. See H.C. 5100/94 Public Committee Against Torture in Israel et al. v. The State of Israel and the General Security Service, 53(4) P.D. 817 [hereinafter LAW Appeal]. The appeal, concerning the Israeli policy of targeted killings, was not rejected. Instead, on April 14, 2002, the Court requested the parties to respond to questions pertaining to the applicable law and relevant rules. It should be noted that under the Israeli legal system, the Supreme Court, unlike other judicial instances, is not bound by the *stare decisis* principle. See Basic Law: Judiciary, art. 20(2), *supra* note 7, at 105. Our assumption that the court may well reverse the position it has taken in the Barakeh case, *supra* note 9, rests further on recent pronouncements made by Barak J., Chief Justice of the Supreme Court, on various public occasions and reported in the press, which suggests that he regards the issue as justiciable. See e.g., Ahron Barak, *Between Security and Personal Freedom*, MA'ARIV, May 10, 2002, at 14 (restating the essential points made by Barak J., in the annual conference of the Israeli Bar Association); see also Moshe Goral, *Can, and Should, the HCJ Preempt the Preemptive Actions?*, HA'ARETZ, Mar. 17, 2002, at B3.

12. The HCJ exercises an administrative, not a criminal, jurisdiction. Its decision on the merits of a certain issue, however, carries with it far-ranging implications, which extend, inter alia, to criminal prosecutions. This is so both because it provides appropriate judicial instances that exercise criminal jurisdiction with the standard they are to apply, and because it serves as a trigger for criminal prosecution, when appropriate. Therefore, the decision of the HCJ sets the standard by which the legality of administrative, and military, actions is measured. That standard then serves to guide the discretion of the Attorney General or the Chief Military Advisor, as the case may be, in instituting criminal proceedings in appropriate cases. Should an action be alleged to have deviated from the standard in a manner that may generate criminal responsibility, it would thus be incumbent upon them to initiate criminal proceedings against the suspects. Should they refuse to do so, it would be possible to appeal to the HCJ. See e.g., H.C. 223/88, Sheftel v. Attorney Gen., 43(4) P.D. 356; H.C. 425/89, Zifan v. Chief Military Advisor, 43(4) P.D. 718; H.C. 935/89, Ganor v. Attorney Gen., 44(2) P.D. 485; H.C. 7074/93, Swissa v. Attorney Gen., 48(2) P.D. 748; H.C. 3425/94, Ganor v. Attorney Gen., 50(4) P.D. 1. It should be noted that no such proceedings were instituted thus far with respect to any of the 80 targeted killings that have taken place over the past two years. It is reasonable to assume that had the HCJ deliberated the issue on its merits, such proceedings, at least with respect to some instances, would have been instituted.

13. The coming of age of international criminal law is grounded in the view that war crimes are justiciable and that should the state most concerned fail to enforce the law, judicial institutions of either the international community or of other states acting as agents for that community are to rectify this failure and exercise jurisdiction over alleged perpetrators of crimes. Thus, domestic courts might be encouraged to respond to such a failure by the judiciary of a state by the exercise of universal jurisdiction. See Amnon Reichman, *When We Sit to Judge We Are Being Judged; The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation*, 9 CARDOZO J. INT'L & COMP. L. 41 (2001). This failure might also be the triggering factor for the exercise of international jurisdiction. For example, the Rome Statute of the International Criminal Court bars the Court

to their review. In so doing, they will determine the legality of the policy according to the standards set by international law.¹⁴ This article, in offering an analysis of the issue from the perspective of the relevant international legal standards, hopes to contribute to this determination.

Law does not operate in a vacuum; the application of a legal text is forever contextual. The context within which Israel pursues its policy of "targeted preemptive killing" is the *al-Aqsa Intifada*. Indeed, the above-noted exceptional resort by the HCJ of the non-justiciability doctrine to dismiss an appeal challenging the legality of the policy, may be explained—though not justified—by the acute distress from, and exceptional violence of, the post-Oslo realities. It is truly telling, and *a fortiori* unprecedented, that during the hearing of the appeal, Justice Cheshin, in response to the question presented by the Applicant's representative as to why Israel does not arrest, rather than assassinate, the targeted people, said: "my son, not yours, goes into that area and I do not want to endanger him."¹⁵ The HCJ's decisions do not rest on the ethnic identity of the Applicants and their representatives. The conclusion to be drawn from this utterance is not that had the Applicant or his representatives been Jewish, rather than Arab, citizens of Israel, the decision would have necessarily been different.¹⁶ This gut reaction of the Judge, however, is important in two respects: first, it explains, though it does not excuse, the *a priori* identification of the bench with one party to the judicial process, the Respondent, and gives evidence of its empathy towards the Respondent's difficult situation; second, it discloses the oft-denied truth that the narrative seeks to determine the normative;¹⁷ that competitive narratives present particular challenges to any

from exercising jurisdiction when the case is properly investigated or prosecuted by the relevant state. See Rome Statute of the International Criminal Court, 17 July 1998, arts. 22-23, U.N. Doc. A/CONF. 183/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute]; see also Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 27 (2001).

14. Resort to international law is not merely inherent in the exercise of universal or international jurisdiction, it is also a source of law used by Israeli courts when they are called upon to determine whether a certain policy or practice contravenes both domestic and international law. Thus, for instance, in the Torture case, *supra* note 8, the Court examined the legality of interrogation tactics employed by Israel's General Security Service (GSS) against Palestinian detainees in light of the international prohibition on torture. In the Bargaining Chips case, *supra* note 8, the prolonged administrative detention of Lebanese hostages for negotiations purposes was held to be illegal in light of, *inter alia*, the conventional prohibition on taking of hostages. In the Assigned Residence case, *supra* note 8, Israel's practice of assigning the residence of terrorists' family members was analyzed solely in light of Article 78 of the Fourth Geneva Convention. Attesting to the Court's awareness of international scrutiny, this later case was introduced in the English language, via the Court's web-site, on the day the decision was published.

15. See Gideon Levy, *The HCJ and the Black Flag*, HA'ARETZ, Feb. 3, 2002, at B1; Avigdor Feldman, Speech at the Israeli Bar Association Annual Conference, "The Law under Fire," 30 *The Lawyer*, June 2002, at 12.

16. This is not to deny that in a situation of an ethnic conflict, the liberal position that the law's eyes are (wide) shut to ethnic identities, does not, in effect, operate in favor of she who belongs to the dominant ethnic group.

17. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) for a discussion on the interaction between law and collective narrative.

attempt to reconcile them within a single normative framework; that the legal text is contextual. The context of the ever-escalating violence and the cycle of revenge, misery, and public outrage wrought by the *al-Aqsa Intifada* on both sides of the conflict, and its consequential cheapening of human life and humane values, is discussed in Section II of this article.

The discussion of the political and operational context offered in Section II discloses the diametrically opposed, competing narratives of the parties to the conflict, and gives rise to various questions pertaining to the appropriate normative frameworks within which the legality of targeted killings should be analyzed. Section III identifies the possible international legal texts that may apply to this situation in order to determine the legality of targeted state killings. This process of identification is not merely an exercise in techno-legal classifications, for it is often the nature of intricate political situations to defy the legal penchant for taxonomic elegance. Indeed, it is far from clear whether the current post-Oslo fighting should be subject to the Laws of War,¹⁸ Humanitarian Law¹⁹ or Human Rights Law.²⁰ This complicated political situation may call for the concurrent application of these supposedly distinct branches of international law, a possibility that requires an inquiry into their interrelations, and further questions the viability of applying traditional legal classifications to realities that defy traditional thinking. Having identified the legal regimes applicable to the situation, this Section then discusses the legal status of the targeted persons, and applies relevant provisions of these legal regimes to the policy of targeted state killings to determine whether or not any of them consider the policy permissible.

Section IV provides an integrative interpretation, suggesting that the legality of targeted state killings in the context of the *al-Aqsa Intifada* should be decided in the light of the interaction between the three legal regimes. The discussion concludes that some actions of targeted killings are justified; some are not justified and entail state responsibility; while some amount to a war crime requiring personal accountability. Finally, this section offers a few observations regarding the rule of law and its role in the context of the fight against terror.

I. The Context: Competing Narratives of the *Al-Aqsa Intifada* and the Israeli Policy of Targeted Killings

A. General

On November 9, 2000, shortly after Hussein 'Abayat, Rahmeh Shahin and 'Aziza Muhammad Danun were killed,²¹ the IDF Spokesman issued the following announcement: "During an IDF-initiated action in the area of the village of Beit-Sahur, missiles were launched by IDF helicopters at the vehi-

18. See *infra* notes 105-31 and accompanying text.

19. Namely, the Law of Belligerent Occupation; see *infra* notes 132-56 and accompanying text.

20. See *infra* notes 157-69 and accompanying text.

21. See *supra* notes 2-3 and accompanying text.

cle of a senior *Fatah/Tanzim* activist. The pilot reported an accurate hit. The activist was killed, and his aide, who accompanied him, was wounded’ Abayat is suspected of having initiated and executed numerous shooting attacks in Beit Sahur, Gilo, and al-Khder during which three IDF soldiers were killed The action this morning is a long-term activity undertaken by the Israeli Security Forces, targeted at the groups responsible for the escalation of violence.”²²

This brief statement is quite telling, both in what it says and in what it neglects to say: (a) targeted liquidations reflect a state strategy; an official policy; (b) the statement identifies the immediate context which gave rise to the policy, referring to the “escalation of violence” that began 42 days earlier; (c) the statement identifies the target by assigning blame to people belonging to “groups responsible for the escalation of violence”; (d) the statement is silent about the operational off-shoots of the “activity”—it fails to mention the two innocent by-standers killed in the “accurate hit”; (e) the statement, while referring to past misdeeds of the target, is silent about either the immediate or future danger he posed.

At this writing, both the “escalation of violence”—the *al-Aqsa Intifada*—and the practice of targeted state killings are in their 25th month. The understanding of this context is crucial from the perspective of the rule of law because the applicable law by which the legality of the policy of targeted killings, or lack thereof, will be determined depends upon the normative characterization of the context.

B. Targeted Killings as a State Policy

Israel is not the only state that pursues a policy of liquidating its opponents. It is, however, the only state that, as of November 9, 2000, confirms publicly that such activity occurs under government orders and reflects a deliberate state policy.²³ This acknowledgement is not only unprecedented

22. STATE ASSASSINATIONS, *supra* note 3, at 8.

23. After the assassination of Dr. Thabet Thabet, on 31 December 2000, the Israeli Deputy Minister of Defense, Ephraim Sneh, stated, “[W]e will hit all those involved in terrorist operations, attacks or preparation for attacks, and the fact of having a position within the Palestinian Authority confers no immunity on anyone.” See STATE ASSASSINATIONS, *supra* note 3, at 7. On December 21, 2000, Voice of Israel Radio confirmed, in a briefing by an unnamed IDF officer, that there was a new policy of “pre-emptive operations,” that it was targeted at terrorist—as opposed to political—leaders of *Hamas*, *Islamic Jihad*, and *Fatah*, that the main method used was sniper fire, and that the IDF went to great lengths not to harm innocent by-standers. *Id.* In an interview conducted by Amnesty International with Colonel Daniel Reisner, the Deputy Legal Adviser to the IDF, Colonel Reisner confirmed that the operations are ordered at the highest level of the army and the government, and are carried out by whatever means seem more appropriate in the circumstances. *Id.* Testifying before the Israeli Parliament Foreign Affairs and Defense Committee, an unnamed high ranking official in the security forces stated that “[t]he liquidation of wanted persons is proving itself useful . . . [t]his activity paralyses and frightens entire villages and as a result there are areas where people are afraid to carry out hostile activities.” See HA’ARETZ, Jan. 8, 2001, at B3. Such confirmations, indeed, have become routine in the Israeli Press, and follow most such operations. In LAW Appeal there are two tables, one presenting a list of targeted assassinations and the other attempted such assassinations, and, in respect of each such operation, there is

in comparison to the secrecy surrounding such activities carried out by other governments, it also stands in contrast to Israel's own denial of liquidating threats to Israelis in the relatively recent past.²⁴ Indeed, Israel used to refute past allegations of such practices vehemently, stating that "the 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."²⁵ Ever since November 9, 2000, however, the confirmation that such a policy does exist and its reiteration in on-going reports concerning its successful execution, are part of the normal public discourse in Israel.

This openness regarding what presumably was an undercover operation in the past is quite extraordinary. On some level, it operates to create and feed a public atmosphere that legitimizes these practices rather than questions them. A public discourse that no longer upholds the "fundamental principle" of the "sanctity of life" may be an unconscious, denied and suppressed consequence of this new openness, undermining the democratic process.²⁶ On another level, it may be a preemptive legal tactic, designed to offer a legal justification for targeted state killings, on the assumption that the government would be asked to provide such justifications. The legal advisers to the government are aware that "pinpointed preventive actions" may be considered an unconvincing euphemism for extra-judicial executions and as such, illegal under both Israeli and international law. By publicly admitting the policy of targeted state killings, Israel indicates that far from engaging in the illegal activity of extra-judicial executions²⁷ or willful killings,²⁸ it is duly exercising its right of self-defense in a

an indication of whether the specific operation was confirmed by the IDF. See *supra* note 11, at 9-14; see generally Yael Stein, B'TSELEM, ISRAEL'S ASSASSINATION POLICY: EXTRA-JUDICIAL EXECUTIONS, (Maya Johnston trans. 2001), http://www.btselem.org/Download/Extrajudicial_Killings_Eng.doc (last visited June, 20, 2003) [hereinafter B'TSELEM Report].

24. On operations during the early 1990's, see generally, Na'ama Yashuvi, B'TSELEM, ACTIVITY OF THE UNDERCOVER UNITS IN THE OCCUPIED TERRITORIES (1992), http://www.btselem.org/Download/1992_Undercover_Units_Eng.doc (last visited June 20, 2003) [hereinafter ACTIVITY OF UNDERCOVER UNITS]; see also MIDDLE EAST WATCH, A LICENSE TO KILL: ISRAELI UNDERCOVER OPERATIONS AGAINST "WANTED" AND MASKED PALESTINIANS (1993).

25. ACTIVITY OF UNDERCOVER UNITS, *supra* note 24, at 90.

26. The point is underscored when, for instance, a Minister in the Israeli Government opines that Israel should not put the leader of the *Tanzim/Fatah*, Marwan Barghuti, whom it had arrested, on trial, but should rather "take him to a forest and put a gun to his head," and that Minister remains in office and his comment seems to arouse no wide criticism in Israel. See Poria Gal, *Arafat is a Mad Murderer that Needs to Be Killed*, MA'ARIV, July 5, 2002, at 5. The Minister is Effi Eitam, the newly elected leader of the *Mafdal* party.

27. The terms extra-judicial or extra-legal killings are used by human rights organizations such as Amnesty International, B'Tselem, and Human Rights Watch. See e.g., STATE ASSASSINATIONS, *supra* note 3; see also B'TSELEM Report, *supra* note 23.

28. This is a term used in article 147 of the Fourth Geneva Convention, which designates such an act as a "grave breach" of the Convention. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 75

situation that amounts to an armed conflict appropriately governed by the Laws of War.²⁹

The official Israeli narrative, therefore, is that the *al-Aqsa Intifada* is an armed conflict, and the normative framework applicable to this narrative is the international laws of war. It follows that if the Israeli construction of the realities of the *Intifada* is correct, the legality or illegality of targeted state killings must be determined by the application of international rules governing armed conflicts.³⁰ It is, however, far from clear that the narrative framework suggested by Israel offers either an accurate or comprehensive description of the *al-Aqsa Intifada* to which the laws of war apply exclusively.

C. Targeted Killings in the Context of the *al-Aqsa Intifada*

The *al-Aqsa Intifada* has a *Rashomon* quality to it, presenting a complex puzzle, the parts of which do not necessarily join together to form a well-defined picture. It broke out as an immediate reaction to a visit, on September 28, 2000, to Temple Mount/Haram al-Sharif, by the then-opposition leader, Ariel Sharon.³¹ The following day, in response to stones thrown at Jewish worshipers from the *al-Aqsa* Mosque in Jerusalem, Israeli security services entered the area around the Mosque and fired rubber-coated metal bullets and live ammunition at the crowd, killing five Palestinians and injuring about 200 more. Palestinian demonstrations throughout the territories and within Israel followed, and the vicious circle of vengeful violence began.³²

While it is clearly outside the scope of the present article to describe the *Intifada* and analyze its root causes and immediate and long-term political consequences, it is nevertheless necessary to understand it from the perspective of both parties, as the Israeli practice of targeted state killings takes place in this context and serves as a central tool of Israeli security policy in response to “the escalation of violence,” and as a trigger for this

U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. See discussion *infra* section III. 4.4.

29. This position was articulated by Colonel Reisner in two interviews with Amnesty International. See STATE ASSASSINATIONS, *supra* note 3, at 23–25.

30. For a substantive and comprehensive analysis of this legal position, see *infra* section III.

31. It should be recalled in this context that sovereignty over *Haram al-Sharif* to Palestinians and Temple Mount to Jews is one of the most sacred sites to both religions, was one of the thorniest issues to be resolved as part of the final agreement status, and one of the issues which account for the failure of the Camp David Summit. The American delegation spent countless hours seeking imaginative formulations to resolve it, ranging from sovereignty of the Security Council to that of God himself. It is thus understood why Sharon’s visit to the site on a Friday, was considered a deliberate provocation. See Natan Zach, *Head of the Violence Camp*, MA’ARIV, October 3, 2000, at 7.

32. On the roots and development of the *al-Aqsa Intifada*, see generally, INTERNATIONAL CRISIS GROUP, A TIME TO LEAD: THE INTERNATIONAL COMMUNITY AND THE ISRAELI-PALESTINE CONFLICT (2002) [hereinafter: ICG Report]; see also WITHOUT DISTINCTION, *supra* note 4.

very escalation in the form of retaliatory actions by the Palestinians.³³ It does not take a particularly keen observer to understand that Sharon's visit was only the provocative spark that ignited the fire; the overt excuse rather than the deep reasons for the uprising. The latter have to be found in the preceding seven years of an incremental peace-process gone awry, failing to achieve its promise and forfeiting its premise that incrementalism would allow for the building of mutual trust.³⁴ The stages of the process are well known and require but a brief reiteration of major milestones leading, alas, not to a final status agreement but to the *al-Aqsa Intifada* and the recent military re-occupation of the territories from which Israel previously withdrew.³⁵ Time does not stand still; but at least in the Middle East, the clock momentarily appears to be turned back.³⁶

33. A poignant example is the liquidation on January 14, 2002 of Riad Karmi. That killing took place after 23 days of a cease-fire, declared and preserved by the Palestinians, and according to the Palestinians was the reason for the collapse of the cease-fire. Israelis maintained that Karmi, a *Tanzim* activist, was a "ticking bomb" who was traveling freely despite the Palestinians' assertions to the contrary, and that the Palestinians used his assassination as a convenient excuse for putting an end to a cease-fire they never intended to last. Israelis find further support for this assertion in the interception of Karin A, a ship containing massive quantities of ammunition which presumably was heading towards Gaza. See ICG Report, *supra* note 32, at 7. Another example is the killing of Salah Shehada, commander and founder of the *Izz al-Din al-Qassam* Brigades (the military wing of the *Hamas* Organization). His killing on July 23, 2002, put an end to efforts on the part of the Palestinian Authority to reach a cease-fire agreement with the *Hamas*. See Jacky Hugi, *Arafat Admits: We've Made Mistakes against Israel*, MA'ARIV, Aug. 4, 2002, at 8; see also *infra* text accompanying notes 278-79.

34. See THE SHARM EL-SHEIKH FACT-FINDING COMMITTEE REPORT, April 30, 2001, SN 3552/01, at 5-6, available at <http://www.state.gov/p/nea/rls/rpt/3060pf.htm>, at 5-6 [hereinafter MITCHELL REPORT]. For an overview of the different agreements signed between Israel and the Palestinians see GEOFFREY R. WATSON, THE OSLO ACCORD: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 41-53 (2000). The Declaration of Principles on Interim Self-Government Arrangements established the framework within which the parties were to move towards the final settlement of the conflict's thorniest issues: final borders, settlements, Palestinian refugees, and Jerusalem. See The Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, Washington, D.C., 32 I.L.M. 1525 (1993), available at <http://www.jmcc.org/peace/agreements.html>. [hereinafter Oslo I]. It was deferred for the permanent status agreement, which was designed within a five-year timetable. During that period, territories and functional authorities were to be transferred gradually from Israel to the Palestinian Authority, building up its institutional capacity and allowing the parties to gain experience in managing their relationship. This framework reflects an incremental, process-oriented approach. See QUESTION OF VIOLATION OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE, U.N. Doc. A/56/440 (2001), available at <http://www.unhchr.ch>. The report of the Special Rapporteur of the U.N. Commission of Human Rights, which was submitted to the U.N. General Assembly by the Secretary General, naming the prolonged occupation of the territories as the principle cause of the second *Intifada*. *Id.* at 7-8.

35. Roni Shaked, *Back to the Civil Administration*, YEDIOT ACHRONOT, June 28, 2002, at 15.

36. The delimitation of any time frame, indeed the practice of periodization, is always problematic, as each point in time which one side considers the cutting point may be considered by another as part of a continuum. The decision that the relevant time frame for our purposes begins with the Oslo Accords is no exception. It does not follow, however, that the broader context of a prolonged occupation is absent from either the discussion of the immediate context of the *al-Aqsa Intifada* or from our legal

Following the 1993 signing of the Oslo Accord, delineating the framework and the steps to reach a final settlement within five years, the parties signed the Cairo Agreement in May 1994, detailing the implementation of the process and triggering the five-year countdown for the permanent status agreement.³⁷ Under the terms of the Cairo Accord, most of the Gaza Strip and the town of Jericho were transferred to the newly constituted Palestinian Authority. A subsequent Interim Agreement, signed on September 28, 1995, established three types of areas in the territories: In Area A, full civilian and military control transferred to the Palestinian Authority; Area B was placed under full Palestinian civilian authority and joint security control, with Israel maintaining an overriding security responsibility; Area C, including Israeli settlements and military installations, remained under Israeli control. These areas do not represent a continuous territorial zone but rather signify a jurisdictional scope: under the terms of Oslo II, 27% of the West Bank was to be under some form of Palestinian jurisdiction, 3% in Area A and 24% in Area B. Further redeployment, transferring additional, yet to be defined, territories to either an A or B status was also noted.³⁸ In short, the peace process was to implement gradually—and in a manner that allowed the building of trust—the “land for peace” concept.

For Israel, this piecemeal process would test the viability of the “land for peace” formula. “Peace,” in that equation, meant a recognition of Israel’s right to exist, security for its citizens, and normalization of relationships with the Arab and Muslim worlds.³⁹ “Land,” in that equation, meant a slow territorial withdrawal of control over Palestinian daily life. The immediate implication of this understanding was that the less security delivered, the more reluctant Israel was to withdraw from the territories. Eventually, with the 1996 election of Benjamin Netanyahu as Prime Minister, the notion of “reciprocity” came into the process, meaning that if the Palestinians refused to comply with their security obligations under the Interim Agreement, Israel would not deliver its part of the deal and withdraw further from the territories.⁴⁰

Given that suicide bombings carried out by Palestinian groups in July 1995 and in March-April 1996 resulting in a death-toll of over fifty Israelis; that the Palestinian Authority did not confiscate weapons defined as illegal under the Interim Agreement; and that the Palestinian Authority did not disband radical groups that attacked settlers and civilians in Israel, it is

analysis of what an occupying power can and cannot do in the face of resistance from the population. See *infra* section III.D.3.

37. Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, art. 23(3), 33 I.L.M. 622 (1994).

38. See Israeli-Palestinian Agreement on the West Bank and the Gaza Strip, 33 K.A. 1, reprinted in 36 I.L.M. 551 (1997), art. 5 of Annex I, Protocol Concerning Redeployment and Security Arrangements.

39. This normalization included the peace agreement with Jordan, signed on October 26, 1994 as well as the lifting of the Arab boycott and the establishment of economic ties with parts of the Arab and Muslim world. See Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, 34 I.L.M. 43 (1995).

40. See ICG Report, *supra* note 32, at 3–5

understandable that Israel did not believe that the Palestinians delivered their part of the equation. Israeli security measures in response to these attacks included closures of towns and villages in the territories, with harsh economic consequences for the population, continued construction of settlements, land confiscation, and demolition of houses. The coupling of these measures with political turmoil culminating in the murder of Prime Minister Rabin, and the subsequent election of Netanyahu as Prime Minister, provide evidence of the growing disenchantment of Israelis with the Oslo peace-process. From their perspective, the Palestinians failed to realize their pledge to resolve disputes through peaceful means alone: if the Palestinians do not abandon violence, Israel will not abandon the territories. For Israel, it is "Security First."⁴¹

The Palestinian mindset is a mirror image of Israel's. From their perspective it is Israel, not the Palestinian Authority, that reaped the fruits of Oslo while failing to stand by its commitments: peace with Jordan, economic ties with other Arab states, and security cooperation. At the same time, Israel often postponed land transfer, and settlements, far from being dismantled, continued to be expanded and constructed. Further, the Palestinians, who recognized at Oslo Israel's right to exist in 78% of the historic Palestine, were left with no tangible benefit, that is, with little or no control over the West Bank and Gaza, in return for their historical compromise. From a Palestinian point of view, the very signing of the Oslo Accord expressed their part of the deal and, for any equation to exist, it was now Israel's turn to deliver the land.⁴² The fact that by the time negotiations on the final agreement were to end, they were yet to begin, underscores Israel's failure to abide by the "land for peace" formula. Israel remained a de-facto Occupying Power of Palestinian territories and, under the guise of a peace-process, it demonstrated no intention to reach a final settlement, as that would require it to dismantle the settlements and relinquish the land.⁴³ Indeed, Israel managed to relinquish the obligations placed upon it as an occupying power, while at the same time preventing the Palestinian Authority from any real possibility of discharging its responsibilities to its people.

Two months separate the Camp David Summit of July 2000 (the last attempt to revive the Oslo process as part of the final status negotiations that began in late 1999) and the current *Intifada* and ensuing operations (marking the death of the Oslo peace process).⁴⁴ While what actually took

41. *Id.*

42. *Id.*

43. On the question of Israel's position as an occupying power see *infra* section III.B.2.

44. There were a few rounds of negotiations after Camp David, culminating in January 2001's negotiations in Taba, amidst the raging *Intifada*. In a joint communiqué issued at the close of the Taba negotiations on January 27, 2001, it was stated that "[t]he sides declare that they have never been closer to reaching an agreement and it is thus our shared belief that the remaining gaps could be bridged with the resumption of negotiations following the Israeli elections." Ben Aluf, *Israel and the Palestinians "We Have Never Been Closer to Reaching an Agreement,"* HA'ARETZ, Jan. 28, 2001, at A1. By then it was too late. President Clinton was moving out of office and Sharon was on his way into office. See generally Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, N.Y.

place at Camp David remains to be determined conclusively,⁴⁵ the far more important consequence of its failure, that is, what most people on both sides believe happened, is much clearer. Many Israelis think that the Palestinians declined the most generous offer Israel ever made or is likely to make in the future. This rejection, coupled with the *Intifada*, demonstrates that the Palestinians never truly accepted Israel's right to exist securely as a Jewish state,⁴⁶ and their violent response to the extended hand of then Prime Minister Ehud Barak underscores their duplicity and bad faith.⁴⁷ The political result is that the majority of Israelis who supported the peace-process and accepted the "land for peace" principle are disillusioned, while the minority who opposed the process feel vindicated and grow in strength.

Palestinians feel that the Camp David summit was oblivious to their most basic need: the creation of the State of Palestine on all the land lost in 1967. Moreover, offering them a deal they could not accept placed them again in the position of the culprit, thereby demonstrating an American-Israeli conspiracy to de-legitimize their position. The harsh Israeli reaction to the *Intifada* during its early days did little to calm their frustration.⁴⁸ From their perspective, the hungry wolf who put on the mantle of a peaceful lamb revealed its true identity: an oppressive colonial power to be rightfully and forcefully resisted by all means.⁴⁹ Thus, on both sides of the conflict, disappointment replaced hope, and groups that opposed the peace process, previously relegated to the radical edges of the political map, became mainstream.

Opinions diverge as to the root causes of the *al-Aqsa Intifada* and, consequently, on the best method of ending the ever-mounting cycle of violence. Many Israelis believe Chairman Arafat orchestrated it, both to pressure Israel into concessions he could not achieve politically at Camp

REV. BOOKS, Aug. 9, 2001, at 59; Gilead Sher, *The Brink of Peace? An Inside Look from Camp David to Taba*, 318 PEACEWATCH, April 18, 2001, available at <http://www.washingtoninstitute.org/watch/Peacewatch/peacewatch2001/318.htm>.

45. As two of the participants in the Camp David summit observed: "Had there been, in hindsight, a generous Israeli offer? Ask a member of the American team, and an honest answer might be that there was a moving target of ideas, fluctuating impressions of the deal that the US [sic] could sell to the two sides, a work in progress that reacted (and therefore was vulnerable) to the pressures and persuasion of both. Ask Barak and he might volunteer that there was no Israeli offer and, besides, Arafat rejected it. Ask Arafat, and the response you might hear is that there was no offer; besides, it was unacceptable; that said, it had better remain on the table." See Malley & Agha, *supra* note 44, at 65.

46. When the issue of finding a solution to the Palestinian refugees' problem was translated into a demand for a right of return, most Jews in Israel felt that this very idea was designed to bring the existence of Israel as a Jewish state to an end.

47. This conclusion was further fueled by the *Intifada's* rhetoric and its acts. See ICG Report, *supra* note 32, at 8-9.

48. Use of heavy military means against demonstrators, lethal crowd control and dispersion methods resulted in a death-toll of 5 Palestinian dead and about 200 injured on the first day of the *Intifada*, on September 28, 2000. See STATE ASSASSINATIONS, *supra* note 3. Demonstrations that followed throughout the territories and Israel were suppressed with force, resulting, within five days, in 35 Palestinians killed and over 1000 Palestinian injured. See *id.* at 5.

49. See ICG Report, *supra* note 32, at 9-10.

David, and to divert the political ramification of Camp David's failure. According to this analysis, to engage in negotiations seeking a political solution amidst terrorist attacks on Israeli civilians rewards terrorism. Israel elected Prime Minister Sharon who supported the idea that security is necessary for any political move.⁵⁰ Many Palestinians, however, see the *Intifada* as a spontaneous response to a series of events and to an accumulation of frustration, culminating in the provocative visit of Sharon to Temple Mount/Haram al-Sharif.⁵¹ Israeli heavy-handed dealing with the popular outburst further fueled anger and generated the complete disenchantment of a younger generation of Palestinians with the peace-process and encouraged their willingness to engage in an all-out war with Israel, including the development of the cult of martyrdom.⁵² According to this analysis, in the absence of a political process pointing to a genuine solution entailing the end of the long occupation, the *Intifada* will continue and Israel will know no security. Indeed, ever since the *Intifada* began, 401 civilians have been the victims of Palestinian attacks.⁵³ Indeed, the now commonplace method of suicide bombing in crowded public places within Israel generates a deep sense of personal insecurity affecting daily life, and anger which translates into political support for a tough response. Israel's reactions include the destruction of Palestinian security facilities; frequent use of targeted state killings of suspected perpetrators of violence; ever-tighter closures around Palestinians locations; aerial bombardments and ground invasions to refugee camps in Operation "Defensive Shield"; and the military re-occupation of the territories from which Israel had previously withdrawn, in Operation "Decisive Road."⁵⁴ While these moves were not productive in terms of either security or peace, they did succeed in virtually incapacitating the Palestinian Authority's ability to service the Pal-

50. *Id.* at 9

51. *Id.* at 6-7; see also MITCHELL REPORT, *supra* note 34, at 5, (finding the *Intifada* to be the result of immediate and structural frustrations that could not be said to have been pre-meditated nor due to a determinant factor).

52. The notion that sacrificing one's life at the altar of national security is, of course, an ethos common to all armies since time immemorial. Yet the cult of martyrdom developed by Islamic groups in general and Palestinian groups in particular is quite distinct. See Roxanne L. Euben, *Killing (For) Politics: Jihad, Martyrdom and Political Action*, 30 POL. THEORY 4 (2002).

53. This is the number of Israeli civilians killed according to B'TSELEM, *supra* note 4. According to IDF statistics, 451 Israeli civilians were killed and 3,330 wounded. See *supra* note 4.

54. Both Operation Decisive Road and its predecessor, Operation Defensive Shield, have received massive support by the Israeli Jewish population. See Ephraim Ya'ar & Tamar Herman, 80% of the Jews in Israel Support Operation "Decisive Road", *Knowing that the Goal is Prolonged Occupation*, HA'ARETZ, July 7, 2002, at C2. In a poll conducted by The Tami Steinmetz Center for Peace Research between June 25-27, 2002, it was found that 80% of the Jewish interviewees support the IDF re-entry into Palestinian towns knowing full well that the stated objective is to remain there for an indefinite period, though the majority does not believe that the re-occupation will bring an end to Palestinian suicide bombing in the long run. See *id.* This is a clear shift in positions when compared to a poll conducted in October 2001, following a re-entry of the IDF into some Palestinian towns, where only 25% favored the IDF's presence in Area A for an indefinite period. See *id.*

estinian population, and its security services' ability to control internal dynamics and militant groups.⁵⁵ It is members of these groups whom Israel targets for liquidation.

D. The Targets

The first victim of the Israeli policy of targeted liquidation was an activist of *Tanzim/Fatah*. In the statement confirming his assassination and declaring it to be in execution of a reasoned policy, the Spokesman for the I.D.F. further identified the targets: activists belonging to "groups responsible for the current escalation of violence."⁵⁶ A review of the case studies conducted by human rights organizations⁵⁷ reveals that the targeted liquidations usually occur in Area A, and that the targets included members of three main groups: *Tanzim/Fatah*; *Hamas*; and *Islamic Jihad*.⁵⁸ These groups do attack Israelis, but due to differences in their political agendas, they differed until recently, in their targets, their methods, and their affiliation and compliance with the Palestinian Authority.

Fatah, headed by Arafat, is the dominant political force of the Palestinian Authority. *Tanzim* is Fatah's military wing.⁵⁹ Thus, Fatah/*Tanzim* considers itself bound by the Oslo Agreement and the PLO's recognition of Israel. Consequently, its activities in the current Intifada concentrate on both Israeli soldiers and civilians in the occupied territories, but not in Israel.⁶⁰ The method most commonly used in these attacks is deliberate shooting at cars with Israeli number plates.⁶¹ The Organization hardly ever

55. For a brief review of these dynamics, see ICG Report, *supra* note 32, at 9-10. The Palestinian Authority's ability to exercise control over area A following almost two years of closures, economic collapse, and recent massive military operations and re-occupation is dubious to say the least. The leader of the *Tanzim*, Marwan Barghuti, made clear, in an interview with ICG in March 2002, that while the *Tanzim* cooperates with Arafat, it is within the *Tanzim* power to decide whether or not, and under what circumstances, to continue to do so. See ICG Report, *supra* note 32, at 10. Note, however, that during Operation Defensive Shield, Israel arrested Barghuti, and he is currently standing trial before an Israeli criminal court. His appeal contesting the detention's conditions and interrogation methods was rejected by the HCJ, stating that the inquiry does not present danger to his health nor is conducted by prohibited methods. The HCJ further found the order issued by the GSS, preventing Barghuti from meeting his lawyer, to be valid, while recommending a monitored meeting. Barghuti's lawyer rejected the recommendation. See H.C. 4016/02, Barghuti v. State of Israel (Judgment of May 14, 2002, not yet published; on file with authors).

56. See *supra* note 22 and accompanying text.

57. STATE ASSASSINATIONS, *supra* note 3, at 9-17; LAW Appeal, *supra* note 11, at 9-12.

58. There are a few other radical military organizations based in the Palestinian Authority, which carry out attacks against Israelis. These include the Popular Front for the Liberation of Palestine (PFLP) and the Democratic Front for the Liberation of Palestine (DFLP), as well as a few new groups whose identity is less clear. To these should be added a few individuals with no apparent organizational affiliation. See AMNESTY INTERNATIONAL, BROKEN LIVES - A YEAR OF INTIFADA, 41 (2001) (hereinafter BROKEN LIVES). The PFLP's military wing is the *Abu 'Ali Mustafa Brigades*, which claimed responsibility for the murder of Israel's Tourism Minister, Rehavam Ze'evi in October 2001. See WITHOUT DISTINCTION, *supra* note 4, at 14.

59. WITHOUT DISTINCTION, *supra* note 4, at 10.

60. ICG Report, *supra* note 32, at 9-10; BROKEN LIVES, *supra* note 58, at 41-42.

61. WITHOUT DISTINCTION, *supra* note 4, at 10.

claims responsibility for any direct killings of Israelis, but it does not deny the targeting of settlers in drive-by shootings. The degree to which Chairman Arafat controls the Tanzim is unclear and alters according to the prevailing political situation: sometimes his call for a cease-fire is heeded and sometimes not.⁶² The Intifada generated an intense internal political struggle within the Palestinian Authority, characterized by a rise in power of a younger generation of activists, mainly affiliated with the Tanzim, who reportedly control the street, initially at the expense of both the traditional leadership and of the more radical Islamic groups.⁶³ At the same time, the cycle of violence radicalized the Tanzim. An illustrative example of this process is the formation of a new organization, affiliated with the Tanzim/Fatah, known as the al-Aqsa Martyrs Brigade, which, in addition to participating in attacks against Israelis in the occupied territories, also participates in suicide bombing in Israel.⁶⁴

In addition, members of two radical Islamic groups that oppose the peace process, *Hamas* and *Islamic Jihad*, are the main targets of Israel's policy of liquidation. These groups, which deny Israel's right to exist and condemn the Oslo concessions, use bombs, and often suicide bombers, targeted at Israeli civilians, usually in crowded public places within Israel.⁶⁵

The control Chairman Arafat used to have over these groups prior to, and in the early days of, the Intifada is also indeterminate. What is known is that Israel called on the Palestinian Authority to arrest individuals allegedly involved in the killing of Israelis, at times publicly stating the names of those it wanted arrested,⁶⁶ and that the Palestinian authority rarely carried out any proper investigations into these killings and hardly ever arrested any suspects. On the exceptional occasion when the Palestinian Authority made arrests, the suspects were released within hours or, at most, days.⁶⁷ Israel maintains that "targeted killing" is a consequence of the Palestinian Authority's failure to carry out its obligation to arrest such people.⁶⁸ What is also evident is that as the violence escalated, and Israel's retaliatory attacks incapacitated the Palestinian Authority and its security

62. *BROKEN LIVES*, *supra* note 58, at 41-2.

63. ICG Report, *supra* note 32, at 4, 9-10.

64. *Id.* at 9-10. The affiliation of *al-Aqsa Martyrs Brigade* to the *Fatah* is not at all clear and there are conflicting views as to whether the group is controlled by the *Fatah*. See *WITHOUT DISTINCTION*, *supra* note 4, at 11-12.

65. For example, the August 2000 bombing of the Sbarro Pizzeria in Jerusalem, where a total of 16 people, including 7 children, were killed and over 100 injured. The attack was carried out by a suicide bomber who was a member of the *Hamas* armed wing, the *Izz al-din al Qassam Brigades*. The *Hamas* also claimed responsibility for the June 2001 suicide bombing outside a disco near the Dolphinarium in Tel-Aviv, which killed 21 people, mainly young immigrants from the Commonwealth of Independent States, and the suicide bombing in March 2002 during Passover night in Park Hotel, Netanya, which killed 25 people.

66. *BROKEN LIVES*, *supra* note 58, at 42.

67. *Id.*

68. For instance, on August 5, 2001 the Israeli Minister of Defense publicly named seven suspects wanted by Israel for bomb attacks, asked the Palestinian authority to arrest them, and indicated that the IDF would push ahead with its policy of "killing the

services, the likelihood of any real enforcement action on the part of the Palestinian Authority against members of such groups is basically nil, and the *rapprochement* between these three groups, with a more radicalized Tanzim intent on using force against a common enemy, has grown.⁶⁹

Individuals often provide significant insights into understanding general shifts in mindsets. One such individual is Marwan Barghouti, the leader of the Tanzim, whom Israel captured during operation Defensive Shield, and who presently stands trial before an Israeli criminal court.⁷⁰ Barghouti was an avid supporter of the Oslo process, committed to the elimination of the occupation, not of Israelis. This man transformed from a peace-activist into a leader of a violent resistance, and then into a full-fledged terrorist because apparently he found it difficult to understand “why should you feel secure in Tel-Aviv when we do not feel secure in Ramallah?”⁷¹ His change tells the story of the radicalization of the Palestinian street. The comment made by a minister in the Israeli government, that Barghouti should not be put on trial but rather “taken to a forest and shot in the head,”⁷² tells the story of the radicalization of the Israeli public.

Two additional points are to be made in this context: first, since the early days of both the Intifada and the Israeli policy of targeted killings, the IDF arrested hundreds of suspects in Area A.⁷³ Second, even after its current re-occupation of Area A, a situation likely to be long-term,⁷⁴ Israel continues to exercise its policy of targeted liquidations.⁷⁵ These points raise three questions: first, what is the degree of the de facto jurisdiction the Palestinian Authority exercises over Area A vis-a-vis the de facto control exercised by the I.D.F., even following its withdrawal from this territory? Second, why does Israel reject the viable alternatives to targeted liquidations—arrests? Third, what is the significance of killings carried out by an Occupying Power in the territories it occupies?

terrorist and their leaders.” See *id.* The Palestinian Authority arrested the *Hamas* activists, but later released them without initiating judicial processes. *Id.* at 42.

69. For instance, there are indications that the *Islamic Jihad* is providing financial assistance to the *al-Aqsa Brigades*. See ICG Report, *supra* note 32, at 10.

70. See *supra* note 55.

71. Gidon Levy, *Listen to Barghouti*, HA'ARETZ, Apr. 21, 2002, at B1.

72. See Gal, *supra* note 26.

73. B'TSELEM, *supra* note 4.

74. Ben Aluf, *The Prime Minister: We Shall Stay in the Palestinian Cities a Long Time*, HA'ARETZ, July 4, 2002, at A4.

75. On July 1, 2002, the IDF's maritime commando killed Muhamed Tahar who was the head of the military wing of the *Hamas* in Area A and “the Number One suspect” in the West Bank. See Amos Har'el, *The IDF and the Security Services Are No Longer Searching for the No. 1 Suspect*, HA'ARETZ, July 4, 2002, at A1. It has further been reported in the Israeli press that with Operation Decisive Road the IDF has achieved the “somewhat bizarre though probably temporary situation” where there is no longer a “Number One suspect,” as most have been either killed or arrested. See *id.* The consequences of this development are that the priorities of the “targeted state killing policy” have changed: the chase henceforth would be less personal and directed more at people about whom there is information that they plan suicide bombing, and less at people in leadership positions within Palestinian organizations. See *id.* Indeed, a few weeks later, on July 22, 2002, a new “number one suspect,” Salah Shehadea, was identified and killed. See *infra* notes 278-83 and accompanying text for a discussion of these two incidents.

E. The Off-shoots

In pursuit of its targets, Israel uses a variety of military means, most commonly, shooting missiles from helicopters;⁷⁶ explosive loads;⁷⁷ sniper fire;⁷⁸ short-range shooting;⁷⁹ and, at times, artillery shooting.⁸⁰ Bystanders are often killed as well.⁸¹ In the reified language of war and law, their deaths are "collateral damage." These data question the accuracy of the "targeted" or "pinpointed" liquidations, and raise the legal problem of proportionality.

F. The Justification

All official confirmations of specific targeted state killings mention the past actions attributed to the target, but they neither specify what actions that target allegedly planned to take nor contain evidence of the immediate danger thereby presented.⁸² At the same time, both the term used in Hebrew to describe the liquidation, "pinpointed preemptive actions," and general official comments on the policy, imply that each liquidation prevented a terrorist attack on Israeli civilians, underscoring the necessity and justification for action.⁸³

The policy of targeted state killings is a security policy. As such, there is no public review of the evidence used to decide who will be targeted. Nor is evidence provided for review after decision and execution.⁸⁴ Indeed, while it is reasonable to assume that the military has specific guidelines used to make these decisions, as well as intelligence information establishing the link between the person and terror activities, past and planned, it is also reasonable to assume that the Chief Legal Attorney for the IDF reviewed these guidelines. But it is crucial that such guidelines be publicly articulated and that specific decisions, and their execution in particular, be subject to judicial review.⁸⁵ It is not enough to create a psychological con-

76. Examples of those killed using this medium are Hussein Muhammad Salim 'Abayat, and Jamal 'Abd a-Rahman Muhammad Mansour. B'TSELEM, *Assassinations—Extra Judicial Executions* at <http://www.btselem.org>.

77. Examples of those killed using this medium are Ayman Halawa and 'Abd a-Rahman Sa'id Hamed. *Id.*

78. An example of a victim killed using this medium is Dr. Thabet Thabet, STATE ASSASSINATIONS, *supra* note 3, at 16–17. See discussion *infra* notes 280–82 and accompanying text. Another example is the assassination of Hani Hussein Abu Baqra. *Id.* at 13.

79. An example of a victim killed using this medium is Jamal 'Abd al-Qader Hassan 'Abd a-Razzek. *Id.* at 10–11. Another example is the assassination of Mahmud al-Madani. B'TSELEM, *supra* note 76.

80. An example of a victim killed using this medium is Suffian Arada. LAW Appeal, *supra* note 11, at 11.

81. For a detailed list see B'TSELEM, *supra* note 76.

82. See LAW Appeal, *supra* note 11, at 5. This point is based on the statements made by the spokesman of the IDF and on media interviews with the Prime Minister and the Minister of Defense.

83. Presumably, reference to the past misdeeds of the target assumes that individual will continue to do what he has done unless he is eliminated.

84. LAW Appeal, *supra* note 11, at 16.

85. This approach is consistent with the HCJ jurisprudence on the justiciability of security policies. Thus, in the Hess case the court justified its decision to subject the

nection in the public mind between every killing and the prevention of a horrific terrorist attack. While this connection explains the widespread, uncritical support for said policy, it does not provide the necessary legal justification for the action and, indeed, underscores the need for judicial review.⁸⁶ A democracy, as a matter of principle, cannot issue a license to kill as a matter of policy.⁸⁷

G. Torn Between Two Narratives: From Political Context to Legal Texts

Mucky realities have a tendency to mock legal aesthetics, frustrating any attempt to arrest their chaotic havoc in static taxonomies and to confine them to clearly delineated, traditional categories. Targeted state killings take place amidst—and give expression to—an intricate, violent political context, the al-Aqsa Intifada. This context is subject to starkly different, competing narratives. There may be some common denominators in these narratives but they do not provide a common horizon; a meta-narrative that can point to a way out of the cycle of violence. Targeted killings and suicide bombing thus signify the excess of both power and powerlessness.

IDF's open-fire instructions to judicial review on the following ground: "We are faced with particular instructions concerning the behavior of an armed soldier under circumstances which may require an immediate reaction, without the possibility of seeking advice regarding the proper way of implementing the instructions once certain circumstances have occurred. This issue deserves—from a normative perspective, from an institutional perspective, and from both as a seamless whole—a judicial determination, and on this matter I see eye to eye with my esteemed colleague, justice Goldberg, that one should not precondition such a deliberation on the prior existence of concrete circumstances of causing death or violating an instruction, in order to determine the question before us." Hess case, *supra* note 8, at 816.

86. A government's decision to deprive people of the most basic human right, especially as it enjoys uncritical public and parliamentary support, requires the judiciary to actively engage in reviewing it in light of existing norms, thereby pouring into the separation of powers principle the very content it was designed to have. The long-term impact of such a decision may well be the free reign of power unchecked by law. It is the balance between the three branches of government which, by design, is intended to prevent this result. A court of law that declines to decide on such an issue does not advance this balance. In fact, the invocation of the doctrine of non-justiciability, ostensibly in the name of respecting the balance between the three branches of government, is precisely a decision that sacrifices this balance, and the Court's own *raison d'être* at the altar of *raison d'état*. The organization of democratic governments is not an end in itself. The separation of the three branches of the democratic government is a means to allow it to walk the tightrope between competing demands without losing its balance and falling. These demands require it to balance the will of the majority and the protection of minorities, security and liberty, and, in certain situations, to fight against terror and protect human rights. That balance is also secured by a judiciary, which reviews the legality of the other branches of government. In so doing the Court does not substitute its political preference for that of the government. It merely informs the latter of the legal limitations to its power and, in so doing, may indeed contribute to, rather than detract from, the quality of the government's decisions.

87. Neither can such a license be legitimized by the laws of war. While principally permitting the targeting of enemy combatants, the *corpus* of the laws of war further contains balancing principles such as humanity, necessity, and proportionality, according to which the legality of such operations should be determined. See discussion *infra* Part III.4.2. The permissibility of these operations is further limited by the law of occupation. See discussion *infra* part IV.

Law, much like force, can neither compensate for this lack of shared narrative nor substitute for wise statesmanship, but it does not necessarily follow that law is irrelevant. Law, unlike force, has or "wishes to have a formal existence,"⁸⁸ and the autonomy it maintains may assist policy-makers and their constituencies in finding a way out of their psychological cul-de-sac.

Within which normative framework is the policy of targeted state killings to be placed? The discussion of the political and operational context offered in this Section suggests more questions than answers. These questions pertain to the following issues:

(a) *Applicable Legal Regime*: It is unclear whether the situation constitutes a full-fledged armed conflict, as Israel maintains, and if so, whether the armed conflict is an international armed conflict.⁸⁹ It is equally unclear whether Israel remained the Occupying Power in Area A when it withdrew from that territory; whether that withdrawal was genuine or merely a ruse (as the Palestinians claim); whether the Palestinian Authority, ever since the beginning of the Intifada, could properly exercise its jurisdiction and function to provide civilian and security services, or does Israel have true control of the area, as indicated by arrests it made even prior to its recent military re-occupation of Area A? What, indeed, are the implications of the current military re-occupation of the territories regarding the status of the parties and in light of Israel's policy of targeted state killings? What is the relevance of Human Rights Law in the context of the Laws of War and in the context of Humanitarian Law?⁹⁰ These questions generate more ambiguities, indicated in (b) and (c) below.

(b) *Legal Status of the Targets*: The status of the people targeted for assassination is unclear. Are they combatants engaged in a war; civilians whose protected status should be respected by an Occupying Power; civilians who lost their protected status; or a special kind of hybrid that fails to comfortably fit into any existing category, and therefore bereft of any status?⁹¹

(c) *Legal Parameters for Determining the Legality of Targeted State Killings as Applied to (a) and (b)*: It is not enough to place the policy of targeted state killings within an applicable normative framework and to reconcile that framework with the status of the targeted people because more intricate questions may present themselves. Are the people targeted for liquidation, even assuming that they are responsible for horrific terrorist actions against civilians, deprived of their human rights? Can their guilt be assumed, rather than determined by verifiable proof? Are arrests, rather than liquidation, of suspects an indication of the existence of a viable alternative to targeted killings? If so, what is the legal significance of the existence of such an alternative? Do the methods and means used support the position that the liquidations are indeed "pinpointed"?⁹²

88. See Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *THE FATE OF LAW* 159 (Austin Sarat & Thomas R. Kearns eds., 1993) (arguing that the law's success lies in its formalism: it assimilates extralegal concerns into its own categories and fashions its autonomy out of the very material it rhetorically discards in the name of that autonomy).

89. See discussion *infra* Part III.2.1

90. See discussion *infra* Part III.2.3.

91. See discussion *infra* Part III.3.1.

92. See discussion *infra* Part III.4.

These questions must be resolved in order to determine the legality or illegality of targeted state killings. Section III below addresses these issues.

II. The Normative Framework: A Legal Analysis of Targeted Killings

A. General

Essentially, three fields of international law may be relevant to the case at hand: human rights law,⁹³ the laws of war (the law of The Hague)⁹⁴ and humanitarian law (the law of Geneva),⁹⁵ especially the rules of the Fourth Geneva Convention.⁹⁶

Note, however, that while such a delimitation is necessary, it is also a somewhat fictitious exercise because it is difficult to contain intricate realities within sharply defined legal categories. The rationale for the classification of the relevant law into these three fields is quite distinct if not altogether contradictory.⁹⁷ Human rights law equally protects *all people at all times*,⁹⁸ while humanitarian law protects *some people*, namely protected

93. As codified in customary international law and the International Covenant on Civil and Political Rights. See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 175, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), 6 I.L.M. 360 (1967) [hereinafter ICCPR].

94. The term pertains to a series of conventions from 1868 to 1907. See e.g., Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Saint Petersburg, Nov. 29 (Dec. 11), 1868, reprinted in THE LAW OF WAR: DOCUMENTED HISTORY 192 (Leon Friedman ed., 1972); Hague Convention No. II with Respect to the Laws and Customs of War on Land, with annexed Regulations, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Hague Convention No. III Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. No. 538; Hague Convention No. IV Respecting the Laws and Customs of War on Land with annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention No. IV]. See also JEAN PICTET, DEVELOPMENTS AND PRINCIPLES OF INTERNATIONAL LAW 49-58 (1985); FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 19-25 (3rd ed. 2001).

95. "The law of Geneva" refers primarily to the four conventions signed in Geneva in 1949. See First Geneva Convention, *infra* note 213; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Fourth Geneva Convention, *supra* note 28. See also KALSHOVEN & ZEGVELD, *supra* note 94, at 25-29.

96. These terms are used somewhat arbitrarily, since, as explained below, the Hague and Geneva laws are considered inseparable, thus forming "one single complex system, known today as international humanitarian law." See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 256 [hereinafter ICJ Advisory Opinion on Nuclear Weapons]. These terms, however, serve to emphasize the difference between the various provisions of the two frameworks.

97. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 ("To speak of the humanization of humanitarian law or the law of war is thus in many way a contradiction in terms.").

98. *Id.* Although certain rights are subject to derogation during times of national emergency, the most basic human rights, such as the right to life, are nonetheless safeguarded regardless of the circumstances. See ICCPR, *supra* note 93, at art. 4; see also JAIME ORAA, HUMAN RIGHTS IN STATE OF EMERGENCY IN INTERNATIONAL LAW (1992).

persons, *some of the time* (during armed conflicts and occupation),⁹⁹ while the law of war concerns itself primarily with the regulation of belligerent conduct during warfare.¹⁰⁰ Having made these distinctions, note that current perspectives seem to emphasize the common teleological basis of all three fields, namely, the maximization of the protection of physical integrity and human dignity.¹⁰¹ In particular, the distinction between the Hague law and the Geneva law is considered obsolete¹⁰² in light of their integration into the 1977 First Additional Protocol to the Geneva Conventions (AP I).¹⁰³

We submit that any attempt to analyze the issue of targeted killings from the perspective of merely one applicable field of law will provide neither a comprehensive, nor accurate answer to the question of its legality. An adequate answer requires a combined perspective.¹⁰⁴ This article addresses this issue in the following manner: subsection two, The Legal Regime, details the conditions of applicability of these three fields of international law; subsection three, A Matter of Status, discusses the subjects to which each field applies; subsection four, The Relevant Provisions, applies the relevant provisions in each field to the question at hand.

99. Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 11-12 (1984).

100. PICTET, *supra* note 94, at 49; Major John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 34 (1991).

101. Human rights law has contributed to the inclusion in the Geneva conventions and protocols the prohibitions on torture and cruel, inhumane, or degrading treatment or punishment, and arbitrary arrest or detention and discrimination. See Meron, *supra* note 966, at 266. The law of war and humanitarian law are both aimed at minimizing the suffering caused by armed conflicts; humanitarian considerations have introduced, *inter alia*, the principles of proportionality and necessity into the law of war. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 328 (1993). The acknowledgement of military necessities is apparent in humanitarian instruments, which allow for less extensive safeguards on human rights during armed conflicts. See discussion *infra* Part III.4.2.

102. ICJ Advisory Opinion on Nuclear Weapons, *supra* note 96, at 256.

103. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 75(4)(c), 1125 U.S.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I] reprinted in 16 I.L.M. 1391 (1977).

104. Interestingly enough, the question of targeted assassinations has not been examined in such a context in international law literature thus far. Emphasis was placed on the questions of a State's right to self defense on the one hand, and of the prohibition of treacherous killing on the other hand. See Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Right to Protect its Citizens*, 15 TEMP. INT'L & COMP. L. J. 195 (2001); J. Nicholas Kendall, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. REV. 1069 (2002); Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321 (1991); Lieutenant Commander Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123 (1991); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609 (1992). While acknowledging that under the law of war's regime the status of the victim is of vital importance, no author, with the exception of Gross, expounds on the subject nor discusses the issue from the perspective of human rights law.

B. The Legal Regime: The Conditions of Applicability of the Laws of War; Humanitarian Law and Human Rights Law

It is necessary to examine the conditions that trigger the application of each of the three fields of international law.

1. *The Law of War*

The modern laws of war stemmed from European states in the nineteenth century concerned about the escalating severity of wars.¹⁰⁵ They developed through a series of conferences, conventions, and declarations from 1856 to 1907.¹⁰⁶ Their goal was to reduce the suffering of war and to strengthen good relations between belligerent States.¹⁰⁷ These rules are well rooted in customary international law:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" . . . that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.¹⁰⁸

As warfare changed, however, so too did perceptions of war. It ceased to be the sovereign prerogative of belligerent states, waged in their exclusive domain. Indeed, most modern hostilities involve non-state actors and the nature and intensity of conflicts vary greatly.¹⁰⁹ Accordingly, some argued that the Hague law should apply to various types of armed conflicts that do not constitute "war" in its traditional sense.¹¹⁰ Yet given the discrepancy between what the law should be and what it is, and the distinction between international and non-international conflicts, remained, with the ensuing differences in applicable law. How a given conflict is defined is therefore important. There are two aspects to this definition: First, is the conflict international or non-international? Second, does the situation amount to an "armed conflict"?

Common Article 2 of the Geneva Conventions defines a conflict as international when it is waged between two or more States. According to

105. See KALSHOVEN & ZEGVELD, *supra* note 94, at 12-15.

106. See GREEN, *supra* note 101, at 27-51 (describing the development of the law of war).

107. *Id.* at 30.

108. ICJ Advisory Opinion on Nuclear Weapons, *supra* note 96, at 257. The Court noted that the humanitarian rules included in the regulations annexed to the Hague Convention No. IV were held by the Nuremberg International Military Tribunal to be of customary status. *Id.* at 258; International Military Tribunal, Trials of the Major War Criminals 253-54 (1947).

109. INGRID DETTER, *THE LAW OF WAR* 18 (2d ed. 2000).

110. Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeal on Jurisdiction, ¶ 97 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> [hereinafter Tadic Appeal]; see also Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 561 (1995) (referring to the rationale underlying the imposition of individual criminal liability for crimes committed during a non-international armed conflict).

Common Article 3 of the Geneva Conventions,¹¹¹ all other conflicts are non-international. In an effort to adapt the rules to changing realities, article 1(4) of AP I broadened the traditional definition of international conflict to incorporate "conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, . . ." thus equating the status of, and the protection accorded to, national liberation movements with that accorded to States.¹¹² This change was instituted with the then Palestinian Liberation Organization in mind,¹¹³ which is precisely why both Israel and the United States refused to join AP I.¹¹⁴ Unlike most parts of the Protocol, which essentially codified existing norms of customary international law, art. 1(4) generated much controversy. Consequently, it cannot be regarded as a customary rule, and it is not applicable to relations between the Palestinian Authority and Israel.¹¹⁵ This analysis generates the conclusion that the legal characterization of the Israeli-Palestinian conflict has to rely on the customary definition, rendering it non-international.¹¹⁶

The definition of a conflict as an "armed conflict" varies according to whether it is characterized as international or non-international. In the international sphere, an "armed conflict" is "any difference arising

111. Article 3 is the only provision in the Geneva Conventions pertaining to non-international armed conflicts. The scope of protection it affords to victims of non-international armed conflict is very limited. It only protects persons who are not taking part in the hostilities, who have laid down their arms, or who are *hors du combat*. See Rosemary Abi-Saab, *Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern*, in *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD* 209, 217 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

112. Leslie C. Green, *International Regulation of Armed Conflicts*, in *INTERNATIONAL CRIMINAL LAW* 355, 373-74 (M. Cherif Bassiouni ed., 2d. ed. 1999).

113. Michel Veuthey, *Non-International Armed Conflict and Guerilla Warfare*, in *INTERNATIONAL CRIMINAL LAW* 417, 425 (M. Cherif Bassiouni ed., 2d. ed. 1999); DETTER, *supra* note 109, at 1.

114. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 683 (1994); Kendall, *supra* note 104, at 9.

115. Cf. U.N. COMM'N ON HUMAN RIGHTS, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, U.N. ESCOR, 58th Sess., U.N. Doc. E/CN.4/RES/2002/8 (2002).

116. It should, however, be noted that another analysis is possible: insofar as the Palestinian Authority possesses all the characteristics of a state enumerated in the Montevideo Convention on the Rights and Duties of States, it may be argued that the conflict conforms to the traditional definition of an international one. See Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19; see also REST. (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (providing a definition of statehood); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 72-7 (5th ed. 1998). Still, the U.N. Inquiry Commission established by the U.N. Commission on Human Rights to investigate violations of human rights and humanitarian law in the Palestinian territories was of the opinion that the conflict is indeed of a non-international nature: "Clearly, there is no international armed conflict in the region, as Palestine, despite widespread recognition, still falls short of the accepted criteria of statehood." U.N. COMM'N ON HUMAN RIGHTS, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine—Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000, U.N. ESCOR, 57th Sess., U.N. Doc. E/CN.4/2001/121 (2001) [hereinafter Human Rights Commission Report].

between two States and leading to the intervention of armed forces It makes no difference how long the conflict lasts, or how much slaughter takes place.”¹¹⁷ A substantially higher threshold, however, is set in a non-international context. Thus, while even an isolated event can be regarded as an armed conflict between two States, only hostilities that are similar to an international war, for example, when armed forces on either side are engaged, can a non-international conflict be defined as an “armed conflict.”¹¹⁸ This standard was considered necessary to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are arguably within the domestic concern of the states.¹¹⁹

Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that a non-international armed conflict exists when there is “protracted armed violence between governmental authorities and organized armed groups.”¹²⁰ It further defined this standard as incorporating a certain degree of intensity, and certain standards pertaining to the military organization of the parties to the conflict.¹²¹ The ICRC Commentary to Common Article 3 of the Geneva Convention provides criteria for the identification of “organized armed groups.” According to the ICRC, this kind of group possesses an organized military force under responsible command; has possession over part of the national territory; exercises de facto authority over persons within that part of the territory; purports to have the characteristics of a State; agrees to be bound by the provisions of the Conventions; to confront it, a recourse to its regular military forces is needed by the opposed Government; that Government either recognized the revolting party as belligerents or claimed to itself the right of a belligerent.¹²² The Commentary specifically stipulates that these criteria “are not obligatory and are only mentioned as an indication.”¹²³ Thus, the Inter-

117. COMMENTARY, THE GENEVA CONVENTION FOR THE AMELIORATION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1952) [hereinafter COMMENTARY OF THE FIRST CONVENTION].

118. COMMENTARY, THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 33 (Jean S. Pictet ed., 1960).

119. COMMENTARY OF THE FIRST CONVENTION, *supra* note 117, at 49-50; Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271 para. 151 (1997) [hereinafter *Tablada case*].

120. *Tadic Appeal*, *supra* note 110, para. 70. The definition was later incorporated in article 8(2)(f) of the Rome Statute. See Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2)(f), U.N. Doc. A/CONF. 183/9 (1998).

121. *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, para. 562 (May 7, 1997) [hereinafter *Tadic Judgment*].

122. COMMENTARY OF THE FIRST CONVENTION, *supra* note 117, at 49-50.

123. *Id.* at 50. Most of these criteria were adopted by article 1 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), July 8, 1977, art. 6(2)(c), 1125 U.N.T.S. 609 [hereinafter AP II], thus making them obligatory, and according to some views, render the scope of application of the Protocol very limited indeed. Leslie C. Green, *Strengthening Legal Protection in Internal Conflicts: Low-Intensity Conflict and the Law*, 3 ILSA J. Int'l & Comp. L. 493, 505-506 (1997). George H. Aldrich, *The Laws of*

American Commission on Human Rights set a lower threshold for the applicability of Common Article 3:

"It is important to understand that application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory."¹²⁴

The Commission focused, instead, on the nature of the hostile acts and the level of the violence exercised in a given event, holding that a carefully planned, coordinated and executed attack by an organized armed group against a military base, confronted by military action, constituted an armed attack, its short duration notwithstanding.¹²⁵

In light of the elastic criteria mentioned above, arguably the Israeli-Palestinian conflict qualifies as an armed conflict to which the laws of war should apply. There can be little doubt that the Palestinian Authority qualifies as an "organized armed group." The Palestinian Authority, far from resembling an unorganized insurrection group, is as close to a State as an entity can be. It is the undisputed leader of the Palestinian people, retaining control over the Palestinian population and, at least until the recent reoccupation of the territories, it exercised control over most of the Palestinian designated territory, especially the "A" territories.¹²⁶ Note that while only the Tanzim Organization is officially affiliated to the Palestinian Authority,¹²⁷ all other military organizations operating in the Palestinian territories are united by the same goals of self-determination and compose a united front of resistance.¹²⁸ These groups are highly organized,¹²⁹ thus fulfilling the condition of "organized military force under responsible command." There can also be little doubt as to the severity of the conflict, as indicated by the high number of casualties and the massive use of arms on both sides. Finally, the conflict has been ever-present on the agenda of the United Nations Security Council.¹³⁰ It is therefore safe to conclude that the conflict is more than mere "unorganized insurrections, or terrorist

War on Land, 94 A.J.I.L. 42, 60 (2000). AP II, however, is not controlling in this situation, as Israel is not a party to it.

124. *Tablada case*, *supra* note 119, ¶ 152. Such a low threshold, it has been suggested, was also set in the definition proposed by the ICTY, since no requirements for territorial control, or that the government be forced to employ its armed forces, or recognize the insurgents as belligerents, were set. See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 43 (2002).

125. *Tablada case*, *supra* note 119, ¶ 155-56.

126. See *supra* notes 37-38 and accompanying text.

127. WITHOUT DISTINCTION, *supra* note 4, at 10; see also *supra* notes 59-64 and accompanying text.

128. WITHOUT DISTINCTION, *supra* note 4, at 4, 10-15; see also discussion *supra* Part II.4.

129. WITHOUT DISTINCTION, *supra* note 4, at 10-15.

130. See e.g., S.C. Res. 1405, U.N. SCOR, 4516th mtg., U.N. Doc. S/RES/1405 (2002); S.C. Res. 1403, U.N. SCOR, 4506th mtg., U.N. Doc. S/RES/1403 (2002); S.C. Res. 1402, U.N. SCOR, 4503rd mtg., U.N. Doc. S/RES/1402 (2002); S.C. Res. 1397, U.N. SCOR, 4489th mtg., U.N. Doc. S/RES/1397 (2002); S.C. Res. 1322, U.N. SCOR, 4205th mtg., U.N. Doc. S/RES/1322 (2000).

activities” and is a full-scale “armed conflict,” even under the harshest of terms. The law of war clearly should be applied to the Israeli-Palestinian conflict.¹³¹ The laws of war, however, do not represent the only corpus of law applicable to the situation.

2. *Humanitarian Law*

This subsection focuses on the applicability of the Fourth Geneva Convention, the primary source of humanitarian law regulating the treatment of a population in an occupied territory, in the context of the *Al-Aqsa Intifada*.

The Fourth Geneva Convention applies, as between the Contracting Parties, to persons who, either during an armed conflict or during an occupation, find themselves in the hands of a party to the Convention of which they are not nationals.¹³² The term “in the hands of” relates, according to the *Tadic* case, to a situation in which the occupying party has effective control over an area, and for the whole duration such control is actually exercised.¹³³ Indeed, a territory is considered occupied only when it is actually under the effective control of an occupant and extends only to those areas over which he is actually able to exercise such control.¹³⁴ The underlying assumption is that there exists no authority, other than that of the occupant in the area.¹³⁵ The existence of such an authority in an area within the occupied territory has no bearing on the state of occupation if that area is surrounded and cut-off from the rest of the occupied territory.¹³⁶ Effective control of the occupant is measured by his ability to assume the responsibilities that attach to an occupying power, namely, the ability to issue and enforce directives to the inhabitants of the territory.¹³⁷

131. The U.N. Inquiry Commission was inclined to the view that “sporadic demonstrations/confrontations often provoked by the killing of demonstrators[,] . . . undisciplined lynching[,] . . . [and] acts of terrorism in Israel itself and the shooting of soldiers and settlers on roads leading to settlements by largely unorganized gunmen cannot amount to protracted armed violence on the part of an organized armed group.” See U.N. INQUIRY COMMISSION REPORT, *supra* note 116, at para. 40. With respect, we find ourselves unable to concur. As indicated, the various acts of hostilities are performed by organized military organizations. Further, since the visit of the commission, the hostilities have substantially escalated, both in organization and degree. Under the circumstances, rejection of the application of the rules of armed conflict cannot be justified in light of its underlining rationales. It should be noted that prior to the Peace Process, the Israeli Supreme Court had accepted the applicability of the Hague Regulations to the Palestinian territories on the grounds of the control Israel had over them at the time. See H.C. 393/82, *Isran v. Commander of the IDF in Judea and Samaria*, 37(4) P.D. 785, 792. In recent cases the Court declared the “rules of war” to be applicable to the present situation. See H.C. 3451/02, *Almadani v. Minister of Defense*, 56(3) P.D. 30, 34 [hereinafter *Almadani* case]; H.C. 3114/02 *Barakeh* case, *supra* note 9, at 16.

132. The Fourth Geneva Convention, *supra* note 28, at arts. 2, 4. For further discussion see *infra* section III.C.2.

133. *Tadic Judgment* at ¶¶ 579-81.

134. Art. 42 of the Hague Regulations 1907; GREEN, *supra* note 102, at 247-48.

135. GREEN, *supra* note 101, at 247-48.

136. *Tadic Judgment* at ¶ 580.

137. THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 243 (Dieter Fleck ed. 1995).

Israel, though a party to the Fourth Geneva Convention, denies its applicability to the occupied territories. Two issues should therefore be addressed: First, Israel's argument that upon their occupation, the territories were not part of the territory of a Contracting Party, and thus the Convention does not apply. Second, given current events, there are questions about the de facto control presently exercised by Israel over these territories.

Regarding the first issue, Israel maintains that the Palestinian territories, upon their occupation in 1967, were under no sovereignty. Since common article 2 of the Fourth Geneva Convention conditions its applicability to an occupation of the territory of a High Contracting Party, that applicability is excluded.¹³⁸ Israel bases this argument on the fact that Jordan's annexation of the West Bank in 1950 was only recognized by Britain and Pakistan,¹³⁹ and on the fact that Egypt never claimed that the Gaza Strip was part of its territory.¹⁴⁰ The Israeli position was met with considerable scholarly disagreement, even within Israel,¹⁴¹ and both the General Assembly¹⁴² and the Security Council¹⁴³ of the United Nations rejected it.

The counter-arguments rest on textual, analytical, and teleological grounds. The textual approach differentiates between the first and second paragraphs of Common Article 2, and relies on the first paragraph to apply in this situation. According to this view, referring to the terms of the sec-

138. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980* 13, 33-34 (Meir Shamgar ed., 1982). Art. 2 of the Fourth Geneva Convention, *supra* note 28, states: "In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

139. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *ISR. L. REV.* 279 (1968).

140. Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 *ISR. Y.B. HUM. RTS.* 262, 263 (1971); Stacy Howlett, *Palestinian Private Property Rights in Israel and the Occupied Territories*, 34 *VAND. J. TRANSNAT'L L.* 117, 153 (2001). Both Jordan and Egypt are parties to the Fourth Conventions. See note 28 & 96 and accompanying text.

141. E.g., Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 *ISR. Y.B. HUM. RTS.* 104, 107 (1978); ESTHER R. COHEN, *HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982* 51-56 (1985).

142. See e.g., G.A. Res. 32/91, U.N. GAOR, 32nd Sess., 101st plen. mtg. at 69, U.N. Doc. A/RES/32/91 (1977); G.A. Res. 33/113, U.N. GAOR, 33rd Sess., 87th plen. mtg. at 70, U.N. Doc. A/RES/33/113 (1978); G.A. Res. 44/48, U.N. GAOR, 44th Sess., 78th plen. mtg. U.N. Doc. A/RES/44/48 (1989).

143. See e.g., S.C. Res. 237, U.N. SCOR, 1361st mtg. at 5 (1967); S.C. Res. 446, U.N. SCOR, 2134th mtg. at 4 (1979); S.C. Res. 605, U.N. SCOR, 2777th mtg. at 4 (1987); see also Adam Roberts, *Prolonged Military Occupation: The Israeli Occupied Territories Since 1967*, 84 *A.J.I.L.* 44, 69-70 (1990).

ond paragraph is of limited relevance, since it is the first paragraph that applies when a belligerent occupation begins during a war, such as in the present case.¹⁴⁴ Support for this contention is found in the ICRC Commentary on Common Article 2 of the Convention.¹⁴⁵ The analytical approach argues that there can be no vacuum in title. Whether or not the Jordanian 1948 occupation and subsequent annexation were legal, the Palestinians allowed the annexation, which combined their sovereignty with that of Jordan's, the net result being that the territories were taken from a High Contracting Party.¹⁴⁶ Finally, the teleological approach is most convincing in its emphasis on the rationale underlying the law of occupation, that is, to ensure protection for persons no longer under the control of their own authority, but of that of a foreign occupying power. Indeed, from the perspective of the residents of the Palestinian territories, Israel is a foreign occupying power, and therefore these residents should be accorded the humanitarian protection decreed by the Fourth Geneva Convention.¹⁴⁷ Finally, Israel's position on the *de jure* applicability of the Convention notwithstanding, it nevertheless declared, prior to the Oslo Accord, the humanitarian provisions of the Convention to be *de facto* applicable,¹⁴⁸ thereby admitting the validity of the teleological interpretation.

The Peace process possibly altered the realities of occupation. The division of the territories into jurisdictional areas, and the subsequent withdrawal of the IDF from most of Area 'A,'¹⁴⁹ led to Israel's conclusion that the transfer of control to the Palestinian Authority excludes the applicability of the Fourth Geneva Convention, at least as far as Area "A" is concerned.¹⁵⁰ This contention is quite problematic, especially in light of recent events, witnessing Israeli forces repeatedly re-entering cities in area "A," encircling them, imposing curfews,¹⁵¹ and finally re-occupying them.¹⁵² Indeed, even prior to the current reoccupation of Area 'A,' these military operations demonstrate Israel's ability to retain control over any part of the area at any given time and exercise its authority therein.¹⁵³

144. Roberts, *supra* note 144, at 64; Eyal Benvenisti, *THE INTERNATIONAL LAW OF OCCUPATION* 109-110 (1993); Cohen, *supra* note 141, at 53.

145. JEAN S. PICTET, COMMENTARY—THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE OF WAR 20-22 (1958) [hereinafter COMMENTARY OF THE FOURTH CONVENTION].

146. Joseph H. H. Weiler, *Israel, the Territories and International Law: When Doves are Hawks*, in *ISRAEL AMONG THE NATIONS* 381, 386-87 (Alfred E. Kellermann et al. eds., 1998).

147. Fleck, *supra* note 137, at 244; Watson, *supra* note 34, at 138.

148. Shamgar, *supra* note 140, at 266.

149. See *supra* notes 37-38 and accompanying text.

150. See Watson, *supra* note 34, at 176.

151. Gidon Levi, *Oslo is Dead*, HA'ARETZ, June 16, 2002, at B1.

152. Israel's policy of assigning the residences of Palestinians residing in the West Bank to the Gaza Strip further attest to Israel's control over the entire area. Indeed, this conclusion was implicitly relied upon by the HCJ in the Assigned Residence case, *supra* note 8, ¶ 13.

153. Indeed, the U.N. Security Council responding to the outbreak of the *Intifada* in October 2000 stressed Israel's position as an occupying power. See S.C. Res. 1322, U.N. SCOR, 4205th mtg., U.N. Doc. S/RES/1322 (2000).

This fact in itself seems sufficient to establish its status as an occupant according to the standards provided by international law, as held by the American Military Tribunal at Nuremberg in the "Hostage" case:

"While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German armed forces of its status of an occupant."¹⁵⁴

The text of the Fourth Geneva Convention is therefore applicable to the context under consideration. The de facto control exercised by Israel over these territories imposes the obligations of an Occupying Power, and indeed renders any counter-argument unjustified and contrary to both the letter and the spirit of the Convention.¹⁵⁵ Further, the HCJ acknowledged Israel's obligations under the humanitarian provisions of the Convention regarding recent operations conducted by the IDF in the Palestinian territories.¹⁵⁶ It now remains to be determined whether international human rights law is also applicable to the situation.

3. Human Rights Law

Human rights law, although interrelated with the law of war and humanitarian law, is a distinct branch of international law. Aside from well-established customary norms of human rights, the corpus of international human rights further incorporates various international and regional human rights instruments. The most prominent international instrument is the International Convention on Civil and Political Rights (ICCPR), which Israel became a party to in 1991.¹⁵⁷ Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Emphasis added.)

Israel rejected any obligations emanating from the ICCPR it may have been deemed to shoulder vis-a-vis the Palestinian residents of the territories. In its second periodical report to the Human Rights Committee

154. U.S. v. Wilhelm List, et al., TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1230, 1243 (1948). This position was also adopted by the U.N. Inquiry Commission. See U.N. INQUIRY COMMISSION REPORT, *supra* note 116, at 13.

155. The ICTY identified the object of the Fourth Geneva Convention as "the protection of civilians to the maximum extent possible," thus expanding its application. See Prosecutor v. Tadic, Case No. IT-94-I-A, ICTY, App. Ch., July 15, 1999, ¶ 168 [hereinafter Tadic Appeal]; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, ICTY App. Ch. Mar. 24, 2000, 152 [hereinafter Aleksovski Appeal].

156. Adallah case, *supra* note 8; Almadani case, *supra* note 131, at 35-6; H.C. 4363/02, Zindah v. Commander of the IDF Forces in the Gaza Strip (Judgment of May 28, 2002, not yet published; on file with authors); Assigned Residence case, *supra* note 8, 13.

157. See International Covenant on Civil and Political Rights, K.A. 31, 269.

(HRC),¹⁵⁸ Israel stated that since the Palestinian Authority has the overwhelming majority of powers and responsibilities in all civil spheres, Israel cannot be internationally responsible for ensuring the rights under the ICCPR in these territories.¹⁵⁹ It further maintained that

[T]he Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.¹⁶⁰

Israel reiterated this position in its periodic reports¹⁶¹ to the Committee on Economic, Social and Cultural Rights.¹⁶² In rejecting both grounds of Israel's contention, the Committee first observed that Israel continues to exercise powers and responsibilities in the Palestinian territories.¹⁶³ Secondly, the Committee observed that fundamental human rights must still be respected, notwithstanding the existence of an armed conflict.¹⁶⁴

The Committee's rejection of Israel's contention that the Palestinian territories are not under its jurisdiction coincides with the HRC's expansive interpretation of article 2(1).¹⁶⁵ Cases involving the activity of a State's agents in the territory of another State hold that the Covenant under article 2(1) applies.¹⁶⁶ The European Commission and the European Court of Human Rights adopts a similar approach regarding the application of the European Convention on Human Rights and Fundamental Free-

158. Under art. 40 of the ICCPR, the Parties are required to submit periodical reports regarding the implementation of the rights provided for in the Covenant to the HRC. The latter then issues its own reports with its concluding observations.

159. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Israel, Nov. 20 2001, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001), 8, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/2cc0a33c394919e0c1256be9002e1188?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2cc0a33c394919e0c1256be9002e1188?OpenDocument).

160. *Id.*

161. Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Report, Israel, Aug. 3, 2001, U.N. Doc. E/19906.Add.32 (Oct. 16, 2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f2b2f8fe4ab74627c1256bdb0054aa13?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f2b2f8fe4ab74627c1256bdb0054aa13?OpenDocument).

162. Under art. 16 of the International Covenant on Economic, Social and Cultural Rights—1966, U.N. GA Res. 2200A (XXI) (Dec. 16, 1966).

163. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 31 August, 2001, U.N. Doc. E/C.12/1/Add. 69 (Aug. 31, 2001), ¶ 11, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/19b934142bfa843ac1256abc003095cb?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/19b934142bfa843ac1256abc003095cb?OpenDocument).

164. *Id.* at ¶ 12.

165. SARAH JOSEPH ET AL., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 65 (2000).

166. *Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88, ¶ 12.3 (1981/1984); *Montero v. Uruguay*, Communication No. 106/1981, U.N. Doc. CCPR/C/OP/2 at 136, ¶ 5 (1983/1990); *Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, U.N. Doc. CCPR/C/OP/1 at 92, ¶¶ 10.2-10.3 (1981/1984). See also MANFRED NOWAK, *CCPR COMMENTARY* 142-43 (1993).

doms.¹⁶⁷ Such interpretation seems most appropriate in circumstances when a state exerts effective control over the inhabitants of a territory other than its own.¹⁶⁸

The Committee's observation regarding the second ground of Israel's contention is more complicated and less self-explanatory. The International Court of Justice in the *Nuclear Weapon* Advisory Opinion addressed the question of the applicability of the ICCPR during an armed conflict in the following manner:

The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of emergency. Respect for the right to life is not, however, such a provision. In Principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict . . . and not deduced from the terms of the Covenant itself.¹⁶⁹

The Court then confined its review to analysis of the content and scope of the right to life during armed conflicts. It is not entirely clear, however, that the answer would be the same regarding other rights provided for in the Covenant. The matter is discussed in subsection 4.5 below, therefore we will observe only this: contrary to the Israeli view, the International Court of Justice established the applicability of the Covenant in situations of armed conflict and occupation. The exact content of its provisions, however, may be influenced by the relevant provisions of the law of war and of humanitarian law.

The context of the *al-Aqsa Intifada* generates the concurrent applicability of three legal texts: the Hague law of war, the Geneva law of occupation and human rights law. Before turning to examine their relevant provisions, it is necessary to identify the subjects each text addresses.

167. *Cyprus v. Turkey*, App. No. 8007/77, Eur. Comm'n H.R. Dec. & Rep. 85, 149-50 (1979); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (Ser. A) at 24 (1995) [hereinafter *Loizidou* case].

168. *Loizidou* case at 24; Watson argues, "The term jurisdiction presumably includes Israel's extraterritorial jurisdiction, which, the Interim Agreement makes clear, can extend to people in the west bank and Gaza Strip." See WATSON, *supra* note 34, at 174. See also Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 *Isr. L. Rev.* 24, 33-34 (1992). Cf. *Bankovic v. Belgium*, at <http://www.hudoc.echr.coe.int/hudoc/default.asp?Language=en&Advanced=1>, where the European Court held that NATO's 1999 military actions in Kosovo did not extend the jurisdiction of the Parties of the Organization over these actions. *Id.* at ¶¶ 75-82.

169. *Nuclear Weapons* Advisory Opinion, *supra* note 96, at 240. The same approach was also expressed by the Inter-American Commission regarding the co-applicability of the Inter-American Convention on Human Rights and humanitarian law. See *Tablada* case at ¶ 161. The Commission took the view that Provisions of the Convention which have not been reproduced in AP II and which provide for a higher standard of protection than the Protocol should be regarded as applicable. *Id.* at ¶ 166.

C. A Matter of Status

In order to determine the legality of the Israeli policy of pre-emptive targeted killings it is necessary to inquire into the legal status of the targets because their status determines the degree of protection that they should receive under the different fields of applicable law. The law of war is concerned with combatants and with civilians, and accords different protection to each; the focus of the Fourth Geneva Convention is on "protected persons," and human rights law applies to all people without discrimination, but not necessarily without differentiation. This subsection is concerned with the conditions for eligibility for each status.

1. *The Law of War: Combatants and Civilians*

At the very heart of the corpus of the law of war lies the distinction between combatants and non-combatants.¹⁷⁰ The former take part in the hostilities and are legitimate military targets, while the latter do not, and therefore cannot be legitimate military targets.¹⁷¹ This right conferred upon non-combatants entails a corresponding duty on their part to refrain from taking part in hostilities.¹⁷² A breach of this duty results in the loss of the special protection to which non-combatants are entitled.¹⁷³ Furthermore, as combatants entitled to participate in the fighting,¹⁷⁴ they cannot be prosecuted once captured, and thus acquire a prisoner of war status.¹⁷⁵ This status is not conferred upon non-combatants since they are forbidden to take part in the fighting. Accordingly, they can be prosecuted for their participation in hostilities.¹⁷⁶

The question of identification is thus fundamental to this field of law. The clear-cut definitions articulated in the days of the Hague laws conformed with the realities of warfare at the time. This is no longer the case. The changing face of war, and in particular the internal nature of most violent conflicts, blurs the distinction between combatants and non-combatants.¹⁷⁷

170. *Nuclear Weapons Advisory Opinion*, *supra* note 96, at 257.

171. DETTER, *supra* note 109, at 135; Horace B. Robertson Jr., *The Principle of the Military Objective in the Law of Armed Conflicts*, 8 USAFA J. Leg. Stud. 35, 36 (1997). For the historical development of the principle of distinction see *id.* at 36-41.

172. Fleck, *supra* note 137, at 210. Save the exceptional circumstances in which a civilian population spontaneously rises against an invader as a *levée en masse*. See art. 2 of the Hague Convention IV; art. 13(6) of the First Geneva Convention; art. 13(d) of the Second Geneva Convention; art. 4A(b) of the Third Geneva Convention. DETTER, *supra* note 109, at 140.

173. Fleck, *supra* note 137, at 232-33. For a comprehensive discussion on these relevant provisions see *infra* section III.4.1-III.4.2.

174. Art. 3 of the Hague Regulations; art. 43 of AP I.

175. Art. 4A of the Third Geneva Convention; art. 44 of AP I. This, of course, does not preclude the possibility of prosecuting them for acts, which do not constitute legitimate fighting tactics, such as war crimes.

176. Fleck, *supra* note 137, at 68, 233.

177. Michael N. Schmitt, *The Principle of Discrimination in the 21st Century Warfare*, 2 Yale Hum. Rts. & Dev. L. J. 143, 158-161 (1999).

(a) Combatants

Combatants were traditionally members of a State's armed forces.¹⁷⁸ Since the principle of distinction relies heavily on the ability of the parties to identify, and distinguish between, combatants and non-combatants,¹⁷⁹ it was duly incorporated into the provisions articulating the status of combatants. Article 1 of the Hague Regulations provided that the laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps that fulfilled the conditions of responsible command, a fixed distinctive emblem recognizable from a distance, arms carried openly, and obedience to the laws and customs of war. In the same vein, Article 13 of the First Geneva Convention, Article 13 of the Second Geneva Convention and Article 4A of the Third Geneva Convention all provide combatant status to two categories of forces: first, the regular armed forces of the states or militias and volunteer corps acting on their behalf; second, militias and volunteer corps¹⁸⁰ that are not part of these forces, but are nonetheless supported by them (a category added in light of the realities of World War II).¹⁸¹ While all groups are required to exhibit the conditions laid out in the Hague Regulations, an explicit reference to these duties exists only in regard to the second category, as the first is presumed to embody them naturally.¹⁸²

With internal conflicts on the rise, these definitions lose much of their validity, since they are rarely applicable to guerilla fighters or to members of a national liberation movement. Recognizing this reality, AP I broadened the definition of international armed conflicts to include, *inter alia*, wars of national liberation movements.¹⁸³ Article 43(2) of AP I proceeded accordingly to re-define combatants as members of the armed forces specified in article 43(1) that includes "all organized armed forces, groups and units" of a party to a conflict, "even if that Party is represented by a government or an authority not recognized by an adverse Party."¹⁸⁴ Article 44(3) further provides that "in order to promote the protection of the civilian

178. Except specific members of an armed force such as medical personnel and chaplains. See art. 28, 30 of the First Geneva Convention; articles 36, 37 of the Second Geneva Convention; art. 33 of the Third Geneva Convention; Fleck, *supra* note 137, at 209-10.

179. Fleck, *supra* note 137, at 75-76.

180. Including organized resistance movements. The phrase is aimed to incorporate Partisans movements. See JEAN S. PICTET, COMMENTARY—THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 52-53 (1960).

181. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 233-34 (1982).

182. DETTER, *supra* note 109, at 136-37. It should be noted, however, that under the Third Convention and the Hague Regulations, forces belonging to the second category were deprived of their prisoner of war status upon failing to comply with those requirements. That was not the case in regards the forces contained in the first category. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JULY 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 525-26 (Yves Sandoz et al., eds. 1987) (hereinafter COMMENTARY OF THE GENEVA PROTOCOLS).

183. Art. 1(4). See also *supra* notes 111-16 and accompanying text.

184. Provided that the unrecognized party undertook to comply with the Protocol by a unilateral declaration under article 96(3) thereof.

population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while engaged in an attack or in a military operation preparatory to an attack.” However, when “owing to the nature of the hostilities . . . [he] cannot so distinguish himself” he shall retain his combatant status provided he carries his arms openly “a) during each military engagement and b) during each time he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.” Interestingly, although a failure on the part of a combatant to comply with the rules and customs of war does not deprive him of his combatant status,¹⁸⁵ a failure to distinguish himself according to article 44(3) entails the forfeiture of this status.¹⁸⁶

Israel refused to accede to this instrument.¹⁸⁷ Therefore, despite the PLO’s attempt to make a declaration under article 96,¹⁸⁸ Articles 43 and 44 are inapplicable to the situation under consideration. What, then, are the relevant rules by which combatants are identified in non-international armed conflicts not regulated by AP I?

The customary distinction between persons taking part in the fighting and those who do not is still applicable,¹⁸⁹ but it lacks definitive clarity. Common Article 3 of the Geneva Conventions simply refers to “[p]ersons not taking part in the hostilities, including *members of armed forces* who have laid down their arms and those placed ‘*hors de combat*’”¹⁹⁰ Subsequent developments proceeded to articulate the definition of “those who take part in the hostilities.” As indicated above,¹⁹¹ the Appeals Chamber in the *Tadic* case defined these forces as either governmental forces or organized military forces under responsible command. Indeed, the determination of an internal conflict as an armed conflict relies on the participation of both such groups. In the same vein, Article I to Additional Protocol II (AP II), which defines the scope of the Protocol’s provisions, makes a similar reference to that incorporated in article 43 of AP I; that is, that the armed forces be linked to one of the Parties to the conflict, that they be organized, and that they be under responsible command.¹⁹² Not even AP II, however, equates the status of combatants in a non-international context with their status in an international context. Since AP II

185. Art. 44(2) of AP I.

186. Art. 44(4) of AP I. The combatant is still entitled to procedural and substantive protections equivalent to those accorded prisoners of war. See COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 537-38.

187. Gross, *supra* note 104, at 203-05; Christopher C. Burris, *Re-examining the Prisoner of War Status of PLO Fedayeen*, 22 N.C.J. Int’l L. Com. Reg. 943, 975-76 (1997).

188. GREEN, *supra* note 101, at 107 fn. 37. The Swiss Government informed the Parties that, owing to uncertainties regarding the status of Palestine, it could not decide whether the declaration constituted a proper instrument of accession.

189. *Tadic Jurisdiction*, at ¶ 119; *Tablada case* at ¶ 177.

190. Alex P. Peterson, *Order out of Chaos: Domestic enforcement of the Law of Internal Armed Conflict*, 171 Mil. L. Rev. 1, 18 (2002) (“Common article 3 was meant to establish fundamental humanitarian standards, not to define status.”).

191. See *supra* notes 117-21 and accompanying text.

192. BOTHE, *supra* note 181, at 672; Peterson, *supra* note 190, at 22-23.

contains no provision comparable to Article 43 of AP I, the protection afforded combatants under the latter (entailing immunity from prosecution for combat actions and a prisoner of war status) does not seem to exist in AP II.¹⁹³ Indeed, the ICRC proposed at the 1972 Conference of Government Experts a draft article providing for a treatment similar to that accorded to prisoners of war in the Third Geneva Convention to other groups of armed forces; it was rejected.¹⁹⁴ It follows that while AP II retained the customary distinction between combatants and non-combatants,¹⁹⁵ neither requirements of distinction nor compliance with the rules and customs have bearing on their status because they are not accorded any special protection.¹⁹⁶ The problematic net result is that according to customary laws of non-international conflicts, combatants are legitimate military targets without any benefits attached to that status.¹⁹⁷

(b) Civilians

Considering that provisions protecting civilians and distinguishing them from combatants existed before the Hague Regulations, it is notable that no international instrument prior to AP I in 1977 provided a definition of civilians or of civilian population.¹⁹⁸ Article 51(1) of AP I provides the following residual definition:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Art. 4(a)(1), (2), (3) and (6) of the Third Geneva Convention and in Art. 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

193. BOTHE, *supra* note 181 at 671-72; Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts*, 30 Int'l Rev. Red Cross 409, 414 (1990).

194. BOTHE, *supra* note 181, at 671 fn. 15.

195. By stripping civilians of the protection afforded to them once they participate in hostilities and rendering them a legitimate military target. See Article 13 of AP II; COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 183, at 1453, and the discussion pertaining to civilians *infra* sections III.4.1.-III.4.2.

196. Article 1 of AP II provides that the armed forces be able to implement the Protocol in the territory. However, this demand does not seem to imply that a failure to do so deprives the applicability of the Protocol. Rather, it is yet another criterion by which the level of control in the territory and over the population is measured. See COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 1353.

197. This is a problematic result insofar as the purpose and objectives of the international humanitarian law are concerned, that is, to offer protection commensurate with the status of either a civilian or a combatant to every person. Thus, in non-international armed conflicts, combatants, like civilians, may be prosecuted for the participation in the fighting. It should be noted that they are not completely without protection as the laws of human rights are still applicable in such a situation. See discussion *infra* section IV.

198. The Commentary of the Geneva Protocols notes that many definitions of the civilian population have been formulated, but lacked the desired precision. See COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 610.

As with combatants, AP II does not define civilians. It nonetheless implies the same residual definition of AP I, and considers civilians as all persons who are not members of the armed forces,¹⁹⁹ in a manner designed to exclude from its ambit persons who can be considered combatants.²⁰⁰ The realities of current conflicts, alas, defy this attempt at simplicity: civilians do carry out various military related functions²⁰¹ and provide support to combatants.²⁰² This militarization of the civilian population is, indeed, a characteristic feature of non-international conflicts, where the civilian population regularly provides combatants with food, shelter and concealment, in a manner that renders it ever harder to distinguish between civilians and combatants.²⁰³ This reality questions the very usefulness of the principle of distinction.

Attempting to respond to this challenge, both AP I and AP II tried to articulate a middle ground between the hitherto binary categories. The solution which, like most of the provisions laid out in Article 51, derives from customary international law,²⁰⁴ provides that a civilian's participation in the military effort does not deprive the individual of his civilian status, but it does diminish the protection guaranteed to him, and renders him an unlawful combatant.²⁰⁵ As such, he may be tried if captured.²⁰⁶ Article 51(3) of AP II and Article 13(3) specifically provide that civilians shall be afforded the protection due to them "unless and for such time as they take a direct part in hostilities." This articulation is of vital importance as it demonstrates the limits to which the principle of distinction can be stretched: a civilian who takes part in hostilities assumes the role of a combatant, presenting an immediate threat to the adverse Party, and is therefore not entitled to the protection afforded to civilians.²⁰⁷ Unlike a combatant, however, once he ceases his participation in the fighting he no longer presents any danger for the adversary²⁰⁸ and, having resumed his civilian status, should receive the protection accorded to civilians and cannot be targeted for an attack.²⁰⁹ This construction broadens the scope of the "civilian" category because it provides that a person taking direct part in the hostilities is not necessarily a combatant.²¹⁰

199. BOTHE, *supra* note 181, at 672.

200. *Id.* at 611.

201. Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of Spear*, 51 A.F. L. REV. 1 (2001); Stephen R. Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field*, ARMY LAW. 29 (1994).

202. Schmitt, *supra* note 177, at 158-59.

203. MOIR, *supra* note 124, at 58-59.

204. BOTHE, *supra* note 181, at 317.

205. Richard R. Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. Y.B. INT'L L. 235, 264-65 (1950).

206. GREEN, *supra* note 101, at 105; Turner & Norton, *supra* note 201, at 27-33.

207. BOTHE, *supra* note 181, at 301.

208. COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 1453.

209. Robert K. Goldman, *Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U.J. INT'L. L. & POL'Y. 49, 67 (1993).

210. Fleck, *supra* note 137, at 211.

Note, however, that the reference to people "taking direct part in the hostilities" encompasses some, but not all, forms and functions of assistance lent by civilians to combatants. In addition to the unequivocal combative functions of killing, taking prisoners, and destroying military equipment, participation also includes gathering information in the area of operations, operating, supervising, and servicing weapons systems, and all other activities that present a direct threat to the enemy.²¹¹ It does not include indirect participation in the war effort since the latter is often required from the population as a whole to various degrees.²¹² Such general participation, does not render civilians as legitimate military targets, though placing themselves in close proximity to military objectives²¹³ means that they assume the risk of attack.²¹⁴

(c) Terrorists

Terrorism, much like pornography,²¹⁵ is more easily recognized than defined.²¹⁶ Like pornography, too, this discursive illusiveness is essentially due to the political and emotional baggage attached to the activity.²¹⁷ For our purposes, however, the debate over whether an act of violence is a deplorable act of terrorism, or a laudable manifestation of heroism, is immaterial. This conclusion derives from the observation that whereas with respect to most human experiences, means determine status, this is not the case when it comes to determining one's status under the law applicable to non-international armed conflicts. Indeed, this characterization of the conflict necessitates a distinction between the methods of combat and the affiliation of the persons who carry them out. Means determine status in the case of militias and volunteer corps operating in the context of international armed conflicts,²¹⁸ in non-international conflicts, where no prisoner of war status exists, unlawful conduct itself has no bearing on the determination of status. The latter depends primarily on the organiza-

211. *Id.* at 232; Goldman, *supra* note 209, at 70-72.

212. COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 619; GREEN, *supra* note 101, at 104-05.

213. For a definition of military objectives, see Article 52 of AP I, which is considered to codify existing customary rules. Robertson, *supra* note 171, at 43-44.

214. Article 51(7) of AP I; Turner & Norton, *supra* note 201, at 26-27; BOTHE, *supra* note 181, at 672; GREEN, *supra* note 101, at 105.

215. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

216. William F. Wright, *Limitations on the Prosecution of International Terrorists by the International Criminal Court*, 8 MSU-DCL J. INT'L L. 139, 141 (1999); JOSEPH J. LAMBERT, *TERRORISM AND HOSTAGES IN INTERNATIONAL LAW* 13-23 (1990). DEETTER, *supra* note 109, at 25. Torsen Stein, *How Much Humanity Do Terrorists Deserve?*, in Delissen & Tanja, *supra* note 111, at 567, 569.

217. M. Cherif Bassiouni, *International Terrorism*, in Bassiouni, *supra* note 112, at 765, 767; LAMBERT, *supra* note 216, at 13-14.

218. See *supra* notes 178-86 and accompanying text. This is not so in regards to members of a state's regular armed forces: terrorist methods of warfare can be employed by combatants and that in itself does not deprive them of their status. Stein, *supra* note 216, at 573-74. They can, however, be prosecuted for such actions. Articles 82-8 of the Third Geneva Convention; Fleck, *supra* note 137, at 80-81.

tional level of the armed forces.²¹⁹ The existence of an armed conflict in these situations is determined primarily by the intensity of hostilities (to distinguish it from banditry, unorganized and short-lived insurrections, or terrorist activities in the first place).²²⁰ It follows that when there is a non-international armed conflict, the relevant laws of war apply and determine the status of individuals as either combatants or civilians by the criteria stated above, regardless of the means they employ.²²¹ Thus, while guerilla fighters and members of national liberation organizations are usually referred to as "terrorists" by their adversaries,²²² this terminology does not carry with it any bearing on their status in a non-international armed conflict.²²³

(d) Defining the Persons Targeted by Israel under the Applicable Laws of War

The above review suggests that the status of the people targeted for pre-emptive killings by Israel should always be made on a case-by-case basis. As in most non-international armed conflicts, identifying combatants is rather difficult since they assimilate themselves in the civilian population with no distinguishing marks. Since the population provides members of the Palestinian organizations with shelter, food and other assistance, it is even harder to distinguish between civilians who take part in the hostilities and those who do not. Generally speaking, Israel's targets, namely, high-ranking members of *Fatah/Tanzim*, *Hamas*, and *Islamic Jihad*, should usually be considered combatants. We reject the view that such people are civilians because they are active members of organized forces that take part in the conflict.²²⁴ While definitions are admittedly hazy, the law of war nonetheless distinguishes between civilians who take part in the hostilities, and those who are full-fledged members of one of the rival forces. The former are persons who provide some form support to one of the warring parties, but they are not full-time fighters. The latter are just that.

It is, we submit, both inconceivable and counter-productive from a humanitarian perspective to regard them in any other way. This is true because they are hardly distinguishable from members of the armed forces. Moreover, there are unintended implications linked to categorizing this group as "civilians." First, such categorization reduces the conflict to the level of unorganized disturbance. This is not the case. The degree of the intensity of the violence and the level of organization of these groups is far beyond internal unrest and justifies the imposition of the laws of war on the situation. Second, this characterization is likely to have the effect of

219. See *supra* notes 118-22 and accompanying text.

220. *Id.*

221. Cf. Gross, *supra* note 104, at 205.

222. DETTER, *supra* note 109, at 145.

223. The term terrorist is applicable mainly during peacetime, where its characterization is left mostly to the domestic legal systems. One should also note its relevance in assessing the applicability of the various anti-terrorism conventions.

224. U.N. INQUIRY COMMISSION REPORT, *supra* note 116, at 19; STATE ASSASSINATIONS, *supra* note 3, at 29.

reducing the protection enjoyed by civilians, as Israel is likely to seek an expansion of the exception to the principle of distinction, leaving most of the civilian population exposed to retaliation.

It does not follow that all people liquidated by Israel in the exercise of its policy of targeted pre-emptive killings are, indeed, combatants. The innocent bystanders were clearly civilians who found themselves in the wrong place at the wrong time. Some were civilians who provided assistance to the Palestinian organizations on a regular basis, but were not themselves members. Insofar as the legality of any specific action under the laws of war depends on the status of the target, the inescapable conclusion is that its determination has to be made on a case-by-case basis.

2. Humanitarian Law: Protected Persons

While the law of war revolves around the distinction between combatants and civilians, the Fourth Geneva Convention addresses "protected persons." Article 4, paragraphs 1 and 2 define them in the following manner:

Persons protected by the Convention are those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The Convention thus applies to both persons of enemy nationality present in the territory of a belligerent state and to the inhabitants of occupied territories.²²⁵ The phrase "in the hands of" implies a wide and general application of the Convention to any of the persons mentioned above on the basis of that person's mere presence in either the occupied territory or in the territory of the enemy state.²²⁶

The first two paragraphs exclude from the ambit of the Convention the nationals of the occupying state; nationals of a state which is not party to the Convention; and nationals of a co-belligerent state or a state that conducts proper diplomatic relations with the occupying state. The definition further implies that persons with no nationality are covered by the Convention.²²⁷ Since the population of the Palestinian territories consists mostly of refugees and persons with no nationality, problems of applicability do not seem to arise.²²⁸ At the same time, a significant segment of the inhabitants holds a Jordanian nationality, and Jordan and Israel do maintain diplomatic relations.²²⁹ A textual reading of the Convention would thus seem

225. COMMENTARY OF THE FOURTH CONVENTION *supra* note 145, at 45. The Commentary states that this issue was never under dispute.

226. *Id.*; *Tadic Judgment* at ¶¶ 579-80.

227. COMMENTARY OF THE FOURTH CONVENTION, *supra* note 145, at 47.

228. Since Palestine is not a recognized state it cannot confer nationality.

229. It should be noted, however, that Israeli-Jordanian relations have been under a strain since the outbreak of the *Intifada*, which almost resulted, at one point, in their

to deprive such people of their “protected persons” status. We submit that this is not the case and that a teleological reading of the Convention, as well as the modern construction of “nationality” under international law, leads to the conclusion that the inhabitants of the territories occupied by Israel who are nationals of Jordan are also “protected persons.”

Indeed, the ICTY held that the nationality requirement of the Fourth Geneva Convention should be construed in a broad manner so as to comply with the object and purpose of humanitarian law, which “is directed to the protection of civilians to the maximum extent possible.”²³⁰ It therefore found that the nationality requirement of Article 4 should be analyzed in light of the *substance* of the relations rather than their legal characterization under domestic legislation.²³¹ Thus, it was determined by the *Tadic*,²³² *Aleksovski*²³³ and *Celebici*²³⁴ Appeals Chambers that ethnicity, rather than nationality, was the determining factor in the conflict, and the fact that the victims and the perpetrators shared the same nationality could not in itself prevent the application of the Fourth Geneva Convention. True, the ICTY’s jurisprudence refers to the situation where both parties to the conflict share the same nationality, which is not the case at hand. But the rationale behind this interpretation, resting on the general need to maximize humanitarian protection, and on the specific question of whether the state of nationality can provide real redress to its nationals, applies equally to the Palestinian inhabitants of the territories occupied by Israel who hold a Jordanian nationality.²³⁵ This conclusion finds strength in the well known trend in international law to construct nationality in terms of substance, genuine link, and effectiveness.²³⁶ Arguably, therefore, ICTY’s extension of the nationality principle could be applied to situations in which the victim is a national of a third State that maintains proper diplomatic relations with the occupying power, so long as there is no genuine link between the two. Since Jordan renounced all connection with these territories and their inhabitants,²³⁷ and since the inhabitants define themselves as Palestinian rather than Jordanian, no such genuine link of nationality exists between them and Jordan, and, therefore, they should not be excluded from the ambit of Article 4.

termination. See Dany Brener et al., *Jordan Forbade Israelis Entrance and Took It Back*, MA’ARIV, Apr. 2, 2002, at 6 (Hebrew).

230. *Tadic* (Appeal) at ¶ 168.

231. *Delalic v. Prosecutor*, Case No. IT-96-21-T, ICTY App. Ch., Feb. 20, 2001, ¶ 83-4 [hereinafter *Celebici* (Appeal)].

232. *Tadic* (Appeal) at ¶¶ 164-68.

233. *Aleksovski* (Appeal) at ¶¶ 151-52.

234. *Celebici* (Appeal) at ¶¶ 82-84.

235. *Tadic* (Appeal) ¶ 165 states that “those nationals are not ‘protected persons’ as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of ‘protected persons.’”

236. Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT’L L. 347, 397-402 (1998).

237. Hussein, King of Jordan “Statement concerning Disengagement from the West Bank and Palestinian Self-Determination,” July 31, 1998, 28 I.L.M. 1637 (1988).

Finally, the Convention excludes persons specifically protected by the First, Second and Third Geneva Conventions.²³⁸ It follows that combatants are not entitled to the protection guaranteed by the Fourth Convention because in an international armed conflict one of these three conventions protect them.²³⁹ When combatants are not protected by these Conventions, as in this case, they are probably protected by the Fourth Geneva Convention, because the aim of the drafters was to leave no person unprotected.²⁴⁰ This interpretation also coincides with the object and purpose of the Convention to maximize the protection of individuals under occupation. In any event, when stripped of their arms and placed hors de combat, combatants are entitled to at least the minimum protection afforded by Article 3 of the Convention.²⁴¹

3. *Human Rights Law: All People under the Jurisdiction of a State*

The rhetoric of law is a finely tuned instrument. In human rights law, the musical scale allows for variations to be played around the terms "distinction," "differentiation," and "discrimination." As indicated above, human rights law concerns rights enjoyed by all people at all times. Article 2 of the Universal Declaration of Human Rights provides:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.²⁴²

Article 2(1) of the ICCPR reiterates the same idea, and the prohibition on discrimination articulated therein is contained in Articles 3, 26, 4(1), 23, 24 and 25 of the Covenant. Nonetheless, while human rights are accorded to all human beings, differentiation of treatment is allowed if established as legitimate. The HRC has held in General Comment 18:

The Committee believes that the term 'discrimination' as used in the covenant should be understood to imply any distinction, exclusion restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on all equal footing, of all rights and freedoms [N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legiti-

238. COMMENTARY OF THE FOURTH CONVENTION, *supra* note 145, at 46.

239. Murphy, *supra* note 99, at 24. The aim of the Convention was to leave no person without some degree of protection. See COMMENTARY OF THE FOURTH CONVENTION, *supra* note 145, at 51.

240. COMMENTARY OF THE FOURTH CONVENTION, *supra* note 145, at 51.

241. MOIR, *supra* note 124, at 59-60. For further discussion on common article 3 see *infra* section III.4.1.

242. Universal Declaration of Human Rights 71, U.N. Doc. A/180 (Dec. 10, 1948).

mate under the Covenant.²⁴³

It follows from the fundamental concept of human dignity that human rights law excludes no human being from protection, whether a combatant or a civilian. The provisions of human rights law apply in full to residents of the Palestinian territories. But this does not endow the same treatment to all people. Differentiation is allowed, and specific provisions carry considerations attuned to the specific right in the prevailing circumstances.

D. Relevant Legal Provisions

Israel's controversial policy of targeted killings receives a variety of references, ranging from extra-judicial executions and political assassinations²⁴⁴ to liquidations and acts of self-defense.²⁴⁵ The term used surely reflects one's political point of view, but also connotes the different legal framework within which the speaker places the action. Extra-judicial killings and political assassination are not terms usually identified with combat terminology, but rather with human rights regimes; liquidation and self-defense on the other hand, are commonly used in combat situations, but are foreign to human rights terminology. This sub-section seeks to clarify this point by identifying the different provisions in each legal framework and by examining the legality of this policy according to these provisions.

1. *The Basic Principle of Distinction*

The starting point of this analysis is the customary principle of distinction,²⁴⁶ applicable to both the Hague law and the Geneva law. This principle introduced the basic rule that non-combatants receive protection from attacks, while combatants do not. The relevant provisions generated from this principle and applicable in non-international armed conflicts are laid out in Common Article 3 of the Fourth Geneva Convention, in articles 4 and 13 of AP II, and in customary law.

Common Article 3 provides:

In case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction . . . [T]o this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

243. U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

244. U.N. INQUIRY COMMISSION REPORT, *supra* note 116, at 17-18. This is the term also used by the Commission, the Palestinian Authority, and Amnesty International. See, e.g., STATE ASSASSINATIONS, *supra* note 3, at 6.

245. Terms used by Israel. See U.N. INQUIRY COMMISSION REPORT, *supra* note 116, at 17-18.

246. See *supra* notes 298-304 and accompanying text.

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . .

(d) The passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

The customary status attained by the article is no longer disputed.²⁴⁷ Its rules, described as “elementary consideration of humanity,”²⁴⁸ represent the minimum mandatory treatment to accord to anyone who has ceased to take part in the hostilities, civilians and *hors de combat* alike, in any armed conflict.²⁴⁹ Article 3 does not include a comprehensive prohibition on attacks directed at the population as a whole; its original goal was to ensure humane treatment of persons not actively engaged in battle.²⁵⁰ This, however, was changed in later developments discussed below.

2. The Law of War

The principle of distinction further develops in Articles 4 and 13 of AP II. While there is much debate whether AP II is now customary law in general,²⁵¹ there is little doubt that these two articles enjoy such status.

Article 4, while not considered a restatement of existing law at the time of its drafting, as it expanded the provisions of Common Article 3,²⁵² has over the years attained the status of a customary norm.²⁵³ The article requires respect for the person, honor and convictions of persons who do not take part in the hostilities, or who cease participation, whether or not their liberty has been restricted. Such persons must be treated humanely and protected from, *inter alia*, acts of violence. Much like Common Article 3, Article 4 of AP II pertains to both civilians and persons who are *hors de combat*.²⁵⁴

247. *Tadic* (Jurisdiction) at ¶ 102; Prosecutor v. Akayesu, Case. No. ICTR-96-4, T. Ch. I, Sep. 2, 1998, ¶ 608 [hereinafter Akayesu case]; Prosecutor v. Delalic, Case No. IT-96-21-T, ICTY T. Ch. II, Nov. 16, 1998, ¶ 316 [hereinafter *Celebici* (Judgment)]; Prosecutor v. Furund_ija, Case No. IT-95-17/1-T, ICTY T. Ch. II, Dec. 10, 1998, ¶ 138 [hereinafter *Furund_ija* (Judgment)].

248. Military and paramilitary Activities in and against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27).

249. *Id.*

250. BOTHE, *supra* note 181, at 667; Goldman suggests that while article 3 does not contain a prohibition on attacks against the population not under the party's control, it may encompass such prohibition in respect to civilians in areas under the control of that party. Goldman, *supra* note 209, at 60.

251. According to Green “much of Protocol II is little more than a reaffirmation of the basic principles of humanitarian law binding on all states.” See Green, *supra* note 123, at 507; Georges Abi-Saab, *The 1977 Additional Protocols and General International Law: Some Preliminary Reflections*, in Delissen & Tanja, *supra* note 111, at 115, 119. See also *Tadic* (Jurisdiction), ¶ 117. Cf. MOIR, *supra* note 124, at 144; Christopher Greenwood, *Customary Law Status of the 1977 Additional Protocols*, in Telissen & Tnaja, *supra* note 239, at 93, 113.

252. BOTHE, *supra* note 181, at 641.

253. MOIR, *supra* note 124, at 144 fn. 52; Akayesu case, ¶ 616.

254. BOTHE, *supra* note 181, at 640; COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 1370.

Article 13 of AP II is also significant to the issue at hand. It provides:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in the hostilities.

At the time of its drafting, Article 13 was innovative because it explicitly prohibited the targeting of civilians. The customary principle of distinction, however, which is the basis of the article, was already part of the customary rules applicable in non-international armed conflicts.²⁵⁵ Furthermore, the prohibition articulated therein, and designed to protect “those who do not (or no longer) take active part in hostilities” in non-international armed conflicts, is now a well-established principle of customary international law.²⁵⁶ This provision then rectifies an omission in Common Article 3, but does so in light of the latter’s ultimate purpose.

Article 13 does not contain an explicit prohibition on disproportionate and indiscriminate attacks against the civilian population. This is due to the drafters’ desire to simplify the text of the article, and does not imply any intent to exclude these prohibitions from the ambit of Article 13. Indeed, the principle of proportionality “cannot be ignored in applying Protocol II.”²⁵⁷ The applicability of these customary prohibitions to non-international armed conflict was reaffirmed by the holdings of the ICTY in the *Tadic*²⁵⁸ and *Kupreskic*²⁵⁹ cases.

The protection guaranteed to civilians under the laws of war while giving evidence of some expansion is nevertheless quite limited: First, operations directed at legitimate military targets that inevitably involve civilian casualties are allowed so long as the harm to civilians is proportionate to the aim pursued. Second, civilians are protected only to the extent they do not take part in the hostilities.²⁶⁰ These exceptions should therefore be examined.

A party’s privilege to engage in attacks is subject to several basic prin-

255. MOIR, *supra* note 124, at 116-7; COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 1448 (“Article 13 codifies the general principles that protection is due to the civilian population against the dangers of hostilities, already recognized by customary international law and the law of war as a whole.”).

256. *Tadic* (Jurisdiction) at ¶ 119.

257. This is despite the drafters’ rejection of such explicit provisions, similar to those that had been introduced into article 51 of AP I. See BOTHE, *supra* note 181, at 677-78. Meron suggests that these prohibitions are derived directly from the principle of humanity that govern internal armed conflicts. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 74 (1989).

258. *Tadic* (Jurisdiction) at ¶ 127.

259. Prosecutor v. Kupreskic, Case No. IT-95-14/2, ICTY T. Ch. II, Nov. 14, 2000, ¶ 524.

260. *Id.* at ¶ 522.

ciples.²⁶¹ The principle of distinction requires that only legitimate military targets be the objects of the attack and that the means and methods employed could in fact discriminate between combatants and non-combatants.²⁶² The principle of proportionality further imposes the obligation to balance between the desired aim and the damage inflicted, thereby subjecting the means and methods used to the standard of reasonableness.²⁶³ Indeed, one does not only measure the legitimacy of a target against its status and the objects of an attack, but also by its effects and necessity.²⁶⁴

These principles are as significant as their application is elusive. Assessments of anticipated military advantages, incidental damage, and the ratio between the two are by nature quite subjective.²⁶⁵ Subjectivity, however, is present in any meaningful decision-making process and is neither synonymous with bad faith nor defies judgment. A determination can and should be carried out in good faith²⁶⁶ and after collection of adequate information.²⁶⁷ There are other factors for measuring the reasonableness of an attack, including the number of casualties anticipated,²⁶⁸ the importance of the target, its location, whether the means employed exceed those sufficient to destroy it, and the existence of any alternative, less harmful, means.

The second exception to the protection afforded to civilians concerns civilians who take a direct part in the hostilities. Non-international conflicts are characterized by the growing participation of civilians in the hostilities.²⁶⁹ The test applicable to the determination of whether or not a person's actions amount to the taking of "a direct part in the hostilities" is whether they "by their nature or purpose, are likely to cause actual harm to the personnel and equipment of the enemy armed forces,"²⁷⁰ and whether they present an immediate threat to the adversary.²⁷¹ These criteria represent the appropriate interpretation of this exception because the exception is just that: an exception to the general rule, which protects civilians, and, as such, should be narrowly construed.²⁷² The rationale under-

261. COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 1449-50.

262. *Nuclear Weapons Advisory Opinion*, *supra* note 96, at 257; Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 36-39 (2000).

263. GREEN, *supra* note 101, at 330-31. Another imposing principle is the prohibition on causing unnecessary suffering to combatants. See *Nuclear Weapons Advisory Opinion*, *supra* note 96, at 257; Ramey, *supra* note 262, at 39-40.

264. Article 51(5) of AP I. See William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 111-12 (1982); Schmitt, *supra* note 177, at 150.

265. Parkerson, *supra* note 100, at 59.

266. COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 1449.

267. Fleck, *supra* note 137, at 221.

268. Or the cumulative number of casualties resulting from repeated attacks. See Kupreskic case at ¶ 256. Indeed a single attack may be lawful, while the repetition of such an attack may not, depending on the cumulative effect.

269. See discussion *supra* notes 198-214 and accompanying text.

270. COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 619.

271. BOTHE, *supra* note 181, at 303.

272. Fleck, *supra* note 137, at 211.

lying the subjection of civilians to attack is the fact that they pose a threat to the adverse party. As long as this threat is neither imminent nor severe, alternative means to prevent the threat from materializing exist. Under these circumstances, a civilian is not a legitimate military target; he can be captured and, indeed, prosecuted, but not killed.

The same restrictive interpretation should be applied to the temporal aspect of such participation. It is commonly argued that a civilian, preparing to take direct part in the hostilities or returning from combat, is a legitimate target as he is assumed to still pose a present and immediate threat to the adversary.²⁷³ We do not agree with such a general assumption. The assessment of the threat such a civilian poses should be made on a case-by-case basis. The proportionality principle imposes a duty to evaluate the military need in such action against the availability of other means in the particular circumstances.

In sum, non-combatants should receive the utmost protection from acts of violence involved in hostilities. This is the working presumption that informs the laws of war. As long as civilians do not present a direct and immediate threat to the adverse party by taking part in the hostilities, they cannot be the objects of an attack. Any military attack, even one directed against legitimate targets that may entail excessive harm to the civilian population, is prohibited. Any uncertainty regarding the legality of an act potentially detrimental to non-combatants should work in favor of non-combatants.

Combatants are not so entitled. They are legitimate military targets regardless of their specific whereabouts, even if not engaged in any threatening activity,²⁷⁴ although usually they are less likely to be targeted when removed from the vicinity of combat.²⁷⁵ It does not follow that combatants are deprived of all guarantees. Military necessity must be balanced against the principle of humanity to the extent that methods and means of warfare that inflict unnecessary suffering on combatants are prohibited.²⁷⁶ It is for this reason that Article 4 of AP II provides that "it is prohibited to order that there shall be no survivors."²⁷⁷ It is for this reason that once a combatant is *hors de combat* as a result of injury or surrender he can no longer be regarded as a legitimate target, and is entitled, if not to the rights of a prisoner of war, at least to the minimum standard of human treatment guaranteed in Common Article 3.

273. Goldman, *supra* note 209, at 70; MOIR, *supra* note 124, at 59 fn. 114 ("military operations clearly must include travel to and from the attack site, even though no action is taken in the transit"). Cf. *Tablada* case, ¶ 189 ("[T]he persons who participated in the attack on the military base were legitimate military targets only for such time as they actively participated in the fighting.").

274. The Commentary of the Geneva Protocols: "Those who belong to armed forces or armed groups may be attacked at any time." See COMMENTARY OF THE GENEVA PROTOCOLS, *supra* note 182, at 1453. See also Goldman, *supra* note 209, at 67.

275. Turner & Norton, *supra* note 201, at 26.

276. *Nuclear Weapons* Advisory Opinion, *supra* note 96, at 262-63. This principle is usually referred to in the context of weapons capable of inflicting excruciating physical suffering. See Ramey, *supra* note 262, at 40-42.

277. BOTHE, *supra* note 181, at 640.

Thus, the laws of war seem to accept the legitimacy of targeting combatants and, to a narrower extent, civilians taking part in the fighting. In regards to the former, it is not necessary for Israel to resort to alternative means in order to prevent them from carrying out their hostile plans or actions. Not so with respect to the latter. Furthermore, an action against a legitimate target can only be regarded as a legitimate act of war if the damage is proportionate to the end pursued with respect to civilian casualties. The application of these principles to some ground realities may well clarify them and substantiate our argument for a case-by-case determination.

On July 23, 2002, a missile with a one ton warhead was fired from an F-16 plane at a building in Gaza, killing sixteen people (nine of whom turned out to be children), injuring over eighty people, and destroying four residential buildings. The object of the operation was to kill Salah Shehada, the commander and founder of the Izz al-Din al-Qassam Brigades, the military wing of the *Hamas*,²⁷⁸ the organization that took responsibility for numerous suicide bombings in Israel's territory. Shehada is clearly a combatant and therefore a legitimate military target, regardless of his specific actions during the attack. The devastating impact of the operation, however, taking into account the relevant factors,²⁷⁹ clearly fails to meet the proportionality standard. The laws of war do not justify this action.

Dr. Thabet Thabet was shot to death upon entering his car in the morning of December 31, 2000 in Tul-karem in area 'A,' some 250 meters from the border separating area 'A' from Israel. Dr. Thabet was a dentist with UNRRWA and the Secretary of the Fatah organization in the city of Tul-Karem. Israel contended that "his role as commander of a Tanzim cell, who instructed his people where to carry out attacks . . . removes him from the civilian category."²⁸⁰ This case is illustrative of the problematic nature of the Israeli policy. First, it is not at all clear what part exactly was played by Thabet in the Fatah Organization.²⁸¹ Second, both the location of his home and his regular driving through Israeli security check-points attests to the ready availability of alternative, less harmful means to achieve the security needs of Israel.²⁸² Third, because he was driving to his clinic when killed, he was not engaged in any hostile activity. Under these circumstances, therefore, Thabet should not have been killed by Israel.

Muhanad Taher was the head of the *Hamas* military organization in the Samaria area ('A'). On July 1, 2002, Israeli forces attempted to arrest Taher, who was hiding at a house in Samaria. Upon their approach, the Israeli soldiers encountered fire from the hiding place. The Israeli soldiers started shooting back, killing Taher and two other *Hamas* activists.²⁸³ The

278. Yoav Limor et al., *IDF Assassinated the Leader of Hamas in Gaza Yesterday*, MA'ARIV, July 23, 2002, at 10 (Hebrew).

279. See *supra* notes 261-68 and accompanying text.

280. STATE ASSASSINATIONS, *supra* note 3, at 17.

281. Thabet was known as a great supporter of the peace process. See *id.* at 16.

282. *Id.* at 17.

283. Yoav Limor et al., *Naval Commando Closed a Score with Hamas Leader*, MA'ARIV, July 1, 2002, at 2 (Hebrew).

killing of Taher and his fellow combatants was a legitimate military operation, in view of the status of the targets and the circumstances of the operation: an immediate and proportionate act of self-defense during combat.

3. *Humanitarian Law*

The law of occupation imposes a general duty upon the occupant to provide for the well-being and safety of the occupied population,²⁸⁴ and further details the humane manner with which the occupying power is to treat the occupied people.²⁸⁵ The Fourth Geneva Convention, however, seems neither to recognize the right of the occupied population to resist the occupying power,²⁸⁶ nor to regulate such resistance once it occurs.²⁸⁷ Indeed, only two provisions relate to the treatment of those involved in such resistance in occupied territories,²⁸⁸ and they fall far shorter of adequate regulation. Articles 5 and 68 are only concerned with the rights of such persons once they are in the custody of the occupant.²⁸⁹ There are no provisions that control the targeting of persons involved in hostile acts against the occupying power.

AP I rectifies this omission. It legitimizes resistance and national liberation movements and regulates the conduct of hostilities once the course of events reaches the level of an armed conflict. Curiously, however, the provisions of Article 51(3) of AP I and of Article 13(3) of AP II, whereby a civilian taking a direct part in the hostilities forfeits his civilian status, seem to be included in the Fourth Convention.²⁹⁰ This was indeed the Israeli position expressed before the U.N. Inquiry Commission, and the

284. Article 43 of the Hague Regulations.

285. In addition to the minimum guarantees of humane treatment enumerated in Common Article 3, the rules regarding the treatment to which protected persons are entitled by the Fourth Geneva Convention are laid out in article 27, according to which their persons, honor, family rights, religious convictions, and property are to be protected. The Convention further introduces a host of detailed provisions prohibiting infliction of physical suffering (art. 32), the taking of hostages (art. 34), reprisals, collective penalties, intimidation, and acts of terror (art. 33), and provides for humane treatment and rights of communication of protected persons who are in the custody of the occupying power (art. 76).

286. Baxter argues that while the Convention authorizes the occupant to penalize and punish acts detrimental to its security, it nonetheless imposes no duty of obedience to the occupant upon the occupied population. See Baxter, *supra* note 205, at 260-63.

287. Although article 27 provides that "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war." The most extreme measures approved by the Convention are found in section II of part III, which is concerned with aliens in the territory of a party to the conflict; internment and assigned residence. See Article 41 of the Convention.

288. Roberts, *supra* note 143, at 79-83.

289. Article 5 provides that in regards hostile acts committed in occupied territories, detained suspected perpetrators "shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention." Article 68 is concerned with defining permissible penalties imposed on protected persons and distinguishes, to that effect, between serious acts of sabotage (or espionage) and hostile acts not aimed at "life or limb of members of the occupying forces or administration" or posing no grave danger or damage to property of the occupant. Only acts included in the first category can entail the death penalty.

290. Fleck, *supra* note 137, at 232; GREEN, *supra* note 101, at 102, 105.

Commission, somewhat surprisingly, concurred with this statement (while declaring the primacy of humanitarian law over the law of war in the context of the Israeli-Palestinian conflict).²⁹¹

The silence of the Fourth Convention can be construed in a variety of ways: First, that the laws of war apply in such a situation with no alterations. This possibility, however, seems problematic because it seems to contravene the main thrust of the Convention and to ignore the power realities entailed in an occupation. Second, that the Convention rejects the legality of compromising the physical integrity of any person belonging to the occupied population, an interpretation that coheres with the primary concern of the Convention, is nevertheless unlikely because would entail a prohibition on any act of justified self-defense on the part of the occupying power. A third way to construct the silence of the Convention introduces a balance between the dialectics of the above options, according to which, the law of occupation, while embracing the principles of a legitimate military target, should nonetheless put an emphasis on a different set of considerations, tilting the balance of interests against those of the occupying power and in favor of the inhabitants of the occupied territory. This option can be inferred from Article 5, which differentiates between hostile acts taking place in the territory of the occupant and those taking place in the occupied territories, providing greater protection in the latter case.²⁹² It is our position that this interpretation is not only the most sensible in the light of the realities of occupation (especially a prolonged occupation), but also the purpose of the Fourth Geneva Convention.²⁹³ This position also finds support in recent developments in international criminal law, discussed below.

4. *International Criminal Law*

Article 146 of the Fourth Geneva Convention imposes on the parties to the Convention the duty to criminalize and sanction those who commit grave breaches of the Convention. Article 147 states:

Grave breaches to which the preceding Article relates shall be those involving any following acts, if committed against persons or property protected by the present Convention:

willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial

291. U.N. INQUIRY COMMISSION REPORT, *supra* note 116, at 19 ("Civilians lose the protection under the Fourth Geneva Convention when they become combatants by taking a direct part in hostilities."). The Commission, however, did not accept Israel's contention that the victims of its policy were indeed combatants. *Id.*

292. COMMENTARY OF THE FOURTH CONVENTION, *supra* note 145, at 57.

293. See *supra* notes 230-35 and accompanying text. The Fourth Geneva Convention's purpose is to maximize the protection accorded to the occupied population on one hand, while acknowledging the need to derogate from such protection in extreme situations on the other hand.

prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The criminality attached to the violations of the prohibitions enumerated in the Geneva Convention has long been indisputably recognized.²⁹⁴ Such grave breaches, however, did not include violations of Common Article 3 since they were not committed against protected persons.²⁹⁵ In fact, the notion of war crimes was limited to situations of international armed conflicts.²⁹⁶ This is no longer the case. The ICTY's Appeals Chamber in the *Tadic* case, skillfully pointing to the existence of individual criminal responsibility incorporated into many states' military manuals and domestic legislation, as well as into the resolutions of the Security Council,²⁹⁷ declared:

All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflicts, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife".²⁹⁸

The imposition of individual criminal responsibility to violations of humanitarian law and the laws of war applicable to non-international armed conflicts was reaffirmed by the ICTY in the *Delalic* case²⁹⁹ and by the ICTR in the *Akayesu* case.³⁰⁰ The ultimate validation of this position is in Article 8(2)(c)-(f) of the Rome Statute:³⁰¹

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

294. See Article 2 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res. 827, 25 May 1993, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203 (1993); Article 8(2)(a) of the Rome Statute.

295. MOIR, *supra* note 124, at 156-57; Meron, *supra* note 110, at 559. But see Article 4 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 Jan. 1994 and 31 Dec. 1994, S.C. Res. 955, Nov. 8, 1994, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994).

296. Final Report of U.N. War Crimes Commission of Experts (for Yugoslavia), U.N. Doc. S/1994/674, para. 42 (1994). That was also the position adopted by the ICRC. See Plattner, *supra* note 193, at 414 (1990).

297. *Tadic* (Jurisdiction) at ¶¶ 128-33.

298. *Id.* at ¶ 133.

299. *Celebici* (Judgment) at ¶ 316.

300. *Akayesu* case at ¶ 617.

301. For a description of the preparatory work on the article during the Rome Conference, see MOIR, *supra* note 124, at 163-66.

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

...

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

...

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

The contribution of Article 8(2)(c)-(f) to the law of war and to humanitarian law is not confined to its reaffirmation of individual criminal liability. The inclusion of the rules applicable to non-international armed conflict further establishes their acceptance and customary character.³⁰² Thus, the illegality of targeting non-combatants and the unreasonable killing of numerous civilians caught in the line of fire is reinforced and receives a new and effective dimension. It is not only the state, but also those personally responsible for such violations that may now find themselves susceptible to criminal prosecution by the international community. This development, substitutes for the silence in the Fourth Geneva Convention regarding the treatment of the civilian population in times of resistance to occupation.

5. Human Rights Law

Israel's policy of state targeted killings affects numerous rights of the Palestinian population, but none are as important as the right to life. It is this right which is at the center of our discussion of the applicability of human rights law to the situation.³⁰³

Rights are not absolute. Their content is examined and determined against the rights and interests of others. This corpus of law thus incorporates the concepts of national security, public order, and public emergency. Indeed, the ICCPR recognizes the need to resort to extreme measures in extraordinary circumstances in Article 4(1), stating that, in times of public emergency, states may take measures derogating from their obligations under the Covenant. Some rights, however, are of such a fundamental character that states cannot derogate from them. The right to life, excluded

302. Since 1998, the Rome Statute was signed by 139 states and ratified by 81. Its universal acceptance and character contributes significantly to the ongoing process of lawmaking in these fields and the affirmation and creation of customary norms. For a discussion on the part played by custom in the development of humanitarian law, see Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 A.J.I.L. 238 (1996).

303. One may add the right to fair trial, right to privacy, and the rights to protection of the family and children.

from the ambit of Article 4(1) by Article 4(2), is one such right.³⁰⁴ It follows that the state of emergency declared by Israel³⁰⁵ does not allow it to derogate from the right to life. This right is specifically guaranteed in Article 6(1) of the ICCPR: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."³⁰⁶

Relating specifically to extra-judicial killings, the Human Rights Committee (HCR) placed a special interest on the excessive use of force exercised by states' security forces,³⁰⁷ and concluded that:

The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6(1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.³⁰⁸

304. General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶ 10 (1994). Other examples are the prohibition on torture and cruel, inhumane or degrading treatment or punishment and the prohibition on slavery; other rights have little to do with a state of emergency and therefore cannot be suspended as, for example the prohibition on imprisonment for inability to fulfill a contract; in regards to some, derogation may be impossible such as freedom of conscious.

305. Israel indeed declared the existence of a state of emergency resulting from "continuous threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings." Israel had thus found it necessary to derogate from article 9 of the convention, which otherwise would have had the effect of limiting its authority to exercise powers of arrest and detention. In referring to Israel's declaration, the HRC indeed recognized "the security concerns in the State party, the frequent attacks on the civilian population, the problems linked to its occupation of territories and the fact that the State party is officially at war with a number of neighboring States." Concluding Observations of the Human Rights Committee: Israel, U.N. Doc. CCPR/C/79/Add.93, ¶ 4 (Aug. 18, 1998). It nonetheless voiced its concerns as to its continued nature and recommended limiting its territorial applicability. The Committee's observation seems to indicate its acceptance of the existence of a state of emergency in Israel. At least in regard to the Palestinian territories, Israel's assertion seems to conform to the restrictive standards set by the European Court of Human Rights and its jurisprudence, which defined such a situation as "an exceptional, actual or imminent situation of crisis or emergency, which affect the whole or part of the population or nation and which constitutes a threat to the organized life of the community of which the state is composed." See *Lawless v. Ireland*, 3 Eur. Ct. H.R. (Ser. A) at 56 (1960). Thus, uncontrolled rioting, shooting and bomb explosions that took a heavy toll on the lives and property of the Northern Ireland population had amounted to a public emergency. See *Ireland v. U.K.*, 25 Eur. Ct. H.R. (Ser. A) at 14-15, 78 (1978).

306. The article further subjects the right of states to impose the death penalty to certain conditions; it may only be imposed according to the law, for the most serious crimes, and can only be carried out pursuant to a final judgment by a competent court (art. 6(2)). The death penalty must neither be imposed on persons under the age of 18 nor carried out on pregnant women (art. 6(5)).

307. ANNA-LEANA SVENSSON-McCARTHY, *THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION* 395 (1998).

308. General Comment No. 6, U.N. Doc. HRI/GEN/Rev.1 at 6, para. 3 (1994).

The HCR harshly criticized Peru for the excessive force used by its military and paramilitary forces against persons suspected of terrorist activity. While condemning the "atrocities perpetrated by insurgent groups" and "the scale of terrorist violence, which shows no consideration for the most basic human rights," the Committee nonetheless held that combating terrorism with arbitrary and excessive state violence, including numerous extra-judicial executions, cannot be justified under any circumstances.³⁰⁹

The Inter-America Court of human rights shares this position. For instance, in the *Neira Alegria* case, the Court faced the question of whether the suppression of a riot brought on by detainees suspected of terrorist activities resulting in the death of seven people was carried out lawfully.³¹⁰ The Court held that notwithstanding the fact that the detainees were highly dangerous and armed, the force used to suppress the riot was disproportional and excessive, thus entailing the responsibility of Peru for violation of the detainees' right to life.³¹¹

Human rights bodies seem to narrowly interpret a state's right to resort to force in response to threats to its security interests.³¹² It is thus not surprising that in the latest report to the U.N. Commission on Human Rights, the U.N. Special Rapporteur on extra-judicial, summary, or arbitrary executions referred to the Israeli policy as a "grave human rights violation."³¹³ This assessment of the Israeli policy is better understood in light of its pre-planned element. Unlike an immediate response to an outbreak of violence, often leaving no time for hesitation nor room for the employment of alternative means, Israel's policy seems to obstruct the possibility of resorting to an available judicial process, a right provided for the by article 14 of the ICCPR.

From a human rights point of view, the Israeli policy as a whole is an unjustified and illegal infringement of the right to life. Human rights law cannot sustain actions that result in so high a death toll. The jurisprudence of human rights bodies suggests that specific and pinpointed killing, even of a person whose employment of terrorist means has been undisputed, cannot be considered legal. Only in rare and exceptional circumstances could such an operation be justified. For instance, in a specific case where concrete information points to an operation aimed at attacking the civilian population *that is already underway*, and cannot be prevented by any other available means, it is reasonable to assume that the killing of the perpetrators of the operation would be justified. Similarly, forces attempting to arrest a suspect, having encountered the latter's violent resis-

309. Concluding observations of the Human Rights Committee: Peru, Sept. 25, 1992, U.N. Doc. CCPR/C/79/Add.8, ¶ 8 (1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9541131000fdc163802564dc0058c931?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9541131000fdc163802564dc0058c931?Opendocument).

310. *Neira Algeria et al. Case.* (19/1/95) Inter-Am. Ct. H.R. 41, OAS/Ser. L/V/III.33, Doc. 4 (1995).

311. *Id.* at 58.

312. WATSON, *supra* note 34, at 178-79.

313. *Civil and Political Rights, Including questions of: Disappearing, and Summary executions*, U.N. Doc. E/CN.4/2002/74 (Jan. 9, 2002).

tance, and then having resorted to fire and killed him, may also meet the standard of human rights law.³¹⁴ As we demonstrated, however, human rights law is not the only legal text applicable to the context of the *al-Aqsa Intifada* within which the Israeli policy of preemptive targeted killings takes place. In what way, then, does this law interact with and affect the application of other applicable legal regimes? Concluding Section IV addresses this and other issues.

Conclusions: Is it Legally Permissible for Israel to Engage in Pre-emptive Targeted Killings?

*"So let us be explicit, if it seems a nasty thought that death and pain are at the center of legal interpretation, so be it . . . As long as death and pain are part of our political world, it is essential that they be at the center of law. The alternative is truly unacceptable"*³¹⁵

The above review and analysis suggest some fairly clear answers to aspects of the question of the legality of the Israeli policy of targeted killings. The relatively clear answers are those that evidence no discrepancy between the three legal frameworks applicable to the situation. They provide the following:

1. The targeting of combatants and of civilians who take a direct part in the hostilities during combat is permissible.³¹⁶
2. The targeting of non-combatants who do not take part in hostilities is forbidden³¹⁷ and amounts to a criminal act under international law.³¹⁸
3. The targeting of non-combatants who took part in the hostilities, but are no longer thus engaged, that is, killing which is undertaken for past deeds, is forbidden³¹⁹ and entails criminal responsibility.³²⁰

This still leaves open the following pertinent questions: Is it permissible to target combatants removed from the location of a battle? What is the extent of the protection afforded to civilians who belong to Palestinian military organizations, but not directly engaged in fighting? Under what conditions can an action taken by Israel in pursuit of said policy be considered proportionate? These questions are open to interpretation because the applicable legal texts do not cohere on any of them. While the laws of war are permissive, human rights law is restrictive and the Fourth Geneva Convention is silent. It is our position that this interpretation must relate to,

314. See, e.g., the killing of Taher, *supra* note 283 and accompanying text.

315. Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1628 (1986).

316. See *supra* notes 269-77 and accompanying text.

317. See *supra* notes 251-56 and accompanying text.

318. See Articles 8(2)(e)(i), 8(2)(c)(i) and 8(2)(c)(iv) of the Rome Statute. See also Djamchid Momtaz, *War Crimes in Non-International Armed Conflicts Under the Statute of the International Criminal Court*, Y.B. INT'L HUMANITARIAN L. 177, 185 (1999).

319. See discussion *supra* notes 269-73 and accompanying text.

320. As they are considered civilians, the rules cited in *supra* note 318 apply. See text accompanying note 256.

and be informed by, all three frameworks, and that it is both possible and advisable to reconcile their provisions and perspectives.

The view that maintains the need for a clear separation between the laws of war and of occupation and human rights law rests on theoretical, practical and analytical arguments. On a theoretical level, the distinction is based on the dividing line between war and peace. It is argued that the law of war, designed to regulate the conduct of hostilities, is conceptually opposed to the law of human rights, designed to reflect harmony in human society during peacetime.³²¹ It follows from this distinction that war is a rare disruption in the course of normal harmony and that due to the differences in the development, theoretical basis, and goals of these fields of law,³²² "[t]he law of war is a derogation from the normal regime of human rights."³²³ On a practical level, it is argued the law of war is better suited for the specific circumstances of battle and thus provides a far more detailed and practical standard for military compliance than human rights law can and does provide.³²⁴ Analytically their fields of applicability are indeed different, as the law of human rights applies between the state and its nationals or other people subject to its jurisdiction, while the law of war applies between states.³²⁵

The view that maintains that these fields of law co-exist on a continuum, rather than across a dividing line considers violence to be an aspect of, rather than an exception to, the normal course of international life. Accordingly, this view emphasizes the principle of humanity that lies at the core of the laws of war, the law of occupation and human rights law,³²⁶ and points to their concurrent development.³²⁷ Indeed, there is no conceptual difference between the law of human rights and the law of war and occupation, at least as they stand today. These regimes promote human dignity and physical integrity and attempt to minimize, if not eliminate, human suffering. This is most apparent in the fast-evolving rules of non-international armed conflicts not aimed at regulating the relationship between states, but rather, between the state and its inhabitants. In that sense, they have not only the same application as human rights rules but also share the same goals.³²⁸ The criminalization of human rights atrocities committed during armed conflicts and entailing personal accountabil-

321. Peterson, *supra* note 190, at 36; G.I.A.D. Draper, *Humanitarian Law and Human Rights* in *Acta Juridica* 193, 205 (1979).

322. Draper, *supra* note 321, at 199.

323. G.I.A.D. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflict*, 1 *ISR. Y.B. HUM. RTS.* 191, 206 (1971).

324. Fleck argues "the provisions of the Fourth Geneva Convention and the relevant rules of customary law take precedent, as law specifically regulating belligerent occupation." Fleck, *supra* note 137, at 241.

325. Draper, *supra* note 321, at 204; Dale Stephens, *Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 *YALE HUM. RTS. & DEV. L.J.* 1, 7-11 (2001).

326. *Furund_ija* (Judgment), ¶ 183; *Celebici* (Judgment), ¶ 200; *Tablada* case, ¶ 158; Meron, *supra* note 97, at 266.

327. Stephens, *supra* note 325, at 12-13.

328. MOIR, *supra* note 124, at 193-94.

ity further attests to the blurring of the boundaries and the growing *rapprochement* between these fields of law.

This approach does not deny that an armed conflict or an occupation poses special difficulties that human rights law is not always adequately equipped to handle.³²⁹ It does maintain, however, that inadequacy is not tantamount to inapplicability, and that human rights law, even if not directly applicable, nevertheless informs the manner with which the laws of war and of occupation are to be interpreted and applied.³³⁰ Indeed, the ICJ held that while the law of war and humanitarian law provide *lex specialis*, the application of human rights in situations of conflict is not suspended.³³¹ This was also the approach adopted by the Committee on Economic, Social and Cultural Rights, which emphasized Israel's obligation under the Covenant regardless of the existence of an armed conflict between Israel and the Palestinians.³³²

Thus, human rights law should affect the interpretation of the specific rules of the laws of war and occupation in a manner that elevates "the humanitarian aspects and priorities of the law of armed conflict and ensure[s] that these 'weighted' humanitarian aspects must be considered when determining the legitimacy of military actions."³³³ This is the case when the law of occupation is added to the mixture. Normally, the law of occupation is more specific than the law of war, as it is designed to respond to problems emanating from the special relationship between an occupant and an occupant population, and to promote the wellbeing of the latter. While the law of occupation is thus the *lex specialis*, taking precedent even over human rights law,³³⁴ in cases where the law of occupation provides no clear answers, human rights law steps in and assists the law of occupation. Human rights law reinforces the weight to be given to the latter's principles and objective, that is, to protect the occupied population and provide for its wellbeing.

Finally, there is yet another factor. The Palestinian territories have been under Israel's rule for over 35 years. The drafters of the Fourth Geneva Convention did not foresee such a prolonged occupation, and

329. Michael J. Matheson, *The Opinion of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 A.J.I.L. 417, 423 (1997). In light of the derogation clauses in international human rights instruments that should rarely be the case. Human rights law incorporates a tool providing it with guidelines applicable in states of public emergency. The derogation clauses further establish the connection between the different regimes; Article 4(1) of the ICCPR clearly states that derogation may not conflict with other international obligation incumbent upon a state. It thus opens the door for the non-derogable rules of war and humanitarian law, which represent the "absolute minimum of protection." SVENSSON-McCARTHY, *supra* note 307, at 378.

330. WATSON, *supra* note 34, at 174-75.

331. *Nuclear Weapons Advisory Opinion*, *supra* note 96, at 240.

332. Concluding observations of the Committee on Economic, Social and Cultural Rights, *supra* note 163, at ¶¶ 11-12.

333. Stephens, *supra* note 325, at 15.

334. U.N. INQUIRY COMMISSION REPORT, *supra* note 116, at 19; Jochen Abr. Frowein, *The Relationship Between Human Rights Regimes and regimes of Belligerent Occupation*, 28 ISR. Y.B. HUM. RTS. 1, 11 (1998).

therefore sought merely to maintain a status quo, imposing only limited duties upon the occupier.³³⁵ The Convention, therefore, does not meet the needs of a population occupied for so long, and additional protection and guarantees are required. These are provided in human rights law.³³⁶ This observation also sheds further light on the failure of the Convention to regulate adequately the resistance an occupying power may face.³³⁷ It is quite plausible to assume that the Convention remained silent on the matter seeking to regulate a temporary relationship. Considering a long-term occupation, the Convention may have questioned its legitimacy, and may have recognized the legitimacy of resistance to it, and regulated its manifestations accordingly.³³⁸

At the very least, this situation requires that more severe restrictions be imposed on the occupying power's rights. General human rights obligations and the added responsibilities Israel, as the occupying power, assumed over the Palestinian population, should place restrictions on Israel's actions. The balance of interests should clearly shift in favor of the Palestinian population in every operation carried out by Israel. It follows that while the specific provisions of the law of war provide the framework for the examination of Israel's conduct, their content and scope now include a primary factor; the duty to ensure the wellbeing of the Palestinian population and its safety. This interpretative construction allows us to respond to the hitherto open questions articulated above, in the following manner:

1. Combatants are only legitimate targets if all other means to apprehend them fail. Pre-emptive targeting of individuals who pose an immediate threat to Israel's security should be an exceptional measure, not a policy. Israel is under the heaviest of burdens to substantiate its claim of a person's culpability. With no judicial oversight over the decision-making process, the individual is deprived of all means of protecting himself and of defending his innocence. This heavy burden should further restrict Israel's ability to engage in targeted killings, thus considerably minimizing their occurrence. The possibility of targeting a person could therefore be limited to incidents where there is an extremely high probability that the individual poses a significant risk to Israel's security and no other recourse is materially feasible.³³⁹

335. Roberts, *supra* note 143, at 71. The scope of these duties further decreases as of one year after the general close of military operations. See article 6 of the Fourth Geneva Convention.

336. *Id.*

337. See *supra* section III.4.3.

338. The COMMENTARY OF THE FOURTH CONVENTION, *supra* note 145, states: "[I]f the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified." *Id.* at 63.

339. It should be noted that a failure to follow these guidelines does not necessarily amount to a criminal act, as the customary laws of war permit the targeting of combatants without imposing such conditions once the requirements of necessity and proportionality are met. See notes 256-77 and accompanying text. It does, however, entail Israel's international responsibility.

2. Non-combatants may not be targeted. As an occupying power, Israel possesses the ability to apprehend the suspect and should therefore exhaust every means in its power to do so. Even if unable to do so, Israel is not permitted to target the individual, even upon his return from a military action.³⁴⁰ The lives of persons belonging to a Palestinian military organization, but who are not in fact combatants themselves (such as Dr. Tabath) may not be compromised. They may be prosecuted for any assistance provided to the military wing of the organization enabling an attack upon civilian lives and property. But as they pose no immediate threat to Israel's security they cannot be targeted by the IDF.

3. Any targeted killings that entail risks to civilians should take into consideration the responsibility Israel assumes over their lives and property. In the light of the fact that the Palestinian territories are densely populated, and that most operations can only take place within these territories, only exceptional circumstances will enable the execution of such operations that have little harmful effects. This is also relevant to the methods employed in these operations. It does not take a particular military expertise to realize that the impact of a one-ton warhead missile from an F-16 is likely to have a very harmful effect. Indiscriminate attacks of such kind are criminal under international law.³⁴¹

Our analysis concludes that while a specific act of preemptive killing may be legal if it meets the above-specified requirements, the policy of state targeted preemptive killings is not. Furthermore, some specific acts of targeted killings may generate state responsibility, while others may constitute a war crime entailing criminal accountability. These conclusions, emanating from the reading of the three legal texts applicable to the context, and informed by a sensibility that coheres them, do not rest on a negation of the importance of the national interest in security. On the contrary, these conclusions incorporate and express the way it should be balanced with a minimum standard of humanity and against the relevant context.

This delicate, ever precarious balance is at the heart of the democratic discourse. A democratic state is not a meek state. True, it is fighting with "one hand tied behind its back,"³⁴² as soberly observed by Chief Justice Barak of the Israeli Supreme Court, but democratic sensibilities internalize this limitation on State power, not as a source of weakness but as a sign of strength. Democracies require a public discourse forever alert to the importance of human rights, suspicious of the way power is used, and committed to the rule of law. The legal culture, in turn, while not a substitute for this public discourse, is never absent from it and indeed serves as a catalyst for its development.

340. As is the case with rules pertaining to combatants, *supra* note 339, it is not entirely clear whether targeting an individual upon his return from action necessarily amounts to a criminal act. See note 273 and accompanying text. It is our submission, however, that in such a case, more often than not, the principles of proportionality and necessity are not met.

341. See notes 257-68 and accompanying text. Indiscriminate attacks against protected persons thus fall under both Article 8(2)(c)(1) and Article 8(2)(e)(i); Momtaz, *supra* note 318, at 185.

342. *Torture case* at 1488.

We therefore reject the notion that the policy of targeted killings, designed by Israel as a way to combat terrorist attacks, is beyond the purview of the rule of law.³⁴³ We also deny the purist position suggesting that the legalistic nitty-gritty preoccupation with details entailed in the above discussion is likely to obscure and legitimize a harrowing policy;³⁴⁴ one that, on principle, should be condemned.³⁴⁵ This position in fact maintains that the legality or illegality of targeted state killings is not a legitimate issue of discussion; that while an emergency situation may exceptionally necessitate the deed, it should never be elevated to the sphere of the Word.³⁴⁶ We appreciate the sensibility of this position, but, alas, do not find it sensible. Indeed, nor would the people who consider themselves victims of the policy of targeted killings, and appeal to the courts to intervene.³⁴⁷ Purity belongs to the Platonic world of ideas; it is a necessary ideal to strive for, even if forever unachievable in this all too fallible City of Man.³⁴⁸ In the best of all possible worlds³⁴⁹ law would be superfluous; in this world, it is a necessary, albeit insufficient means to achieve some possible betterment. This article hopes to contribute to this modest goal.

343. See *Barakeh* case, *supra* note 9. The Court's concise judgment, reproduced here in its entirety, reads: "We read and widely listened to the claims of the Applicant's representative. It seems to us that the announcement given on behalf of the Respondents supplied an exhaustive response to the Applicant's claims. The 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. This is the case *a fortiori* when the appeal lacks a firm factual foundation and seeks a sweeping redress."

344. Indeed, such a position would seem to suggest the inadvisability of international humanitarian law in its entirety, insofar as that law is based on the positivist admission that violent conflicts do take place, rather than on the antecedent, normative, position that they should not take place. At the same time, we do not propose that law, and behavior according to law, offer any substantive solution to either the problem of occupation or to terrorism: law is derivative; it is an instrument of a political order. At best, it can rectify some of the latter's abuses; at worst, it can justify and perpetuate them.

345. RICHARD WEISBERG, *POETHICS* 137-41 (1992).

346. See, e.g., SLOVOJ ZIZEK, *WELCOME TO THE DESERT OF THE REAL: FIVE ESSAYS ON SEPTEMBER 11 AND RELATED DATES* 112-14 (2002). Zizek discusses the issue of torture as an example of an issue that should not be a legitimate subject for discussion even when the act of torture itself has to be taken. The acknowledged cost of being charged with hypocrisy is considered a better moral position than that of a liberal stand which takes as its starting point the notion that torture is on principle illegal but that law may provide guidelines differentiating between cases where the principle holds and cases where it gives way to other considerations such as the "ticking bomb" situation. This latter position, argues Zizek, elevates the torturous deed into a universal principle, thereby erasing the sense of guilt and the awareness of the unacceptability of the deed.

347. See the LAW appeal, *supra* note 11.

348. PLATO, *THE REPUBLIC* (Francis MacDonald Cornford trans., 1941); ST. AUGUSTINE, *CITY OF GOD*, BOOK XI 429-70 (Henry Bettenson trans., 1972) (1467).

349. In reference to Voltaire's *Candide*, a satirical expose of Leibnitz' philosophy and system of universal harmony. See VOLTAIRE, *CANDIDE* (Shane Weller trans., (Dover Publications, 1993) (1759).