

FEATURED ARTICLES

The Israeli Policy: Targeted Killing for Preventive Self-Defense or Extra-Judicial Executions?

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I. Introduction

Israel officially adopted a targeted killing policy¹ after the beginning of the Second Intifada² in 2000 (Intifadat Al-Aqsa). Since then, at least 386 Palestinians have been killed as the result of this policy; among them are 154 innocent civilians.³ Israel's targeted killings have taken place by shooting missiles from helicopters, explosive loads, sniper fire, short-range shooting, and artillery shooting.⁴

Israel used the targeted killing against Palestinian fighters⁵ and political leaders, long before it became an official policy. Its use, however, has become more frequent since 2000. A famous example of targeted killing prior to 2000 is to assassinate the planners of the attack on Israeli athletes in the Munich Olympics Games in 1972.⁶ Other examples include: targeted killing of Sheik Ragheb Harb, a leading Hezbollah figure in Lebanon in 1984; targeted killing of Hezbollah's Secretary General, Sheik Abbas Musawi, with his wife and his five year old son and five bodyguards in 1992 in Lebanon; and targeted killing of the head of the Palestinian Islamic Jihad, Fathi Shikaki, in 1995 in Malta.

The Israeli policy of targeted killing has several names in professional literature. The official Israeli name is "targeted thwarting"⁷; other names are "liquidation," "elimination," "preventive strikes," and "interception."⁸ These names are attempting to legitimize targeted killing as self-defense, within the law of war. Human rights organization that view this policy as a gross violation of the most basic human rights,

usually use other terms, such as "extra-judicial execution"⁹ and "assassination."¹⁰ Also, it is worth noting that Israel has used the targeted killing policy against fighters who attacked both Israeli citizens and soldiers without distinguishing between the two, given that according to International Humanitarian Law (IHL), soldiers are legitimate targets and attacks against them do not constitute terrorist acts.¹¹

This article will not discuss the effectiveness of this policy.¹² In addition, the article will not discuss the morality of this policy.¹³ The focus of this article will be on the question of the legality of the policy according to the judgment of the Israeli Supreme Court on 13 December, 2006,¹⁴ sitting as a High Court of Justice (hereinafter HCJ). First, the article surveys the HCJ's decision and methodology to deal with the issue; second, it explores applicable laws to the ongoing Israeli-Palestinian conflict; third, after assuming that the applicable law is international humanitarian law (hereinafter IHL), the article discusses whether the Israeli-Palestinian conflict is an international armed conflict or not; fourth, then, it answers whether the Palestinian fighters are civilians or combatants under IHL; fifth, after assuming that the Palestinian fighters are civilians, the article discusses the issue of "civilians who take direct part in hostilities for such a time" under Article 51(3) of Additional Protocol I to the Geneva Convention¹⁵ with an examination of each of the three key terms "hostilities", "direct part" and "for such time"; finally, the article elaborates on the HCJ's four-fold test for the legality of targeted killings with an examination of each requirement. The article concludes

with acknowledging that HCJ's judgment is a pioneer on the targeted killing issue, however, it has many loopholes that may lead to other sets of problems.

II. The Israeli Supreme Court Judgment

In 2002, the Public Committee against Torture, an Israeli NGO, and the Palestinian Society for the Protection of Human Rights and the Environment, a Palestinian NGO, jointly submitted a petition to the HCJ, arguing against the legality of targeted killing. In December 2006, the HCJ ruled on this petition and without recognizing that Israel's targeted killing policy is illegal, and without totally approving it as a legal policy, provided a four fold test that should be employed in every single targeted killing case, in order to determine legality/illegality of targeted killing in that case.¹⁶

HCJ ruled that IHL is the applicable law for the targeted killing, because Israel and Palestinians organizations are in a state of war, and governing rule for the law of war in international law is IHL. Without providing any reasoning, the Court stated that for targeted killing cases, main applicable law is the law of war, although human rights law could be employed when there are gaps that applying IHL alone, is not able to solve the problem.¹⁷

Petitioners were in favor of International Human Rights Law (IHRL) and Belligerent Occupation Law. They argue that Palestinian civilians should not be governed by military law that is currently forced over them, because as a population under occupation, there should be a minimum level of human rights that government ought to respect.¹⁸

Referring to the Article 1 of Chapter 1 of the Hague Convention (IV), the HCJ classified the Palestinian fighters as civilians and not combatants.¹⁹ The Court rejected the State's argument that there is a third legal category as "unlawful combatant."²⁰

The HCJ ruled that, according to customary international law (as defined in Art. 51(3) of Additional Protocol I),²¹ civilians taking direct part in hostilities lose their protection as civilians that they should not be the object of attack by the adversary party.²² The HCJ rejected the State's argument that Art. 51(3) of the Additional Protocol I of the Geneva Convention did not reflect customary international law.²³

The Article 51(3) of Additional Protocol I provides, "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." In its analysis of the Article, HCJ defines two groups of civilians.²⁴ Based on the Court's definition, first group of civilians is the one that bears arms openly on his way to, or back from, the place where he used arms against the enemy.²⁵ In the second group, there is a civilian who generally supports the hostilities against the enemy, by selling food or medicine to fighters, but does not participate in combats.²⁶ The HCJ's definition of civilians creates a grey zone between these two

extreme groups, to which most Palestinian fighters belong.

Afterwards, the HCJ provided examples for the term "for such time" of the Article 51(3), in which a civilian who takes part in the hostilities forfeits his protection from attacks. On one extreme, there are civilians who take part in the hostilities once or sporadically, and then detach themselves from the hostilities. On the other extreme, there are civilians who have joined a fighting organization, which has become their home, and engaged in many attacks with short periods of rest between them.²⁷

In contrast, regarding the term "direct part" of the Article 51(3), the HCJ did not give examples of the gray zone between the two extremes. Instead, the Court offered a four-fold test with safeguards to be taken by the State.²⁸ The four-fold test requires the State to examine whether:

1. the state has strong evidence that the potential target meets the conditions of having lost their protected status;
2. there are other less drastic alternative measures to stop a potential threatening target, such as arrest, without posing too great a risk to the lives of State's soldiers;
3. conduct an immediate independent and thorough investigation of the operation to determine its justifiability, and compensating innocent civilians in appropriate cases; and
4. assess in advance proportionality of innocent civilians' expected collateral damages to the anticipated military advantage gained by the operation, to make sure operation gains are greater than civilian collateral damages.²⁹

The HCJ applied the same four-fold test to examine the proportionality requirement of the term "for such time" of the Article 51(3). On one extreme is a civilian sniper shooting at civilians or soldiers from his porch, and his killing is permitted, because it meets the proportionality requirement of the four-fold test. On the other extreme, bombing of a whole building and killing many civilians is not permitted for the sole purpose of killing a "terrorist," because collateral civilian damage is disproportionate to military gained.³⁰

At conclusion, the HCJ ruled that targeted killing is not a permitted or forbidden policy. Instead, each case of targeted killing operation must be examined on its merits, under the standards of customary international law regarding international armed conflict, applying the Court's four-fold test.³¹

III. Which Law Is Applicable to the Israel-Palestinian Conflict: IHL, IHRL or the Law of Belligerent Occupation?

The HCJ ruled that IHL is the applicable law on the issue of targeted killing. HCJ did not provide any reasoning for its ruling. The Court, only referred to its previous rulings, in which it adopted the IHL to resolve armed conflicts between Israel and Palestinian organizations.³²

It is important to note that in its previous rulings, the

HCJ had never ruled on the applicability of the Geneva Conventions in the Occupied Palestinian Territories (OPT) and had accepted the State's position that the Conventions are not applicable in the OPT.

The ruling that the applicable law is IHL, justified HCJ's interpretation of the Article 51 of the UN Charter³³ in giving Israel the right to self-defense. However, there are two interpretations of Article 51. Restrictive interpretation argues that self-defense is limited to the time of armed attack by another state.³⁴ Liberal interpretation argues that state may also act in self-defense in cases of threats of imminent attacks.³⁵ Furthermore, the liberal interpretation of self-defense doctrine includes non-state actors, in addition to state actors. It argues that at the time of attacks by non-state actors, restrictive interpretation of self-defense cannot apply, therefore, a new regime for self-defense should be adopted.³⁶ The HCJ adopted the liberal interpretation without providing any reasoning for this adoption.

Although the HCJ considered the IHL as the applicable law on the issue at hand, it did not answer the question of when the armed conflict began. Did it begin with the creation of Israel in 1948, with the Palestinian Territories' occupation by Israel in the 1967 war, Or after the first suicide bombing conducted by a Palestinian? If there is a new armed conflict after each attack or is every attack a renewal of an existing armed conflict? Whether a series of minor assaults may be in totality an armed attack?³⁷ If so, should they occur in a limited period or after an initial attack occurred? Is it reasonable to conclude that the first attack was one in a series of attacks that together constitute a single "terrorist campaign,"³⁸ so that the state has the right to target a civilian to prevent such an immediate attack? Is there a time-line during which the goals of the Israeli targeted killing policy will be reached? There is no answer to these questions and thus it is not clear how the Israeli-Palestinian Conflict is considered an armed conflict.

In ruling that there is an armed conflict, the HCJ rejected the petitioners argument that the applicable law in the OPT is IHRL or the law of belligerent occupation without providing an in-depth analysis. Several scholars and many international organizations, including Amnesty International, the U.N. Commission on Human Rights, the U.N. Secretary General, and the U.N. General Assembly share the petitioners' view that use of targeted killings in the counter-terrorism strategy should be governed by IHRL and therefore is illegal.³⁹

In addition, the HCJ did not discuss Israel's long-term occupation of OPT. The Court would have had to accept application of IHRL in the OPT, if it had acknowledged that the area is under occupation.⁴⁰ It is noteworthy that HCJ refrained from discussing the status of the OPT after the Oslo Peace Agreement⁴¹ and especially after completion of Israel's disengagement (unilateral withdrawal) from the Gaza Strip in 2005.

There is a dispute as to whether the Israeli disengagement

from Gaza Strip finished the occupation in this area. The dispute is about the interpretation of Article 6 of the Geneva Convention of 1949,⁴² and according to that, answering the questions of legal status of Gaza Strip as an evacuated territory and the Israel's responsibilities towards its inhabitants.

Israel alleges that the occupation finished in 2005, when the Israeli forces withdrew from the Gaza Strip. It reasons that there is no occupation, since there is no Israeli military government exercising its authority or any of its government functions in the Gaza Strip.⁴³

Palestinians and several human rights organizations allege that the Israeli occupation did not cease after the disengagement, and therefore IHRL should apply according to Article 6 of the Geneva Convention. They argue that Israel continues to effectively control the Gaza Strip. Israel controls over movement of people and goods to and from the Gaza Strip via land crossing; exercises complete control of Gaza's airspace and territorial waters; oversees the Palestinian Population Registry; controls Gaza's tax system and fiscal policy; and exercises power over the Palestinian Authority and its ability to provide services to Gaza residents.⁴⁴

After the second Intifada, in 2000, the situation in the West Bank in regard to Israel's control over the area, became even more complicated than the one in Gaza Strip. The Oslo Agreement distinguished between three different areas in West Bank. Area A was transferred to full Palestinian civilian and military authority;⁴⁵ area B is under full Palestinian control and joint security control, with Israel maintaining an overriding security responsibility; and Area C, including Israeli settlements and military installations, remained under Israeli control. These areas do not represent continuous territorial zones.⁴⁶

One might wonder how the HCJ chose to apply IHL, while avoiding the complicated status of the OPT. Question also remains unanswered on the applicable law, if Israel attempts to targeted killing in East Jerusalem, which is considered occupied under international law but annexed by Israeli law?

Overall, it is not clear why IHL must govern the issue of targeted killings, instead of IHRL or the law of belligerent occupation. In any case, the HCJ failed to provide an explanation as to why IHL is the applicable law.

IV. Is the Israeli-Palestinian Conflict an International Armed Conflict or Non-International Armed Conflict?

Even if there is an assumption that IHL is the applicable law in the Israeli-Palestinian Conflict, it is not clear why the HCJ ruled that this armed conflict is an international armed conflict and not a non-international armed conflict. The Court only mentioned its precedent for its ruling.⁴⁷

The Court's assumption on existence of international armed conflict between Israel and Palestine did not meet the

condition in Common Article 2 of the Geneva Conventions of 1949.⁴⁸ The Article requires the intervention of at least two states for existence of an international armed conflict. The Palestinian organizations are not the State of Palestine and even the Palestinian Authority is not a recognized state. Therefore, it is hard to see how the ongoing conflict is an international one.

The court characterized the conflict as an international armed conflict, without providing explanation for this characterization. Moreover, it seems that the HCJ took conveniently selective definitions to reach the conclusion, without mentioning the sources: the HCJ knows that according to the Common Article 2 of the Geneva Conventions, an international armed conflict is not considered to be international, if the conflict crosses the state's border, when one of the parties is not a state. Article 1(4) of Protocol I,⁴⁹ however, extends the rule of the international armed conflict to non-state actors such as national liberation movements. Perhaps, since Israel is not a party to the Additional Protocol, the HCJ avoided referring to this Article.⁵⁰

V. Are Palestinian Fighters Civilians or Combatants?

Under IHL, there is a distinction between civilians and combatants. In both international and non-international armed conflicts, it is justified for the adversary party to attack combatants (unless under limited protection conditions). Civilians are, however, protected from adversary's direct attack. This is a fundamental rule of IHL, which reflects customary international law.⁵¹ When a person's situation is in doubt, s/he shall be considered a civilian.⁵²

The HCJ characterizes the Palestinian fighters as civilians since they do not meet the condition in Articles 1, 2 and 3 in chapter 1 of the Hague regulation.⁵³ These conditions that are repeated in the Geneva conventions,⁵⁴ provides that combatants have a fixed emblem recognizable at a distance and they do not conduct their operations in accordance with the laws and customs of war.⁵⁵ A combatant is an object of attack. If he is captured by the adversary party he is entitled to prisoner of war status, and may not be subject to punishment for taking part in hostilities, unless he violates the law and customs of war.⁵⁶

The HCJ judgment in this regard raised the question of whether it is possible to have an international armed conflict without a combatant on one side, an armed conflict in which state fights only civilians who take direct part in hostilities. It is understood that an armed conflict should take place among at least two armed groups (combatants). The HCJ's ruling is problematic because it considers the current conflict between Israel and Palestinians as armed conflict, while it gives the status of "civilian" to all the Palestinian parties involved, regardless of their status as regular civilians or organized armed groups.⁵⁷ The Court should have distinguished active

members of organized forces that take part in hostilities, as combatants and not full time a civilian.⁵⁸

The HCJ added to the ambiguity of its ruling by using the term "unlawful combatants," to describe civilians who take a direct part in hostilities.⁵⁹ This is particularly confusing, given that the Court rejected the State's argument to establish a third group, as "unlawful combatants."

Another ambiguity arises from HCJ's ruling that the Palestinian fighters are civilians. The Article 50(1) of the Additional Protocol gave a negative definition of civilians; a civilian is a person who is not a combatant.⁶⁰ Since the HCJ classified Palestinian fighters as civilians, question remains as to whether Hezbollah fighters will be considered civilians or not, since the conflict between Israel and Hezbollah crosses the borders of the State.⁶¹ Palestinian fighters should be classified as combatants. But, since Israel is not a party to the Additional Protocol I,⁶² the HCJ refrains from considering them as combatants.

The HCJ adopted its definitions for "civilian" and "combatant" from two different sources. The Court applied the Additional Protocol I to define civilians.⁶³ On the other hand, the Court applied the Geneva Convention to define combatants, even if there is a flexible criteria in Article 44(3) of Additional Protocol I, that provides a flexible criteria for definition of combatant, that can include Palestinian fighters.⁶⁴ The HCJ's selective use of legal sources is questionable.

VI. Civilian: Direct Participation in Hostilities

As mentioned above, the HCJ characterizes Palestinian fighters as civilians. However, according to international law (more specifically according to Article 51(3) of Additional Protocol), since these fighters take a direct part in hostilities, they can lose their immunity and are subject to attacks. The Article 51(3) provides, "[c]ivilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

This rule is a new rule⁶⁵ and HCJ is the very first judicial authority to interpret this international rule.⁶⁶ In its interpretation, the HCJ adopted a broad interpretation for three key terms; "hostilities," "direct part" and "for such of time."

A. Hostilities

There is no precise definition of the term "hostilities" in international legal literatures.⁶⁷ The term has been interpreted both narrowly and broadly. The narrow interpretation emphasizes that a hostile act entails loss of civilian immunity against direct attack, therefore definition of "hostilities" should be restricted to actual fighting, operations preparatory to actual fighting, and other conducts posing an immediate threat to the adversary.⁶⁸ On the other hand, the broad interpretation states

that the term “hostilities” could include certain logistical and intelligence activities and all activities of a belligerent nature aimed at ultimately winning the war.⁶⁹

The HCJ gave the term “hostilities” a broad interpretation and applied it to situation broader than actual fighting. In addition, the HCJ interpretation concludes that hostilities could be towards civilians and not only towards the army (combatant) and military forces.⁷⁰ According to the ICRC commentary on Additional Protocol I “hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces”.⁷¹ The ICRC Commentary adopted the narrow interpretation, stating that hostilities include “preparations for combat and the return from combat” and also the time that a civilian actually uses a weapon and carrying it, “as well as situations in which he undertakes hostile acts without using a weapon.”⁷²

B. Take Direct Part in Hostilities

There is no precise definition of the term “direct participation in hostilities” in literatures of international law.⁷³ Same as interpretation of the term “hostilities,” there is a narrow and a broad interpretation of the term “take direct part in the hostilities.” The narrow interpretation is the notion that an adversary party can attack civilians when they are engaged in fighting, but should stop the attacks when they lay down their arms, surrender, or not directly attacking, even if they have prepared and planned the operation.

Additionally, the narrow interpretation argues that any broad interpretation of the term “take direct part” will demolish the distinction between combatants and civilians. The argument goes further and alleges that such civilians are subject to arrest and prosecution, but not to targeted killing, which is considered assassination and could be considered a war crime.⁷⁴ The argument mentions that Article 5 of the Fourth Geneva Convention extends protection to civilians who take direct part in hostilities and entitles them to human treatment and a fair and regular trial.⁷⁵

In contrast, the broad interpretation of the term “take direct part in hostilities” considers the whole chain of command involved in an attack, including those who plan, decide, and perform the operation.⁷⁶

The ICRC Commentary adopted the narrow interpretation. The commentary provides that “direct participation” should include “acts of war which by their nature or purpose likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection”.⁷⁷

The phrase, “likely to cause actual harm” that requires casual proximity, raises the question that this requirement

could be evaluated only ex post and not ex ante and the military response cannot wait until the damage has been done. Therefore, there is a dispute if the meaning of “like to cause actual harm” means “harm that has actually occurred” or “harm that could objectively be expected.”⁷⁸

The HCJ provided two extremes in the interpretation of the term “civilian who take a direct part in hostilities”. The ruling of the HCJ on the term is very broad, and examples it provides are among those disputed by experts. For instance, the HCJ considers civilians who are deliberately serving as human shield to the fighters, as civilians who take direct part in hostilities. The court’s ruling ignores applicability of its definition to real situations. For instance, it happens that a civilian climbs to the roof of a building in which he has an apartment, in order to protect his apartment in face of an attack. If fighters have stored weapons in the same building (but not in this civilian’s apartment) how can one know, whether this civilian is taking a direct part in hostilities or simply protecting his apartment from destruction? How can we know if this civilian was forced to do so or if he has done so willingly? In examples like this, HCJ’s broad definition of civilians who “take direct part in hostilities” is not pragmatic, and in reality, is open for abuse by the army.⁷⁹

Furthermore, the HCJ ruled that civilians who drive trucks with ammunition to the place of combat are taking part in hostilities. This example has long been disputed among experts. Is such a civilian taking a direct part in hostilities? And if yes, under what circumstances could he be subject to direct attack?⁸⁰

The HCJ did not consider whether taking a “direct part in hostilities” include a Palestinian organization’s computer network attack (CAN) on an Israeli system? If yes, as some experts think, does Israel have the right to perform a targeted killing against the perpetrators of this attack? Is the establishment of control over financial assets of the adversary a direct participation? Are workers of a weapon manufacturer taking direct part in hostilities and could be targeted?

HJC also refrains from discussing a very important issue: the reality that almost all the Palestinian organizations have a political movement with a military wing, and even if the military wing’s members are considered to be civilians who take a direct part in hostilities, it is not clear how the political or religious leaders could be considered as taking a direct part in hostilities.⁸¹ Israel however, killed the Hamas political leaders, Sheik Ahmed Yassin on March 22, 2004, and Abdul-Aziz Rantissi on April 17, 2004.⁸² It is not clear how those leaders were taking a direct part in hostilities; was it due to their involvement in organizations whose military wing was engaged in hostile acts?

C. For Such Time

This term raises the question of when direct participation

in hostilities ends and therefore civilians who took direct part in hostilities may no longer be directly targeted? The HCJ interpreted the term “for such time” in the same method as defining two extreme groups of civilians and creating a grey zone between them.⁸³

In comparison to the interpretation of the term “direct part” the HCJ did not give examples of the grey zone between the two extremes, instead the HCJ provided a four-requirement test for the State, along with some safeguards. This is a general test for examination of legality of targeted killing:

1. The State must have strong evidence that the potential target meets the conditions of having lost their protected status;
2. State shall use less drastic measures such as arrest to stop the potential target, unless this alternative poses too great of a risk to the lives of its soldiers;
3. Immediately after the operation, State must conduct an independent and thorough investigation to determine whether the attack was justified, and in appropriate cases, the State should compensate innocent civilians for harm done;
4. State attacks must meet the proportionality requirement. This means that in advance to a targeted killing, the State ought to assess and make sure that the anticipated military advantage to be gained by the operation is greater than expected collateral damage to innocent civilians.⁸⁴

There are three different approaches to interpretation of the term “for such time.” Specific acts approach asserts that civilians lose their protection against direct attack for exactly as long as they are directly participating in specific acts amounting to hostilities. Affirmative disengagement approach states that a civilian loses his protection against direct attack from the first specific act amounting to direct participation in hostilities until he disengages from such activities in a manner objectively recognizable to the adversary. Membership approach combines the two above mentioned approaches and explains if someone is part of an armed group his status should be analyzed under the affirmative disengagement approach, and status of a civilian who does not belong to an organized armed group should be considered under the specific acts approach. It says that a member of an armed group is considered as taking part in hostilities all the time, but unorganized civilians lose their immunity only when they take a direct part in hostilities and should regain it afterwards.⁸⁵

The HCJ did not adopt the membership approach. Moreover, the HCJ and some experts criticize the specific acts approach, because it is very narrow and does not give the state the ability to fight back and prevent attacks against its citizens. They argue that this approach creates a “revolving door” problem, in which the civilians who take part in hostilities will be protected most of the time, and endanger their immunity only when they carry out any operation.⁸⁶ The criticism goes further and argues that a soldier, whom cannot know when a civilian might attack him, will suspect every civilian and

this will expose the civilian population as a whole to a greater danger.⁸⁷ Therefore, these critics do not agree to allow a civilian to regain his immunity when he has carried out an attack.⁸⁸

This interpretation, however, contradicts the ICRC commentary which interprets the term “for such time” as preparation for combat and return from combat, and once the civilian ceases to participate in attacks, he no longer presents any danger to the adversary, hence, he should regain his right to protection.⁸⁹ It is also disputed as to when the “deployment to the hostile act” began and when the “return from the hostile act” finished.⁹⁰

The HCJ seemed to adopt the affirmative disengagement approach.⁹¹ There are several problems with this adoption: how, in reality, a civilian’s disengagement from such activities is in a manner objectively recognizable to the adversary? Is the civilian supposed to announce his disengagement? Or, is he required to take positive actions to imply his disengagement? If so, what kind of actions? Perhaps this approach is realistic, when the entire armed group wishes to disengage rather than an individual civilian.⁹² In sum, the HCJ provides a very broad interpretation of Article 51(3) of Additional Protocol I and looks at the whole chain of command involved in an attack, including persons who sent the perpetrators, who decide and plan the operation.⁹³

VII. The HCJ’s test for legality of targeted killing

The HCJ provides a four-fold test to examine the legality of targeted killing in any case (the same test as they provide for the term “for such time”).⁹⁴ Here’s a summary of each of the four requirements:

A. Strong evidence

The HCJ ruled that before executing a targeted killing, the state must have strong evidence that the potential target meets the conditions of having lost their protected status.⁹⁵ The problem is that the executioners are the ones who judge the application of this vague and ambiguous requirement. In this case, the Israeli intelligence classifies the information without the possibility of its examination by an independent body (not even the Supreme Court of Israel) to determine its sufficiency.⁹⁶

On the other hand, there is an argument that in counter-terrorism context, for the defense to be effective, the best opportunity to defuse an attack is long before the attack is implemented. Therefore, there is no need for strong evidence for specific act of hostilities.⁹⁷

B. Less drastic measures

Article 57 of Additional Protocol I⁹⁸ provides that if

less drastic measures, such as arrest, can be taken to stop a potential target from posing a security threat, state must use them, unless this alternative poses too great a risk to the lives of its soldiers. The HCJ ruled that this is a requirement for testing legality of a targeted killing case.⁹⁹

This requirement raises several problems: first, this condition is from human rights law and argues that targeted killing denies an individual's right to life, fair trial, and due process. But, this condition does not specify how threat level of a potential target can be determined to know whether he should be arrested or subjected to targeted killing. HCJ's decision leaves this determination to the discretion of the Israeli army, which may abuse the test and deny the possibility of an arrest.¹⁰⁰ Moreover, the HCJ did not rule under which law civilians would be arrested and prosecuted: the war crimes, crimes against humanity, or the Israeli criminal code.¹⁰¹

Second, the question remains as to who has the authority to decide whether Israel should take less drastic measures. If this authority is given to the army and the executive branch, they have almost always argued that the area where the targeted killing occurs is under Palestinian control, and there are no less restrictive means that would not put soldiers in danger.¹⁰² The state also argues that a targeted killing is better than invasion, since it causes less damage to innocent civilians.¹⁰³

Good illustration of the problematic use of this requirement is the killing of Dr. Thabet on December 31, 2000 in Tul- Karem in area A in the West Bank.¹⁰⁴ Dr. Thabet passed almost everyday with his car through the Israeli checkpoints in this area. He was killed in his way to his clinic, when at last at the moment, he was not engaged in hostile activities.¹⁰⁵ In addition, during the second Intifada, the Israeli Army arrested hundreds of suspects in Area A, re-entered cities in Area A, encircled the area, and imposed curfews.¹⁰⁶ Therefore, it is not clear if there are no less drastic measures as Israel alleged.

Moreover, the assumption that Israel's use of targeted killing is a preventive mean to protect its civilians, as future oriented and not as a punishment of fighters, is not obvious.¹⁰⁷ Sometimes, it seems that the targeted killing is a reprisal in response to some of the Israeli population's anger and their desire for revenge. For instance, after the killing of the Fatah's activist, Hussein Abayat, on 9 November 2000, the Israeli Army spokesman stated that "Abayat is suspected of having initiated and executed numerous shooting attacks in Beit Sahur, Gilo, and al-Kader 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."¹⁰⁸ This official statement referred to past operations of the target, but does not provide any information about the immediate or future danger he posed. Therefore, there is an impression that the targeted killing was done to create and feed a public atmosphere to legitimize these practices and not to prevent a future danger.¹⁰⁹ Another example is the statement of the

Israeli Minister, Effi Eitam, on July 5, 2002 about the arrest of the Fatah leader, Marwan Barghuti. Minister Effi Eitam stated that the solution is not to arrest Barghuti but to "take him to a forest and put a gun to his head".¹¹⁰

Finally, this is a broad authority for Israeli army and government to decide on absolute necessity of a targeted killing. This authority can be easily abused. For example, the Israeli government had the authority to torture Palestinian detainees to gain information (Israel described as use of moderate physical force in the interrogation of Palestinian suspects), until in 2000, the HCJ prohibited use any kind of torture.¹¹¹ Torture was permitted if all the other methods to gain information fail, but this had become a standard method of interrogation.¹¹² Therefore, leaving the decision up to the Israeli government and army on when to apply less drastic measures is not a good solution. The court should draw a line on such a sensitive issue, before it has been abused the same as the torture case.

C. Independent and thorough investigation

The HCJ ruled that after the execution of a targeted killing, an independent and thorough investigation must be conducted immediately to determine its justifiability. In appropriate cases, the State should compensate innocent civilians for the harm done.

This requirement is not clear. What does the court mean by "an independent investigation"? The Court did not rule on involvement of a judge in these investigations. If we assume that this investigation is supposed to be conducted by the government or army, how can we expect a subordinate to rule independently on acts of his supervising authority?¹¹³ In addition, the court did not explain what the "appropriate cases" are that civilians should be compensated; are these cases in which identifications have been mistaken or cases of huge collateral damage to innocent civilians?¹¹⁴ Moreover, the HCJ did not explain how this compensation can possibly happen, since there is an Israeli domestic law which gives immunity to army acts if the act is an "act of war" in the OPT. This domestic law prevents victims, even in collateral damages, to sue the State of Israel in Israeli courts, for a tort action.¹¹⁵

D. Proportionality

There are two notions on proportionality regarding the policy of targeted killing. The first notion argues that targeted killing is presumptively disproportionate and therefore illegal; the second notion argues that targeted killing may satisfy the IHL principle of proportionality in certain cases.¹¹⁶ It should be noted that the term "proportionality" does not appear in IHL treaties even though it has a long pedigree within the laws of war.¹¹⁷

The HCJ adopted the second notion and ruled that in

a targeted killing, the State must assess in advance whether the expected collateral damage to innocent civilians is greater than the anticipated military advantage to be gained by the operation. If so, an attack is not proportional and therefore, not permitted. The HCJ provides two extremes to examine when an operation is proportional without providing examples of the grey zone between these two groups.

The HCJ examines proportionality according to three sub-requirements:

- (1) Rational link: the means are rationally selected to the desired military objectives;
- (2) Least injurious alternative: the means selected ought to cause the least possible humanitarian harm and;
- (3) Proportionality *stricto sensu*: the harm caused by a measure should stand in a reasonable proportion to its anticipated military benefits.¹¹⁸

The Court explains that the State must consider as guidance that: (1) the desired military advantage should be both “direct and anticipated” and; (2) balance between the State’s duties to protect lives of its soldiers and civilians, and its duty to protect lives of innocent civilians harmed during the attack against fighters.¹¹⁹

The targeted killing policy does not meet the rational link requirement, because as mentioned earlier, it is not clear whether every targeted killing is performed to prevent a future harm or to punish perpetrators of past attacks. Also, until situation of Israel’s control over the OPT is not fully answered, it will be difficult to take “least restrictive measures,” such as arrest and prosecution, against Palestinian fighters. Finally, the *stricto sensu* requirement raises questions such as how to evaluate a civilian’s worth. Should Israel protect its own soldiers and civilians at the cost of an uninvolved occupied people, and at what ratio?¹²⁰

VIII. Conclusion

The HCJ judgment is a pioneer decision and is considered the first real attempt to clarify the legal status and rules applicable to the issue of targeted killing. However, the HCJ judgment raises several problems and questions that must be considered.

The HCJ judgment ruled that the applicable law to the ongoing Israeli-Palestinian conflict is IHL, dealing with international armed conflict. The HCJ did not provide explanations for either of these classifications and it is not clear why international human rights law or the law of belligerent occupation will not govern the conflict, especially in a long-term occupation, such as the one of Israel in the OPT.

The HCJ’s ruling that Palestinian fighters are civilians under IHL is not so clear, since in fact, these fighters are combatants according to IHL. The HCJ provides a very broad interpretation of each of the three terms “hostility,” “take a direct part” and “for such time” in its definition of civilians

that are immune from attacks.

Even though the HCJ denies the existence of a third group as “unlawful combatant,” it recognizes, *de facto* such a group, with a cosmetic change calling it a “civilian who takes direct part in hostilities.” This group lacks the immunity of civilians and the privileges of combatants.

The HCJ ignores that Article 51(3) of the Protocol is an exception to the general rule of protected civilians and as such, must be interpreted narrowly and should be an exceptional measure when there is an extremely high probability of significant risk. This means, as long as civilians who take part in hostilities do not present a direct and immediate threat to the adversary, they should not be objects of an attack. The HCJ ruled that every targeted killing must meet four requirements to be legal, but each requirement raises problems and is unlikely to become a pragmatic solution.

In sum, the HCJ’s decision provides a legal framework that justifies killing Palestinian civilians and establishes only a weak limitation, which will fail to restrict those killings.

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1 The targeted killing policy became official after the killing of Palestinian Faction Fatah activist, Hussein Abayat, on November 9, 2000, in Beit Shaur In the West Bank. See Orna Ben-Naftali & Keren Michaeli, *We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 Cornell Int’l L.J. 233, 234 (2003-2004).

2 The Second Intifada means the Palestinian uprising that began on September 28, 2000, following the visit of the then Israeli opposition leader, Ariel Sharon, to the Al-Aqsa Mosque in Jerusalem.

3 Forty percent of the casualties were innocent civilians. The ratio between the fighters and innocent civilian casualties during targeted killing is 1.5 : 1. See B’Tselem, *Statistics: Fatalities*, available at <http://www.btselem.org/English/Statistics/Casualties.asp> (last visited Nov. 6, 2008).

4 Ben-Naftali, *supra* note 1 at 250.

5 I use the neutral term fighters instead of the term “terrorist,” which Israel uses or the term “freedom fighters,” which the Palestinians use.

6 Daniel Byman, *Do Targeted Killings Work?* 85 Foreign Aff. 95, 97 (2006) (referring to Steven Spielberg’s movie “Munich”). See also Yael Stein, *Israel’s Assassination Policy: Extra-judicial Executions*, 2 (Maya Johnson trans., The Israeli Information Center for Human Rights in the Occupied Territories, Jan. 2001) available at http://www.crimesofwar.org/onnews/btselem_extrajudicial_killi.pdf

7 Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5 Theoretical Inq. L. 111, 114 (2004).

8 *Id.*

9 The Amnesty International has defined the extra-judicial execution as “an unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extra-judicial killing is a killing which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. These killing take place outside any judicial framework.” See David Kretzmer, *Targeted Killing of Suspected Terrorist: Extra-Judicial Executions or Legitimate Means of Defense?* 16 *The European Journal of International Law*, No. 2, 171, 176 (2005).

10 Ben-Naftali, *supra* note 1 at 276; see also Kretzmer, *supra* note 9 at 174.

11 Ben-Naftali, *supra* note 1 at 460.

12 For discussion about the effectiveness of the targeted killing policy see Byman, *supra* note 6 at 98-106.

13 For discussion on the morality of the Targeted killing: see Daniel Statman, *Targeted Killing*, 5 *Theoretical Inq. L.* 179 (2004) (arguing that the targeted killing is moral), Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5 *Theoretical Inq. L.* 111 (2004) (arguing that targeted killing is immoral).

14 HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (2006), available at elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

15 Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at <http://www.unhchr.ch/html/menu3/b/93.htm>.

16 *HCJ 769/02*.

17 *HCJ 769/02* pp. 18, 21.

18 *HCJ 769/02* pp. 4, 18.

19 *Id.* at p. 26. The court referred to Article 1 of Chapter 1 of The Hague Convention (IV), Respecting the Laws and Customs of War on Land, (18 October 1907):

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”

Available at: <http://www.icrc.org/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6>.

20 *HCJ 769/02* at pp. 27-28.

21 Article 51(3) provides, “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” Available at: <http://www.unhchr.ch/html/menu3/b/93.htm>.

22 *HCJ 769/02* pp. 26.

23 *Id.* at p. 30.

24 *Id.* at p. 34, 56. See also Antonio Cassese, *On Some Merits of the Israeli Judgment on Targeted Killings*, 5 *Journal of International Criminal Justice* 339, 343 (2007).

25 *Id.* at p. 35. Per HCJ’s definitions, this group includes: civilians collecting intelligence about the enemy army; civilians transporting fighters to or from the place of combat; civilians who operate weapons to be used by the fighters, or supervise such operation or provide service to the fighters; civilians driving trucks with ammunition to the place of combat; civilians deliberately serving as human shields to the fighters; civilians who enlist fighters or send them to commit hostilities, and civilians who decide or plan armed hostilities.

26 *Id.* at p. 34. The HCJ provides examples of this group as: civilians who aid fighters by general strategic analysis; civilian who provide the fighters with general logistic or monetary support, and civilians who distribute propaganda for the fighters. See also William J. Fenrick, *The Targeted Killings Judgment and the Scope of Direct Participation in hostilities*, *Journal of International Criminal Justice* 5 332, 336 (2007).

27 *Id.* at p. 39. See also Cassese, *supra* note 24 at 343-44.

28 *Id.*

29 *HCJ 769/02* at p. 40. See also Cassese, *supra* note 24 at 344, Michelle Lesh, *Case Notes, The Public Committee Against Torture in Israel v. The Government of Israel, The Israeli High Court of Justice Targeted Killing Decision*, 8 *Melb. J. Int’l L.* 373, 386-87 (2007).

30 *Id.* at p. 46.

31 *Id.* at p. 60. Note that the four-fold test is the general test of the targeted killing legality meanwhile the same test apply to the examination of the term “for such time”.

32 *Id.* at p. 16. See also Lesh, *supra* note 29 at 380.

33 United Nations Charter, Article 51 provides, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” Available at <http://www.un.org/aboutun/charter/>.

34 ICJ, *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, 43 *ILM* 1009 p. 139 (2004).

35 J. Nicholas Kendall, *Israeli Counter-Terrorism: Targeted*

Killing” under *International Law*, 80 N.C. L. Rev. 1069, 1979-1080 (2001-2002).

36 Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 Case W. Res. J. Int’l L. 319, 323 (2004).

37 Kendall, *supra* note 35 at 1086.

38 Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, 525 (Berlin: BWV, Horst Fischer et al eds., 2004).

39 W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 Colum. J. Transnat’l L. 711, 718 (2006-2007).

40 Ben-Naftali, *supra* note 1 at 290.

41 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, available at http://www.knesset.gov.il/process/docs/heskemb_eng.htm.

42 *Geneva Convention Related to the Protection of Civilians Persons in Time of War*, Aug. 12, 1949, 75 U.N.T.S. 287, available at

<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5>.

43 Dori Gold, *Legal Acrobatics: The Palestinian Claim that Gaza is Still “Occupied” Even After Israel Withdraws*. Available at: <http://www.jcpa.org/brief/brief005-3.htm>.

44 Sari Bashi & Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza*, 29-56, 97-98 (Gisha – Legal Center for Freedom of Movement, January 2007) available at: <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>.

45 Ben-Naftali, *supra* note 1 at 234.

46 *Id.* at 243.

47 Lesh, *supra* note 29 at 381.

48 Article 2 of the Geneva Convention of 1949 provides: 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.

49 Article 4(1) provides,

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the

Charter of the United Nations.

50 Ben-Naftali, *supra* note 1 at 463-64.

51 Article 25 of the Hague Regulation states “the attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which undefended is prohibited.” *See also* Jean-Marie Henckaerts & Louise Doswald-Beck, *ICRC, Customary International Humanitarian Law*, 3 (Cambridge University Press, Vol. 1, 2005).

52 Article 50 (1) of Additional Protocol I. *See also* Henckaerts, *supra* note 51 at 24.

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

54 Article 13 in the First and Second Geneva Conventions of 1949, and Article 4 in the third Geneva Convention of 1949 Relative to Treatment of Prisoner of War.

55 *HCJ 769/02* p. 24.

56 Antonio Cassese, *Expert Opinion on Whether Israel’s Targeted Killing of Palestinian Terrorists Consonant with International Humanitarian Law*. at p. 4.

57 Roy S. Schondrof, *The Targeted Killing Judgment, A Preliminary Assessment*, 5 Journal of International Criminal Justice 301, 306 (2007). *See also* Kretzmer, *supra* note 9 at 194.

58 Ben-Naftali, *supra* note 1 at 271. *See also* Kretzmer, *supra* note 9 at 210.

59 *HCJ 769/02* at p. 11, 25

60 Cassese, *supra* note 56 at p. 5.

61 Schondrof, *supra* note 57 at 305.

62 The Additional Protocol I gives a more flexible definition of combatants, a definition that can be applied to the Palestinian fighters.

63 *HCJ 769/02* at p. 30.

64 The Article provides,

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) During each military engagement, and

(b) During such time as 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.

65 The original article was Article 58 with the title “Cessation of Protection.” The Article states “the protection due to persons, building, material and means of transport engaged in civil defence tasks shall not cease unless they are used to

- commit, outside those duties, acts harmful to the enemy. Protection may, however, cease only after a warning, specifying in all appropriate cases a reasonable time limit, has remained unheeded.” The Article goes further with examples of acts which will not cease the protection. See ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary*. 75 (Geneva, October 1973).
- 66 Cassese, *supra* note 24 at 339-40.
- 67 International Committee of the Red Cross and the TMC Asser Institute, *Second Expert Meeting on the Notion of Direct Participation in Hostilities*, 24-25 (summary report, drafted by Nils Melzer, The Hague, 25-26 October 2004).
- 68 International Committee of the Red Cross and the TMC Asser Institute, *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, 19 (summary report, drafted by Nils Melzer, Geneva 23-25 October 2005). See also ICRC, *Commentary on the Additional Protocol of 1977 to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I)*, 1943 page 618 (Geneva 1987); Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, *New Rules For Victims Of Armed Conflict, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 302 (Martinus Nijhoff Publishers 1982).
- 69 *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, *supra* note 68 at 19-20.
- 70 *HCJ 769/02*, at p. 33.
- 71 ICRC, *supra* note 68 at 1942. See also Kretzmer, *supra* note 9 at 192.
- 72 ICRC, *supra* note 68 at 1943.
- 73 Henckaerts, *supra* note 51 at p. 22.
- 74 Cassese, *supra* note 56 at pp 35-37.
- 75 *Id.* at ¶ 22.
- 76 Lesh, *supra* note 29 at p. 384.
- 77 ICRC, *supra* note 68 at 1944.
- 78 *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, *supra* note 68 at 28. See also *Second Expert Meeting on the Notion of Direct Participation in Hostilities*, *supra* note 67 at 25.
- 79 Schondrof, *supra* note 57 at p. 308.
- 80 *Id.* at 332-33. See also Schmitt, *supra* note 38 at p. 507.
- 81 Kretzmer, *supra* note 9 at p. 200.
- 82 See http://news.bbc.co.uk/1/hi/talking_point/3635913.stm
- 83 See page 8.
- 84 *HCJ 769/02* at p. 40. See also Cassese, *supra* note 24 at p. 344, Lesh, *supra* note 29 *et seq* 386.
- 85 *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, *supra* note 78 at p. 59.
- 86 Kretzmer, *supra* note 9 at 193. See also Fisher, *supra* note 39 at 724-25.
- 87 Schmitt, *supra* note 38 at 510.
- 88 *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, *supra* note 68 at 60.
- 89 ICRC, *supra* note 68 at 1944.
- 90 *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, *supra* note 68 at 66.
- 91 *HCJ 769/02* at p. 40
- 92 *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, *supra* note 68 at 60.
- 93 Lesh, *supra* note 29 at p. 384.
- 94 See pp. 25-26.
- 95 *HCJ 769/02* at p. 60
- 96 Lesh, *supra* note 29 at p.388.
- 97 Schmitt, *supra* note 38 at p.524.
- 98 See note 15.
- 99 *HCJ 769/02* at p. 40.
- 100 Lesh, *supra* note 29 at p.388.
- 101 *Id.*
- 102 Kendall, *supra* note 35 at 1086.
- 103 Statman, *supra* note 13 at p. 187.
- 104 Area A is supposedly under full Palestinian control.
- 105 Ben-Naftali, *supra* note 1 at 280. See also B’Tselem, *supra* note 6 at 6.
- 106 *Id.* at 249, 261. Also, this shows the importance of involvement of an international body (such as UN) to determine whether Israel has control over the OPT or not.
- 107 Guiora, *supra* note 36 at 329; see also Kendall, *supra* note 35 at 1082.
- 108 Ben-Naftali, *supra* note 1 at p. 250.
- 109 *Id.*
- 110 *Id.* at p. 240.
- 111 *HCJ 5100/94*, Public Committee Against Torture in Israel v. The State of Israel, September 6, 1999.
- 112 Kretzmer, *supra* note 9 at 182-83.
- 113 Lesh, *supra* note 29 at p. 390.
- 114 *Id.* at p. 391.
- 115 Civil Wrongs (Liability of the State) Law, commonly known as “the Intifada law.”
- 116 Fisher, *supra* note 39 at 729.
- 117 Amichai Cohen & Yuval Shany, *A Development of Modest Proportions, The Application of the Principle of Proportionality in the Targeted Killing case*, 5 *Journal of International Criminal Justice* 310, 311 (2007).
- 118 *HCJ 769/02* at pp. 42-46. See also Cohen, *supra* note 117 at p. 316.
- 119 *HCJ 769/02* at pp. 42-46.
- 120 Cohen, *supra* note 117 at p.316.