

CURRENT LEGAL DEVELOPMENTS

Israeli Civilians versus Palestinian Combatants? Reading the Goldstone Report in Light of the Israeli Conception of the Principle of Distinction

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Abstract

Goldstone's recent retraction can leave the reader of the report that bears his name somewhat perplexed. Indeed, if the deliberate intent to target civilians could be discussed in some specific attacks listed, such a report nevertheless describes a pattern of behaviour that cannot be swept aside without disregarding the order of priorities set by the Israeli legal system itself. Through analysis of the new Israeli military code of ethics as well as the Israeli Supreme Court case law, this paper examines how civilians in Gaza were deliberately put at risk by a specific interpretation breaking down the flat rule of civilian immunity into a more complex construction opposing the Israeli soldiers' right to life to the rights of an 'enemy population'.

Key words

Operation Cast Lead; civilians; combatants; Goldstone

If I had known then what I know now, the Goldstone Report would have been a different document . . . [T]he investigations published by the Israeli military and recognized in the U.N. committee's report . . . indicate that civilians were not intentionally targeted as a matter of policy.¹

Judge Goldstone's recent retraction is as spectacular as the main conclusion of the Fact Finding Mission report that bears his name:

While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self defence, the Mission

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1 R. Goldstone, 'Reconsidering the Goldstone Report on Israel and War Crimes', *Washington Post*, 1 April 2011, available online at www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html.

considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.²

Beyond the issue of which facts prompted Judge Goldstone to change his mind, since the UN committee of experts' report's assessment of Israel's investigations is far more critical than his own characterizations of them,³ one can be surprised by this all-or-nothing conception of intention. In terms of the Rome Statute of the International Criminal Court, intention need not be premeditated.⁴ The 'mental element' exists when 'In relation to a consequence, [a] person means to cause that consequence or is aware that it will occur in the ordinary course of events'.⁵ In this regard, the 'zero-risk-to-soldiers' policy pursued by the Israeli army during the Gaza war,⁶ which sets aside the traditional balance between the anticipated collateral damage and the military advantage to focus on the extent to which the risk of collateral damage can be increased in order to lower the risks run by Israeli citizens, is abundantly documented in the Goldstone Report. The figures provided by Professor Yagil Levy are telling: the casualty ratio between Israeli Defence Forces soldiers and Palestinian civilians was 1:6 during the First Intifada, and increased to 1:9 during the Al-Aqsa Intifada. After the Israeli disengagement from the Gaza Strip in August 2005, the ratio grew to 1:33. However, during Operation Cast Lead, the ratio grew to a staggering 73 Palestinian civilians killed for every Israel Defense Forces (IDF) soldier.⁷ Taken at face value, those figures seem to indicate that not only is the care taken of civilians less than the care taken of Israeli soldiers, but it is also *undermined* by the policy adopted to keep the latter safe.

Goldstone's peremptory rejection of any deliberate attack against civilians leads to further questioning. For example, if only combatants were deliberately attacked, shall one now analyse the attacks launched against the Gaza police as attacks against a legitimate military target? In other words, what does the category of combatants encompass? According to the Palestinian NGOs PCHR and Al Mezan, fewer than 17 per cent of the Palestinians killed during the military operations were combatants.⁸ Conversely, the Israeli armed forces claim that at least 60 per cent, and possibly

2 See Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict, Doc. A/HRC/12/48, 15 September 2009, para. 1680 (hereafter, Goldstone Report).

3 See Human Rights Council, Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9, Doc. A/HRC/16/24, 18 March 2011.

4 See J. Dugard, 'Where Now for the Goldstone Report?', 6 April 2011, available online at www.newstatesman.com/blogs/the-staggers/2011/04/goldstone-report-israel-rights.

5 Rome Statute of the International Criminal Court, Art. 30(2)(b).

6 See, e.g., A. Pfeffer, 'IDF Officer: Gaza Civilians Risked to Protect Israel Troops during War', *Haaretz*, 3 February 2010, available online at www.haaretz.com/news/idf-officer-gaza-civilians-risked-to-protect-israel-troops-during-war-1.262686.

7 Y. Levy, 'Why Did the Killing Increase?' (in Hebrew), *Haaretz*, 18 January 2009, available online at <http://www.haaretz.com/hasite/spages/1056373.html>.

8 PCHR, 'Confirmed Figures Reveal the True Extent of the Destruction Inflicted upon the Gaza Strip', press release, 12 March 2009, available online at www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=1073:confirmed-figures-reveal-the-true-extent-of-the-destruction-inflicted-upon-the-gaza-strip-israels-offensive-resulted-in-1417-dead-including-926-civilians-255-police-officers-and-236-fighters&catid=36:pchrpressreleases&Itemid=194; Al Mezan Center for Human Rights, 'Cast Lead Offensive in Numbers', at 7, available online at www.mezan.org/upload/8941.pdf.

as many as three out of four, of those killed were combatants.⁹ The mere fact that PCHR provides a number of 1417 victims while the Israeli armed forces claim that ‘only’ 1166 Palestinians were killed during the military operations does not justify such a gap, which can only arise from a different conception of the very notions of civilians and combatants and therefore from a different definition of the principle of distinction between these two categories. This assumption leads to a last question: is the principle of distinction – defined as an ‘intransgressible principle of international customary law’¹⁰ – subject to such variations? A thorough study of the Israeli definition of the principle of distinction proves that the answer does not lie in question itself. The Kasher and Yadlin doctrine is the most operational example in this perspective. The ‘military ethics of fighting terror’ that Kasher and Yadlin articulate and defend were indeed developed and first presented in 2003, when they were members of a team at the IDF College of National Defense, and their recommendations were subsequently approved in principle and employed as training guidelines.¹¹ Kasher himself confirmed in an interview that Operation Cast Lead was conducted in the spirit of the new code that he co-authored with Yadlin and that ‘the norms the commanders applied in Gaza were generally proper’.¹² This first illustration must nonetheless be complemented by an analysis of the most uncontroversial legal sources in the Israeli legal system: the Israeli Supreme Court judgments. Both endeavour to break down the flat rule of civilian immunity into a more complex rule recognizing an Israeli soldier’s right to life on the one hand while encompassing within the definition of ‘unlawful combatants’, on the other hand, large parts of the Palestinian population.

I. THE ‘DUTY’ TO PROTECT THE SOLDIERS’ LIVES VERSUS THE DUTY TO SPARE CIVILIANS’ LIVES

During the first phase of the *Targeted Killing* case, in response to the question presented by the applicant’s representative as to why Israel does not arrest rather than assassinate targeted people, Justice Cheshin said ‘my son, not yours, goes into that area and I do not want to endanger him’.¹³ In other words, the safety of ‘our’ soldiers takes precedence over the safety of ‘their’ civilians. Even if one should not overestimate the legal implications of such a statement, it reveals the close ties between Israeli society and its defence forces. The reasons are easy to understand. In the words of the president of Israel, pardoning GSS agents for beating to death a suspect under interrogation, ‘[i]n the special conditions of the State of Israel we cannot allow ourselves any relaxation of effort, nor permit any damage to be caused to the defence

9 IDF spokesperson, ‘Majority of Palestinians Killed in Operation Cast Lead: Terror Operatives’, 26 March 2009, available online at <http://dover.idf.il/IDF/English/News/today/09/03/2602.htm>.

10 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. (I), 226, 257.

11 A. Kasher and A. Yadlin, ‘Assassination and Preventive Killing’, 25 SAIS Review, Winter–Spring 2005, 45.

12 See A. Harel, ‘The Philosopher Who Gave the IDF Moral Justification in Gaza’, *Haaretz*, 6 February 2009, available online at www.haaretz.com/hasen/spages/1062127.html.

13 Quoted by A. Feldman, ‘The Law under Fire’, *The Lawyer*, June 2002, 12.

establishment and to those loyal men who guard our people'.¹⁴ It does not seem necessary to explore deeply what those special conditions are. Suffice it to recall that a majority of the Supreme Court justices were of the opinion that:

The danger to the Israeli public, to its security and to its life is a clear and present danger The source of the danger, it should be remembered, is not merely the Palestinian Authority but – and perhaps mainly – the terror organizations and the Palestinian public in its entirety.¹⁵

The Kasher and Yadlin doctrine must be understood in this context. In an endeavour to substitute a system of rights for a utilitarian pecking order of interests, this doctrine indeed offers a new ethical appraisal of the traditional principle of distinction between civilians and combatants, which turns this 'us/them' dichotomy into practical guidance for military action. The first step in this direction is to subject the state's external obligations towards enemy civilians to the fulfilment of its internal prime duty to provide its citizens with effective defence. Such an obligation is even reinforced for states facing terrorism, since the danger posed by terror is new and of a special nature.¹⁶

1.1. From a state's duty to protect its citizens to a soldier's rights to life

In the Kasher and Yadlin doctrine, the most important aspect of the relationship between a state and its citizens is the obligation of self-defence, which requires it to 'protect its citizens . . . from any danger to their life, health, security, and well-being resulting from acts of violence, in both the short and long term'.¹⁷ In this doctrine, the obligation of self-defence is based on a simple rationale: an effective defence of life and well-being is a necessary condition for maintaining the democratic way of life.¹⁸ To uphold this system, the state must preserve and defend the conditions that enable it to exist. The most obvious of these conditions is the very fact that the citizen is alive. In this perspective, the distinction between letting some of its citizens die and killing them is of no crucial moral significance. The authors explain that, from the point of view of a democratic state, a decision to let citizens die when they can and should be effectively protected is tantamount to a decision to kill them.¹⁹

The shift from the state's obligation to protect the lives of its citizens to the state's obligation to protect the lives of its soldiers rests, in the Kasher and Yadlin

14 See HCJ, 428/86, *Barzilai v. Israel*, 40(3) P.D. 505, 1986.

15 See, HCJ, *Manning v. Attorney-General*, HCJ 7052/03, 14 May 2006, Opinion of Vice-President Emeritus M. Cheshin, para. 110.

16 See A. Kasher and A. Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective', (2005) 4 *Journal of Military Ethics* 8.

17 A. Kasher, 'Operation Cast Lead and Just War Theory', *Azure*, Summer 2009, 55. See also Kasher and Yadlin, *supra* note 16, at 8. A. Kasher, 'A Moral Evaluation of the Gaza War: Operation Cast Lead', 9 *Jerusalem Center for Public Affairs*, 4 February 2010, available online at www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=1&DBID=1&LNGID=1&TMID=1111&FID=378&PID=0&IID=3345&TTL=A_Moral_Evaluation_of_the_Gaza_War_%E2%80%93_Operation_Cast_Lead.

18 Kasher and Yadlin, *supra* note 16, at 8.

19 *Ibid.*, at 20.

doctrine, on a 'common-sense' view. A combatant is a citizen in uniform, 'his blood is as red and thick as that of citizens who are not in uniform. His life is as precious as the life of anyone else'.²⁰ Under the cover of a classical conflict of norms, the balance to be struck actually confronts two very different interests embodied in two very different systems of law. The duty to protect the lives of civilians concerns the humanitarian law's external horizontal relations between combatants and non-combatants. The state's duty to protect the lives of its soldiers relates to the human-rights law's internal vertical relations between a state and its citizens. Flowing from a construction equalizing in the internal sphere the status of combatants and that of civilians, such a conflict thus seems to be artificial. The Kasher and Yadlin doctrine, however, takes it for granted that no moral view would ignore the individuals who are members of the armed forces.²¹ On the contrary, given that human rights are attributed to every person because of his human nature, irrespective of assumption or performance of any obligations, soldiers, as all human beings, are entitled not to be arbitrarily deprived of their lives.²² This right must be appropriately protected by the state even when he/she is directly involved in hostilities. Even though the notion of risk and the potential of death are embedded in every military operation, the soldiers' consent to membership in a mission should indeed be seen as consent to the risk of death, but not to its certainty. In the Kasher and Yadlin doctrine, the whole notion of 'risk' is annulled as soon as this potential ceases to be a potential and is transformed into a certainty.²³

The use of human rights to equalize the status of combatants and that of civilians leaves no doubt about Kasher and Yadlin's endeavour to replace the traditional distinction between combatants of both sides on the one hand and civilians of both sides on the other by a group-to-group relation mediated by the state's duty to protect its citizens, whatever their legal status. Soldiers' right to life only derives from their membership of a national group. Citizenship turns into a screen, preventing the right to life from being tempered by the humanitarian law's principle of distinction. In this construction, the intention to avoid harming civilians cannot be measured by the acceptance of risks to the combatants.²⁴ The two spheres are totally separated: killing a soldier is legal only from an enemy's point of view. From an internal point of view, even the likelihood of the forfeit of life can render a state accountable for violation of its obligation to respect and ensure that particular right. Not only are states obliged not actively nor arbitrarily to deprive their citizens of a specific right,

20 Ibid., at 17. Kasher, 'Operation Cast Lead and Just War Theory', *supra* note 17, at 66; Kasher, 'A Moral Evaluation of the Gaza War', *supra* note 17. See also A. Yadlin, 'Ethical Dilemmas in Fighting Terrorism', (2004) 4 *Jerusalem Center for Public Affairs Brief*, available online at www.jcpa.org/brief/brief004-8.htm.

21 A. Kasher, 'The Principle of Distinction', (2007) 6 *Journal of Military Ethics* 152, at 163. See also D. Statman, 'Targeted Killing', (2004) 5 *Theoretical Inquiries in Law* 179, at 189–90. Cf. L. Bomann-Larsen, 'Licence to Kill? The Question of Just vs. Unjust Combatants', (2004) 3 *Journal of Military Ethics* 142, at 143–5.

22 E. Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians', (2006), 39 *Israel Law Review* 83. See also S. Solomon, 'Targeted Killings and the Soldiers' Right to Life', (2007) 14 *ILSA Journal of International and Comparative Law* 108.

23 Solomon, *supra* note 22, at 109; Kasher, *supra* note 21, at 164.

24 See, on this point, H. A. Frantzen, "'Incident at a Roadblock": Get Used to It!', (2003) 2 *Journal of Military Ethics* 78, at 78–81; J. Bethke Elshstain, *Just War against Terror* (2004), 67–9; M. Walzer, *Arguing about War* (2004), 136–7.

but they are also held responsible for infringement of human-rights law once they do not prevent their citizens from entering life-threatening situations or, in other words, for establishing the crucial link that led to these soldiers' deaths.²⁵

Of course, states have a very basic obligation to protect their own citizens. One could even easily acknowledge that:

each side in a war quite naturally views its soldiers not as helmeted warriors but as 'our kids,' young, pure, and innocent, who have been trained and issued uniforms by the state and who find themselves endangered by a cruel enemy.²⁶

As long as this internal vertical relation between a state and its citizens does not collide with the external horizontal relations between combatants and non-combatants, a dualist perspective would support the idea that a decentralized system of implementation of international norms is, after all, embedded in the very nature of international law. Difficulties arise when the rights and duties attached to citizenship retroact on the relations between belligerents in an armed conflict.

1.2. The impact of the soldier's right to life on the principle of distinction

The soldier's right to life in Kasher and Yadlin's doctrine is not merely a principle determining, *ex post facto* and before domestic jurisdictions, the scope of the state's responsibility for a particular decision. On the contrary, it turns into practical guidance for military action, allowing combatants 'to jump the queue for their own safety – so that their safety comes before the safety of civilians'.²⁷

Under this formulation, the principle of discrimination seems partly a matter of considering consequences, blurring the distinction between the two *jus in bello* principles: discrimination, which is deontological, and proportionality, which is consequentialist.²⁸ Moreover, in this construction, not only is the principle of proportionality invoked twice – for the protection of civilians and the reduction of their casualties, but also for the protection of soldiers' lives²⁹ – but its determination will eventually depend on the very location of the field of operation.

Undermining the humanitarian foundations of the principle of distinction through a debatable interpretation of the human-rights philosophy, which, according to the authors, is based on 'the "common-sense view" that our obligations to help others differ according to the relationships in which we stand to them, such

25 Solomon, *supra* note 22, at 111–14; Benvenisti, *supra* note 22, at 89–90, 93. See also, concerning the link between the state and its citizens, HCJ, *Physicians for Human Rights v. The Commander of IDF Forces in the Gaza Strip* [the *Rafah* case], HCJ 4764/04, 30 May 2004, para. 33: 'Israel has a duty to protect its citizens. It does not forfeit this duty because some citizens are "prepared to take the risk." The state remains responsible for the safety of its citizens, and it must do its utmost to return them safely to Israel.'

26 See A. Margalit and M. Walzer, 'Israel: Civilians and Combatants', 56 *New York Review of Books*, 14 May 2009.

27 *Ibid.*

28 S. Lee, 'Double Effect, Double Intention, and Asymmetric Warfare', (2004) 3 *Journal of Military Ethics* 247. See also R. D. Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', (2009) 34 *YJIL* 47, at 75ff.

29 A. Kasher, *Military Ethics* (1996), 57–8. See also Solomon, *supra* note 22, at 106.

as being their parents, other family members, friends, fellow citizens, and so on',³⁰ this doctrine indeed adopts for a postulate that Israel is bound by a hierarchy of duties towards different populations. Israel's special obligations towards its citizens 'far exceed its duties toward all human beings as such'.³¹ Consequently, they stand on the first and highest tier of this hierarchy.³² Just below them, on the second tier, are 'residents of the state who are not citizens, such as permanent residents, foreign workers, visiting tourists, etc. These are all the people who are found within Israel's international borders (the Green Line)'.³³ On the third tier are 'the residents of the territories over which Israel has had effective control since the Six Day War, who are not Israeli citizens'.³⁴ On the fourth tier, 'which lies far below the preceding one', are residents of territories that Israel does not effectively control and who are not Israeli citizens.³⁵

The state's order of priorities when carrying out military activities lines up with the order of duties it has towards these differentiated groups. Since Israeli citizens occupy the first tier in the Israeli human-rights hierarchy, the state's prime duty is to cause minimum injury to their lives when they do not directly participate in the hostilities. Then comes, in the order of priority proposed, the duty to cause minimum injury to the lives of other persons (outside the state) who are not involved in terror when they are under the effective control of the state; the duty to cause minimum injury to the lives of the combatants of the state in the course of their combat operations; the duty to cause minimum injury to the lives of other persons (outside the state) who are not involved in terror, when they are not under the effective control of the state; and the duty to cause minimum injury to the lives of other persons (outside the state) who are indirectly involved in terror acts or activities. The last priority is to cause 'injury as required' to the liberties or lives of other persons (outside the state) who are directly involved in terror acts or activities.³⁶

In this construction, the classic interplays between humanitarian law and human-rights law during armed conflicts leave room for a systemic conflict between these two branches of law, organized in order to justify the casualties suffered by the civilian population. The distinction between civilians and combatants, and thus the extent of the protection owed to the civilian population under humanitarian law, is subject to the extent of control a state has over a territory – a criterion that is only relevant under human-rights law.

On the one hand, when the hostilities are conducted within an area under the effective control of the state, the 'package of the state duty' to minimize injury to persons under its effective control is heavier than the 'package of the state duty' to minimize combatant casualties during combat.³⁷ To temper such a general

30 Kasher and Yadlin, *supra* note 16, at 19–20; Kasher and Yadlin, *supra* note 11, at 52–3.

31 Kasher, 'Operation Cast Lead and Just War Theory', *supra* note 17, at 65.

32 *Ibid.*, at 65–6.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 Kasher and Yadlin, *supra* note 11, at 49.

37 Kasher and Yadlin, *supra* note 16, at 17.

statement, one should nevertheless be precise that, according to the order of priorities described above, only soldiers directly participating in hostilities are considered as genuine combatants. Those who do not directly participate in hostilities are assimilated to civilians – citizens of the state entitled to full protection of their right to life.³⁸ Moreover, the combatants should, in any event, give preference to the duty to protect the life of a single fellow citizen over the duty to respect the life of persons – non-citizens – in the vicinity of a terrorist, even if ‘the collateral damage caused in the course of protecting him or her is much higher in number’.³⁹ To those who believed that the equality of rights of every person living under the jurisdiction of the state lies at the heart of the human-rights system, Kasher and Yadlin reply:

To be sure, the state does have the moral duty to respect the human dignity of those bystanders; however, the state has the moral duty to respect the human dignity of its citizens as well as the additional moral duty to protect their civil rights, including their right to have an effective state defense of their life.⁴⁰

When law is reduced to mathematics, two duties are superior to one and the state is thus permitted to cause harm to non-citizens for the sake of preventing harm to citizens.⁴¹

On the other hand, when the state does not effectively control the territory in which the hostilities are being conducted, the protection of the soldiers’ lives has priority over the protection of civilians’ lives. The justifications offered by Kasher and Yadlin defy the legal logic enshrined in the principle of distinction: when a state does not control a territory, it does not bear the responsibility for properly distinguishing between dangerous individuals and harmless ones.⁴² Jeopardizing combatants rather than bystanders during a military act against a terrorist would mean shouldering responsibility for the mixed nature of the vicinity ‘for no reason at all’.⁴³ Consequently, ‘soldiers are not required to endanger their own lives in order to reduce the risk of harming a terrorist’s neighbors’.⁴⁴ Not only is the state no longer obligated to endanger the lives of its own soldiers in order to attempt to further such a separation, but it is forbidden to do so.⁴⁵

This transfer of responsibility and military risks, and the subsequent shift from the state’s obligation to take precautions in attack⁴⁶ to the enemy combatants’ obligation to take precautions against the effect of attacks⁴⁷ seems to be a classic feature in Israeli legal discourse. For example, one can read in the *Physicians*

38 Kasher, *supra* note 21, at 159–60.

39 Kasher and Yadlin, *supra* note 11, at 53.

40 *Ibid.* See also Kasher and Yadlin, *supra* note 16, at 20.

41 See on this point the criticisms raised by B. Haydar, ‘The Ethics of Fighting Terror and the Priority of Citizens’, (2005) 4 *Journal of Military Ethics* 55.

42 Kasher, ‘Operation Cast Lead and Just War Theory’, *supra* note 17, at 66; Kasher, ‘A Moral Evaluation of the Gaza War’, *supra* note 17.

43 Kasher and Yadlin, *supra* note 16, at 18.

44 Kasher, ‘Operation Cast Lead and Just War Theory’, *supra* note 17, at 69.

45 *Ibid.*, at 66.

46 Additional Protocol I to the Geneva Conventions, 1977, Art. 57.

47 *Ibid.*, Art. 58.

for *Human Rights v. Prime Minister* case judged by the Israeli Supreme Court on 19 January 2009 – in the course of the hostilities in Gaza – that:

It is our hope that the state will indeed do its very best to comply with Israeli and international law, in order to alleviate the suffering of the civilian population in the Gaza Strip, which has been seriously affected by the combat operations. This suffering is a result of the conduct of the cruel terrorist organization that controls the Gaza Strip and operates from within the civilian population while endangering it and abandoning it to its fate.⁴⁸

In other words, such a ‘cruel terrorist organization’ coerces the Israeli forces to attack targets in ways that would necessarily harm civilians. Likewise, the Israeli report on the operation in Gaza released by the Ministry of Foreign Affairs in July 2009 states that:

in many cases, the IDF could not forego a legitimate military objective without undermining its mission and jeopardizing both its soldiers and Israeli civilians. In those circumstances, the result of Hamas’ approach was to make it difficult, and sometimes impossible, for IDF forces to avoid harm to civilians and civilian structures.⁴⁹

Such rhetoric, in which ‘terrorists’ choose the punishment of their own fellow nationals, totally eliminates the Israeli army as the intervening agent,⁵⁰ rendering meaningless Article 51(8) of Additional Protocol I to the Geneva Convention, which states that a failure by the defending actor to abide by its obligations with respect to the civilian population does not alter an attacking state’s obligations to take the precautionary measures provided for in Article 57.⁵¹ This obligation is yet owed by the combatants directly to those who are uninvolved in the hostilities. It is not mediated by the actions of the ‘terrorists’.⁵² Accordingly, civilian bystanders living in a mixed vicinity should not bear a responsibility that the attacking forces refuse to shoulder.⁵³ In a situation in which soldiers must either take excessive risks in getting close enough to a target to avoid collateral damage or else risk excessive collateral damage, as long as the attacking forces are in no immediate danger if they do not carry out the attack, then they need not take those risks, but ought to cancel the attacks.⁵⁴

More surprisingly, even the implementation of the customary humanitarian-law requirement to issue effective advance warning of attacks that may affect the civilian population unless circumstances do not permit⁵⁵ paradoxically reinforces, in the

48 See HCJ, *Physicians for Human Rights and Others v. Prime Minister of Israel and Others*, HCJ 248/09, 19 January 2009, para. 27.

49 Israeli Ministry of Foreign Affairs, ‘The Operation in Gaza, Factual and Legal Aspects’, July 2009, 56. See also 140–1.

50 G. P. Fletcher, ‘Collective Guilt and Collective Punishment’, (2004) 5 *Theoretical Enquiries in Law* 163, at 165–6.

51 See on this point D. H. Fischer, ‘Human Shields, Homicides, and House Fires: How a Domestic Law Analogy Can Guide International Law Regarding Human Shields Tactics in Armed Conflict’, (2007) 57 *AULR* 489.

52 Lee, *supra* note 28, at 249.

53 Haydar, *supra* note 41, at 57.

54 A. P. Rogers, ‘Zero-Casualty Warfare’, (2000) 837 *IRRC* 179; H. E. Shamash, ‘How Much Is Too Much? An Examination of the Principle of *Jus in Bello* Proportionality’, (2005–06) 2 *I.D.F. Law Review* 124.

55 Art. 57(2)(c) of Additional Protocol I. According to the ICRC, Article 57(1) codifies the principle of precautions in attack and Art. 57(2)(c) is a rule of customary international law applicable to international and non-international armed conflict. See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian*

Kasher and Yadlin doctrine, the transfer of military risks to the civilian population. In Kasher's words:

If you look at non-combatants in a territory where one does not have effective control and have already made a series of warnings that are known to have been effective, then the lives of the troops come first The person who is afraid his home would be looted does not create by his odd behavior a reason for jeopardizing soldiers' lives.⁵⁶

In this construction, if the warned population stays in the battle zone or in close proximity to military objectives, it takes the calculated risk of possible injury and, thus, by analogy with the voluntary human-shield regime, bears the responsibility for such a risk. The humanitarian-law principle according to which those who qualify as civilians are entitled to protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities and location may expose them to an increased risk of incidental injury and death,⁵⁷ is set aside without a proper assessment of the effectiveness of the warnings provided. Indeed, the fact that, during Operation Cast Lead, civilians were forced to remain in an enclosed area that was the subject of ongoing aerial, naval, and ground-based shelling because the closure of the borders prevented relocation to avoid the conflict;⁵⁸ that since the UN shelters, the UNRWA compound, or the al-Quds hospital have also been the objects of attacks⁵⁹ civilians were being asked to leave their homes to go to places that, as far as they could reasonably assess, were already in much more danger than they were in their own homes;⁶⁰ that people who were physically disabled, too frail, or deaf could not respond to the warning;⁶¹ or simply that phone calls in the morning saying 'this is not a nightmare' could not reasonably be interpreted as a warning,⁶² is not discussed. According to Kasher, 'The person who does not know where to go is a myth'.⁶³ To say the least, not only is the care taken for civilians *less* than the care taken for Israeli soldiers, but it is also *undermined* by a policy adopted to keep the latter safe. Examples drawn from the Report of the United Nations Fact Finding Mission on the Gaza Conflict (hereafter, Goldstone Report) eloquently illustrate this point.

Law: Rules (2005), 51, 62. For a description of the warnings provided by the IDF in relation to attacks during Operation Cast Lead, see Israeli Ministry of Foreign Affairs, *supra* note 49, at 99–100; Goldstone Report, *supra* note 2, paras. 498ff.

56 Kasher, 'A Moral Evaluation of the Gaza War', *supra* note 17.

57 International Committee of the Red Cross, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International humanitarian Law', May 2009, at 40, available online at www.icrc.org/web/eng/siteeng.nsf/html/review-872-p991.

58 See J. Dugard, 'No Safe Place', report of the Independent Fact Finding Committee on Gaza presented to the League of Arab States, 30 April 2009, §298.

59 Goldstone Report, *supra* note 2, para. 516; see also Israeli Ministry of Foreign Affairs, *supra* note 49, at 128–39.

60 Goldstone Report, *supra* note 2, para. 513.

61 *Ibid.*, para. 520.

62 See Dugard, *supra* note 58, para. 288.

63 Kasher, 'A Moral Evaluation of the Gaza War', *supra* note 17.

1.3. The practical consequences of the duty to protect the soldiers' lives in Operation Cast Lead

In Kasher and Yadlin's writings, Gaza is given as an example of a territory that Israel does not effectively control and, consequently, in which the protection of the soldiers' lives always has priority over the protection of civilians' lives.⁶⁴ Such an assumption can find support in the *Iyyad v. State of Israel* case in which the Israeli Supreme Court stated that the Gaza Strip should not be regarded as a territory that is subject to a belligerent occupation, since 'the State of Israel has no permanent physical presence in the Gaza Strip, and it also has no real possibility of carrying out the duties required of an occupying power under international law'.⁶⁵ The Goldstone Report reaches the opposite conclusion and considers that the ultimate authority over the Occupied Palestinian Territory still lies with Israel.⁶⁶

The debate surrounding the continuing occupation of Gaza need not be analysed in this article.⁶⁷ It suffices to point out that, if the fact that Israel has no permanent physical presence in the Gaza Strip is enough to remove this territory from the jurisdiction of the state, then every area in the West Bank where Israel, pursuant to the Oslo Accords, withdrew its military forces and transferred security and civil powers to the Palestinian Authority also falls outside the control of the state. In other words, Gaza should not be treated as a *unicuum*, but rather as a premise of a practice that could be extended.

The implementation of the Kasher and Yadlin doctrine during Operation Cast Lead is not subject to controversy. The order of priorities set was, for example, reiterated almost verbatim in a briefing given by the brigade commander, Colonel Herzl Halevy, to the paratroop brigade: 'first complete the mission, after defend the soldiers' lives and finally minimize the damage to the Palestinian civilian population'.⁶⁸ The transfer of military risks to the civilian population induced by such an order of priorities is also obvious in the testimonies gathered by Israeli NGOs. For example, one can read in the Breaking the Silence report that:

64 Ibid. See also Kasher, 'Operation Cast Lead and Just War Theory', *supra* note 17, at 66.

65 HCJ, *Iyyad v. State of Israel*, CrimA 6659/06, 11 June 2008, para. 11.

66 Goldstone Report, *supra* note 2, paras. 273–281.

67 On this point, see, e.g., UN Human Rights Council, UN Human Rights Council: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, A/HRC/4/17, 29 January 2007, at 6, available online at www.unhcr.org/refworld/docid/461e52b12.html; SC Res. 1860 (2009) and Human Rights Council Res. S-9/1; Human Rights Watch, 'Israel: Threatened Sanctions on Gaza Violate Laws of War', 20 September 2007, available online at www.hrw.org/en/news/2007/09/19/israel-threatened-sanctions-gaza-violate-laws-war; B'Tselem, 'The Scope of Israeli Control in the Gaza Strip', available online at www.btselem.org/english/Gaza_Strip/Gaza_Status.asp. See also A. Zemach, 'Taking War Seriously: Applying the Law of War to Hostilities within an Occupied Territory', (2006) 38 *George Washington International Law Review* 645, at 662ff.; C. James, 'Mere Words: The "Enemy Entity" Designation of the Gaza Strip', (2009) 32 *Hast. ICLR* 643, at 643ff.; I. Scobbie, 'An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination', (2004) 11 *Yearbook of Islamic and Middle Eastern Law* 3, at 20ff.; G. E. Bisharat et al., 'Israel's Invasion of Gaza in International Law', 36 *Denver JILP* 41, at 47ff.

68 See Channel 10 News, 'I'm Not Ashamed', 23 January 2009, available online at <http://news.nana10.co.il/Article/?ArticleID=611758&sid=126&typeid=1&pid=48>, quoted by the Public Committee against Torture in Israel, 'No Second Thoughts: The Changes in the Israeli Defense Forces' Combat Doctrine in Light of "Operation Cast Lead"', Special Report, November 2009, 14, available online at www.stoptorture.org.il.

If we detect anything that should not be there – we shoot. We're told the air force distributed flyers telling everyone to go to Gaza City. If beyond this line any people are detected – they are not supposed to be there.⁶⁹

More explicitly, the Knesset Committee for Foreign and Security Affairs stated, during the time of the war, that 'After the shooting, the warnings, anyone remaining in the area, in one of the most densely populated urban sites in the world, is either a terrorist or knows the price to pay'.⁷⁰

The hardships inflicted on the civilians by such a policy are described at length in the 10th chapter of the Goldstone Report, devoted to the 'Deliberate attacks against the civilian population'.⁷¹ If Judge Goldstone, in his op-ed, expressed misgivings regarding the intentionality of the attacks, the facts documented stand essentially uncontroversial. The Mission investigated several incidents in which serious allegations of direct attacks with lethal outcome were made against civilians. There appeared to have been no justifiable military objective pursued in any of them. In most of the cases, the civilians were ordered to evacuate their houses, were trying to reach a safe place,⁷² were waiting for instructions from the soldiers,⁷³ or complied with those instructions.⁷⁴ According to the report, the Israeli soldiers could not have perceived an imminent threat from those attacked, because either civilians were raising hands, held their ID or Israeli driving licence in their hands,⁷⁵ had their hands shackled with white plastic handcuffs,⁷⁶ carried white flags,⁷⁷ or were at a distance of more than 100 metres from them.⁷⁸ Moreover, in some cases, the civilian status of those attacked could not be questioned, since the Israeli army, who had complete control over the area at the time, had already identified the persons present in the area⁷⁹ or had interacted with them during the preceding 12 or 24 hours and therefore knew them to be civilians.⁸⁰

69 Breaking the Silence, *Soldiers' Testimonies from Operation Cast Lead, Gaza 2009*, Testimony 8, at 21, available online at www.breakingthesilence.org.il/wp-content/uploads/2011/02/Operation_Cast_Lead_Gaza_2009_Eng.pdf. This peculiar testimony is confirmed by many others. See Testimony 7, at 20; Testimony 9, at 24; Testimony 10, at 27; Testimony 11, at 30; Testimony 12, at 33–4; Testimony 20, at 48; Testimony 21, at 50–1; Testimony 22, at 53; Testimony 24, at 56; Testimony 25, at 60; Testimony 27, at 64; Testimony 31, at 72; Testimony 34, at 77; Testimony 40, at 89; Testimony 41, at 90; Testimony 43, at 92; Testimony 50, at 104–5.

70 Quoted in the Public Committee against Torture in Israel, *supra* note 68, at 19.

71 Goldstone Report, *supra* note 2, paras. 702–881.

72 See The death of Muhammad Hajji in the attack on his family's house and The shooting of Shahd Hajji and Ola Masood Arafat, *ibid.*, para. 747; The shooting of Ibrahim Juha, *ibid.*, para. 761; The killing of Majda and Rayya Hajaj, *ibid.*, paras. 764, 767; The shooting of Amal, Souad, Samar and Hajja Souad Abd Rabbo, *ibid.*, para. 770; The shooting of Rouhiyah al-Najjar, *ibid.*, para. 781.

73 See The shooting of Amal, Souad, Samar and Hajja Souad Abd Rabbo, *ibid.*, para. 776.

74 See The Abu Halima family case, *ibid.*, para. 798.

75 See The killing of Ateya al-Samouni and his son Ahmad, *ibid.*, para. 707.

76 See The shooting of Iyad al-Samouni, *ibid.*, para. 736.

77 See The death of Muhammad Hajji in the attack on his family's house and The shooting of Shahd Hajji and Ola Masood Arafat, *ibid.*, para. 748; The shooting of Ibrahim Juha, *ibid.*, para. 758; The killing of Majda and Rayya Hajaj, *ibid.*, paras. 764, 767; The shooting of Amal, Souad, Samar and Hajja Souad Abd Rabbo, *ibid.*, paras. 771, 776; The shooting of Rouhiyah al-Najjar, *ibid.*, para. 781.

78 See The killing of Majda and Rayya Hajaj, *ibid.*, paras. 764, 767.

79 See The attack on the house of Wa'el al-Samouni, *ibid.*, paras. 723, 727.

80 See The death of Muhammad Hajji in the attack on his family's house and The shooting of Shahd Hajji and Ola Masood Arafat, *ibid.*, para. 752; The shooting of Ibrahim Juha, *ibid.*, para. 761.

The similarity between all the attacks investigated tends to indicate a real pattern of behaviour. Testimonies gathered describe what the report of the Fact Finding Mission in Gaza calls a 'shoot in case of doubt' policy,⁸¹ summed up by a soldier in the following terms: 'better hit an innocent than hesitate to target an enemy.'⁸² Such a policy can be an expression of the aim to eliminate as far as possible any risk to the lives of the Israeli soldiers or a way to 'communicate with the civilian population'.⁸³ Nevertheless, the likelihood of lethal consequences induced by this sort of non-verbal communication allows one to consider that recklessness, rather than negligence, led to civilian casualties. In the Gaza operation, the risk of massacres is not only known and understood by military planners, but is a completely predictable consequence of the protection provided to military personnel, programmed into the risk analysis of war.⁸⁴ In this perspective, the life-life trade-off policy resulting from the organized confrontation between the soldiers' right to life and the civilians' right to life does not result in the redistribution of human-rights violations, but in abolition of the right itself.

This line of reasoning also shed a different light on the notion of 'operational error' or, as it is called in the Israeli Report, 'unfortunate incident', illustrated, for example, in the bombing of the Al-Samouni family residence, which killed 24 members of the family.⁸⁵ In his recent op-ed, Judge Goldstone wrote that 'The shelling of the home was apparently the consequence of an Israeli commander's erroneous interpretation of a drone image'.⁸⁶ Yet, reports that the incident has been described as a legitimate interpretation of drone photographs portrayed on a screen⁸⁷ does not change the fact that everything indicates that the Israeli forces knew that there were about 100 civilians in the house. Air Force officers reportedly informed their senior officer of the possible presence of civilians. Despite being made aware of this information, the officer approved air strikes.⁸⁸ In this perspective, as recalled by Crawford and Olleson in their commentary on the International Law Commission's articles on the responsibility of states for an internationally wrongful act, 'if a State deliberately carries out some specific act, there is less room for it to argue that the harmful consequences were unintended and should be disregarded'.⁸⁹ There is indeed a huge gap between negligence and recklessness. Recklessness involves an awareness or foresight of the likely harm. Combatants who violate the principle of discrimination, like the reckless and unlike the negligent, are aware that their actions impose risks on civilians. In fact,

81 Ibid., para. 802.

82 Ibid., para. 801.

83 Ibid., para. 805.

84 On this point, see M. Shaw, 'Risk-Transfer Militarism and the Legitimacy of War after Iraq', available online at www.theglobalsite.ac.uk/press/402shaw.htm.

85 Goldstone Report, *supra* note 2, paras. 711–713.

86 Goldstone, *supra* note 1.

87 See *Haaretz*, 24 October 2010, 'What Led to IDF Bombing of a House Full of Civilians during the Gaza War?', available online at www.haaretz.com/news/diplomacy-defense/what-led-to-idf-bombing-house-full-of-civilians-during-gaza-war-1.320816, quoted in Human Rights Council, *supra* note 3, footnote 21.

88 See *ibid.*, para. 27. See also the Goldstone Report, *supra* note 2, para. 727.

89 J. Crawford and S. Olleson, 'The Nature and Forms of International Responsibility', in M. Evans (ed.), *International Law* (2003), 445.

violations of this principle of discrimination are very much like a standard example of domestic recklessness, namely, the discharging of a firearm in a crowded room. This would normally be reckless rather than negligent because the shooter would be aware that the shooting imposes great risks on innocent individuals⁹⁰

– the same sort of awareness that combatants generally have about the civilian risk their actions impose. It is precisely to reduce this gap and to prevent any shift from negligence to recklessness that the principle of discrimination requires states to take effective precautions in attacks and to issue credible warnings, giving civilians sufficient time to react and explaining what they should do to avoid harm.⁹¹ To deny such a difference means denying the principle of distinction itself.

2. THE GAZAN POPULATION AS A LEGITIMATE MILITARY TARGET

The order of priorities displayed in Kasher and Yadlin's doctrine, which favours the soldiers' lives over the civilians' lives, only offers guidance regarding the relations between Israeli *citizens* – civilians or combatants – and Palestinian *civilians*. The balance to be struck does not, in any event, take into account a hypothetical Palestinian combatants' right to life. Members of this latter category can lawfully be targeted when they meet the criteria set by humanitarian-law provisions.

A total confusion is nevertheless organized around the legal status of the members of Palestinian armed groups during the Gaza war. The report released by the Israeli Ministry of Foreign Affairs in July 2009 is truly telling in this regard. This report relies on the traditional definition of an armed group, enshrined in Article 43(1) of Additional Protocol I to the Geneva Convention,⁹² to state that Hamas is a 'highly organized and well-armed group that uses armed force against Israel, and, indeed, considers such armed struggle to be its primary mission'.⁹³ If the definition given by Article 43(1) is relevant to determine the existence of an armed group, it is hard to understand how and why one should set aside its logical consequence enshrined in Article 43(2), according to which 'Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities'. The Goldstone Report goes along with such a qualification when it acknowledges that, if individual members of the law-enforcement agency are at the same time members of an armed group, they would be combatants.⁹⁴ Nevertheless, other parts of the Israeli report totally contradict this assertion. One can, for example, read that, due to their military functions, the military operatives of Hamas 'were

90 Lee, *supra* note 28, at 244.

91 Goldstone Report, *supra* note 2, para. 528.

92 Art. 43 of Additional Protocol I to the Geneva Conventions, 1977: 'The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.'

93 Israeli Ministry of Foreign Affairs, 'The Operation in Gaza: Factual and Legal Aspects', July 2009, paras. 28, 75, 78–79, available online at www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperation.pdf.

94 Goldstone Report, *supra* note 2, paras. 34, 308, 413, 429, 434, 493.

not accorded the immunity from attack generally granted to civilians'.⁹⁵ Members of Hamas could thus be targeted not only because they were combatants, but also because they were civilians who were not accorded immunity from attack. At last, neither combatants nor civilians, members of the Palestinian armed groups are more generally encompassed in an undefined category of 'terrorists'.⁹⁶ Obviously, Kasher's idea, according to which the principle of distinction only involves 'a distinction between different contexts of justification' and creates the sole obligation 'to resort to different standards of justification of . . . interference [in human life], according to certain features of the contexts',⁹⁷ finds a proper illustration. It thus seems that, to be understood, this pick-and-choose classification must be analysed in light of the Israeli Supreme Court's rulings that reveal one of the most striking features in the Israeli legal perception of the conflict: the absence of Palestinian armed groups and the absence of Palestinian combatants.

2.1. The basic assumption: Palestinians are terrorists and not combatants

According to the Supreme Court:

The terrorists and their organizations, against which the state of Israel is conducting an armed conflict of an international character, are not included in the category of combatants. They do not belong to the armed forces nor are they included among the units that are given a status similar to that of combatants by customary international law.⁹⁸

The logic is circular: the Palestinian fighters cannot be combatants because they do not belong to an armed group; Palestinian 'militias or volunteer corps'⁹⁹ cannot be qualified as armed groups, since their members are not combatants.¹⁰⁰ To say the least, such a construction is not self-evident. Strictly speaking, the requirements set by the Geneva Convention for combatant status constitute conditions for the post-capture entitlement of irregular armed forces to combatant privilege and prisoner-of-war status and are not constitutive elements of the armed forces of a party to a conflict. Thus:

while members of irregular armed forces failing to fulfill the four requirements may not be entitled to combatant privilege and prisoner-of-war status after capture, it does not follow that any such person must necessarily be excluded from the category of armed forces.¹⁰¹

95 Israeli Ministry of Foreign Affairs, *supra* note 93, para. 237.

96 *Ibid.*, paras. 36, 237.

97 Kasher, *supra* note 21, at 152.

98 H CJ, *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02, 14 December 2006, para. 25.

99 See the terminology used in Art. 4(2) of the Third Geneva Convention.

100 This logic is not new and can be traced back to a 1969 judgment of an Israeli Military Court; see *Military Prosecutor v. Kassem and Others*, (1970) 42 *Israel Law Review* 470. See also Y. Dinstein, 'Unlawful Combatancy', (2002) 32 *IYHR* 258.

101 International Committee of the Red Cross, *supra* note 57, at 22.

Nonetheless, the Court seems to find in the global notion of terrorism a sufficient justification to allow such a reversal of the legal reasoning. Indeed, the organizations fighting against the state of Israel are not labelled terrorists following a clear demonstration of their intent to spread terror among the civilian population,¹⁰² but because their individual members are not entitled to prisoner-of-war privileges, since they 'do not have a fixed recognizable mark that makes it possible to distinguish them from afar and they do not conduct their activities in accordance with the laws and customs of war'.¹⁰³ In particular, these organizations 'deliberately attack civilians and shoot from amongst a civilian population, which they use as a shield'.¹⁰⁴ In turn, since such organizations are terrorist ones, the fact that their individual members do not have a fixed recognizable mark and deliberately use the civilian population as a shield is treated as a judicial notice, raising no controversy.¹⁰⁵ The absence of armed groups and the interrelated absence of combatants in an armed conflict naturally retroacts on the definition of the civilian population, which will enjoy only the lesser degree of protection. A twofold reasoning is proposed.

On the one hand, the Court constantly defines the notion of combatants according to the strict qualifying conditions detailed in Article 1 of the Regulations appended to the Fourth Hague Convention of 1907¹⁰⁶ and refuses to take into account subsequent endeavours to extend the protection provided to new categories of combatants or to new situations.¹⁰⁷ The rise of guerrilla or national liberation movements during the decolonization period indeed led the drafters of Additional Protocol I to redefine combatants as members of the armed forces. This category 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'.¹⁰⁸ The Protocol

102 Additional Protocol I, Art. 51(2).

103 HCJ, *supra* note 98, para. 24.

104 HCJ, *Arad v. Knesset*, 2967/00, 191; see also *State of Israel v. Barghouti*, SFC 1158/02 (TA), para. 35.

105 In this regard, it seems important to recall that the Goldstone Mission has not been able to obtain any direct evidence related to the specific intent of shielding the combatants from counter-attack on this question. See Goldstone Report, *supra* note 2, para. 450. Amnesty International, for its part, did not find evidence that Hamas or other Palestinian groups violated the laws of war to the extent repeatedly alleged by Israel. In particular, it found no evidence that Hamas or other fighters directed the movement of civilians to shield military objectives from attack. Amnesty International, *Israel/Gaza, Operation Cast Lead: 22 Days of Death and Destruction* (July 2009), 76–7. Likewise, in the 53 civilian deaths in Gaza investigated by Human Rights Watch, Palestinian fighters were not in the area at the time of the attack. See Human Rights Watch, *Turning a Blind Eye, Impunity for Laws-of-War Violations during the Gaza War* (April 2010), 9. The Report of the United Nations High Commissioner for Human Rights also acknowledges that either there was no large-scale abuse of civilians and civilian objects by combatants or that civilian deaths could not be explained as resulting from the presence of fighters in civilian areas. See Human Rights Council, *The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks against the Occupied Gaza Strip*, Report of the United Nations High Commissioner for Human Rights on the implementation of the Human Rights Council Res. S-9/1, Doc. A/HRC/12/37, 13 August 2009, para. 24.

106 Art. 1 of the Regulations appended to the Fourth Hague Convention of 1907: 'The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: To be commanded by a person responsible for his subordinates; To have a fixed distinctive emblem recognizable at a distance; To carry arms openly; and To conduct their operations in accordance with the laws and customs of war.' This wording is repeated in Art. 13 of the First and Second Geneva Conventions, and Art. 4 of the Third Geneva Convention.

107 See, on this point, C. J. Mandernach, 'Warriors without Law: Embracing a Spectrum of Status for Military Actors', (2007) 7 *Appalachian Journal of Law* 162.

108 Additional Protocol I, Arts. 43(1), 43(2).

concedes that, to ensure the protection of civilians, combatants must differentiate themselves from civilians. Nevertheless, it eliminates the absolute requirement to do so by noting that, in some situations, ‘owing to the nature of hostilities an armed combatant cannot so distinguish himself.’¹⁰⁹ Similarly, 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.¹¹⁰ In such situations, a person retains the status of combatant, provided that he carries his arms openly during military operations and when visible to his adversary while deploying to an attack.¹¹¹ Although Palestinian fighters meet the flexible criteria for ‘combatants’ stipulated in Article 44(3) of Additional Protocol I, Israel has objected persistently to this expansion of the definition¹¹² and is therefore not bound by it, even upon its arguable evolution into a customary norm.

On the other hand, however, if the Palestinian militants are not entitled to the rights and protections given to combatants, neither are they entitled to the protections given to civilians.¹¹³ On the contrary, the Supreme Court considers that they constitute a legitimate target for attack in accordance with Article 51(3) of Additional Protocol I, which states that ‘civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities’.¹¹⁴ This application of the law – simultaneously applying the Geneva Conventions to define ‘combatants’ and Additional Protocol I to define ‘civilians’ – is troubling if one acknowledges that the restrictive definition of combatants provided by the 1949 Geneva conventions is directly related to the broad protection offered to civilians under these instruments – which contain no reference to the civilians’ direct participation in hostilities. In turn, the relaxed definition of combatants in Additional Protocol I is directly related to the lesser protection offered to civilians who take part in the hostilities under Article 51(3) of Additional Protocol I.¹¹⁵ The balance between the different regimes of protection implied by the principle of distinctions as well as the distinct logic informing the normative frameworks of the Fourth Geneva Convention and of Additional Protocol I vanish.¹¹⁶

The confusion organized around the applicability of the Geneva Conventions and Additional Protocol I generates further incoherence in the already eroded distinction between civilians and combatants. It explains why the Supreme Court, while acknowledging that ‘it is hard for us to see how it is possible to recognize a third category [of unlawful combatants] within the framework of interpreting the Hague and Geneva Conventions’,¹¹⁷ nevertheless *de facto* recognizes such a status, equating

109 Ibid, Art. 44(3).

110 Ibid., Art. 44(2).

111 Ibid., Arts. 44(3)(a), 44(3)(b).

112 E. 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’, (2001) 15 Temple ICLJ 195, at 203–5; O. Ben-Naftali and K. R. Michaeli, ‘We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings’, (2003) 36 CILJ 233, at 266ff.

113 See H CJ, *supra* note 98, para. 27.

114 Ibid.

115 See O. Ben-Naftali and K. Michaeli, ‘Public Committee against Torture in Israel v. Government of Israel, Case n° HCJ 769/02’, 101 (2007) AJIL 459, at 464–5.

116 Ibid.

117 H CJ, *supra* note 98, para. 27.

it with civilians who take a direct part in the hostilities.¹¹⁸ Arguing that rules that were developed against the background of a reality that has changed should be given a dynamic interpretation that will adapt them to the new reality,¹¹⁹ the Court indeed considers that all those who do not fall within the definition of combatants – in its view, every Palestinian militant – bear an obligation to refrain from participating directly in hostilities.¹²⁰ When they breach this rule, civilians, even if they do not lose their status, ‘do not enjoy the rights of civilians who are not unlawful combatants’¹²¹ and are ‘subject to the risks of an attack just like a combatant, but without enjoying the rights of a combatant’.¹²² Undoubtedly, the immunity afforded to individual civilians is subject to an overriding condition, namely their abstaining from all hostile acts.¹²³ The protection attached to the civilian status should not lead to the absurd situation in which only one party to an armed conflict has combatants, legitimate military targets.¹²⁴ But neither should it lead to a situation in which every single civilian can be deemed to turn into an ‘unlawful combatant’. Yet, that is where the construction offered leads. The wide extension of the notion of ‘direct participation in hostilities’ as well as the time during which the civilians directly participating in the hostilities can be targeted are signs of this endeavour.

2.2. The wide notion of direct participation in hostilities

Article 51(3) of Additional Protocol I provides that civilians shall be afforded the protection due to them ‘unless and for such time as they take a direct part in hostilities’. The commentary clarifies that there should be a clear distinction between direct participation in hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.¹²⁵ ‘Direct’ participation only encompasses acts of war that, by their nature or purpose, are likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.¹²⁶ This articulation is of vital importance, as it demonstrates

118 See H. Moodrick Even-Khen, ‘Can We Now Tell What “Direct Participation in Hostilities” Is?’, (2007) 40 *Israel Law Review* 213, at 228ff. In the same perspective, in *State of Israel v. Marwan Barghouti*, the Court ruled that ‘terrorists who attack civilians are not “lawful combatants” entitled to POW status in light of their unlawful activities ... unlawful combatants who attack civilians are not entitled to this status’, Cr.C. (T.A.) 092134/02, *State of Israel v. Marwan Barghouti*, 2002, available online at www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/12/State%20of%20Israel%20ovs%20Marwan%20Barghouti-%20.

119 See HCJ, *supra* note 98, para. 27; *Ajuri v. The Commander of IDF Forces in Judaea and Samaria*, HCJ 7019/02, 3 September 2002, para. 9; *Iyyad v. State of Israel*, *supra* note 65, para. 6.

120 HCJ, *supra* note 98, para. 31.

121 *Ibid.*, para. 26.

122 *Ibid.*, para. 31.

123 Y. Sandoz, C. Seimarski, and B. Simmerman, *Commentary on the Additional Protocols of 1977 to the Geneva Convention of 1949* (1987), para. 618. See also D. Jinks, ‘The Declining Significance of POW Status’, (2004) 45 *Harv. ILJ* 367, at 410.

124 See D. Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’, (2005) 16 *EJIL* 194; see also M. Sassòli, ‘Use and Abuse of the Laws of War in the “War on Terrorism”’, (2004) 22 *Law and Inequality: A Journal of Theory and Practice* 195, at 207–8.

125 See Sandoz, Seimarski, and Simmerman, *supra* note 123, paras. 1679, 1945. See also ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgement of 17 July 2008, paras. 175–176.

126 Sandoz, Seimarski, and Simmerman, *supra* note 123, para. 619; Henckaerts and Doswald-Beck, *supra* note 55, at 22–3. International Committee of the Red Cross, *supra* note 57, at 46.

the limits to which the principle of distinction can be stretched: a civilian who directly takes part in hostilities assumes the role of a combatant and is therefore not entitled to the protection afforded to civilians. Unlike a combatant, however, once he ceases his participation in the fighting, he no longer presents any danger for the adversary¹²⁷ and, having resumed his civilian status, should receive the protection accorded to civilians and cannot be targeted for an attack.¹²⁸ The threshold set for civilians to lose protection by crossing over from indirect to direct participation is fairly high. Acts amounting to direct participation in hostilities must indeed meet three cumulative requirements.

First, for a specific act to qualify as direct participation in hostilities, the harm that may reasonably be expected to result from it must attain a certain threshold, reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack.¹²⁹

Second, the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm.¹³⁰ Consequently, even though the general war effort and the war-sustaining activities may ultimately contribute to the military defeat of the adversary or may even be indispensable to harming the adversary, those acts merely maintain or build up the capacity to cause such harm and must be distinguished from the conduct of hostilities, which is designed to bring about the materialization of the required harm.¹³¹ Such 'indirect' participation in hostilities that does not lead to a loss of protection for civilians involved encompasses, according to the International Committee of the Red Cross (ICRC), the production and shipment of weapons and military equipment; the construction or repair of roads, ports, airports, bridges, railways, and other infrastructure outside the context of concrete military operations; political propaganda; financial transactions; or media activities supporting the general war effort.¹³² Likewise, although providing food and shelter to the armed forces or recruiting and training the military personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm inflicted on the adversary will generally remain indirect.¹³³ Only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as direct participation in hostilities.¹³⁴

Last, to be qualified as a direct participation in hostilities, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.¹³⁵ In other words, an act must not

127 Sandoz, Seimarski, and Simmerman, *supra* note 123, para. 1453.

128 See Ben-Naftali and Michaeli, *supra* note 112, at 269.

129 International Committee of the Red Cross, *supra* note 57, at 47.

130 See Sandoz, Seimarski, and Simmerman, *supra* note 123, para. 1679.

131 See International Committee of the Red Cross, *supra* note 57, at 52. See also Sandoz, Seimarski, and Simmerman, *supra* note 123, para. 1944.

132 International Committee of the Red Cross, *supra* note 57, at 51–2.

133 Report DPH 2004, at 10; Report DPH 2005, at 35ff. For dissenting views, see Report DPH 2006, at 26, 65; Report DPH 2008, at 51, 53ff.

134 International Committee of the Red Cross, *supra* note 57, at 53.

135 *Ibid.*, at 58.

only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another.¹³⁶

These strict customary conditions are set aside in the Israeli system, following the impulse initiated by the Supreme Court itself. The Court indeed set out a novel and expansive definition of ‘direct’ participation, encompassing all civilians ‘performing the function[s] of combatants’.¹³⁷ In its view, the ‘function determines the directness of the taking part in the hostilities’¹³⁸ and replaces it in the acts effectively carried out. Even if one can agree that the function of a combatant is to affect the military operations or military capacity of a party to an armed conflict, such a switch eliminates the requirement of a certain threshold of harm caused by the act. The examples offered by the Court to support its assertion are telling: collecting information about the armed forces outside the spheres in which the hostilities are being carried out, operating weapons being used by ‘unlawful combatants’, or providing service for them ‘whatever the distance from the battlefield may be’¹³⁹ are indeed included in the combatant function.

The uncertainty about the threshold of harm required has logical repercussions on the very notion of acts designed to bring about the materialization of this required harm. Lowering the threshold of harm by a wide interpretation of the notion of adverse military effects indeed leads the Supreme Court to consider that direct participation should not be narrowed merely to the person committing the physical act of attack.¹⁴⁰ In its view, the persons who recruit the ‘unlawful combatant’ to take a direct part in the hostilities and the persons who send him to carry out hostilities as well, take ‘a direct part’. The same goes for the person who decided upon the act, and the person who planned it.¹⁴¹ In other words, the legitimate target is identified as every Palestinian who plays a significant role in the hostilities – that is, ‘doers’ and ‘senders’ alike.¹⁴² This assertion is broad enough to neglect the customary requirement of a direct causal link between such acts and the conduct of hostilities. Yet, the Interpretative Guidance published by the ICRC seems pretty adamant: the direct participation cannot be presumed; only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act.¹⁴³ When the commission of a specific hostile act is replaced by a general notion of ‘combatant function’, such a demonstration cannot be offered.

136 See ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96–23, Judgement of 12 June 2002 (Appeals Chamber), para. 58; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96–3, Judgement of 26 May 2003 (Appeals Chamber), para. 570.

137 HCJ, *supra* note 98, para. 35.

138 *Ibid.*

139 *Ibid.* See also Israeli Ministry of Foreign Affairs, *supra* note 93, para. 120.

140 *Ibid.*, para. 37.

141 *Ibid.*

142 A. Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law*, HCJ 5100/94, Pub. Comm. against Torture in Israel v. Israel (Israel 1999), paras. 12–15; K. E. Eichensehr, ‘On Target? The Israeli Supreme Court and the Expansion of Targeted Killings’, (2007) 116 *Yale Law Journal* 1876.

143 International Committee of the Red Cross, *supra* note 57, at 53.

The first steps initiated by the Israeli Supreme Court lay legal grounds for a further extension of the notion of direct participation in hostilities in the Kasher and Yadlin doctrine, which defines as ‘unlawful combatant’ all civilians who ‘play a significant role in creating an otherwise unavoidable danger’.¹⁴⁴ This broad category indistinctively includes persons posing an immediate danger; persons providing immediate support to persons posing an immediate danger; persons dispatching other persons to pose an immediate danger; persons planning an act or activity of terror, whether the operational idea or its practical details; persons recruiting certain other persons to carry out acts or activities of terror; and persons making operational decisions to carry out a planned act or activity of terror.¹⁴⁵ Following the Supreme Court model, only the likelihood of harm resulting from a specific act is taken into consideration, whether this act reaches the threshold of harm required or not. In this construction, imminence is seen as a proxy for high likelihood of occurrence. Likewise, the requirement of a direct causal link between the planning of an attack, the recruitment or incitement of ‘unlawful combatants’, and the conduct of hostilities is set aside.

This first questionable category is completed by a second, which goes far beyond the limits identified by the humanitarian-law provision for direct participation and includes all war-sustaining activities that may be necessary to harming the adversary. According to Kasher and Yadlin, any person preparing devices for ‘acts or activities of terror’, providing essential ingredients of devices of terror (e.g., a pharmacist supplying major ingredients of explosives or a person who lends crucial funds) or making general operational decisions related to ‘acts or activities of terror’ must indeed be regarded as being directly involved in terror.¹⁴⁶ Such a conception tends to transform the notion of direct participation in hostilities into a relaxed standard of ‘indirect causation of harm’¹⁴⁷ or ‘materially facilitating harm’¹⁴⁸ – a move vehemently rejected by the ICRC, since it ‘would bring the entire war effort within the concept of direct participation in hostilities and, thus, would deprive large parts of the civilian population of their protection against direct attack’.¹⁴⁹

Moreover, this relaxed standard of participation goes along with a relaxed standard of proof regarding the direct participation. The Kasher and Yadlin construction indeed introduces a ‘probabilistic presumption on grounds of general facts about direct involvement’, according to which:

a person who is known to have recently planned an act of terror is thus presumed to be doing it again or continuing to carry out his plan, even if there is no specific intelligence to that effect in terror that have emerged from intelligence analysis of terrorist activity.¹⁵⁰

144 Kasher, ‘A Moral Evaluation of the Gaza War’, *supra* note 17.

145 Kasher and Yadlin, *supra* note 11, at 46; Kasher and Yadlin, *supra* note 16, at 13.

146 Kasher and Yadlin, *supra* note 16, at 13–14. See also Kasher and Yadlin, *supra* note 11, at 46.

147 Report DPH 2005, at 28.

148 Background Doc. DPH 2004, at 27; Report DPH 2005, at 28, 34.

149 International Committee of the Red Cross, *supra* note 57, at 52. See also Background Doc. DPH 2004, at 27ff.; Report DPH 2004, at 11, 25; Report DPH 2005, at 28, 34.

150 Kasher and Yadlin, *supra* note 16, at 15.

This presumption remains valid unless evidence to the contrary is found. This peculiar methodology explains that, in the figures provided by the Israeli Defence Forces, 162 men between the ages of 16 and 50 killed during the course of hostilities in Gaza were classified neither as combatants nor as civilians.¹⁵¹ Any Palestinian man in this age group is considered a potential terrorist unless otherwise proven, and allows the IDF to remove them from the ranks of uninvolved civilians.¹⁵²

Along with this first element, the Kasher and Yadlin model holds that, under conditions of uncertain intelligence, low-probability intelligence, or where probabilities cannot be determined regarding a threat or danger, considerations must be made in accordance with the Maximin Principle, according to which ‘one course of action is preferable to another if the worst possible outcome of the former is less bad than the worst possible outcome of the latter’.¹⁵³ The value of an outcome is determined according to the priorities of the state that gives priority to the lives of Israeli citizens – civilians or combatants – over the lives of enemy civilians. To quote the authors:

Probabilities cannot be determined, but the stakes are high: if he or she carries out the plan, citizens of the state are going to be killed. [The Maximin Principle] directs you to do something rather than nothing, because the worst outcome of doing nothing is an event of citizens of the state being killed by an explosion.¹⁵⁴

Even if one assumes that the IDF indeed tries to minimize, as far as possible, the harm to the protected population, the central principle put forward here is a universal lesser-evil principle that regards no atrocity as unacceptable per se, but as morally and legally indeterminate pending investigation into what the facts show.¹⁵⁵ More troubling still, if one keeps in mind that, according to the norm of priorities proposed by Kasher and Yadlin, ‘the state has to give preference to saving the life of a single citizen even if the collateral damage caused in the course of protecting him or her is much higher in number’,¹⁵⁶ this act-utilitarianism theory seems to tie the effectiveness of the principle of distinction to an evaluation of the relative worth of the parties to the conflict. In this perspective, civilians voluntarily contributing to an ‘unjust war’, either morally or materially, are not ‘innocent’ in the ethical sense. Needless to say, such a construction turns the principle of distinction on its head. At last, if the salient consideration is maximizing social utility, one can wonder why it should matter whether the threatened harm is imminent, as long as it is sufficiently

151 The Public Committee against Torture in Israel, *supra* note 68, at 10.

152 *Ibid.*

153 Kasher and Yadlin, *supra* note 16, at 23.

154 *Ibid.*, at 24. See also Y. Shani, ‘Israel Counter-Terrorism Measures: Are They Kosher under International Law?’, in M. N. Schmitt (ed.), *Terrorism and International Law: Challenges and Responses* (2003), 104.

155 E. Blumenson, ‘Killing in Good Conscience: What’s Wrong with Sunstein and Vermeule’s Lesser Evil Argument for Capital Punishment and Other Human Rights Violations?’, (2007) 10 *New Criminal Law Review* 229.

156 Kasher and Yadlin, *supra* note 11, at 53.

certain to happen as to make calculations of social utility reliable.¹⁵⁷ The extension of the time during which the civilians directly participating in the hostilities can be targeted proves that such a question is not merely rhetorical.

2.3. The temporal scope of direct participation in hostilities and the affiliation to an armed group

Pursuant to Article 51(3) of Additional Protocol I, civilians enjoy immunity from attack 'unless and for such time as they take a direct part in hostilities'. Under this customary rule,¹⁵⁸ measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.¹⁵⁹

This construction necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities – the so-called 'revolving door' of civilian protection.¹⁶⁰ For this reason, proponents of a broader interpretation of the civilian targeting exception contend that, because the hostilities between Israel and Palestinian armed groups are protracted and because individual 'terrorists' tend to be repeat actors, a narrow interpretation of this clause would grant to any person affiliated with insurgent or terrorist groups a 'safe harbour', except when they are actually engaged in hostilities.¹⁶¹

In this perspective, and to give practical effect to its expansion of 'direct participation', the Israeli Supreme Court chose to retain the broader interpretation of the civilian-targeting exception and underlined the necessity to 'avoid a phenomenon of the revolving door, whereby every terrorist may invoke sanctuary or claim refuge while he is resting and making preparations, so that he has protection from being attacked'.¹⁶² Kasher and Yadlin go along with this conclusion because any other alternative granting immunity from military attack 'would mean that he or she has mastered a mode of operation that enables terrorists to kill as many citizens of the state as they wish'.¹⁶³ This conception treating the revolving door of civilian protection as a malfunction of international humanitarian law (IHL) rather than as an

157 See, on this point, C. O. Finkelstein, 'Duress: A Philosophical Account of the Defense in Law', (1995) 37 *Arizona Law Review* 259.

158 Henckaerts and Doswald-Beck, *supra* note 55, para. 38.

159 International Committee of the Red Cross, *supra* note 57, at 65.

160 See G. Gaggioli and R. Kolb, 'A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights', 37 *Isr. YHR* 115, at 146ff.; Y. Dinstein, 'Distinction and Loss of Civilian Protection in International Armed Conflicts', 38 *IYHR* 10.

161 Kretzmer, *supra* note 124, at 171, 190–1. See also Kasher and Yadlin, *supra* note 11, at 48–9; R. D. Rosen, 'Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity', (2009) 42 *Vand. JTL* 683, at 737–9; K. Watkin, 'Controlling the Use of Force: A Role For Human Rights Norms in Contemporary Armed Conflict?', (2004) 98 *AJIL* 17; W. Hays Parks, 'Air War and the Law of War', (1990) 31 *AFLR* 1, at 118–20. M. N. Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict', in H. Fischerr (ed.), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (2004), 536; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), 29; Shani, *supra* note 154, at 104. See also Supplemental Response on Behalf of the State Attorney's Office, Pub. Comm. against Torture in Israel v. Israel, HCJ 769/02, at 9–10.

162 HCJ, *supra* note 98, para. 39.

163 Kasher and Yadlin, *supra* note 16, at 21.

integral part of it can only be explained by the broad view adopted by the Supreme Court in the first place, when it defined the direct participation in hostilities as the exercise of a combatant function rather than as the commission of a specific hostile act. The *Targeted Killing* judgment indeed distinguishes between civilians who indulge in occasional direct participation and those who do so on a continuing basis as a result of organizational membership or assumption of a combatant function.¹⁶⁴ According to the Court:

a civilian who joins a terrorist organization that becomes his home, and within the framework of his position in that organization he carries out a series of hostilities, with short interruptions between them for resting, loses his immunity against being attacked ‘for such time’ as he is carrying out the series of operations. Indeed, for such a civilian the rest between hostilities is nothing more than preparation for the next hostile act.¹⁶⁵

Under the court’s definition of ‘for such time’, the military is no longer required to ask what the terrorist is doing at the time at which he is targeted, but only whether he is still an active member of a militant organization.¹⁶⁶ Likewise, the military no longer has to show that the target poses an immediate threat, rendering the use of force necessary. Because the Court did not temporally limit the chain of acts committed or specify a maximum duration for the ‘periods of rest’, a target could theoretically be attacked during days, weeks, or, as stated in Kasher and Yadlin’s writings, ‘an additional half year or some other period, to be determined on professional intelligence grounds’¹⁶⁷ – in any event, far longer than the traditional conceptions limiting ‘for such time’ to the period immediately surrounding an attack.¹⁶⁸ The court’s interpretation thus provides the armed forces with a low evidentiary safe haven to justify the attacks: if they can prove that the target is a member of a militant group, the direct participation and the immediate threat are presumed. This lower standard for threat justifies the use of force, adding weight to the military’s side of the balance and increasing the likelihood of collateral damage because the military will now balance that threat – though it is not imminent – against the civilian harm that an attack would cause.

The attacks launched during the first minutes of an Israeli air bombing campaign against the Gaza police are indicative of the implementation of this low evidentiary standard, which regards every person affiliated with a militant group as a legitimate military target regardless of their direct participation in hostilities. Information gathered by the Goldstone Mission indicates that 248 members of the Gaza police were killed in the course of Israel’s military operations.¹⁶⁹ According to the Israeli Report, ‘due to their military functions, these internal security forces were not

164 W. J. Fenrick, ‘The Targeted Killings Judgement and the Scope of Direct Participation in Hostilities’, (2007) 5 JICJ 332, at 336–7.

165 HCJ, *supra* note 98, para. 39. See also Statman, *supra* note 21, at 195.

166 Eichensehr, *supra* note 142, at 1876; Moodrick Even-Khen, *supra* note 118, at 238ff.

167 Kasher and Yadlin, *supra* note 16, at 14.

168 Eichensehr, *supra* note 142, at 1876.

169 *Ibid.*, para. 391.

accorded the immunity from attack generally granted to civilians'.¹⁷⁰ To prove that the police forces had been incorporated in the Palestinian armed forces, the Israeli report relies on the fact that their weaponry, including machine guns and anti-tank weapons, does not fit with the tools of a regular civilian police force;¹⁷¹ on pictures in which members of the al-Qassam Brigades pose on top of a police vehicle during training operations;¹⁷² as well as on statements made by the police spokesperson, the police chief, or the commander of National Security in the Gaza Strip, according to which Hamas leadership had instructed police to fight against the IDF.¹⁷³ Additional arguments were later presented, pointing out that 'among the 343 members of the Palestinian security forces who were killed, 286 have been identified as terror organization members (83 percent); Another 27 fighters belonging to units undergoing infantry training raises this total to 313 (91 percent)'.¹⁷⁴

Such a conclusion is nevertheless problematic. The concept of organized armed group refers to non-state armed forces in a strictly functional sense. For the practical purposes of the principle of distinction, therefore, 'membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse'.¹⁷⁵ Members of organized armed groups indeed lose protection against direct attack only and for as long as they assume their continuous combat function.¹⁷⁶ Conversely, individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of international humanitarian law.¹⁷⁷ In this regard, the Israeli government has presented no basis on which a presumption can be made against the overall civilian nature of the police in Gaza.¹⁷⁸ On the contrary, the Israeli Report even acknowledges that 'The newly established police force thereafter assumed many traditional law enforcement functions, to the extent enforcing the unlawful rule of a terrorist organization over a population could be termed – law enforcement'.¹⁷⁹ Likewise, the Goldstone Mission notes that there are no allegations that the police as an organized force took part in combat during the armed operations.¹⁸⁰ On the contrary, it appeared that 75 per cent of the police officers killed died as a result of the air strikes carried out during

170 Israeli Ministry of Foreign Affairs, *supra* note 93, para. 237.

171 *Ibid.*, para. 241.

172 *Ibid.*, para. 242.

173 *Ibid.*, paras. 244–245. See also Meir Amit Intelligence and Terrorism Information Center, 'Hamas and the Terrorist Threat from the Gaza Strip: The Main Findings of the Goldstone Report versus the Factual Findings', March 2010, available online at www.terrorism-info.org.il/site/content/t1.asp?Sid=13&Pid=334.

174 J. D. Halevi, 'Palestinian "Policemen" Killed in Gaza Operation Were Trained Terrorists', 9 *Jerusalem Center for Public Affairs*, 13 September 2009, available online at www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=1&DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=3081&TTL=Palestinian_Policemen_Killed_in_Gaza_Operation_Were_Trained_Terrorists. See also Israeli Ministry of Foreign Affairs, *supra* note 93, paras. 247–248.

175 *Ibid.*, at 33.

176 International Committee of the Red Cross, *supra* note 57, at 70.

177 *Ibid.*, at 34.

178 Goldstone Report, *supra* note 2, para. 417.

179 Israeli Ministry of Foreign Affairs, *supra* note 93, para. 247. See also para. 241.

180 Goldstone Report, *supra* note 2, para. 415.

the first minutes of the Israeli attack and, thus, that they were neither engaged in any military activity at the time of the attacks nor carrying out preparations for combat.¹⁸¹ In other words, even within the expanded Israeli definition of direct participation in hostilities, the terrorist organization did not become their 'home' and the chain of acts was interrupted, since the resting time between hostilities was used to carry out civilian functions rather than to prepare the next hostile act.¹⁸²

The deliberate attacks against the police forces are a peculiar example of the inevitable dire consequences flowing for non-combatants from the overly broad notion of 'supporting terrorist infrastructure' that framed the Israeli armed-forces activities in Gaza. In the particular context of Gaza, where Hamas gathered a majority of votes in the 2006 election, such a conception is at least 'particularly worrying'¹⁸³ and raises major issues. Indeed, if anyone who supports Hamas in any way may be considered as promoting its terrorist activity, does it mean that, for Israel, a majority of the population turned into a legitimate target?¹⁸⁴ In other words, should the violations committed be seen as 'mere exceptions' unable to undermine the effectiveness of the principle of distinction or should they be analysed as indicative of a broader trend denying the very usefulness of such a principle? Was Operation Cast Lead a war 'on terror' or a war against the Gazan population? Relying solely on a statement made by the Israeli Deputy Chief of Staff,¹⁸⁵ the Goldstone Report seems to opt for the second alternative when it states that:

the indiscriminate and disproportionate impact of the restrictions on the movement of goods and people indicates that, from as early as some point in 2007, Israel had already determined its view about what constitutes attacking the supporting infrastructure, and it appears to encompass effectively the population of Gaza.¹⁸⁶

A quick overview of the most uncontroversial legal sources confirms that such a conception is indeed embedded in the Israeli legal system.

The *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* case, ruled by the Israeli Supreme Court in May 2006, is probably the most striking example in this perspective. In the majority decision written by Justice Michael Cheshin, the fact that Hamas won a majority of the seats in the Palestinian parliament

181 Ibid. The reports are even precise that 'At the other police stations, the police were engaged in a range of routine tasks, including questioning detainees and handling issues for members of the public who were present in police facilities in the middle of an ordinary day'; see *ibid.*, para. 427.

182 See the definition given by the Israeli Supreme Court, HCJ, *supra* note 98, para. 39.

183 *Ibid.*, paras. 63, 1206.

184 *Ibid.*

185 *Ynet*, 'Deputy Chief of Staff: Worst Still Ahead', quoted in the Goldstone Report, *supra* note 2, para. 1208.

186 *Ibid.*, para. 1207.

in the 2006 elections is analysed as clear and explicit evidence not only of the ‘great hostility that many Palestinians feel towards Israel and Israelis’,¹⁸⁷ but also of the ‘strong connection between the terror organizations and the Palestinian civilian population’.¹⁸⁸ According to the judgment:

The Palestinian public plays an active part in the armed conflict. . . . Large parts of the Palestinian public – including also persons who are members of the organs of the Palestinian Authority – support the armed struggle against Israel and actively participate in it.¹⁸⁹

This active participation, which seems to be equated to the ‘supporting terrorist infrastructure’ referred to in the Gaza war, includes, in the Supreme Court definition, the direct participation in hostilities, the indirect aid provided to terror, but also the assistance the armed groups receive from ‘all parts of Palestinian society . . . by its silence and failure to prevent terror operations’.¹⁹⁰ In other words, all those who do not collaborate are deemed to be part of the ‘supporting terrorist infrastructure’. This point is made clear in Kasher and Yadlin’s writings. Justifying the fact that an anti-terror squad will often be right in assuming that ‘almost all the persons it encounters during a mission do not support it since they endorse activities of terror and are not its victims’,¹⁹¹ these authors indeed explain that, since ‘direct involvement in carrying out acts of terror is definitely immoral, there is a prima facie reason to endorse measures taken against such acts’.¹⁹² Moreover, since acts of terror are intended by whoever performs them to kill people or otherwise injure them when they jeopardize the life of no one, ‘there seems to be even a prima facie duty to denounce acts of terror and endorse anti-terrorist acts’.¹⁹³ The utterly immoral nature of terrorism overrides, in this perspective, the distinction between civilians and combatants and turns it into a more complex moral division between innocent and guilty, where innocence does not necessarily depend on one’s status as a civilian or combatant.¹⁹⁴ Civilians voluntarily contributing to an unjust war, either morally or materially, are not ‘innocent’ in the ethical sense, but are rather ‘uncivilized civilians’¹⁹⁵ and, consequently, more appropriate targets for attack than combatants prosecuting a just war.¹⁹⁶ As mentioned, the consequentialist calculations taking into account the

187 HCJ, *Adalah Legal Centre for Arab Minority Rights in Israel and others v. Minister of Interior*, HCJ 7052/03, 14 May 2006, paras. 9, 110.

188 *Ibid.*

189 *Ibid.*, para. 12.

190 *Ibid.*, paras. 8, 12. See also HCJ, *supra* note 98, para. 2.

191 Kasher and Yadlin, *supra* note 16, at 7.

192 *Ibid.*, at 65.

193 *Ibid.*

194 See J. Halper, ‘The Second Battle of Gaza: Israel’s Undermining of International Law’, *Monthly Review*, available online at <http://mrzine.monthlyreview.org/2010/halper260210.html>.

195 See HCJ, *supra* note 98, paras. 2, 3.

196 See, on this point, A. X. Fellmeth, ‘Questioning Civilian Immunity’, (2008) 43 *Texas ILJ* 453, at 462. See also Margalit and Walzer, *supra* note 26.

'stakes' involved further extend this logic, justifying the incidental killing of some morally innocent civilians in pursuit of the 'just war' to the extent that such killing does not outweigh the morally justifiable goals of the armed conflict itself. The Gaza war must be understood along these lines. 'Innocence' no longer refers to the lack of capacity to injure, but to the absence of culpable intent; the 2006 election is clear evidence of a collective culpable intent. Since the guilt is collective, so must be the punishment.