"Players" on the Battlefield of the War against Terror: Rules of Attack, Detention, and Protection of Civilians

by Hilly Moodrick-Even Khen*

The spread and intensification of the phenomenon of terror in the twenty-first century has changed the modern battlefield. One of the main phenomena contributing to this change is the manner in which terror blurs the distinction between combatants and civilians. The center of gravity has shifted from the clear distinction between civilians and combatants to more subtle distinctions, where civilians undertake various activities—from information gathering for and logistical support of the combat forces to morally supporting them—giving them a central role. This paper presents and analyzes the assertion that the change which terror has created on the battlefield justifies an alteration in the attitude toward the various participants on the battlefield. My argument is that this shift in attitude involves, *inter alia*, the influence of human rights law on humanitarian law, and I shall demonstrate the practical significance of this influence on how we react to the players on the battlefield: combatants, civilians, as well as civilians who participate (directly or indirectly) in combat. Prior to the discussion itself, I will present the various characteristics of the battlefield created by the war on terror.

The war on terrorism may be defined as armed conflict,[1] and from a legal perspective it does not differ from conventional warfare: all of the rules of warfare and humanitarian law[2] apply to it. Nevertheless, a number of differences exist between a war on terrorism and conventional warfare. In general, the former does not involve large military forces; it is often characterized by focused campaigns intended to achieve short-term objectives with the use of sophisticated weaponry. To these attributes is added, as stated above, the manner in which terrorism blurs the distinction between combatants and civilians, chooses civilians as its victims, and for the most part operates from among the civilians, making it difficult for its opponents to adhere to the doctrines of humanitarian law.

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* Assistant Professor, Sha'arei Mishpat College.

[1] See, for example, HCJ 2461/01, *Canaan v. The IDF Commander in Judea and Sumeria*, Takdin S.Ct. 2001(1) (Hebrew), 1600; see also**,** HCJ 4706/04, *Physicians for Human Rights v. The IDF Commander in Gaza*, 58(5) IsrSC. 385 (2004) (Hebrew)(hereinafter, *Physicians for Human Rights*); HCJ 3239/02, *Marab v. The IDF Commander in Judea and Sumeria*, 57(2) Isr.S.Ct 349 (2003) (Hebrew); and most recently, HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (unpublished), 14 December 2006, available at www.court.gov.il. See also, the position of the Inter-American Commission on Human Rights, according to which the war on terrorism can be considered armed conflict: Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/-V/II.116 Doc.5 rev.1 corr., 22 October 2002.

[2] From a military perspective, the war on terrorism is defined as warfare of low force, but this definition has no legal significance: according to the tests surveyed, the war on terrorism is carried out between organized and armed bodies that use powerful weaponry and is, for all intents and purposes, an armed conflict of high force.

Against the background of these distinctions, I shall survey the means of reacting to participants in combat. I will analyze the accepted paradigms with respect to such reaction to *direct* participants in combat (that is, combatants and civilians who take a direct part in combat) and examine them in the context of acts of terrorism on the levels of both international and noninternational armed conflict, as well as from the perspective of the occupying regime. The analysis will consider the problems that arise when the paradigms accepted in regular combat are applied to combat against terrorism, and I shall propose an alternative paradigm.

Occupying Regime and Effective Control

The question of what means may be used against terrorists also arises in an occupied area—since acts of terrorism occur in these areas as well. On the face of the matter, this question should be answered through the laws of occupation; however, the arrangement these laws create is not exhaustive and therefore they should be integrated into the laws of armed conflict.

One of the central characteristics of occupying regimes is effective control of the occupier over the area it occupies. The test of effective control is to determine whether the occupying force can assert its authority and carry out its obligations with regard to the occupied area.[3] Where such control exists, the occupying force must deal with disturbances by means of policing with the aid of the tools provided it by the Hague Regulations and the Fourth Geneva Convention: that is, mainly through means such as arrest, assigned residence, and administrative detention.

Article 43 of the Hague Regulations, which sets forth the occupying force's authority to restore order to the occupied area, could serve as a basis for the detaining power.[4] According to the Fourth Geneva Convention, the detaining powers are quite limited. Articles 42, 43, and 78 of the Convention permit arresting persons who are enemy civilians or placing them in assigned residence—where this is absolutely necessary due to *compelling* demands of the security of the detaining power. Continued imprisonment of the person when such reasons cease to exist is not permitted. In the language of Article 42 of the Fourth Geneva Convention, "The internment or placing in assigned residence of protected Persons may be ordered only if the security of the Detaining Power makes it *absolutely necessary*" (italics added). The Convention did not set forth criteria for the requirements the detaining power must meet or for the appraisal of the danger posed by the detainee.[5] However, the commentary on the Convention states that "the mere fact that a person is a subject of an enemy power cannot be considered as

[3] See**,** section 42 of the Hague Regulations. See also, HCJ 102/82, *Tzemel v. Minister of Defense*, 37(3) IsrSC 365, 375 (1983) (Hebrew) (hereinafter, *Tzemel*).
[4] *Al-Jedda v. Secretary for Defence* (2006) EWCA Civ. 327.
[5] See also, the bill for the Detention of Unlawful Combatants 5760-2000 (opinion of the General Counsel for the Foreign Affairs and Defense Committee of the Knesset), 17 June 2001, sec. 38 at 11.

threatening the security of the country where he is living; It is not, therefore, a valid reason for interning him or placing him in the assigned residence."[6]

According to the commentary on the Geneva Convention, then, the preventive detention or placement in assigned residence of a person is justified only where the state can reasonably assume that the deeds, knowledge, or skills of the person in question constitute a true threat to present or future state security.[7] In other words, these persons must constitute a threat to state security by virtue of their very deeds, knowledge, or skills.[8]

Article 5 of the Fourth Geneva Convention permits the denial of communication rights (exchange of letters and visits of Red Cross personnel and clergy) to citizens detained for aiding or participating in acts of espionage and sabotage against the occupying power as long as is necessary for reasons of security. Similarly, the denial of protected civil rights the article refers to permits indicting them for carrying out the actions for which they were detained and which constitute a general breach of international law.

It seems, therefore, that the Geneva Convention indeed sets forth the right to detain and to indict protected persons—to the extent necessary for the security needs of the occupying power. However, it contains no provisions for implementing the laws of armed conflict in an occupied territory in the event of armed opposition against the occupying state. This fact reflects the traditional approach that the laws of detention and arrest alone (rather than the laws of targeting) are to be implemented by the legal regime with regard to the occupied territory. This is based upon two underlying assumptions of international law: that after the occupation of a territory, relative calm prevails; and that the duration of the occupation is generally short.[9] Therefore, the main goal of the

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[6] Jean S. Pictet, ed., *Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War or 12 August 1949* at 258 (1958).

[7] Ibid.

[8] This reading—that a threat stemming from knowledge and skills is sufficient to make one subject to internment—is likely to be regarded as too broad. However, Pictet notes that the fact that a particular person has arrived at the age of recruitment (example of skills) is not sufficient basis upon which to inter him as a threat to state security. This may only be done on the basis of the fear that he intends to pose such a threat. See ibid., at fn. 1. In the decision of the Tel Aviv District Court regarding the internment of Sheik Obeid pursuant to the Imprisonment of Unlawful Combatants Law, 5762-2002, *Sefer Hahukkim* 192, Judge Caspi adopts the opposite interpretation, granting the state broad discretion when it determined the absolute security considerations to be used as the basis for the detention in the occupied territory. The judge relied upon the commentators (even on Pictet) who assume that the Fourth Convention ascribes broad discretion to the state. It is to be noted that the commentators emphasize the need for a connection between the danger to state security and the person the state seeks to intern (see MP 92680, *The State of Israel v. Sheik Abd el Kareem Obeid*, *Pador* 93 (8)03). It is noted that the quote used from Pictet is only partial. Further on, he sets forth the need for a direct connection between the deeds of the person the state wants to detain and the state's security needs (see Pictet, *supra*, fn. 6, 257).

[9] This approach is expressed in Convention Relative to the Protection of Civilians Persons in Time of War (Geneva Convention No. IV), 12 August 1949, 6 *U. S. T.* 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, Article 6 (hereinafter, Fourth Geneva Convention), which limits the applicability of most of the Convention's arrangements to one year from the end of the fighting.

occupant is to insure the basic rights of the citizens and to administer the routine in the occupied territory solely through use of police forces.

However, according to another approach, the applicability of the policing rules also pertains to situations in which there is not (or there is still not) effective control.[10] The rationale behind this integrative approach is also valid for the applicability of the laws of armed conflict[11] in a place where the laws of occupation or effective control apply. However, this approach seems to take into account mainly how the policing laws broaden the authority of the power engaged in combat rather than how they could restrict the actions of the combat power. For example, when civilians take part in combat action, they are, according to the policing laws, to be detained, as set forth above, on the basis of the detention provisions of the Fourth Geneva Convention that require proof of the danger stemming from the detainee.[12] On the other hand, the laws of armed conflict permit activists of the organization to be detained for organizational belonging, and even to be attacked as legitimate targets, without requiring their prior detention.[13] Such situations arise, of course, when the underlying assumption of relative calm in the occupied territory is disturbed, or when actual combat that meets the definition of armed conflict occurs in the occupied territory. In such situations, the laws of occupation do not create an exhaustive arrangement, even though they constitute a default choice.[14] When the occupier does not have effective control, the laws of armed conflict will even take precedence over the laws of occupation.

Notwithstanding what is stated above, the special need of the occupants to insure the security and interests of the residents of the occupied territory under their effective control must be taken into consideration.[15] In other words, the regime of belligerent occupation takes precedence over the regime of armed conflict when there is effective control, and thus the default choice of the occupier in actions against opposition groups is the use of law enforcement means. However, as stated above, these may not suffice where the level of armed opposition is high. As we shall see below, law enforcement is likely to be the default choice against the war on terror in the framework of an armed

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[10] See, *Tzemel*, *supra* fn. 3, 372.

[11] To be called later also the laws of warfare or the laws of war.

[12] Articles 5 and 78 of the Convention. Self-defense is likely to apply with regard to them only in the narrow criminal field (e.g., at the time of resistance to arrest). Self-defense according to international law does not apply to these details but rather to states and, according to a particular interpretation, to organizations.

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (7/12/1978), 1125 U.N.T.S 3, reprinted in 16 I.L M. 1391 (1977) Article 51 (3) (hereinafter, API) and Protocol Additional to the Geneva Conventions of August 12 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 July 1977, 1125 U.N.T.S 609, *reprinted* in 16 I.L.M. 1442 (1977), Article 3 (hereinafter, APII).

[14] See**,** HCJ 7957/04 *Marabah vs. The Prime Minister of Israel*, Takdin S.Ct. 2005 (3), 3333 (Hebrew) (hereinafter, the *Marabah* case) para. 17. The question of how to identify actions that come within the definition of armed conflict and which exceed the definition of criminal acts needs to be resolved through use of the parameters defining armed conflict, such as whether both sides of the conflict are involved in an intensive armed struggle and use massive weaponry.

[15] Orna Ben-Naftali and Keren Michaeli, "*We Must Not Make a Scarecrow of the Law*": *A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 Cornell L.J. 233, 282 (2003).

conflict, and this fact is based both on the tests of necessity found in the laws of war and on the interpretation of the laws of war through human rights law.

Military Targets

The polar opposite of combatants in international armed conflicts being entitled to the status of prisoners of war is their being legitimate targets at any time. Similarly, the fact that direct participants in combat in noninternational armed conflicts are not entitled to the status of a prisoner of war does not mean that they can be regarded as legitimate targets at any time—they may be targeted only when they participate directly in hostilities. The question examined in this section, therefore, is the significance of legitimate targets. I shall ask whether the intention is that every combatant or civilian who takes a direct part in combat is necessarily exposed to the risk of being killed in armed conflict when they are labeled legitimate targets. In this context, I shall also analyze the issue of preventive and targeted killings—a method of combat that has become common in the war against terrorist organizations and their activists.

The questions shall be approached through the examination of several variables. The first is the relationship between the view of the combatant as a legitimate target and additional doctrines of humanitarian law: those of military necessity and proportionality. I will argue that these doctrines do not unequivocally prohibit preventive killing of terrorists. However, the second variable leads to another consideration: the influence of the connection between the international humanitarian law (IHL) and the international human rights law (IHRL) with respect to the appropriate relationship between combatants and civilians who took a direct part in the combat. I will argue that the demand to view the nonregular combatants and the civilians directly involved in combat as legitimate targets raises two central difficulties: identification and repentance. These difficulties are likely to lead to the conclusion that the activists of the terror organizations (as distinct from their leaders) cannot always be considered legitimate targets, even when IHL renders them such. It is necessary, therefore, to implement mechanisms of human rights law in their consideration. On the other hand, these difficulties do not affect, for the most part, the status of the leaders of the organizations. For these, a wider permissibility of targeting should be adopted in the context of preventive killing. In addition, the position of this argument on the question of preventive killing of terrorism activists and their leaders will be contrasted with others positions, thus clarifying its rationale.

Before beginning the discussion, a methodological comment must be made about the distinction between the *lex lata* and the *lex ferenda*. The fact that theoretical and abstract legal solutions do not always faithfully reflect the powers and interests that create reality cannot be ignored. Even when the objective is to guide human leadership according to legal and moral principles, the conditions on the ground are likely to lead to solutions in which the *lex ferenda* is inoperable within the *lex lata*. This distinction is especially relevant when dealing with terrorism, which is carried out in field conditions where it is even more difficult to predict future occurrences. It is also not always possible to predict that all of the "players" in the field will behave according to the rules. Moreover, frequently the rules themselves are not known and clear. Therefore, even though the solutions proposed below are based, in general, on the *lex ferenda*, they do not

ignore the problems and difficulties that the *lex lata* is likely to raise. Throughout the following argument, these difficulties are mentioned whenever they occur and the manner of dealing with them is considered, such that the influence of the *lex ferenda* on the *lex lata* is taken into account.

Legitimate Targets and Doctrines of Humanitarian Law

One of the established ideas of humanitarian law is the creation of balance and parallelism between military needs and humanitarian principles. This idea is expressed in section 22 of the Hague Regulations, which limits the means available to the aggressor. This section can be broken down into several basic principles whose objective is to balance military and humanitarian considerations.

The principle of military necessity. This principle, which is a preliminary condition for the legality of actions carried out in a war, provides that the military action must serve a military objective; in other words, it must be directed against a military target or another target that substantively contributes to the military activity of the other side.[16]

The principle of the distinction between legitimate and nonlegitimate targets. This doctrine distinguishes between military targets and civilian targets. In this context, it also defines the distinction between civilians and combatants, the rules under which persons belonging to these categories operate, and the appropriate attitude towards them on the part of the opposing forces of the enemy. The combatant is permitted to use means of warfare in order to kill its enemy. In a symmetrical fashion, the combatant's enemy is permitted to kill the combatant, who is considered to be a legitimate target. There is no need to consider who is the aggressor and who is entitled to act in self-defense. Civilians do not have permission to fight. (And pursuant to domestic law, they are also liable to be indicted for the very act of fighting, with the exception of the limited permission for spontaneous organization of civilians wishing to defend themselves from an enemy threatening to take over their territory. Even in this case, any armed uprising is permitted only under certain conditions and for a limited period of time.)[17] The obligation of the other side is to not harm civilians.

Proportionality. This is a rule that limits the use of force with regard to harming civilians: the injury caused to property and to life must not be to an extent beyond that necessary with respect to the military target.[18]

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[16] API, Article 52.

[17] Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), 12 August 1949, 6 *U.S.T.* 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Article 4(6).

[18] This rule, which appears in API, Article 51(5)(b) was adopted (with certain changes, seen below) by the Statute of the International Criminal Court, see**,** *Statute of the International Criminal Court*, UN Doc. A/CONF/183/9, reprinted in 37 ILM 999 (1998), corrected through 8 May 2000, by UN Doc. CN.177.2000. TREATIES-5, Article 8. This rule is to be distinguished from the principle of proportionality that determines the laws of opening a war, according to what is necessary, because the military power to be applied shall be proportional to the military target.

The Martens clause.[19] This segment unites all of these doctrines into one residual interpretive principle, which provides that where international law is silent on the duties and rights of combatants and civilians, these should be determined in accordance with established custom, the principles of humanity, and the dictates of public conscience.

In the discussion of the doctrines below, I shall consider whether the conclusion to be drawn from them is that combatants (legitimate targets) are free game at all times, whereas civilians who take a direct part in the combat are free game only while they do so.

It should be noted that the sources of the general doctrines that govern the laws of war are, for the most part, the documents that deal with international armed conflicts, starting with the Saint Petersburg Declaration[20] and up to the First Additional Protocol to the Geneva Conventions. However, as we shall see below, their adoption by the great majority of states and the fact that most of them set humanitarian standards whose objective is to protect civilians from arbitrary injury on the battlefield[21] render them doctrines of customary law that also apply to armed conflicts that are not international.

I now turn to examine the question of whether the doctrine of military necessity justifies that a terrorist or the civilian who takes direct part in combat can be killed at any time. I shall analyze the doctrine of military necessity and then examine how my conclusions can be implemented with regard to preventive killings, one of the methods used in the war against terrorism.

On the face of things, the four principles set forth above can be divided into two groups: the last three form the basis of the humanitarian considerations while the first, the principle of military necessity, resides in the military considerations at the other end of the spectrum.[22] This division faithfully describes the view, drafted by German lawyers (and called "*kriegsraison"*),[23] according to which military necessity takes precedence over written legal instructions. Indeed, formal international law never clearly accepted this outlook.[24] However, until World War II, it was, in effect, possible to find expressions

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[19] API, Article 1.

[20] Declaration Renouncing the Use in Time of War of Explosive Projectiles under 400 Grammes Weight, Signed at Saint Petersburg, 29 November/11 December 1868, reprinted in Schindler and Toman, eds., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* at 95 (Sijthoff & Noordhoff, 1981) (hereinafter, Saint Petersburg Declaration).

[21] The principle of the distinction between legitimate and nonlegitimate objectives and the principle of proportionality are, undoubtedly, of this kind.

[22] However, as a practical matter, and as we shall see in the continuation, this is a humanitarian doctrine, for indeed from the positive the negative may be deduced—a target that is not military may not be attacked.

[23] The German rule provides "*Kriegsraison geht vor Kriegsmanier*"—needs of war take precedence over laws of war.

[24] In the preface to the Fourth Hague Convention, support is expressed for the dominance of military considerations. However, the Hague Regulations set forth a formula to balance between the military needs and other interests, such as proportionality, distinction between combatants and citizens, and prevention of unnecessary suffering. See, Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex Regulations Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, T.S. No. 539 (hereinafter, the Hague Regulations).

of this approach in military practice, according to which the military commander had the role of deciding in real time and according to immediate data and military needs if the laws of war should be fulfilled or ignored. In this approach, the one acting—through the military commander—is essentially the only and decisive judge of the military necessity of the action. Therefore, the actor is authorized to decide whether to implement the law or breach it, to the extent that this choice serves the military advantage.[25]

The approach delineated above can be attributed either to the continual flux of the battle arena since the Hague Regulations were drafted and adopted in 1907 or to a feeling of contempt for the law.[26] The extent to which this issue is a direct challenge to the laws of war is reflected in the fact that the policy of Germany in World War II was aberrant and its leaders were punished for this. The arguments of German war criminals on trial in Nuremberg who sought to use the theory of military necessity as a defense were rejected by the tribunal. Thus, for example, the tribunal ruled in the List case that,

> [the German generals] invoke the plea of military necessity, a term which they confuse with convenience and strategical interests. … It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules. … The rules of international law must be followed even if it results in a loss of a battle or even a war.[27]

The approach presented by the tribunal is based upon a humanitarian orientation according to which the principle of military necessity is designed to *limit* the use of military means to those situations in which the military necessity to harm civilians arises. After the war, the opposite approach, which is accepted to this day, began to take hold, according to which military necessity does not justify the breach of legal rules.[28]

However, this approach does not finish off the definition of military necessity. It is indeed possible to locate a number of definitions of this concept. The first appears in the Lieber Code as "those measures which are indispensable for securing the ends of the

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[25] William G. Downey, *The Law of War and Military Necessity*, 47 AJ.I.L. 251, 253 (1953); Lasse Oppenhiem and Sir Hirsch Lauterpacht, 2 *International Law: Disputes, War and Neutrality* at 231 (7th ed 1952). This position echoes throughout the recent American neo-Conservative literature on the breach of international law according to the need and in order to protect vital state interests. See**,** for example, Michael J. Glennon, "The New Interventionism: The Search for a Just International Law," *Foreign Affairs* 2. (1999); Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* 13 (2005).

[26] Yves Sandos, Christoph Swinarsky, and Bruno Zimmerman eds. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* at 391 (International Committee of the Red Cross**,** 1987) (hereinafter, ICRC Commentary).

[27] *United States v. List,* Annual Digest 15 (1948), 632 (hereinafter, *List*).

[28] See**,** for example, the ruling of the Israeli Supreme Court during the period of the latest conflict with the Palestinians: HCJ 3114/02, *Bracha v. The Minister of Defense,* 56(3) 11, 16; see *Physicians for Human Rights*, supra, fn. 1; and see *Tzemel*, *supra,* fn. 3, 368.

war, and which are lawful according to the modern law and usages of war."[29] The U.S. Army's Operational Law Handbook returns to this approach and provides that any means may be used that are not forbidden pursuant to international law and which are essential for insuring the surrender of the enemy at the earliest possible moment.[30] After the appearance of the definition in the Lieber Code, the doctrine was defined in the Saint Petersburg Declaration, which provides that the sole legitimate target of warfare is to weaken the military forces of the enemy, and for this purpose it is sufficient to neutralize the greatest number of enemy soldiers.[31]

However, the concept of military necessity shifted as the rules of international law, subject to constant alteration, changed and were formed. As is known, the development of international law is influenced by conventions adopted over time, as well as by rooted customs and developing reality not yet set down in consensual law. Thus, in every era, "military necessity" is redefined according to the relevant legal rules for that era. For example, dropping bombs in the midst of civilian population centers in the period of World War II was considered to serve the military necessity of harming the morale of the population and weakening, through such injury, the other side. This was despite the fact that the principle of the distinction between legitimate and nonlegitimate targets was already set down in the Hague Regulations,[32] which formed the normative basis of the laws of warfare of that era. Attack (intentional as well as unintentional) of civilian targets was considered, therefore, to be the unavoidable price of military necessity.[33] As we shall see in the discussion of the principle of proportionality, this is not the case today, since this doctrine and the criteria for appraising it were explicitly formulated in the First Protocol additional to the Geneva Conventions of 1949 (hereinafter, API) and in the Statute of the International Criminal Tribunal.

As stated above, the principle of military necessity went through a number of incarnations. In the end, it evolved from a principle that broadened the military authority to one that limited the military authority to injuring only targets whose neutralization will

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[29] Instructions for the Government of Armies of the United States in the Field. Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, Article 14, reprinted in Schindler and Toman *supra*, fn. 20.

[30] The U.S. Army's Operational Law Handbook, 2002. These definitions also appear in the legal literature. See, for example, Morris Greenspan, *The Modern Law of Land Warfare* at 313-314 (1959). Downey, *supra*, fn. 25, 254. It is to be noted that Greenspan does not explicitly refer to the limitation of military necessity by the law. However, he provides that the appropriate means are those that bring about the maximum savings in time, money, and human life. According to the spirit of API, the savings in human life is to be interpreted as relating to the attacked side and not just to the attacking side.

[31] Saint Petersburg Declaration, *supra*, fn. 20, 95.

[32] Article 25 of the Hague Regulations.

[33] Downey points out, for example, that the injury of civilians in a hotel near railroad tracks in Versailles that were bombed in World War II by the American Air Force was not a war crime. This is because it was auxiliary to the military necessity of preventing the German Army from using this transportation line. See, Downey, *supra*, fn. 25, 257. In this determination, Downey does not examine the relationship between the military advantage achieved and the surrounding damage caused as mandated by API, which provides that surrounding damage is justified only when it is not excessive in relation to the expected military advantage from the campaign. For a detailed discussion of the subject, see the discussion of the proportionality principle.

make an effective contribution to the military action. This formulation of the principle of military necessity appears in Article 52 of API and is considered to be one of the most important and current of its definitions. From this definition, it is possible to derive a test of necessity according to which the military necessity would justify the harm to targets that will give one side a military advantage. It seems that the military advantage should be appraised on the basis of long-term considerations rather than on the basis of those justifying immediate action, but this position is not unequivocal. On the one hand, the former approach is supported by the position of some states that demanded that the term "effective contribution to the military action" be interpreted as relating to the military campaign in its entirety and not to a specific act of attack.[34] However, the fact that various states attached interpretive declarations to the definition of the term "effective contribution" appearing in the Protocol[35] in order to clarify their intention at the time of ratifying the section reveals the text's ambiguity on this issue.

We must consider the question of whether the criteria for the appraisal of military necessity—in relying upon the tests of absolute necessity mentioned above—are subjective or objective. In other words, are they determined by the commander on the basis of the facts presented to him (a subjective criterion) or by the court appraising the circumstances after the fact according to the discretion of a reasonable commander (an objective criterion)? According to the case law, a distinction must be made between the facts and the conclusions derived from them. Of course, the appraisal is dependent upon the facts that were known to the commander, and this is the subjective aspect of it. However, the commander must convince the court that such facts provided a reasonable basis for the assumption that the attack was indeed necessary. In this sense, the criterion is objective—as the American Supreme Court stated,

> A court in reviewing a case must consider the facts, as they appeared to the officer at the time he acted … And if with such information as he has a right to rely upon, there is *reasonable ground* for believing that the danger is immediate or menacing, or the necessity urgent, he is justified in acting upon it; and discovery afterwards that it was false or erroneous, will not make him a trespasser … He must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be. (Emphasis added)[36]

In addition to this, the criminal standard upon the basis of which the commander is liable to be tried must be distinguished from the standard in proceedings to determine the state's liability. The criminal standard sets, of course, a higher level in relation to the question of whether the commander was aware of the circumstances due to which he

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[34] See the discussions of the principle of distinction between objectives and the principle of proportionality, below.

[35] Germany, for example, attached an interpretive declaration to the principle of proportionality, in which it is stated that the term "military advantage" must be understood as one that relates to the military advantage anticipated from the attack in its entirety and not that expected from isolated and specific parts of it. See**,** Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflict* at 162 (Oxford University Press,1995).

[36] Quoted by Downey, *supra*, fn. 25, 256. See also, *List, supra,* fn. 27, 176.

decided that the military necessity exists. On the other hand, in a process determining the state's liability for damages created as a result of the attack, the question of whether the military necessity exists will be examined according to laxer criteria (or more stringent criteria from the perspective of the state's liability), which do not require awareness beyond a reasonable doubt.

To summarize the presentation of the principle of military necessity, it is important to point out that even where the documents of IHL are explicitly in favor of the military considerations and needs, it is clear that such considerations were taken into account at the time the documents were drafted. Military necessity constitutes, therefore, an integral part of the law in the sense that all of its implications are dealt with in the law.[37] Thus, for example, Article 57 of the API provides that the means of caution the attacker is to adopt prior to a military action are those that are feasible.[38] Similar to this is the already mentioned broad interpretation of the concept "military advantage" appearing in the API adopted by some of the states. Despite its amorphousness, therefore, the doctrine of military necessity adds to the other limitations that we shall set out below: prevention of unnecessary suffering, distinction between objectives, and proportionality (in the sense that it prohibits carrying out an action that does not serve a military objective). This is, as stated above, the significance of Article 52 of the API, which defines the permitted target in an attack as one that makes an actual contribution to the military effort.[39]

On the basis of what is stated above, I shall examine the question of whether the killing of terrorists will make a real contribution to the military effort and thereby serve a military need. In this context, it will also be possible, of course, to justify those actions that do not serve an immediate military need but are undertaken on the basis of long-term considerations. However, it must be certain that these actions are consistent with the laws of warfare and its customs. One method carried out for this purpose is preventive killing. I shall therefore turn to an analysis of this issue and examine whether preventive killing can be justified through the doctrine of military necessity.

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[37] Fleck, *supra,* fn. 35, 33.

[38] By way of analogy, the laws of occupation also recognize considerations of security and allow the occupant to use reasonable means to return order to the occupied territory. For example, section 43 of the Hague Regulations. However, it is understood that military considerations are not the central considerations arranging the laws of seizure in wartime.

[39] The doctrine of military necessity also had influence on the limitations imposed upon the laws of going to war (*jus ad bellum).* Until the drafting of the UN Charter in 1945, a state going to war was permitted to set as its goal the maximum surrender of the enemy. This goal is no longer permitted. According to the UN Charter, which prohibits the use of force (Article 2[4]), permission was given to go to war only for the purpose of self-defense, and hence the military necessity limits the use of force to the repelling of attack, the return of occupied territories, and the removal of the threat from the state. For more on this subject, see Fleck, *supra,* fn. 35, 30.

What Is Preventive Killing?

Preventive killing, also termed "targeted frustration,"[40] is the means serving the objective of liquidating a particular person: a political or military leader or commander or a person directly responsible for acts of terror. This description creates a positive connotation of the concept "assassination," making the use of this means permissible. Despite the fact that preventive killing, assassination, or elimination is intuitively viewed as an immoral means, it cannot be ignored that in the conditions of modern warfare it has a number of advantages, some of which are even moral. Thus, for example, preventive killing is likely to reduce the damage to innocent civilians. This is because this combat focuses on specific targets, and in this way can prevent unnecessary and nonproportional harm to the lives and property of innocent civilians—that is, citizens who do not take part in hostile deeds. This is not possible, in general, in conditions of conventional warfare. On the other hand, preventive killing raises moral and legal questions about the right to life and to a fair trial of its victims.

The legal reasons for forbidding preventive killings in international law may be divided into two groups: the prohibition of such acts during times of peace and the prohibition of such acts during times of war. I shall focus upon the latter, asking whether there is an unequivocal legal prohibition of preventive killing during war time. Preventive killing is likely to be limited by the doctrines of humanitarian law set forth above, and my objective is to examine the manner of these limitations. The prohibition is also expressed in the doctrine of chivalry, developed in customary and conventional international law,[41] and was also adopted into the Statute of the International Criminal Court.[42] A comment must be made about the validity of this doctrine in the war of states against terrorist organizations. The doctrine of mutuality, such that the commitment imposed upon one side is not dependent upon its fulfillment by the other side, was rejected in armed international conflicts. However, it is likely to apply precisely in the case of noninternational armed conflicts , and especially to conflicts between a state and a terrorist organization that categorically refuses to obey the laws of warfare and to carry out the obligations derived from them. This is, of course, with the exception of the instructions of common Article 3 that delineate firm obligations which are not to be conditioned upon the doctrine of mutuality. Therefore, there is some doubt as to whether the doctrine of chivalry must apply to conflicts between a state and a terrorist organization. This is based on the fact that the doctrine is not fulfilled by the terrorist organization, whereas the non-applicability to a state does not harm basic values, *jus cogens* rights, or *erga omnes* obligations such as those that appear in common Article 3 to the Geneva Convention.

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[40] The term was coined by former Attorney General Eliyakim Rubinstein, who, in his appearance at the conference of the Forum for Law and Society, stated that the term "liquidation" was unjust to Israel and that it should be termed "principle of proportionality." See Gideon Alon, *Haaretz*, 2 December 2001.

[41] Soafer disagrees with this assertion. According to him, only assassinations with a political goal are prohibited, whereas assassinations of military officers in the framework of combat are permissible. See, Abraham D. Soafer, The Sixth Annual Waldemar A. Solf Lecture in International Law, *Terrorism, the Law and the National Defense*, 126 Mil. L. Rev. 89 (1989). at 120.

[42] The Statute of the International Criminal Court, *supra*, fn. 18, section 8(b)(xi).

Although the laws of warfare prohibit treacherous killings, it should be remembered that they do not prohibit ruses and subterfuges of war (which allow the weaker side to reduce the gap between itself and the strong side)[43] provided that the provisions of humanitarian law are adhered to.[44] From this it may be stated that the act of firing on a combatant from a vehicle or a helicopter does not constitute use of treacherous means in the sense of the Hague Regulations. This is because the intended strategy here is the surprise factor provided by the warfare subterfuge that has developed with the technological advances of weaponry.[45] However, using means that the other side has no response at all to—and thus, in effect, has no chance against—also runs contrary to chivalry or raises a feeling of unfairness.

Nevertheless, assassination is included by some as being among the prohibited treacherous means discussed above.[46] The rationale of this perspective may stem from the moral basis of the laws of warfare. War is viewed as impersonal in that it is carried out between anonymous soldiers who have no personal animus for one another. The soldiers on both sides of the line are viewed as representatives of their armies and states, and they kill and are killed only because of this. As long as they do not carry out crimes, they bear no legal liability for their actions. Unmasking the soldiers, marking them, and choosing a specific soldier to be killed changes the conceptual and moral basis of the laws of war. It compels justification of the singling out of that individual, and it is likely to tilt the justification for killing in the course of war from a general one to one based upon the laws of individual self-defense.[47] It bears remembering that one of the justifications for the killing of every soldier belonging to the army of the enemy without attributing importance to the position that they hold is based upon the view that the enemy is a machine of war, one in which it is impossible to determine which of its parts is more or less vital. Therefore, the soldier in an office is not distinguished from the soldier on the battlefield, and both of them constitute legitimate targets. Personalization and individualization of the targets of war are liable to destroy the accepted notion of war and the justification to kill in the course of it.

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[43] There are even those who assert that ploys are more effective for the weaker side and that permitting them will create equal conditions in the confrontation between the sides. See, ICRC Commentary, *supra*, fn. 26, 440.

[44] See API, Article 37 that sets forth the prohibited ploys that constitute breach of trust, such as use of the uniform and vehicle of neutral forces and waving a white flag as a subterfuge.

[45] However, some modern technological means and subterfuges are prohibited by international law. Among these are types of weapons designed to cause unnecessary suffering that were prohibited by the Hague Regulations and booby-trapped articles, according to the Protocol Additional to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be excessively Injurious or to have Indiscriminate Effects and relating to the Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, (Protocol II), UN Doc A/Conf.95/DC/CRP/2 Rev.1.

[46] Greenspan, *supra*, fn. 30, 317. Additional prohibited means are the use of mercenaries, offering a reward for the head of an enemy, impounding an enemy or placing him outside of the law, and pretending to be injured, dead, or ill as a subterfuge to enable attack. This last element was even adopted into API, Article 37, which establishes what constitutes a breach of faith.

[47] Michael Gross, *Fighting by Other Means in the Mid East: A Critical Analysis of Israel's Assassination Policy*, 51 Journal of Political Studies 1, 8 (2003).

However, criticism of the assertion set forth above is also based on the foundational principles of the laws of warfare and especially on the principle of military necessity. As clarified above, the definition of the principle of military necessity may be based upon the apprehension of danger, and according to this doctrine, permission to operate against the dangerous target is granted to the extent that destruction of the target is more vital to achieving the goal of one side (or, in other words, to the extent that the target's survival more greatly endangers that side).[48] Therefore, focusing upon harming certain people who hold key positions in the unit or the military organization does not contravene the laws of warfare but rather fits in with them.[49]

On the basis of this, and relying upon the presumption that what is not explicitly prohibited by law is permitted,[50] it seems that preventive killing is not within the definition of treacherous killing prohibited under international law. Hence, it is necessary to examine whether it can be justified according to the remainder of the principles of humanitarian law and if so under what conditions. I shall therefore examine whether the principle of military necessity justifies preventive killing: Does the killing or preventive killing of terror activists and their leaders make a real contribution to the military effort? Can it contribute to bringing the enemy to total surrender? These questions are relevant in relation to every military target who takes a direct part in combat, including combatants or civilians. The importance of these questions recurs in view of the special problems that arise in relation to terrorists. One problem is the significant possibility of making a mistake regarding the identity of a terrorist. The second problem is terrorists' limited ability to repent and turn over their weapons.

The war against terrorism is combat against organizations, at times small organizations that often draw their strength from a charismatic leader. Killing a leader is likely to bring about contradictory results. On the one hand, it could end the conflict, or at least weaken the organization, and thus prevent the killing of additional people; on the other hand, it is likely to start a cycle of retribution and revenge. Two extreme situations are possible. If the killing indeed brings about the end of the conflict or a significant weakening of the organization, then it is an action that served the desired military goal. However, if it is possible to predict that the killing will lead to escalation, it is possible to argue that it does not make a real contribution to the war effort. Therefore, if the deed in question is not an illegal means and does not serve military necessity, at the very least it reflects faulty policy reasoning. Thus, for example, it is possible to foresee that eliminating leaders one after the other will bring about escalation even if it succeeds in weakening or paralyzing the organization for some time. It is known that preventive killing does not succeed in neutralizing terror organizations for more than a short period of time (except, perhaps, the short-lived eccentric movements among them) and that new

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[48] As set forth *supra*, this approach is taken from API, Article 52.

[49] I have previously pointed out the moral position supporting this approach, termed "the assertion of named killing."

[50] Permanent Court of International Justice, *The case of S. S."Lotus" (*France/Turkey). 7 September 1927, P.C.I.J. Series A, No. 10 (hereinafter, *Lotus*).

leaders quickly rise to replace those who were killed.[51] There is no doubt that an attack upon a leader has tactical and even strategic implications, because the knowledge and experience acquired by leaders makes them more effective. However, in general, in a large military organization engaged in a war of a nationalist-popular character, a leader killed will very likely be replaced by another without causing the organization any significant and long-lasting damage, and this consideration applies all the more so for those who fulfill a low or mid-level position of command.

In addition, it is reasonable to believe that the attack upon a military leader will cause retributive and revengeful attacks. In assessing this possibility, the reactions of those close to the one killed (relatives and loved ones) and the organized and popular reactions must be taken into account. The greater the seniority of the person killed, the fiercer will be the reaction on the organizational-popular level. It is to be noted that these considerations, rooted more in utilitarianism than in the question of the legality or illegality of the action, are not unique to the war against terrorism. For example, the regular army also has little difficulty replacing its soldiers. Yet, the killing of a military leader is likely to have a greater impact upon the actions of a terrorist organization than those of a regular army. There is, indeed, no doubt that the killing of a leader within a regular army will have an effect on the morale, tactics, and even strategy of the organization. However, the cohesiveness of the members of a terrorist organization around a charismatic leader, which often affects their willingness to join the organization or to act for it, is likely to increase the degree of injury to the organization if its leader is harmed.

It seems, therefore, that the efficacy of killing the leader of a large organization is not unequivocal. In contrast, the effect of killing the leader of a small organization upon the organization's ability to continue to carry out acts of terror is clearer. Two advantages (which are connected) are customarily attributed to the preventive killing of leaders of terrorist organizations (as well as of activists): the first is the disruption of the action of the terrorist organizations, and the second is the deterrent effect. Every act of preventive killing compels the organization's activists and leaders to commit resources to hiding, thereby disrupting the organization's actions and making it more difficult for it to operate. These results will have a greater impact when it is a leader (as opposed to a junior activist) who has been eliminated, especially one fulfilling a key position in a small organization whom it will be difficult to replace.[52] In other words, the disruption of

[51] Thus, for example, the elimination of Sheik Yasin did not bring about the neutralization of Hammas' activity. Similarly, the elimination in 1996 of Yehye Ayash, who was the head of the military arm of Hammas (and called "the engineer" because he was the chief preparer of explosives in the organization) did not end the terrorist attacks in Israel. Mohi a-Din a Shareef ("the engineer 2") took the place of Ayash.

[52] An example of this is the elimination of Fathi Shakaki, the leader of the Islamic Jihad, in October 1995, which brought about an extended paralysis of the organization, almost to the beginning of the second *Intifada* in October 2000. It can also be argued that the recent moderation in the activity of the Hammas is a result of the assassinations and assassination attempts against the organization's leadership. However, it is not clear if this is the only reason or whether the moderation stems from other factors as well, such as international political pressure and a desire to provide an opportunity for achievements in the framework of the diplomatic route.

activity caused as a result of eliminating junior activists does not serve the doctrine of military necessity to the same extent as eliminating a leader of a small organization.

Appraising the efficacy of the deterrent effect generally attributed to preventive killing is even more problematic. The position of the Israeli Supreme Court in the context of permitting the demolition of houses of terrorists (which is another way of fighting terrorism) is that the deterrence serves a military need.[53] Indeed, it may be assumed that specific acts of terrorism have been prevented as a result of certain eliminations. However, there is no doubt that other acts were not prevented, and, furthermore, the terrorist organizations generally do not encounter any problem replacing their activists. In addition, it is clear that many retributive acts, which are constantly being declared, are a clear result of the preventive killing. In this sense, this practice is responsible for the problem of mutuality, whereby a reaction draws a reaction: in other words, the existence of an unending cycle of revenge.[54] However, in the end it is difficult to isolate the deterrent effect from the military efficacy contained in the neutralization of an enemy soldier, and therefore it is difficult to decide whether the act of killing that was intended to create a deterrent effect satisfies the doctrine of military necessity.

To summarize the discussion of military necessity and preventive killing, I must examine whether preventive killing is likely to satisfy the doctrine of military necessity when it is intended to serve an urgent need for military action that cannot be delayed. This is with respect to the attempt to prevent a particular act of terror that is meant to be performed in the near future. Certainly, when speaking of a terrorist who has already set out to perpetrate a terror attack and whose arrest is not possible, it seems that killing is the only choice and that such an act will serve a military necessity. However, beyond this it must be remembered that the military necessity is determined on the basis of strategic considerations: that is, on appraising the contribution made by the neutralization of the target in relation to the entire military effort.[55] Therefore, an act of preventive killing is also likely to be justified when it is undertaken in earlier stages of an act of terrorism. At this stage it is still ostensibly possible to attack the means of manufacture or the training bases instead of attacking activists.[56] However, in view of the considerations enumerated

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[53] See HCJ 6026/94, *Jazal v. The Commander of IDF in Judea and Sumaria*, 48(5) IsrSC 338, 347-348. In this case, the court held that the objective of using means accorded to the authority of the military commander is to deter those who harm the forces from carrying out murderous acts, as a positive means for upholding security.

[54] See, for example, the attack upon the head of the Popular Front, which brought about the murder of Minister Rahavam Zeevi. Additional evidence of the fear of creating a cycle of reactions is the fact that the the relatives of someone who was killed by Israeli military forces are identified as "prevented from entering" by the security services.

[55] The test is extracted from API, Article 52; compare also with Article8(2)(b)(iv) of the Statute of the international criminal Court, which provides that the attack of a target is forbidden if it is known that it will cause excessive damage to civilians and to civilian property in relation to the concrete and direct military advantage anticipated..

[56] It is also possible to bring about the capture of leaders and to prosecute them; however, if such an act involves kidnapping, it is prohibited by international law. See**,** United Nations Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Rres. 47/133, U.N. GAOR, 47th Sess. Supp. No. 49, at 207, U.N. Doc. A/49/47 Sess. 1992.

above, including the efficacy of neutralizing an enemy soldier (and especially the efficacy of neutralizing a leader and disrupting the organization's activity), it seems that, according to the doctrine of military necessity, the act of killing will also be justified at this early stage.

The next sections discuss the obligation of the attacker to balance the humanitarian and the military considerations when it is planning a military operation. The precise guidelines for this balance are expressed through the three doctrines (surveyed later) that detail the prohibitions and limitations on the use of certain weapons and means of combat and the injury of civilian populations and targets.

The Distinction between Legitimate and Nonlegitimate Targets

This section begins with a discussion of the connections among the following three things: the principle of the distinction between inanimate targets; the nature of the reaction toward legitimate targets that are people; and the permissibility of attacking terror activists. The connection among these is expressed in two ways. On the face of things, the choice to attack inanimate targets (such as locations of the manufacture of explosives, or training and command bases) allows for abstention from targeted killings of particular terror activists. However, the choice of these objectives does not allow, for the most part, the attacker to avoid killing civilians who do not participate in combat, insofar as the areas are not sterile and the military targets are at times located in the heart of a civilian population. Of course, at the time that the attacker appraises its military advantage in attacking the target, it must weigh competing values, including the principles of humanitarian law: prevention of unnecessary suffering, proportionality, and insuring the safety of nonparticipating civilians. Only through weighing these interests can an attacker determine whether the attack of any target, even when this serves a military need, is indeed legitimate. I shall examine, therefore, the implications of the principle of the distinction between military and civilian targets on the question of the justification of preventive killing of terror activists.

The technological developments of recent decades—permitting the use of exacting weapons and air advantage—allow an attacker to more precisely define military targets and distinguish between them and civilian targets. However, many questions remain open that make the application of this distinction difficult and give rise to criticism of it, from both the humanitarian and the military-operational perspective. As we shall see below, the question of what a legitimate military target is—as well as the strategic and tactical considerations guiding the answer to this question—is also relevant to the war on terrorism, defined, from a legal perspective, as an armed conflict.

The distinction between legitimate targets and nonlegitimate targets is framed in the API as follows: "Attacks shall be limited strictly to military objectives. Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at

the time, offers a definite military advantage."[57] The two parts of the definition (the first, an effective contribution to the military action, and the second, the definite advantage to the other side provided by their destruction) are to ensure that the view of military objectives by the Protocol will not to be reduced to military equipment, military bases, and ammunition, but rather will include the means for logistic support such as transportation and communications systems, highways, trains, airfields, and factories and industries that serve the military effort.[58]

Additionally—and as opposed to civilians, who constitute a legitimate objective only when they take direct part in hostilities[59]—these installations and means serve a legitimate objective throughout the course of the armed conflict and not just when the military action takes place.[60] Civilians who are in such installations at that time are not immune from harm even if they took no part in combat.[61] However, the permissibility of attacking such installations, especially when civilians are present, also depends upon the principle of proportionality, as explicated below. It seems that this permissibility and the list of targets above, which broadens the catalogue of military targets and also includes targets that support the operational military activity, strengthens the broad interpretation of Article 51(3) of the API. According to this interpretation, civilians who participate in actions that seem on the surface to be only accessory actions, may be considered, under certain circumstances, civilians participating directly in combat.

As stated above, the very definition of "military targets" reflects the progress of the codification of humanitarian law; however, the definition accepted in the API drew quite a bit of criticism. The definition of "military targets" combines two criteria: the contribution of the target to the military operation and the appraisal of the military targets of the attacking state, insofar as the destruction or neutralization of the target must provide a clear military advantage to the attacker. The appraisal of the military advantage is dependent upon a number of factors—from strategic considerations to considerations of the security of the combat force—and is assessed according to the circumstances.[62] The discretion of the attacker is further limited by the emphasis on the advantage being definite:[63] that is, concrete rather than speculative. The main criticism was directed against the interpretation of the "military action" and the "definite military advantage." Indeed, the legislative history of the article demonstrates that the military advantage is

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[57] API, Article 52(2).

[58] This interpretation relies upon the list of objectives that was assembled in the Delhi Conference. See, Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Time of War, reprinted in ICRC Commentary, fn. 26, 632, fn. 3.

[59] API, Article 51(3). Note that "direct participation in hostilities" will hereinafter also be referred to as "direct participation in combat."

[60] Michael Bothe, Karl Josef Partsh, Waldemar A. Solf with the collaboration of Martin Eaton, *New Rules for Victims of Armed Conflicts* at 324 (Nijhoff, 1982).

[61] Fleck, *supra*, fn. 35, 163.

[62] API, Article 52(2).

[63] At the time of drafting, a number of descriptions were proposed, among them distinct, clear, immediate, obvious, and substantial, but no significant difference exists between them and the version that was chosen. See Bothe, *supra*, fn. 60, 326.

not estimated in relation to the circumstances of the specific attack,[64] but rather in relation to the circumstances of the entire operation.[65] However, this broadening is not sufficiently exact, and it is not clear where the boundaries of the operation should be placed. The appraisal of the military advantage is clearly dependent upon the operation's boundaries, and if too broad a base for an appraisal is determined, it will be impossible to decide until the end of the war.[66] In such circumstances, whether or not the chosen targets were indeed legitimate and served a military necessity can only be assessed retrospectively. Thus, the danger is that in the course of the war targets will be hit that are not legitimate.

However, the U. S. position with regard to the principle of proportionality (one of the components of which is the military advantage),[67] which calls for a standard to be used for the appraisal of a proportional attack, supports the broad understanding of the military operation.[68] Thus, for example, the criticism leveled by Parks at API definition and the list of targets that informed its acceptance is based upon the argument that they reflect a narrow understanding of the military operation and of the military advantage. A broad understanding relates to the entire war and not to a specific military operation, and it recognizes significant advantages that the war is interested in achieving in addition to the military ones—such as strategic, economic, or psychological advantages. Parks insists that the definition accepted in the API misses the true character of the war. The war is not just a collection of violent actions but rather a series of actions that sets in motion a political process of persuasion and discussion, and the destruction caused in its course is indeed an unavoidable consequence but does not serve its main objective.[69] This position conflicts, of course, with the nature of military necessity as described above, according to which the injury to a target must be intended to achieve a military advantage and not another advantage (political, diplomatic, etc.). Therefore, the criticism is also directed at the limited definition of military necessity, but it is not satisfied with expanding the definition of the military operation or determining that both tactical and strategic considerations should be taken into account. We shall discuss this possibility further on.

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[64] See API, Article 49(1), that defines an "attack" as a military operation of a specific unit, carried out against the adversary in defense or offense.

[65] Bothe, *supra*, fn. 60, 325 as well as Fleck, *supra*, fn. 35, 162.

[66] William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 Mil. L. Rev. 91, 107 (1982).

[67] The principle of proportionality is formulated in API thusly: "[an indiscriminate attack is] an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the *concrete and direct military advantage* anticipated" (emphasis added).

[68] See, for example, declarations of the American Department of Defense and the Department of the Army at the time of the First Gulf War, according to which the injury to civilians who do not participate in hostilities must be evaluated in relation to the overall military campaign. See**,** *Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991*, section 8(F), Report on US Practice, chap. 1.5, 1997; US Department of Defense, *Final Report to Congress on the Conduct of the Persian Gulf War*, Appendix O, The Role of the Law of War, 10 April 1992, ILM, Vol. 31, 1992, at 622.

[69] W. Hays Parks, *Air War and the Law of War*, 32 A. F. L. Rev. 1, 141-142 (1990).

The criticism discussed above raises a number of questions with regard to the legitimate targets in the framework of the war against terror. The legal definition of the war against terror as a highly powered armed conflict seems to suggest that even in such a conflict long-term strategic considerations are taken into account, so that the scope of the military operation is likely to spread beyond the concrete operation, as stated above. Indeed, the criticism contains more than a kernel of truth and it cannot be dismissed out of hand. The Protocol does not define the scope of the military operation. But such a definition is very important for the purpose of assessing, in a more exact manner, the military advantage achieved from it. This definition would also have implications on the questions of who is authorized to assess the military advantage and what scope of information is required to determine this. When the range and scope of the military operation are more limited, it is more difficult to attribute awareness of the general objectives of the war to those planning and carrying out the operation. Of course, such awareness, or lack thereof, affects the ability to assess the military advantage of the operation, and the significance of this fact is likely to be that only senior-ranking officers can make such an assessment. Hence, only they have the ability to determine what the military objectives are. It is doubtful that such a conclusion is logical under combat conditions, but, in any event, the definition appearing in the Protocol does not clarify who bears the responsibility for determining the military advantage or what level of information is necessary to appraise such advantage.

However, Parks' criticism proves to be too sweeping, especially in relation to the fundamental component of the war against terrorism: virtually all such combat occurs in civilian surroundings in which and near which the terrorists are operating. In this context, acceptance of the criticism as it stands is not consistent with the spirit of the API and humanitarian law and other important principles upon which it is based.[70] On the other hand, it is possible to argue that although the purpose of the Protocol is to ensure the protection of civilians at the time of armed conflict and to establish the means to do so, the articles of the Protocol cannot be interpreted in such a manner as to provide ideal protection to civilians while ignoring the circumstances of the reality of the battle.[71] Nevertheless, if one considers the general objectives of the war, especially the psychological implications of the use of force, the results are likely to be negative. Thus, for example, broadening the definition of the legitimate purposes of the war will likely bring about attacking targets that are of doubtful legitimacy—and thus indirectly endangering civilians near such targets. An example of this is the attack upon the Serbian television and radio stations; legitimacy of these targets was questioned by the report of the UN Committee to examine the attack by NATO forces in Serbia. The list of strategic targets of the attack in Serbia was broad, covering the objectives not only of weakening Serbia's military strength but of making clear to Milosevic the seriousness of the NATO states' objection to Belgrade's attacks in the Balkan region and deterring him from

[70] Attention must be paid to Article 31(1) of the Vienna Convention on the Law of Treaties, which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. See Vienna Convention on the Law of Treaties, 23 May 1968, 1155 U.N.T.S. at 331 (hereinafter, *Vienna Convention*).
[71] Fenrick, *supra*, fn. 66, 101.

continuing the attack on defenseless civilians.[72] Broadening the strategic targets of the war also has the direct effect of weakening the defense of civilians who do not participate in combat. An excellent example of this is the intense bombing of Hamburg, Dresden, and Tokyo during World War II, the purpose of which was undoubtedly to cause demoralization and fear among the civilians. Such objectives have been explicitly forbidden by the Geneva Convention (1949)[73] and the API[74] in order to ensure that achieving the goals of the war does not deny the civilians their fundamental right to remain outside of the circle of violence. In the final analysis, from the perspective of expediency, in a war against terror, harming civilians is particularly dangerous to the attacker because it enlarges the circle of support for the terrorists and thus the attacker's gain is nullified by its loss.

Indeed, the terrorists create a strong connection between the civilian population and the combatants by violating the principle of the distinction between civilians and combatants, emphasizing the strategic military advantage embodied in the influence upon the civilian population in a war against terror. However, the manner of the influence cannot rise to the point of violating the prohibitions (considered customary) against physically harming or traumatizing civilians.[75] Given these strict rules, from a military perspective, the possibilities available to a state fighting terror to influence and dissuade civilians from supporting terror are limited to the indirect and general influence that the combat has upon both civilians and combatants. However, the state does retain some nonmilitary means. Thus, for example, the state is likely to limit the entry of civilians of the state that supports terrorism into its territory, and it is likely to terminate the trade and labor relations between itself and the state supporting terror, if indeed such relations exist. It bears noting that the state has a great interest in influencing how civilians think in the course of the war against terror—in order to prevent the circle of the supporters of terrorism from broadening and to stop civilians from joining terrorist organizations.

It seems, therefore, that Parks' approach can be accepted, subject to reservations. At the time that legitimate targets for an attack are decided, the general and strategic objectives of the war should not be excluded from the discussion—to the extent that they are derived from the principle that the only legitimate objective of the war is to weaken the enemy's military strength.[76] At the same time, emphasis must be placed on the provision of Article 52 API, according to which the circumstances of the attack are to be taken into account. The intent of this provision is, in my opinion, that the attacker examine values competing with the military objectives, which would include insuring the well-being of civilians, preventing unnecessary suffering, and proportionality.

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[72] These targets, which were presented to the United States Senate are quoted in the Final Report of the UN Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, ICTY Doc. PR/P.I.S./510-E, 13 June 2000, para. 1, 6, 39, I.L.M. 1257 (2000).
[73] The Fourth Geneva Convention, Article 33.
[74] API, Article 51(2).
[75] API, Article 51(2), APII, Article 13(2) of, and the Fourth Geneva Convention, Article 33.
[76] Saint Petersburg Declaration, *supra*, fn. 20.

Additional criticism of the above discussed article on legitimate targets presumes that in cases in which there is doubt that a particular target is military (and not civilian) structures with clearly civilian characteristics (such as houses of worship, residential buildings, or schools) shall not be considered to be targets that can contribute to the military operation.[77] However, these structures can serve as a military target where it is clear that they are not used for their original purpose. Thus, for example, in October 2003, the Israeli security forces attacked the *Ein Sahav* camp, which was used as a training camp by Palestinian organizations, including the Islamic Jihad and Hammas deep within Syrian territory. In this framework, they damaged a laboratory of the Islamic Jihad for the development of weaponry. Therefore, even though Syria asserted that the camp was used by Palestinian refugees from the leftist organizations for civilian purposes, this was a legitimate target.[78] Cases of this kind are particularly relevant to the war against terror, which takes place, as we have stated, in civilian surroundings and often among residential or other civilian buildings. According to criticism, the burden of determining if the property of the defender is civilian or military should not be imposed solely upon the attacker: the one on the defensive will take reasonable measures to make it clear that it is civilian property. Thus, for example, civilian structures should be marked with recognized signs and, at the least, civilians should be evacuated from them if combatants are known to be hiding nearby. The *a priori* presumption that it is civilian property works against the accepted agreements, according to which each of the parties must take every measure to insure the protection of civilian targets. The presumption thus unreasonably transfers the burden to the attackers, requiring them to endanger the lives of soldiers for this purpose.[79]

The article discussed above indeed created a great deal of controversy among the drafters. I shall argue that it is not realistic and that it would result in the attacking forces of both sides in contact zones hiding in civilian structures and firing from within them. Assuming that it would be impossible to implement the section in practice, a proposal was put forward to add a sentence providing that the presumption will not apply i) in areas of strife between the warring sides and ii) when the safety of the combatant force requires that it not be applied. These additions were in response to the argument that soldiers at the front cannot be expected to endanger their lives for such a presumption.[80] In the end, however, the proposal was not adopted. The drafters' assumption was that enemy soldiers do not act on the basis of an understanding that there are civilian structures located at the front.[81] However, this assumption does not hold for the modern battlefield—especially in the case of terrorist combat . As stated above, the underground nature of terrorist organizations and the tendency of their activists to hide among the

[77] API, Article 52(3).
[78] "First Attack in Syria since 1983," available at: bambili.com/bambili_news/katava_main.asp?news_id+4439&sivug_id+1
[79] However, this article seems to presume that attackers have knowledge of the normal use of the structure and that they must take reasonable cautionary measures to ascertain it.
[80] ICRC Commentary, *supra*, fn. 26, 637. There is an argument that the presumption transferring the responsibility for the defense of civilians and civilian targets is not only with regard to the attacker but also to the defender, and that they must use all obligatory means for the purpose of defending these targets.
[81] Bothe, *supra*, fn. 60, 326-327.

civilian population leads to combat that often takes place in a civilian setting. Terrorists who hide in civilian houses, seek, of course, to exploit the prohibition upon attacking residential building; however, it is clear that their presence in these buildings makes them legitimate targets of an attack, subject to the principle of proportionality, which we shall discuss further on.

Clearly, the situation can be more complicated—for example, it may not be known whether combatants indeed are hiding in such buildings, or whether the target is military or civilian. The larger forces of the regular armies, along with their greater potential for information gathering and their interest in ensuring the safety of the civilian population, allow them to act effectively against terrorist organizations. The regular army can warn the other side. Thus, for example, proclamations may be distributed to civilians to notify them to evacuate. This occurred in the IDF's "Change of Direction" operation in Lebanon in 2006, when it distributed leaflets from the air notifying the civilians of the anticipated attack upon the residential area in which, to all appearances, the Hizbollah fighters were hiding. However, it must be emphasized that the use of such means does not exempt the army from its obligation to ascertain the legitimacy of its targets, while taking into consideration the principle of proportionality

From the discussion above it transpires that the definition in the API strives to perform an all-encompassing weighing of the military interests, even the general ones, against the principles and spirit of humanitarian law. In spite of this, and as stated above, the rather amorphous standards the definition proposes have met more than a little criticism.[82] One of these arose in the course of the First Gulf War, when it was argued that even when military targets were attacked in accordance with the provisions of the Protocol, the result was fatal and long-term damage to the economy of the state and serious harm to the civilian population.[83] Therefore, proposals were made to update the definition in the Protocol so that the effects of the attack upon the civilian population will also be considered; in other words, the decision of whether the target under discussion is a legitimate military target must be based on the overall effect of the attack upon the civilian population as well.[84] The opposing argument is likely to be that this effect is taken into account through the principle of proportionality, and therefore there is no need to include it in the definition of the legitimate targets.[85] In my opinion, the effect that the

[82] I shall elaborate upon this in the discussion of the principle of proportionality.

[83] The report regarding the NATO attack in Yugoslavia, *supra*, fn. 72 and Judith G. Gardam, *Proportionality and Force in International Law*, 87 Am. J. Int'l. L., 391, 404-410 (1993).

[84] Francoise Hampson, *Means and Methods of Warfare in the Conflict in the Gulf*, in *The Gulf War 1990-1991 in International and English Law*, at 89, 100 (P. Rowe ed., 1993).

[85] The distinction between the approaches is a fine one. The argument for considering the effect on the civilian population in the context of the definition of the term "legitimate target" implies that the target is not legitimate simply as a result of its definition when the military need is not properly balanced with the injury to civilians. As opposed to this, the argument that this interest characterizes the principle of proportionality—and there is no need to reflect it in the definition of legitimate target—implies that the target itself is legitimate as a matter of principle, and that it is only where the injury is not proportionate that it will not be legitimate. However, in the final analysis, both approaches lead to the same result: that is, when the harm to civilians is not proportional in relation to the military advantage, the attack is not to be carried out.

attack will have on civilians must indeed be considered at the time the attacker decides what constitutes a military target, but there is no need for it to be explicitly added to the language of the definition. This is because it is included in the concept "circumstances ruling at the time," discussed above. The operative aspect of the criticism is with regard to the ability to weigh the competing values—the military advantage verses the well-being of the civilian population and strict adherence to the principles of humanitarian law—in combat conditions. This is where the standards set forth in the distinction are not sufficiently defined.

From the foregoing survey it transpires, indeed, that a broad definition that fails to establish excessively precise criteria is consistent with the combatant interest in defining the list of the military targets in accordance with the customary means of action and in relation to the entire conflict. However, creating a definition without sharp boundaries is liable, in the end, to be a double-edged sword for states, and to limit their freedom of action. This is based on the assumption that an interpretation in the spirit of IHL will reduce the permitted targets of an attack in order to insure the maximum defense of civilians and of nonparticipatants in the combat. It seems, therefore, that in this context we should aspire to an unequivocal definition to the extent possible—even though recognition of the fact that the situation of combat is by nature not "closed" makes it difficult to create a more precise definition of a military target. This conclusion becomes even clearer below, in my discussion of the principle of proportionality, one of whose components is the definition of a military target.

Proportionality

The principle of proportionality is one of the most important considerations in the targeting of terrorists, where most of the acts of killing and preventive killings occur not in sterile territory but in densely populated areas.[86] The principle of proportionality provides that civilians and civilian targets are not to be attacked where the injury is not proportional to the anticipated military advantage: "Those who plan or decide upon an attack shall … refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life … which would be excessive in relation to the concrete and direct military advantage anticipated."[87]

This principle moderates the seemingly unequivocal dichotomy that the principle of distinguishing between legitimate and nonlegitimate targets creates. In other words, a reading of the distinction doctrine combined with the principle of proportionality indicates that an attack of civilians or civilian targets that meets the conditions of proportionality is permissible and is not considered to be an indiscriminate attack. However, it is important to note that the principle of proportionality sets forth the

[86] In an interview, the Deputy Director of the Israel General Security Services, who completed his service in 2003, said that in the Gaza Strip, where most of the targeted killings are carried out, there is a high risk of injuring people who simply happened to be in the area of the action because the roads and alleyways are crowded with people. Ze'ev Schiff, "Targeted Killing: From a Ticking Bomb to a Ticking Infrastructure," *Haaretz***,** 10 September 2003, A1.

[87] API, Article 57 of the API and see *infra* other articles that repeat this principle

exception rather than the rule, whereas the principle of distinction creates the rule according to which a civilian target is not a permissible target. Evidence of this may be found in the fact that an intended attack upon civilians and civilian targets is considered to be a serious violation of the API and a war crime.[88]

The inclusion of the principle of proportionality in the customary law is not the subject of dispute. The preliminary documents of IHL already contain more than a few expressions of the doctrine.[89] This notwithstanding, as emerged in the discussions in the diplomatic conference prior to the drafting of the API, there is no consensus on the implementation of the principle of proportionality among the states. Therefore, some have argued in the past that it cannot be regarded as a principle of the customary law.[90] However, at present, it is acceptable to view proportionality as a basic principle of humanitarian law, even by states that have not ratified the API.[91]

The definition of the principle of proportionality currently accepted in IHL appears in the API. In Article 51(5) the principle appears in the context of attacks that do not discriminate between civilian and military targets (indiscriminate attacks). It provides that collateral damage to civilians is justified only where it is not excessive in relation to the anticipated military advantage from the operation. In Article 57(3), the principal of proportionality appears in connection with the cautionary means that the attacker must use prior to the attack. The article prohibits an attack where the anticipated collateral damage to civilians and to civilian targets is excessive in relation to the anticipated military advantage. An identical version appears in the Second Protocol Additional to the Conventional Weapons Convention of 1980 regarding the use of mines placed outside of military areas. The Statute of the International Criminal Court adopted a version that was nearly identical, but with two differences. First, the statute requires that in order for a nonproportional act to become a criminal act, the deviation from proportionality must be clear.[92] Second, the estimated military advantage is required to be an overall advantage.[93] I shall address these differences below.

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[88] API, Article 85.

[89] See, for example, The Hague Draft Rules of Air Warfare of 1923, reprinted in *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* Articles 24, 25 at 147(Dietrich Schindler and Toman Jiri eds., 1981).

[90] Parks, *supra*, fn. 69, 173.,.

[91] Thus, for example, the doctrine is accepted by the United States, which did not ratify API. See, Christopher Greenwood, Customary Law Status of the 1977 Geneva Protocols in *Humanitarian Law of Armed Conflict; Challenges Ahead* at 102-103 (Astrid M. Delissen and Gerard J. Tanjaeds., Nijhoff, 1991).

[92] See, Article 8(2)(b)(iv) of the Statute of the International Criminal Court, *supra*, fn. 18, "such attack will cause incidental loss of life … which would be *clearly* excessive" (emphasis added).

[93] See, ibid., "concrete and direct overall military advantage." The Statute refers also to injury caused to the natural environment and thereby adds to the serious breaches enumerated in API causing disproportional damage to the environment. However, a distinction must be made between the criminal standard for the identification of a disproportional attack and the "civilian standard" that relates to the responsibility of the state. In a criminal proceeding, the attacker's awareness of the conditions that existed must be proven in order to attribute liability to them. On the other hand, in a civil proceeding, the proof of negligence in relation to the failure to adhere to the principle of proportionality is likely to suffice. The level of proof also

It is impossible to exaggerate the importance of the principle of proportionality in the effort to anchor the rules of IHL in reality—to insure that these rules do not remain a moral ideal that cannot be practically realized. The conference of experts of the International Committee of the Red Cross thus insisted upon the drafting of this principle, refusing to acquiesce to the eastern European and developing states' argument that this principle should not be included in humanitarian law because it ultimately grants legitimacy to and approves the injury of civilians.[94] Western states as well, including West Germany, Finland, Canada, Australia, Britain, and the United States, supported the initiative to define the boundaries of the principle of proportionality, recognizing that collateral harm to civilians is dictated by the realities of war that cannot be ignored. However, the practical implementation of the criterion that establishes the rule of proportionality is far from simple and unequivocal. In this context as well, the representatives of the states that participated in the drafting of the API insisted that the military advantage be attributed to the attack in its broad sense: that is, that the advantage be estimated in relation to the entire operation.[95] The problems characterizing the implementation of the principle of proportionality lie thus in the appraisal of excessive damage and military advantage—much like the difficulties encountered in defining legitimate targets.

The difficulties of assessing the military advantage were discussed above. However, it may be that the principle of proportionality actually provides guidance regarding the type of anticipated advantage and the range of the operation to which it relates. The principle of proportionality provides that the military advantage must not only be clear, it must be direct and concrete. If "direct advantage" is interpreted to mean that the advantage is caused by the operation itself (thus excluding advantages that only become clear in the long run),[96] then the appraisal of the military advantage is more precise and can be made with relation to each operation.[97]Although the Statute of the International Criminal Court required that the advantage be concrete and direct, it uses an

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differs between the proceedings—in the criminal proceeding the facts must be proven beyond a reasonable doubt, whereas in the civil proceeding meeting the balancing of probabilities is sufficient.

[94] Bothe, *supra*, fn. 60, 361, fn. 6 and the reference there.

[95] Thus, for example, Belgium and Italy insisted that the military advantage be attributed to the entire attack and not to parts of it. Similar demands were made by Great Britain and the United States. See Parks, s*upra*, fn. 69, 172, and the citations there. Fenrick proposes that in the context of the articles dealing with the principle of proportionality the term "attack" shall also be interpreted to include a broader range of action than that intended in Article 49 of the First Protocol, which provides that the attack is a violent act toward the enemy, regardless of whether carried out in the framework of defense or of an attack. Pursuant to the articles dealing with the principle of proportionality, the attacker is required to take a number of cautionary measures prior to carrying out the attack, and thus it seems that concept of attack should be understood as an act of a similar brigade or order of troops and not as an isolated act of attack, as could be understood from Article 49 of the First Protocol. See Fenrick, *supra*, fn. 66, 102.

[96] ICRC Commentary *supra*, fn. 26, 684.

[97] For opposition to this opinion and the argument that the range of the operation as well as the type of the anticipated advantage from it remain unclear even when the word "clear" appears, see Fenrick, *supra*, fn. 66, 108.

expansive formulation that estimates the damage in relation to the "overall military advantage."[98]

The questions above also arise when appraising the military advantage in relation to the war on terrorism. The military advantage of a military act whose objective is to strike a person active in a terrorist organization (and not of an act directed against stationary targets, such as laboratories for the manufacture of explosive materials or ammunition warehouses) is weighed, in effect, by examining the level of danger that a terrorist participating directly in combat poses both to soldiers of the other side and to its civilians. This level of danger is broken down into various components, which include the person's role (combatant, supporter of combat, or leader) and level of policy influence in a terrorist organization on the continuation of the action and on future actions.[99] These factors demonstrate the general and broad risk that the terror activist in a terrorist organization creates (if they indeed create such a risk).

From this, we can see that the question of whether to kill the person is appraised according to the overall military advantage of a broad scope and not the specific advantage that will be achieved in this one attack. The difficulty here, as described above, is whether or not junior officers are in a position to appraise the overall anticipated advantage from the operation. A possible solution is to exclusively grant the authority to approve the order to carry out acts of pre-planned killing of terrorists to high-ranking officers. However, and understandably, operational problems arise *ad hoc* and their solution often depends upon the discretion of the lower-ranking officers who carry out the mission, obligating them to appraise the anticipated military advantage in the final analysis. However, subject to the conditions of the compartmentalization of intelligence information, this problem could be resolved to some degree through the use of information systems—transferring intelligence information relevant to the killing mission to the assigned junior officer.

What is stated above demonstrates that in spite of the efforts of the drafters and the intention of the International Committee of the Red Cross to ensure that the principle

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[98] Article 8(2)(b)(iv) of the Statute of the International Criminal Court, *supra*, fn. 18. The version chosen by the Rome Statute seeks to take both approaches. It insists, on the one hand, upon the advantage being direct and, on the other hand, on its inclusiveness. This raises the question of how the two extremes may be reconciled. This formulation may be viewed as a demand of states that the military advantage be assessed in relation to the military operation as a whole and not only with regard to the specific attack. However, to the extent that a military operation of a smaller scope is under discussion and it is carried out by lower ranking officers, it is more difficult to attribute to them awareness of the overall anticipated advantage from the attack. Another possibility is that the Rome Statute set forth a standard with relation to a criminal provision that does not necessarily apply to the general principle. See the discussion in Bothe, *supra*, fn. 60, 365; Michael Bothe, *War Crimes* in 1 *The Rome Statute of the International Criminal Court: A Commentary* at 399 (Antonio Cassese, Paola Gaeta, and John R.W. Jones, eds., Oxford University Press, 2002). See also the declarations of Britain at the time of the signing of API relating to Articles 51 and 57, according to which the anticipated military advantage from a particular attack is to be attributed to the overall attack and not to isolated parts of it. The declaration is quoted there.

[99] In this context, considerations of the defense of necessity are taken into account in the appraisal of military advantage.

of proportionality provides clear guidance on to the permission for collateral injury to civilians, this is, in the end, an abstract standard that is difficult to implement. The use of vague terms such as "excessive damage" renders the principle of proportionality a general standard through which specific laws are to be derived in each case—not a law that can be implemented uniformly in every situation. Therefore, in most cases policy considerations can be based upon principles for the purpose of decision making in the face of the dilemmas that arise in every situation. However, the principle of proportionality makes this difficult to carry out. It is not always possible to derive the specific laws appropriate to each case, especially in instances where there is nothing to insure a general result known in advance. In this sense, the principle of proportionality does not present clear guidelines for an action on the battlefield.

Appraising excessive damage is more difficult in view of the fact that competing values—the military advantage on one hand and the damage to the civilian population on the other—are not based upon a common denominator that allows a comparison between them. Military advantages are based upon strategic considerations and *ad hoc* decisions made in real time, and their development is likely to be much more dynamic than the principles of humanitarian law, including the defense of the civilian population. The attempt to compare these values raises questions: Can numerical or other values be set up that will demonstrate the military advantage on the one hand and the injury to civilians on the other? Is it possible to break down each of the values into details, and what will such details be? Should the soldiers of one side be exposed to danger in order to reduce the injury to the civilian population of the other side, and if so, to what extent? These dilemmas demonstrate the fact that beyond the unequivocal rule that an intentional attack upon civilians (which is itself prohibited) causes excessive damage to the civilian population, it is difficult to clearly establish the level at which unintentional damage will be considered excessive.

A study of the legislative history of the article and the deliberations before the diplomatic conference does not shed much light upon the definition of excessive damage. The initial proposal of the International Committee of the Red Cross was to define prohibited damage as that which is "disproportionate" to the direct and substantive military advantage anticipated.[100] The Eastern European states objected to the above formulation on the basis of the argument that the expression "disproportionate" promotes a comparison between matters that cannot be compared, sets a subjective standard, and does not permit an objective choice between the competing values.[101] In effect, they argued that the principle of proportionality is not consistent with the principles of humanitarian law and its objectives. In the end, the compromise version that was adopted[102] exchanged the expression "disproportionate" for the word "excessive." The transcript of the meetings of the committee does not reveal the reasons for the change, but

[100] H. Levie, ed., *Protection of War Victims: Protocol 1 to the Geneva Conventions* at 123 (1980). This is the draft of Article 46, which later became Article 51 of the Protocol.
[101] See, the statement of the Hungarian representative, ibid., 128.
[102] This version was adopted in the committee that deliberated on Article 57 (then, Article 50), which also set forth, as stated above, the principle of proportionality. The considerations and deliberations raised there were identical in the discussion of Article 51.

apparently it was based upon the assumption that the word "excessive" sets a less vague standard for the appraisal of the legal collateral damage in the course of the military action than does the word "disproportionate." The reasons for this are not explicated, and it could be that the change in the formulation was intended, in the final analysis, to convince the Eastern European states to support the inclusion of the principle of proportionality in the Protocol. In spite of this, the change in wording did not succeed in establishing a substantive change in the appraisal of legal collateral damage in the course of a military action. The Statute of the International Criminal Court, which also adopted the term "excessive," emphasizes the objectivity of the criteria for evaluating the anticipated damage to civilian targets through the requirement that the damage be "clearly excessive" and not merely "excessive."[103]

Recently, two different interpretations of the standard set forth in the API in relation to the appraisal of excessive damage were adopted. The International Criminal Tribunal for Yugoslavia ruled that the vagueness of the standard makes it difficult to evaluate the legality of an isolated attack that is not clearly illegal but rather lies in the "gray area" between legality and illegality. On the other hand, where repeated attacks occur that are mostly within the gray area, it may be concluded from their cumulative effect that they are not consistent with the provisions of humanitarian law.[104] A different approach was expressed in the Report of the Committee of the International Criminal Tribunal for War Crimes in Yugoslavia that examined the NATO bombings in Yugoslavia. There it was determined that it is not possible to make a determination of illegality from the accumulation of operations within the gray area. The illegality must be evaluated according to the entirety of the operations in relation to the general military goals.[105]

An additional problem is the fact that the choice between competing values and the final determination regarding the necessity of the military action are subjective. They are decisions based upon the broad discretion of those making them: military officers and their teams.[106] Western states—and particularly the states that are members of NATO, which ratified the API—insisted that the discretion of the decision makers be examined according to the information they had at the time of the decision. Thus, for example, Germany declared that the decision made by authorized officials should be evaluated on the basis of all of the relevant information they had at that time—not after the fact.[107] On the other hand, Romania, which continued to object to the inclusion of the principle of proportionality in the Protocol, argued that placing the discretion in the hands of the military officers would lead to a situation in which a certain portion of the civilian population would be knowingly and legally sacrificed for the sake of military interests

[103] Article 8(2)(b)(iv) of the Statute of the International Criminal Court, *supra*, fn. 18. It can also be said that the Statute adds a quantitative requirement with respect to damage, in that it requires that it be clearly excessive.
[104] *Prosecutor v. Kuperskic* Case No. IT-95-16-T, para. 526 (2000).
[105] The Report Regarding the NATO Attacks in Yugoslavia, *supra*, fn. 72, 14.
[106] Fleck, *supra*, fn. 35, 179; Bothe, *supra*, fn. 60, 310.
[107] The words are quoted in Fleck, ibid. However, the decision in *Oil Platforms* (Iran v. U.S.), ICJ Rep 90, (2003) rejects this idea with respect to the US demand for a defined range of discretion.

(real or imaginary). The danger is that military officers will be inclined, in the final analysis, to place greater weight on military interests and advantages than on the protection of the lives of civilians who do not participate in combat.[108] However, it bears emphasizing that the subjectivity of the decision touches only upon the question of what facts were before the official who made the decision to attack at that time, and not on the question of whether the officer assessed the collateral damage as excessive or not. This assessment needs to be made by the court according to the objective standard of the "reasonable officer."[109]

In the course of fighting terrorism, the question of assessment of the injury to the surroundings arises constantly. The members of terrorist organizations are not generally located on military bases, or in training or headquarters areas, but rather they act from within the civilian population. Therefore, the question of whether the anticipated injury to the civilian population is excessive is always considered. The proportionality is determined according to the estimated harm prior to the action, and not according to the harm that was in fact caused. This is because arbitrary factors that cannot be anticipated are likely to change the force of the injury caused. The difficulties in assessing the reasonableness of excessive injury are outlined above. Additional difficulties arise in view of the problem inherent in determining and implement ting the relevant criteria for assessing excessive damage. What is the importance of political considerations and the positive or negative contribution of the action in achieving long-term state objectives?[110] How can the short-term effects be measured against the long-term effects? Should the extent of the likely injury to soldiers and the civilian population be taken into consideration in the wake of taking alternative operative action, such as arrest, and how should this be done?

The possibility of alternative means of action is very central to the proportionality test, especially with regard to its implementation in the war on terror. The alternative means of action for killing terrorists are varied. First, one can strike against inanimate targets, such as training camps, factories for weapons manufacturing, and places for the

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[108] Levie, *supra*, fn. 100, 327-238.

[109] See the report in the matter of the NATO attack in the former Yugoslavia, *supra,* fn. 72, para. 50. It is interesting to note that the committee did not meet the standard that it established itself. In a critical paper analyzing the work of the committee, Timothy Waters describes the committee's examination of the bombing of the bridge and train in Grdelica. Two missiles were launched, and according to NATO the intention was to bomb the bridge only, which is a legitimate target, and not the train. The committee examined only the circumstances that led to the projection of the first bomb, and not the second. It did not focus on why the pilot shot the second missile and whether his decisions were reasonable in the circumstances. According to Waters, this exemplifies the inclination of the Committee (or of its authoritative position) to give the NATO version of the events preference. See**,** Timothy William Waters, *Unexploded Bomb: Voice, Silence, and Consequence at the Hague Tribunals a Legal and Rhetorical Critique,* 35 N.Y.U. J. Int'l. L. & Pol. 1015, 1047-1049 (2003).

[110] In an interview with the deputy head of the General Security Services, *supra*, fn. 86, the deputy stated that appraising the success of a preventive action depends upon the perspective—active or political-strategic. According to him, success of an action is measured according to the small number of Israelis injured; whereas the criterion from the strategic-political perspective is first of all minimizing the attacks and harming the terror infrastructure, but also includes creating a situation in which the political branch can realize its objectives.

stockpiling of weapons. Of course, whether striking alternative targets will bring about the same estimated military advantage that killing terror activists would must be decided. Similarly, as has already been stated several times, the struggle against terrorism is carried out not only through armed struggle but through law enforcement as well. I also emphasized the fact that the choice of one venue does not negate the other channel, especially in armed conflicts that are not international. Therefore, the possibility of arresting the terror activists instead of killing them may be considered. This action, whose goal is to render the terror activists incapable of participating in the war effort, may bring about a military advantage similar to that which would be realized by killing them.

However, in assessing the military advantage that will be achieved, one can also consider the risk faced by the combatant force at the time the arrest is carried out. As stated above, the presumption is that the combat force can be placed at reasonable risk. But it is hard to assess such reasonable risk, especially where it is clear that the inclination of the officers is to reduce such risk to a minimum, even at the price of injuring civilians who are not participating in combat. For example, NATO forces were criticized in the former Yugoslavia for trying to achieve a zero casualty level for themselves while violating the principle of proportionality. It was argued that NATO forces flew at altitudes that allowed them to escape the Yugoslav defense forces but that did not allow them to distinguish between military and civilian targets on the ground.[111] In an opposite vein, it is worth noting the criticism voiced in Israel of the Israel Defense Forces (IDF) action in Jenin in the context of the "Protective Wall Campaign." The claim was that many soldiers became victims[112] due, among other things, to the refusal of the Minister of Defense to approve aerial bombing of the camp because of the concern that Palestinian civilians would be injured.[113] In addition, one must also consider the extent of collateral damage that will be caused to the civilian population in the arrest of terror activists. At times, it is precisely the act of arrest—which requires entering with numerous troops into the terrorists hiding place—that is likely to cause greater damage to the surrounding than an act of targeted killing would. This is particularly the case if the terrorist is hiding among a civilian population. It seems, therefore, that although weighing alternative actions is important in the war against terrorism, it is not clear that alternative means are always more proportional than killing terror activists.

Asa Kasher and Amos Yadlin propose a model to deal with other difficulties that arise in assessing the reasonableness of excessive damage. The model is based upon the principle that the more certain the estimated military advantage from the operation is, the greater the priority it should be accorded over the estimated collateral damage. Therefore, where the estimated military advantage is more certain, the operation should be approved even where the estimated collateral damage is great. For example, if it is known that a

[111] See para. 2 of the Report Regarding the NATO Attack in Yugoslavia, *supra*, fn. 72. However, it bears noting that these arguments were ultimately rejected by the committee, which determined that from the entirety of the attacks it transpires that NATO did not violate the principle of proportionality.
[112] Twenty-three were killed and seventy-five were injured among the IDF forces.
[113] Available at: pedia.walla.co.il.

terrorist organization has weapons of mass destruction (such as chemical weapons) and if there is evidence at the level of near certainty as to their intention to use them, an action to destroy the stockpile of weapons should be approved even at the price of collateral damage. On the other hand, where the military advantage is not clear, its probability should be evaluated, and the lower it is, the greater the weight to be accorded the estimated collateral damage. Additionally, where the value of the estimated military advantage is low and the estimated collateral damage is not negligible, the action should be postponed.[114] The main problem with these criteria, as well as other attempts to propose criteria for the determination of proportionality, is that they are based upon the assumption that the military advantage can be precisely and easily assessed. There may be situations like this, in which an attack or an order to attack is based on excellent intelligence. There may also be cases in which the damage that is likely to be caused[115] is unequivocally excessive. An example of such a case is the dropping of a one-ton bomb in an attack on the Hammas activist Salah Shahadah by Israeli defense forces in July 2002. This bomb caused the death of fifteen Palestinian civilians, among them eleven children.[116] However, if one applies the general and theoretical proportionality formulation to individual cases, one encounters difficulties, and this is because of the need to balance between concern for human life and military advantage—two values that do not share any common basis. This problem leads to the inability to apply any of the balancing formulations;[117] it seems that in many cases the principle of proportionality remains amorphous, and thus it cannot always provide real guidelines to the forces operating in the field.[118]

This ambiguity of the principle of proportionality may be somewhat alleviated through the use of the secondary tests set forth in Article 51 regarding the prohibition on the use of weapons that strike imprecisely. Thus, weapons that are not aimed at a specific target and that do not fulfill the principle of distinction between targets may not be

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[114] Asa Kasher and Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, Journal of Military Ethics, 4 (2005).

[115] The assessment is made, of course, *ex ante* and not *ex post ante.*

[116] The way the lessons of the action were applied at the time of the attempted attack on senior Hammas members in September 2003 demonstrates that indeed disproportionate collateral damage was at issue. A bomb weighing only a quarter ton was dropped on the house in which the terrorists were located. A senior officer said that the failure of the attack was foreseen, but that the collateral damage of the liquidation of Shahada was the reason they risked an unsuccessful action. Lilly Galili, "Authors Petition: To Examine the Attack of Shahadah 'Prior to the Petition to the International Tribunals'" *Ha`aretz*, 30 Sept. 2003, A1; www.ynet.co.il/articles/0,7340,L-2747855,00.html (hereinafter, *Hammas attack*).

[117] See, Jan Klabbers, *Off Limits? International Law and the Excessive Use of Force,* 7 Theoretical Inq.L ., 59,62 (2006).

[118] Another difficulty in assessing the expected military advantage is the writers' assumption that at the time of the balancing of i) harm to civilians not under the effective control of the state fighting terror and ii) the expected risk to the soldiers of the attacking state, the priority is protection of the lives of the soldiers over that of the civilians. I suggest that the assumption is mistaken and inconsistent with the principle of distinction between combatants and civilians. IHL seeks to insure the exclusion of civilians as civilians from the circle of combat. Therefore, the endangerment of the life of combatants on any side is inherent to their position, whereas risk to the life of civilians must be avoided to the extent possible. Although we should aspire to reducing the risks to the combatant soldiers, this should not be at the cost of injury to civilians not participating in the combat.

used.[119] Similarly, where several targets are located in a civilian area and where it is possible to separate between them, they may not be attacked (or mainly air bombed) as if they constituted a single target.[120]Alternative means that cause less damage to civilians should be used to the extent that this is possible.[121] These secondary tests supply the combat forces with more concrete means than the standard that sets forth the principle of proportionality, to allow them to plan attacks whose results will be proportional to the desired military advantage. As stated at the beginning of this section, combatants fighting against terrorism implement these means, choosing, in general, to use precise armaments with the goal of reducing the damage to the civilian surroundings.

The failure to follow the rules of proportionality carries criminal liability pursuant both to the articles regarding grave breaches in API and in the Statute of the International Criminal Court. This raises the question of who should bear this liability. The accepted assumption—based upon Article 57(2) of the API dealing with the means that should be taken prior to an attack—is, first of all, the commanders, and, to a lesser extent, the soldiers who carry out the attack.[122] The paragraph provides that the responsibility for taking these precautions lies with those who plan or decide upon an attack. The deliberations of the diplomatic conference also make it apparent that the intention was to impose upon the senior ranks of the military command the responsibility for ensuring that cautionary means are used prior to an attack and that attacks are planned so as to be consistent with the principle of proportionality.[123] This position is also consistent with the long-accepted doctrine on the liability of commanders in international law, according to which commanders are liable for crimes committed under their command if they did not use reasonable means to prevent or punish the prohibited behavior.[124]

The above discussion of the principle of distinction between targets referred to the argument that although attacking military targets is permitted even when civilians are actually in them or nearby, the permission to attack them is dependent upon the principle of proportionality. Similarly, I mentioned the difficulty of implementing the principle of proportionality in the current technological reality, in which military targets or mixed targets are placed in densely populated areas. The battlefield, especially in combat against terrorism, is often in such areas, and thus what had been previously viewed as the "home front" becomes the front. According to customary law, civilians who are in such places are not identical to combatants, and injury to them in the course of an attack of legitimate targets (such as a military or ammunition installation) must be considered according to

[119] Article 51(4).
[120] Article 51(5)(a).
[121] The report regarding the NATO attack in Yugoslavia, *supra,* fn. 72, para. 21.
[122] Fleck, *supra,* fn. 35, 181-182.
[123] Fenrick, *supra,* fn. 66, 108. Fenrick proposes imposing the liability on the brigade commanders or parallel ranks.
[124] For a discussion of the commander's liability see, for example, Yuval Shany and Keren R. Michaeli, *The Case against Ariel Sharon: Revisiting the Doctrine of Command Responsibility,* 34 NYU J. Int'l L. & Pol. 797 (2002).

the proportionality principle.[125] However, it seems that injuring them is almost unavoidable. This is because their activity is part of the military activity, and the difficulty of isolating them from the legitimate target is much greater than the difficulty of attacking military targets where civilians are located nearby.

The questions discussed above and others that are likely to arise when implementing the principle of proportionality on the battlefield are barely discussed in the case law. Earlier case law dealing with the API, especially the decisions of the military tribunal at Nuremberg for adjudicating war crimes, made some indirect reference to the principle of proportionality, but this does not include the elements that we discussed above because the principle of proportionality had not yet been established in any convention at that time.[126] Some of the decisions deal with the question of whether actions taken by one side in reaction to an attack by the other side must be proportional to the act of attack;[127]others deal with the proportionality principle as an auxiliary question to the central problem of the decision;[128] and others examine the principle of proportionality in the framework of fulfillment of a military need.[129] The principle of proportionality as formulated in the API was not part of the proceedings for the adjudication of war crimes until the International Criminal Tribunals for Yugoslavia and Rwanda were established. I cited above the decision of the tribunal for Yugoslavia in the *Kuperskic* case[130] regarding the principle of proportionality and the opposing position of the Commission for the Examination of the NATO Bombings in Yugoslavia.

The survey above considered a number of the dilemmas that the principle of proportionality creates. These dilemmas and others find concrete expression when they arise on the battlefield, where uncertainty reigns. As the Nuremberg tribunal stated in *The Hostage Case:* "The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his

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[125] Compare with the opposing view of Parks, according to which the principle of proportionality should not be taken into account at the time of an attack on legitimate military targets on the premises of which civilians are employed. This opinion is based upon the apprehension that anyone wishing to avert an attack on a legitimate target will place civilians there and employ them in military service. Parks, *supra,* fn. 69, 75.

[126] However, it is possible to find treatment of the question of the liability of commanders and soldiers, which is, as we have seen, a problem that also arises in implementing the principle of proportionality. See, for example, *The Hostages Case*, 8 *Law Reports of Trials of War Criminals* 34 at 69 (Hein & Co., 1997) (hereinafter, *Hostages*).

[127] L. Green, *The Naulilaa Incident, International Law through the Cases* 679, 680-681 (4th ed., 1978).

[128] For example, in the case of the hostages, in which the question of whether the killing of the hostages could have been justified, the tribunal also examined the relation between the number of hostages killed and the number of soldiers killed. See, *Hostages, supra,* fn. 126

[129] See, for example, *United States v. Von Leed*, 11 *Law Reports of Trials of War Criminals* 563 (Hein & Co., 1997) In this matter it was ruled that it is permissible to shoot at civilians fleeing from a besieged city in the direction of the enemy lines in order to return them to the besieged city and to bring about its surrender. Actions such as these are no longer permitted since the promulgation of the API, which prohibits intentional attack on civilians. See Article 51 of the API.

[130] *Kuperskic, supra,* fn. 104.

intentions."[131]As a result of all of these factors, it is often difficult to establish in advance how the actions should proceed in the face of enemy forces, and thus to appraise the extent of the civilian damage permitted in relation to the desired military advantage. The examination of how various armies behave in the framework of specific events and battles strengthens this conclusion.[132] Indeed, in some cases the breach of the principle is clearer. This is where the extent of the injury to civilians was known, or at least could have been known, prior to the attack. In other cases, where the decision between competing values is less clear, guidelines may provide assistance. Thus, for example, Article 57 of the Protocol, which instructs officers to use certain cautionary measures prior to an attack, sets forth in subparagraph 3 that "[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be the one where the least danger to civilian lives and to civilian objects may be expected to be caused by the attack on it."[133] Similarly, the military officers should be instructed through the formulation of rules of engagement that are appropriate to a given action in a given conflict. Training, debriefings, and criticism after the fact are also likely to improve and increase the awareness of the principle of proportionality.[134]

However, all of these notwithstanding, military officers will have the natural and almost axiomatic tendency to consider primarily the military advantage, whether general or specific, and to make the understandable effort to save and avoid risking soldiers' lives. Nor can we ignore the changing and unpredictable circumstances of the battlefield. All of these facts lead to the conclusion that ultimately the principle of proportionality is one of the most difficult principles for military officers to implement and for judicial authorities to retrospectively examine.[135]

Implementing the principle of proportionality with respect to the question of killing activists in terrorist organizations is thus far from simple and unequivocal. There

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[131] *Hostages*, *supra*, fn. 127, 69.

[132] See the survey of examples in Fenrick, *supra*, fn. 67, 117-125.

[133] The example customary to cite is that instead of attacking a train station located in the heart of a city, another transportation route with identical strategic importance but which is distanced from the civilian population should be attacked. See ICRC Commentary, *supra*, fn. 266, 686.

[134] Bothe, *supra*, fn. 60, 310-311.

[135] It is interesting to compare this argument with the practice of the Israeli Supreme Court in its review of the army's decisions as an administrative authority and the implementation of the proportionality principle with respect to security matters. Indeed, at issue are not decisions of the military officer after the fact, as is inferred from the proportionality principle in API or in the Statute of the International Criminal Court. However, it is possible to discern guidelines with respect to the readiness of the court to adopt the position of the military officer or to criticize him. In the matter of *The Village Council of Beit Sorik v. the Government of Israel* 58(5) Isr. S.Ct. 807, (2004) (Hebrew)Chief Justice Barak states that with respect to issues that are matters of military expertise, the court will not substitute its discretion for that of the military commander (*ibid.*, para. 48.). In the *Marabah* case, supra, fn. 14, the court went even further than it did in previous cases.
and, in examining the proportionality, rules that "it was not persuaded regarding the existence of an overriding security-military reason to establish the line of the fence in the place it passes currently." This position, in which the court disagrees with the security conclusion of the military commander, is rare, and does not characterize the court's tendency to adopt, and even to rely upon, the military commander's statements with respect to the factual-security foundation.

is no doubt that collateral damage to innocent people will almost always be caused by actions intended to kill someone who has been targeted—who is active in a terrorist organization or suspected of such activity. The principle of proportionality provides that certain means should not be used if *it may be estimated* that injury to nonlegitimate targets is likely to accompany them, provided that the injury is excessive in relation to the general military advantage that was to be gained by the activity.[136]

In this context it is worthwhile to note Great Britain's approach in its reservation regarding Article 51 of the API, according to which it views itself as exempt from commitment to the principle of proportionality where the other party does not carry out this principle or the principle of distinction between combatants and civilians.[137]This position emphasizes, of course, the principle of mutuality, the advantages and disadvantages of which were discussed in a preceding section. The question is whether it is indeed appropriate to apply the principle of mutuality to proportionality in a situation of combat against terror in the framework of noninternational armed conflicts. In such situations as these, there might arise a demand for mutuality. Therefore, some may suggest certain rules that apply in international armed conflicts and that forbid certain actions while ignoring the principle of mutuality would not apply here.[138] However, these are not rules of custom that apply in every situation (that is, those that relate to basic values and to *erga omnes* obligations set forth in international law) whereas the principle of proportionality is. Therefore, it seems that one should not operate according to the principle of mutuality in this context, because such an action is likely to lead to massive civilian losses in a manner inconsistent with the provisions of customary international law. It is important to clarify that a state's military interests may be insured in the framework of the principle of proportionality, so that the state need not reject it in a sweeping fashion. Thus, for example, in a situation where the other party does not fulfill its obligation to distinguish between civilians and combatants, the balancing equation of proportionality will change, permitting the state to attack even where the attack contains the possibility of civilian injury, due to their lack of ability to differentiate.

The difficulties in implementing the principle of proportionality are thus likely to cause two possible conflicting results. The first, and less probable, is that certain military actions cannot be carried out or that they will be planned in such a manner that the advantage achieved will not be as satisfactory. It may be assumed that such situations are dependent mainly upon awareness and a great deal of public pressure on the military to reduce the collateral injury to civilians. An example of this is Israel's first assassination attempt against senior Hammas officials in Gaza.[139] The attempt failed because the

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[136] Causing excessive damage, as stated, has been designated as a war crime in the Statute of the International Criminal Court. See Article 8(b)(iv). As an example of an action which seems to not meet the conditions of the principle of proportionality, see fn. 116 and the accompanying text.

[137] Bothe in Antonio Cassese, Paola Gaeta, and John R.W Jones. eds., 1 *The Rome Statute of the International Criminal Court: A Commentary* at 399 (Oxford University Press, 2002).

[138] The examples given above are the inapplicability of the chivalry principle as well as an easing of the requirement for combat in uniform so that the need to identify oneself will apply only at the last moment before the attack and this is where the other party does not fulfill this requirement at all.

[139] See *Hammas* attack, supra, fn. 116.

criticism of a previous act of assassination led to an attack that was not sufficient to achieve the desired result. The second possible result is that military actions will be planned and carried out without sufficiently taking the principle of proportionality into consideration. This route is possible due to the many "escape hatches" allowing the military commander to retrospectively justify the action, including evaluation of the competing values (danger to soldiers opposed to danger to civilians) and mistakes of various kinds (intelligence mistakes about for example the presence of civilians, the distribution of arms, or identity).

The problems above arise in every combat situation, but they become more serious in the context of combating terror. This is mainly because terror combat focuses on people more than on weapons. Many of the "combatants" are civilians who take a direct part in hostilities. Furthermore, the combat takes place in civilian surroundings, among those who do not take any part in the combat and who must be protected from harm. As stated above, humanitarian law has always had to deal with these problems; however, the combat against terror demonstrates and emphasizes its inadequacy in solving them.

It seems that the principles of humanitarian law do not lead to an unequivocal conclusion on the prohibition of preventive killing of a terrorist. As we have seen, such preventive killing is likely to be justified in certain conditions by the principle of military necessity, and it is not prohibited by the principle of proportionality. However, the above discussion does not take into account two problems inherent to combating terrorism: identifying the terror combatants and the possibility that they will repent. These problems do not generally arise with respect to regular combatants, and thus IHL does not provide specific solutions with regard to them.

The first problem—that of identifying terror combatants—lies in the failure in intelligence evaluations and the making of mistakes. A mistake can occur with regard to the identity of a person, to the role and contribution of the person designated for killing (a central activist in a terror organization, a minor activist, or a civilian who does not participate in combat), and to this person's current status in the terrorist organization (active or not). In the absence of an external identifying sign, it is more difficult to know if the person belongs to a terrorist organization and assists in the acts of combat. Similar to mistakes arising in the context of damage to the surroundings, mistakes are likely to stem from the blind reliance upon intelligence material and the difficulties in evaluating it.[140]A particularly prominent problem is that the ones doing the evaluating tend to over-evaluate positive results and under-evaluate negative results for various reasons, chiefly psychological: anger and the desire to react, the dehumanizing of those designated to be killed, and the desire to show the public that there is a national response to terror. Ultimately, the mistakes damage one of the basic principles of IHL: the protection of civilians. However, it seems that IHL is not capable of providing a solution to this

[140] Mordechai Kremnitzer, *Is Everything Fair in Dealing with Terror? Regarding Israel's Policy of Preventive Killing (Focused Frustration) in Yehuda and Shomron* at 30-31 (The Israel Institute of Democracy, 2005).

problem. This is because while its apparatuses allow for a sufficient degree of clarification of the risk the regular combatant creates (one who can be easily identified by a uniform and whose possible repentance and surrender are determined by IHL procedures), they do not deal appropriately with the risk created by a civilian who participates in terrorism and who is not a member of a regular unit.[141]

Therefore, when one cannot appropriately examine the extent of a person's role in carrying out an act of terrorism, or when that person's status as a "legitimate target" is based solely upon the appraisal (based chiefly on intelligence information) that they endanger the combat force or the civilian population, then the risk of mistake is not negligible. It is true that this problem can be dealt with through a restrictive interpretation of Article 51(3) of API, which provides that civilians who directly participate in hostilities are legitimate targets only at the time that they participate in combat. However, this interpretation creates difficulties regarding the war against terror. Generally, an immediate action is indeed required in order to avert immediate danger; however, this is not the case in all of the possible situations. At times, an immediate action is necessary for the frustration of a danger that is not immediate because it will not be possible to take such measures at a later stage. In such situations, the defensive action is mandatory, and therefore it is appropriate to expand the timeframe in which injuring one planning to carry out an act of terror is permissible. It seems, therefore, that another solution must be found that will, on the one hand, deal with the problem of mistakes and, on the other hand, permit a broader range of time for the frustration of acts of terrorism (not necessarily through killing) than that proposed, *prima facie*, in Article 51(3) of API.

Another issue that also has a moral aspect is the possibility of the repentance of a member of the terror organization or of a person taking direct part in hostilities who is not a member of any organization. Combatants are considered to be combatants as long as they wear a uniform, thus they serve as legitimate targets throughout that time. However, there is no external sign to clarify the intentions of members of terrorist organizations who end their memberships.[142] It is simpler for rank and file combatants to turn in their weapons and surrender. Although it is true that terrorists and regular soldiers share the same powerlessness against a missile or an explosive charge. But in situations other than these extreme cases, it is more difficult for members of terror organizations to surrender.

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[141] This is based on the assumption that the restrictive interpretation of Article 51(3) of API, according to which persons are considered direct participants in hostilities only while they hold a weapon, is rejected. In another place, I proposed a broader interpretation of the concept of direct participation in hostilities, both from the perspective of the actions that point to participation such as this and from the perspective of the length of time during which it happens. See, Hilly Moodrick-Even Khen, *The Influence of the Combat against Terror on the Distinction between Combatants and Civilians in International Humanitarian Law* (Ph.D. Dissertation, Hebrew University of Jerusalem, 2006), 196-255 (hereinafter, Moodrick-Even Khen)

[142] However, some terrorist organizations use an identifying symbol that distinguishes between them and civilians who do not participate in combat. In these cases, the possibility of repentance becomes simpler, a fact that must influence what means can be used against terror activists of this nature and to bring about a situation in which there is no need to interpret the rules of humanitarian law through human rights law. As we shall see later, such a need arises where the problems of identity and repentance have validity.

Theoretically, of course, they could turn themselves in.[143] Other than this, their practical ability to repent and change their ways is dependent upon there being some follow-up that will clarify their intentions to the forces that intend to injure them. However, after a decision is made to liquidate a person suspected of actions intended for the carrying out of acts of terror, it is not clear that such a follow-up will really happen.

Attention must be paid to the question of whether the problems mentioned above arise only with regard to activists from among the ranks of terrorist organizations or if they are also relevant with regard to leaders. For the most part, the possibility of making a mistake with regard to the identity of a leader of a terrorist organization is quite remote. Similarly, the choice of the leader to serve as a key figure in the organization creates an *a priori* assumption regarding that person's readiness to continue to lead the organization. The question of a leader's possible repentance therefore is not as significant as that of a junior activist in a terrorist organization, whose *modus vivande* is not known to the opposing party.[144] However, the possibility of making a mistake regarding the role of a leader raises a more difficult question. At times, the distinction between a religious or spiritual leader and a military leader may be unclear. Furthermore, intelligence forces are likely to be mistaken about the degree of control leaders have over their forces in the field, as well as about their level of involvement in giving instructions to carry out acts of terror. This is especially the case in terrorist organizations whose cells sometimes undertake independent activity.

For example, the Tel Aviv district court acquitted Marwan Barghuti from most of the counts of murder (except for three) in the indictment against him on the grounds that in these cases they could not prove i) that he was involved in planning and implement ting the attacks, ii) that he knew in advance the attacks that the people in the field and the commanders of the sections supported by him were going to carry out, or iii) that he was essentially their commander.[145]Another example is that Israel did not charge the Secretary General of the Popular Front, Ahmed Sadat, for the murder of the Minister Rahavam Ze'evi. However, it is important to clarify that these examples relate to liability that must be proven in a criminal proceeding that sets a high standard of proof (beyond a reasonable doubt). If tried according to the rules of humanitarian law, liability of such commanders could be attributed to them.

In a summary of this discussion of the question of whether the chance of mistake and repentance of leaders of terrorist organizations should be considered, the gap between the *lex lata* and *lex ferenda* must again be noted. The *lex ferenda* would obligate

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[143] Their very shift to the other side is likely to endanger them. The situation is different when a soldier seeks to surrender, because they can use agreed-upon signs for surrender, such as waving a white flag. It is not clear that such signs could assist a terror activist in surrendering. It may be that the combat force will assume, on the basis of past experience, that this is an attempt to deceive.

[144] In fact, some activists from among the rank and file devote most of their time to activity in the organization. However, the ability to discern and carry out surveillance to clarify this is more problematic. Therefore, the presumption must be that they may repent and ask to end their activity in the organization.

[145] See, for example, Criminal Case 1158/02, *The State of Israel v. Marwan ben Hatib Barghuti***,** *Takdin Mehozi* 48 2004(2) 3430 (Hebrew), para. 168.

the promulgation of arrangements that would ensure the basic rights of every person, and would also include dealing with the apprehension of mistakes and the question of repentance in borderline cases of those leaders who wish to end their membership in a terrorist organization. However, the *lex lata* deals with the state's obligation to insure the security of its residents while balancing interests that are likely, in a few cases, to bring about the derogation of rights of others. To paraphrase the words of the Israeli Chief Justice Barak in what is known as "the torture case,"[146] it seems that there is no choice at times other than to loosen the strength of the restraint of democracy (without releasing it entirely) in order to permit it to fulfill its obligation to protect the security of its residents. In the end, the law must be such so as to allow it to be fulfilled in practice. However, my proposal is that in the framework of deciding whether to attack the leader of a terrorist organization, questions about identity and role must be considered, where the possibility of a mistake in identification will be weighed against the dangers expected from the leader.

In the section that follows, the intention is to distinguish between the models based on the reaction toward terror activists and the models that are relevant to the leaders. Any liquidation of those active in terror organizations should be conditional upon a quasi-legal proceeding, or it should be determined that the default action is arrest and not killing. In contrast to this, my proposal with regard to liquidating leaders of the organizations is to condition it upon a review procedure in which legal figures also participate. In this framework, the question of the certainty of identification (of the identity of the leaders or of their position) is likely to come up for discussion, as will presenting the possibility of repentance. However, before presenting and advancing the support for such a paradigm, I shall briefly survey the main positions on preventive killing of terror activists and their leaders.

The Reaction to Direct Participants in Hostilities—Three Paradigms

Three central paradigms exist in answer to the question of how the state can frustrate the activity of members of terrorist organizations and their leaders, within the assumption that an armed conflict exists between the state and the terrorist organization.

The First Paradigm

According to the first paradigm,[147] the terrorists are considered irregular combatants; however, since they do not meet the conditions required by the Third Geneva Convention, they are not defined as combatants but rather as civilians who participate in combat. Hence, terror combatants can be attacked as legitimate targets only if they meet

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[146] HCJ 4054/95, *The Public Committee against Torture v. The Government of Israel,* 53(4) IsrSC 817, 845 (1999).

[147] This paradigm was proposed in the expert opinion submitted by Prof. Antonio Cassese to the Israeli Supreme Court on behalf of the petitioners in HCJ *The Public Committee against Torture in Israel*; see Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinians Terrorists is Consonant with International Humanitarian Law*, written at the request of the Petitioners in HCJ 769/02, *The Public Committee against Torture, et al. v. The Government of Israe*l (unpublished).

two cumulative conditions. The first is direct participation in hostilities. This would include outright participation in a narrow manner such as physical use of a weapon or explosive material (for example, setting a bomb), as well as participation in deployment in readiness for an attack. If the civilian lays down the weapon, or is not in the location of the military action, that civilian re-acquires immunity from injury. The second condition is when they openly carry weapons. This means it is permissible to injure a civilian who is carrying a revealed weapon—because they are defined as direct participants in hostilities. A civilian who does not openly carry a weapon, on the other hand, will not be defined as one who participates directly in combat, and therefore is not to be attacked. As Cassese stated,

> Firstly, the categories of persons who take a direct part in hostilities without being entitled to do so, namely so-called irregular combatants: guerrilla, spies, saboteurs and mercenaries, may be shot at only in *flagrante delicto.* If captured in action, they are not immune from prosecution … [A] civilian suspected of directly preparing an attack, or somehow participating in the planning and preparation of an attack or an hostile act, may not be attacked and killed if: (1) he is not operating within a legitimate military objective (for instance, barracks or other military installations), or (2) he is not carrying arms openly while in the process of engaging in a military operation or in an action preceding a military operation.[148]

The exception to these strict conditions is the permission to attack those who present themselves as suicide bombers—who conceal their weapon on their persons. But this exception only applies under two conditions. The first is that the person was warned and ordered to reveal the weapon but did not cooperate with the forces of the other party. And the second condition is when the person is clearly carrying a weapon and there is not sufficient time for a warning because the intention to use the weapon against the combatants of the other side or against civilians is unambiguous.[149]

Other conclusions that arise from the above are that those who carry out actions of support of combat may never be attacked, insofar as they are not considered direct participants in hostilities; and that those who organize and plan acts of terror cannot be considered civilians who participate directly in hostilities if they do not bear arms openly and when they are not in a place in which the military action is taking place. It is not practically possible, therefore, to attack the leaders of the terrorist organizations in order to prevent the implementation of terrorism campaigns under their direction. The act of planning does not require the use of weapons, and hence the only way those who prepare terrorism attacks and the leaders can be regarded as legitimate targets is if they carry arms for their defense—and this is only when they are in a location defined as a military target.[150] Detention, therefore, is the only means that may be taken against those who are not direct participants in combat. This applies as well to those who participated in combat

[148] Ibid., paras. 8, 15.
[149] Ibid., para. 16.
[150] Ibid., para. 29.

but either were not discovered carrying their weapons openly or were discovered only after they laid down their weapons. After being detained, they may be prosecuted and sentenced in accordance with the relevant criminal law of the detaining state.

The rationale behind the above position is the centrality of the distinction between combatants and civilians in IHL. According to this viewpoint, any interpretation of the law that is likely to splinter or undermine this distinction, even slightly, must be rejected, insofar as such undermining is likely to bring about the attack of civilians who did not participate in combat and to whom IHL wishes to grant protection. Therefore, in order to legitimately attack a civilian who participates in hostilities, such civilian must be identified in a nearly certain manner by the enemy forces as one who participated in hostilities. Such identification can happen only in the most serious conditions described above: in other words, the civilian must be carrying arms openly and using them, insofar as such requirements explicitly differentiate between a participant and a nonparticipant in combat. Permitting the attack on one who does not openly bear arms increases the danger of a mistake and of arbitrary killing because it does not address the uncertainty involved in determining whether a person who does not bear arms is indeed a direct participant in hostilities.

However, this position is lacking on several fronts. First, it does not seem to take into account the inherent strategic contribution of lower rank leaders and commanders to the military action of terrorist organizations. Second, the cumulative objective of this paradigm—which seeks on the one hand to grant broad protection (like that accorded to a civilian) to one who violates the laws of combat by not obeying the fundamental rule of openly bearing arms, and on the other hand to permit attacking precisely the one who does bear arms openly[151]—is not at all reasonable[152]and does not give any incentive to terror combatants to obey the laws of war.

In summarizing the discussion of the first paradigm, it seems that this position does not take into account the legitimate interest of the state to protect itself from the threats of terrorism. Acts of terrorism often require prior frustration, because the moment of their being carried out, within the restrictive interpretation of Article 51(3) to API, is likely to be too late. Of course, the permission to undertake preventive measures should not be expanded too broadly, and the frustration of overly remote dangers should not be authorized (that is, it is not permitted to act against targets whose neutralization will not lead to a concrete military advantage). In other words, what is at issue is the need to restrict the permission implicit in Article 52 of API, which allows the attack upon every target whose neutralization will provide the other side with a military advantage.[153] Narrowing the permission to attack targets allows preventive actions against activists and leaders of terrorist organizations, and thus allows for more effective strategies in dealing with the threats of terrorism.

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[151] And if what is at issue is a noninternational armed conflict, this occurs without granting them the privilege of a prisoner of war,.

[152] See this argument also in the Second Response of the State of Israel to the petition in HCJ *The Public Committee against Torture in Israel* (unpublished) at para. 229, (hereinafter, *State's Second Response*).

[153] This is assuming that Article 52 applies to human targets.

The Second Paradigm

According to the second paradigm, preventive killing of terror activists, and mainly of leaders of the organizations, is legitimate in almost every situation defined as an armed conflict or in situations in which the state acts in self-defense against terrorist organizations.[154] The authorization of preventive killing is dependent upon the question of whether it is consistent with all the principles of the laws of war—among them, military necessity, proportionality, and the doctrine of distinction—[155]and is not derived directly from the question whether the members of terrorist organizations, especially their leaders, are civilians directly participating in combat. According to this position, the answer seems to be implicit and is based upon the understanding that every civilian who participates in the carrying out of the war or fills a position that a soldier would likely fill is considered to be a direct participant in combat.[156]

In considering the question of the timeframe in which it is permissible to attack terrorists and their leaders, the answer according to this paradigm is inextricably linked to a view that uses the rationale of self-defense to expand the length of time that terrorists are considered to pose a danger.[157] According to this position, an action of preventive killing against activists of terrorist organizations is permitted, and it is not necessary to wait until the moment at which they take their plans from the potential to the actual.[158]

The failure in this paradigm is in its first part, which defines the direct participants in hostilities. This failure is found in the fact that the paradigm does not take into account the characteristics of combat and the acts in the framework of terror organizations, which set them apart from regular combat. Those active in terrorist organizations are seen as fully analogous to soldiers in a regular army, and the paradigm ignores the differences between the combat of two state armies[159]and the combat of a state against terror organizations. Thus, the gaps in the balance of strength between the parties, which is usually in favor of the states, is not addressed. Similarly, the paradigm does not deal with the problems of identification and repentance in the combat against terrorist organizations, which are not relevant to regular combat. These objectives, it seems, are

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[154] For various expressions of this position see Jami M. Jackson, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications,* 24 N.CJ Int'l L. & Com. Reg. 669 (1999); Thomas C. Wingfield, *Taking Aim at Regimes Elites: Assassination, Tyrannicide and the Clancy Doctrine,* 22 Nd. J. Int'l L. & Trade 287 (1999).

[155] Louis R. Beeres, *The Permissibility of State-Sponsored Assassination During Peace and War,* 5 Temple Int'l & Comp. LJ 231, 238 (1991) and Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 Yale J. Int'l. Law, 609, 640 (1992).

[156] Nathan Canestaro, *American Law and Policy on Assassination of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C Int'l & Comp. L. Rev. 1, 8-9 (2003). It is to be noted that these do not end with the combat against terror and they were written from the perspective of combat between regular armies; however, their logic serves as the basis for the paradigm described above.

[157] Moodrick-Even Khen, *supra*, ft. 141, at 245-255.

[158] Schmitt, *supra*, fn. 155, 648.

[159] The exception is the difficulty of finding the terror activists in real time, which brings about the need to act against them in a preventive action, as stated above.

achieved in a more appropriate manner in the third paradigm, which shall be described below.

The Third Paradigm

The third paradigm proposes the use of means other than preventive killings, such as enforcement of the law by the state attacked by terrorist organizations (through arrests) or cooperation with the state in which the terrorists are operating to bring about their arrest in that state or their extradition to the attacked state. This is the case as well where the legal relationship between the state and the terrorist organization is defined as armed combat. However, it does not exclude the preventive killing of activists or leaders of terrorist organizations[160] under certain conditions: where a risk is expected from the activists or the leader of the terrorist organization and where the possibility of arrest is not reasonable or cannot be implemented.[161] The rationale behind this position is that the norms of humanitarian law *and* the norms of human rights law should be applied to the armed conflict between a state and a terrorist organization, and the norms set forth in the former should be interpreted on the basis of the norms established by the latter.[162] This integrative approach, which is based upon the paradigm that will be suggested in this paper, shall be explicated in the presentation of my position in a later section. At this point, the main differences between the third paradigm and that proposed by this paper will be clarified.

The model I propose has two stages. In the first stage, those holding various positions in the terrorist organizations must be defined, and distinctions must be made between leaders and rank and file activists and between direct participants in combat and indirect participants in combat.[163] In the second stage, the means that should be taken with respect to each of the groups defined above shall be clarified. In this context, I will discuss the special characteristics of the group of rank and file activists that justify the application of the norms of human rights law in an interpretive manner to the norms of humanitarian law My conclusions with regard to the means to be taken against active terrorists will be, therefore, similar to those of the third paradigm, according to which law enforcement measures are, in general, preferable. However, as we shall see, in this regard

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[160] In this regard, various scholars differ. For example, Orna Ben-Naftali and Keren Michaeli propose distinguishing between commanders and activists, where the former may be compared to combatants and therefore, allow implementing a broader permission for preventive killing. With regard to the latter, they propose implementing the narrow interpretation of Article 51(3) of the API —to attack only armed activists at the time they are holding arms. See Ben-Naftali and Michaeli, *supra*, fn. 15, 278, 290. Kretzmer, on the other hand, does not distinguish between leaders and activists, treating all of them as "terrorists". David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Execution or Legitimate Means of Defence*, 16(2) EJIL 171 (2005).

[161] This position also appears in *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Organized by the University Centre for International Humanitarian Law, Geneva, Convened at International Conference Centre, Geneva, 1-25 September 2005, at 25.

[162] For the implementation of this position regarding the IRA in Northern Ireland, see Fionnuala Ni Alolain *The Politics of Force: Conflict Management and State Violence in Northern Ireland*, (Blackstaff Press, 2000) 233-234.

[163] For expansion on this subject see Moodrick-Even Khen, *supra*, fn. 141, 196-255,

as well I argue that differences exist between leaders and rank and file activists. Regarding the former, it is possible to make do with the rules of humanitarian law, whereas with regard to the latter, human rights law must be applied in an interpretive manner to IHL. Similarly, I shall argue that the risk test (supported by a broad interpretation of the requirement for imminence in the doctrine of self-defense from the criminal law) provides a basis for a broad interpretation of the period of time (in the initial stage) during which means of preventive killing may be used, both with regard to activists (as a second possibility in terms of preference, and where other means cannot be implemented) and with regard to leaders. This solution differs from another of the third paradigm's positions, according to which the authorization for the killing of terror activists (as opposed to the leaders) should not be expanded beyond the narrow interpretation of Article 51(3) of API.[164] My position regarding this is similar, to a certain extent, to Kretzmer's. He proposes to base the permission for the killing of terror activists and leaders on the analogy between the requirement for "absolute necessity" in human rights law (for permission to use deadly means in self-defense) and the doctrine of self-defense in the *jus ad bellum*. Kretzmer suggests comparing absolute necessity and the requirement of necessity in the doctrine of self-defense in the international law, and thereby permitting preventive killing where it is proven that the anticipated danger from the activist or the leader (which is not necessarily immediate) requires an immediate action.[165]

In addition, I argue that the decision-making process with respect to preventive killing, both of leaders and of activists, needs to be backed by a process of exacting review. To the extent possible, a quasi-criminal process should be held in which the opposing version of the candidate for killing can be presented. If this is not possible, members who are legal figures as well as operational officials should be present in the oversight body in order to ensure that the decisions are not made on the basis of an operational process based upon the gathering of intelligence information, which is likely to be partial and imprecise. In summary, I shall point out that the integrative paradigm between human rights law and humanitarian law creates the impression according to which legal defenses are unjustifiably accorded to terrorists who camouflage themselves among the civilian population and act in violation of the laws of war. The fear is that they will exploit the defenses accorded by human rights law and will defend themselves through them, in an illegal fashion. However, a democratic state, loyal to the assurance of the basic rights of every person, cannot escape the problems arising with respect to preventive killing, even of a terror activist, but must make an appropriate attempt to resolve them.

The Response to Direct Participants in Hostilities—A New Model

This section considers the effects of connecting the norms of IHL and the norms of human rights law. It deals with interpreting the former in accordance with the latter in how we respond to one who is considered a legitimate target in general, and, in the

[164] See, Ben-Naftali and Michaeli, *supra*, fn. 15 .
[165] See Kretzmer, *supra*, fn. 160, 203.

context of the war against terror, to civilians who take a direct part in hostilities in particular. The first step is to clarify the connection between human rights law and humanitarian law. The next is to discuss whether the norms of human rights law apply to the permissibility of killing a legitimate target and how they affect the question of preventive killing. Finally, I shall consider the problems that arise with respect to the killing of members in a terror organization who constitute legitimate targets, and I will propose ways to solve these problems through this nexus between human rights law and humanitarian law.

The Applicability of Human Rights Law in the Course of Armed Conflict

There are three theoretical approaches that deal with the relationship between human rights law and humanitarian law. The traditional approach is the separation theory, according to which these are exclusive realms because they were intended to apply in different situations—human rights law in times of peace and humanitarian law during a state of war.[166] The second approach is the convergence theory,[167] according to which there is complete overlap between human rights law and humanitarian law. This overlap is expressed not only in that the same principle of humanitarianism forms the basis of the two legal systems, but also in that the two systems provide an equal level of protection to the individual. According to this theory, the human rights of every individual must be fully protected in every moral system, regardless of whether there is peace or a state of war.[168] The third approach is the cumulative theory, according to which even though human rights laws and IHL converge in certain contexts, there are differences between the legal methods. The two systems of laws should be integrated, therefore, by utilizing the arrangements in one legal system for the purposes of filling lacunae found in the other. Similarly, the two systems can be applied in a cumulative manner in every situation, in order to interpret provisions of one legal system through the provisions of the other legal system. The convergence theory recognizes, therefore, that IHL and human rights law have a nucleus of joint foundations,[169] and, as the international tribunal for former Yugoslavia stated, "[They] share a common 'core' of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted."[170]

The cumulative theory is also supported by the doctrine of interpretation of conventions. First of these is Article 31(3)(c) of the Vienna Convention,[171]which provides that in interpreting conventions "any relevant rules of international law applicable to relations between the parties" must be taken into consideration, and hence human rights law must be taken into account to the extent that it applies to the relations between the parties to the armed conflict. Additional interpretive support is found in the

[166] Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law*, 86 IRRC 789 at 790 (2004).
[167] Ibid., 794.
[168] Ibid., and see also Ibid., fn. 19.
[169] Theodor Meron, *The Humanization of Humanitarian Law,* 94 AJIL 239, 266-67 (2000).
[170] *Prosecutor v. Delalic*, Appeals Judgment, No. IT-96-21-A para. 149 (20 February 2001).
[171] *Vienna Convention*, *supra,* fn.70.

fundamental principle of the consensual and customary humanitarian law. The Martens clause[172] provides as follows: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, principles of humanity and from the dictates of public conscience." The clause, therefore, is a complementary clause, so that where no express prohibition has been defined or where the formulation of the limitation is unclear (at times intentionally), the parties are bound by the provisions of customary international law and the demands of human conscience.

The cumulative theory has been adopted by the International Court of Justice, both in its advisory opinion regarding the separation wall[173] as well as in its opinion regarding nuclear weapons. Recently, the court referred to the question of the interpretation of the right to life—more precisely, the right not to be subjected to the arbitrary denial of life—set forth in Article 6 of the International Covenant on Civil and Political Rights. The court discussed this right in connection to the question of whether the use of a certain weapon should be prohibited: that is to say, where the departure point of the discussion is a state of war and not of peace. The court determined that it is also possible to apply international human rights law in the situation of armed conflict. However, in this context it should not be interpreted according to the language of the Covenant on Civil and Political Rights or to human rights law, but rather according to the laws governing the conduct of armed conflict: in other words, the laws of IHL, which are the *lex specialis* applying to the situation.[174]In its opinion on the separation wall, the court ruled that it would examine its legality through the integration of the two systems of laws—human rights law and humanitarian law—as a *lex specialis*.[175] Indeed, it could perhaps be argued that if IHL is the specific law, it must take precedence over human rights law, the general law—*legis specialis derogate legis generalis*. However, this is certainly a sweeping generalization, for, indeed, in certain fields (such as the laws of arrest, interrogation, etc.) IHL is quite lacking. Furthermore, the argument regarding the Martens Clause is likely to contradict that of the precedence of IHL over human rights law, because it is evident that the requirement for the interpretation of IHL according to humanitarian principles and the general requirements of conscience is an inherent principle of IHL.[176] In summary, in several cases that were brought before the European

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[172] This clause is named for Russian legal scholar Friedrich von Martens (1845-1909), the representative of Czar Nicholas II to the Peace Conference in the Hague (1907).

[173] See *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), General List No. 131 available at http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (hereinafter, *Wall*), para. 106.

[174] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), General List No. 958, July 1996 reprinted in 35 I.L.M. 809 (hereinafter, *nuclear weapons*), para. 25 at 240,

[175] *Wall*, *supra*, fn. 173, para. 106. It is interesting to note that the decisions of the Israeli Supreme Court regarding the separation wall do not apply human rights law to the situation, but only IHL. See *Beit Sorik*, *supra*, fn. 136. However, in the *Maraba*h Case the Supreme Court agreed to assume, without making a finding in that regard, that the international conventions regarding human rights apply in the area under consideration. See *Marabah*, *supra*, fn.14, para. 27

[176] Of course, when there is a specific provision in IHL, human rights laws and the Martens Clause will be rejected.

Court for Human Rights and the Inter-American Commission for Human Rights for deliberation, they applied a methodology of concurrent application of the systems of IHL and human rights law and used the rules of IHL to interpret the human rights conventions that were under discussion.[177]

From the discussion above, it seems that an individual in the center of an armed conflict will be better protected through an interpretation of IHL according to the norms of human rights law—which would include the completion of lacunae in the former legal system through the norms of the latter. This is, undoubtedly, one of the goals of IHL, as stated by Pictet in the introduction to the commentary of the Fourth Geneva Convention, which appraises the work of renewing the Geneva Conventions in 1949: "[The Convention] reaffirms and ensures, by a series of detailed provisions, the general acceptance of the principle of *respect for the human person in the very midst of war*—a principle on which too many cases of unfair treatment during the Second World War appeared to have cast doubt" (emphasis added).[178] Below we shall see how an integration of human rights law and IHL influences the combat against terrorism, and how the integration of the norms and mechanisms of human rights law in IHL solves, in a more appropriate manner, problems raised by the combat against terrorism with respect to the agreed-upon aspects of IHL regarding the distinction between combatants and civilians.

International Human Rights Law and the Combat against Terror

Traditional interpretations of the concepts "combatants," "civilians," and "civilians who take a direct part in hostilities" do not succeed in dealing with the problems created by the combat against terrorism. This combat requires a broad interpretation of the concept "civilians who participate directly in hostilities" to include more than the use of weapons. Similarly, the length of time during which the person is considered to be physically involved in combat must be extended.[179] Furthermore, interpretations such as these—especially with respect to activists in terror organizations, and to a much lesser extent with respect to leaders of terrorist organizations—are likely to create ground fertile for intelligence and other kinds of mistakes and to make it difficult for the direct participants in combat to repent, to surrender, or to turn in their arms.

Using IHL solely to deal with the issues mentioned above brings about an undesirable result. This is the case even though its objectives in this context are preferable to other objectives—because the departing point of the discussion is the state of war and not of peace.[180] If certain civilians are defined as direct participants in

[177] See, for example, *Juan Carlos Abella v. Argentina*, Case 11.137 Inter-Am C.H.R. Report No. 55/97, OEA/Ser.L./V/II.95 doc. 7 rev. 271 (1997) (*Tablada* case); Inter-Am. Ct. H.R. (Ser.C) No. 70 (2000), and compare (*Bamaca-Valesquez* case); *Ergi v. Turkey* Application No. 23818/93, Judgment of 28 July 1998, Inter-Am. Ct.H.R. For cases in which the Tribunal or Inter-American Conference did not apply IHL, see Inter-Am. Ct.H.R. (Ser.C) No. 67 (2000) (*Los Palermas* case); *Lozidou v. Turkey*, Application No. 15318/89, Judgment of 18 December 1996, 310 Eur. Ct. H.R. (Ser A) (1995).

[178] Pictet, *supra*, fn. 6, 9.

[179] For a detailed explanation of this position see Moodrick-Even Khen, *supra*, fn. 141, 127-144

[180] See the position of the International Court of Justice in *nuclear weapons*, *supra*, fn. 174, para. 25.

hostilities in the framework of terrorist organizations, they would, on the face of things, become legitimate targets: that is, they would be automatically exposed to being shot to kill as long as they participate in the combat. However, this determination is likely to obstruct the basic distinction between combatants and civilians. In other words, IHL is not ensuring one of its defining principles when it attempts to impose the principle of legitimate targets on this particular aspect of the combat against terror: that is, the combat against civilians who participate in acts of terror. Norms and other apparatuses that will assist in finding a solution to this problem must be identified. As we shall see below, the norms of human rights law and the mechanisms of this law can deal with the issue.

Before discussing how human rights law and IHL should be integrated in the context under discussion, I shall make a comment that supports the expansive definition of direct participants in hostilities, both from the perspective of their role and from the perspective of the length of time during which they are legitimate targets. It should not be concluded that the failure to implement the principle of distinction between combatants and civilians renders inappropriate the definition that expands the time span during which a civilian may be considered a direct participant in hostilities. Indeed, the principle of distinction will be more appropriately ensured through a definition that seeks to implement a restrictive interpretation of Article 51(3) of API, in which civilians are participants in combat only at the time of their physical participation (when they are holding weapons). However, this definition addresses the need to frustrate the dangers that terrorism creates that arise in the early stages of the action.

As opposed to this, the concurrent implementation of human rights law and humanitarian law is likely to achieve the two desired results. On the one hand, an interpretation of the article that gives appropriate weight to basic rights recognized in human rights law—the right to life and to a fair trial—will lead to the default choice of detaining activists in terror organizations rather than shooting them to kill. On the other hand, an expansive interpretation of Article 51(3) will permit, in certain circumstances, shooting to kill, but only where carrying out detention is not reasonable, or under strict conditions that include rigorous review of the decision's approval and implementation—in the spirit of the mechanisms of human rights law. An expansive interpretation of Article 51(3), limited through the norms of human rights law, will ultimately lead to a more exacting application of humanitarian law and will ensure loyalty to its principles that seek to balance military with humanitarian considerations. The concurrent implementation of human rights law and humanitarian law regarding the combat against terror functions to address two additional factors. First, given the importance of the norms of human rights law, primarily the right to life, they must be integrated into IHL—to the extent possible and without this conflicting with its objectives and rationale. Second, policy considerations indicate that applying norms of human rights law (through the use of internal police means or international cooperation in intelligence information) instead of or in addition to the norms of humanitarian law will likely reduce the threshold

of the violence. And this fact supports the concurrent application of the two legal branches.[181]

The integration of the norms of human rights law with the norms of humanitarian law is also likely to be learned from the parallel application of different legal frameworks—the laws of enforcement and the laws of armed conflict—to the situation of combating terror.[182] It is true that while the possible action against terrorists in the criminal arena does not directly justify the application of human rights law to the arena of the armed conflict, it is instructive regarding the possibility of integrating the two branches of law.[183]

There are also norms of human rights law whose integration with IHL is expressed in legislation—and not based upon interpretation only. Thus, instruments that determine the duties of the parties to the armed conflict include provisions that touch upon the rights set forth in the human rights conventions. For example, Article 5 of the Fourth Geneva Convention provides that a protected person is not to be deprived of a fair trial, even during a state of emergency. Article 75 of API enumerates the rights of persons who have fallen into the hands of the other party to the conflict who are not protected by any of the Geneva Conventions. Among the rights also protected by IHL is the right to life and to physical wholeness (the prohibition against the killing, injury, or torture if one is captured by the enemy)[184] as well as some of the rights to due process[185] that appear in the Covenant on Civil and Political Rights,[186] such as the right to know the cause for arrest, the right to a due process, the right to defense in the criminal process, and the presumption of innocence. Common Article 3 of the Geneva Conventions sets forth the minimal rights accorded to every person in a noninternational armed conflict, among them the right to life[187] and the right to a fair trial.[188]

The normative conclusion from the above-stated is that we can integrate human rights law and humanitarian law with respect to the war on terror from the perspective of the type of questions that the two branches of law deal with. In addition, from the perspective of policy considerations, it is justified to use maximum means against terror

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[181]Kenneth Watkin, *Controlling the Use of Force: A role for Human Rights Norms in Contemporary Armed Conflict*, 98 AJL 1, 29 (2004).

[182] This integrative approach characterizes the struggle of the United States against Al Qaeda.

[183] As stated above, around ten years ago the Commission of Experts proposed the adoption of minimal standards of humanitarianism that would apply in every situation regardless of whether there was a state of peace or of armed conflict. See Declaration of Minimum Humanitarian Standards, 2 December 1990, U.N. Doc.E/CN.4/Sub.2/1991/55 (1990) (adopted by the Meeting of Experts at Human Rights Institute of Abo Akademi, Turku, Finland). (hereinafter, *Turku Declaration*) For an example of the application of human rights law to the situation of the combat against terror that does not take place within an armed conflict, see *McCann v. United Kingdom*, 21 Eur. H. R. Rep. 97, 160 (1995).

[184] API, Article 75(2).

[185] API, Articles 75(3) and (4).

[186] *International Covenant on Civil and Political Rights***,** G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (hereinafter, ICCPR), Article 14**.**

[187] Common article 3(a) to the Geneva Conventions (1949).

[188] Ibid., Article 3(d).

activists on the one hand, and to act to minimize the threshold of violence and to choose means that will serve this objective on the other hand. Below, I shall examine the special means by which the laws of war should be integrated with human rights laws in the war on terrorism and in the reaction towards civilians who participate in combat in these organizations.

Every individual application of the cumulative applicability of human rights laws and IHL is dependant upon two central rights protected in human rights law: the right to life and the right to a fair trial. These are protected in human rights law through international conventions, international committees for human rights that examine allegations of violations of such rights, and the international and local courts of the member states to the conventions charged with the enforcement of these rights. It is to be noted that these rights are also protected in IHL and they influence the proper relationships of combatants and civilians in the battlefield. An examination must be made of how to integrate this protection into the system of the laws of war, which, in principle, would grant them a more limited protection.

International human rights law considers the right to life to be nearly absolute, having the status of *jus cogens*. The Human Rights Committee and the human rights covenants have provided that this right cannot be negated in an arbitrary manner, and that only legislation can limit the circumstances under which any regime may strip a person of his right to life.[189] Article 4(1) of the International Covenant on Civil and Political Rights provides that executions without trial are forbidden, even during states of emergency or during an armed dispute.[190]Among the examples of the arbitrary denial of the right to life that were given by the Human Rights Committee in the report it published on immediate or arbitrary executions or executions without trial was targeted assassination of designated individuals who were not under governmental detention.[191]

The norms of IHL, which are intended to ensure the exclusion of civilians from the circle of violence, demonstrate the recognition of the importance of the right to life of civilians who do not participate in hostilities. It was noted above how IHL is likely to bring about an undesirable result when those who present themselves as combatants—even if they do not physically take part in combat (expansive interpretation of Article 51[3])—are injured. However, this expansive interpretation ignores the problems that endanger the civilians who do not participate in combat, as well as their basic right to life. Therefore, the basic right to life of the civilians who do not participate in hostilities must be taken into consideration, and the importance accorded to this right in human rights law must be foundational in any integration between the branches of law to solve these problems. Of course, the combatants also have a right to life. However, this right, according to the rationale of IHL, is secondary to the civilians' right, for indeed the

[189] See Article 6(1), ICCPR, *supra*, fn.186.
[190] Attention should be paid to the fact that the Article was not given meaning in the internal Israeli legislation, in the sense that the Israeli law does not relate to the use of force that endangers life and does not contain provisions as to when it is permissible or forbidden to use such force.
[191] E/CN4/1983/16 paras. 74-75.

combatants are legitimate targets at all times, whereas civilians are protected, as a matter of principle, from attack.

The right to a fair trial, protected by human rights law, has also earned recognition in IHL. Human rights law provides for the protection of the right to a fair trial in the Universal Declaration of Human Rights,[192]as well as in Article 14 of the International Covenant on Civil and Political Rights, which sets forth minimal standards for due process. The Article sets forth, *inter alia*, the presumption of innocence (that is, that persons are regarded as innocent of wrongdoing until their guilt is proven in court) as well as the right of every defendant to be informed of the nature of the charges against them and to defend themselves against them personally (even if assisted by counsel).[193] The right of detainees and prisoners to a fair trial is recognized by humanitarian law in the Fourth Geneva Convention, which provides that in no circumstance may the right of a person to a fair trial be denied, even during a state of emergency,[194] and in Article 75 of API, as stated above. Of course, the right to a fair trial is not accorded *a priori* to every combatant on the battlefield, for indeed the principle according to which the combatant is a legitimate target takes precedence to his right to a fair trial, to which he will be entitled only if and when he falls prisoner or is arrested.

However, as we shall see below, the fight against terrorism undermines this paradigm due to the problems of identification and repentance discussed above. With the war against terror, the need to ensure the distinction between combatants and civilians means that priority must be given to apparatuses derived from the right to a fair trial over the principle of legitimate targets. As we shall see below, the framework of the criminal law, from which the right to a fair trial is derived, is appropriate to preventive actions against terrorism, usually taken through IHL, such as preventive detention.[195] Of course, the fact that such priority is likely to protect the terrorist organizations and their members and to endanger the residents of the state combating terror cannot be ignored. Therefore, in describing the new paradigm for the combat against terrorism, I shall also suggest various means of strengthening the state's ability to fight terrorism (for example, distinguishing between low level activists in terrorist organizations and their leaders).

Before examining how IHL and human rights law should be integrated, and clarifying the significance of the protection that must be accorded to the rights enumerated above in the framework of humanitarian law, I shall make a comment on the connection between the right to a fair trial and the war against terror. One of the arguments for the justification of preventive killing of terrorists is that they do not uphold the laws of war and they employ illegal methods, *inter alia*, targeting civilians and not soldiers. It may be argued that even when the motivation for their action is a war of

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[192]*Universal Declaration of Human Rights*, G.A. Res. 217A, U.N.GAOR, 3d Sess., pt. 1 at 71, U.N. Doc. A/810 (1948)**.**

[193] ICCPR, Article 4, *supra*, fn. 186**,** permits derogation in situations of "a state of emergency that threatens the safety of the nation." Israel makes frequent use of this permission, and has withdrawn from the duties set forth in Articles 9 and 14 of the Covenant, regarding administrative detentions.

[194] See, for example, Article 5 of the Fourth Geneva Convention.

[195] Ibid., Articles 42, 43, 78.

liberation against occupation (therefore constituting part of the protected interests by the international law),[196] the invalid nature of the means obscures the justice of their cause. Of course, this argument confuses *jus in bello* and *jus ad bellum*. The protection of the rights of terror combatants as well as those of other combatants, in the framework of *jus in bello*, completely ignores the justice of the cause for which the combatants are fighting. The protection is granted to them by virtue of their being combatants or civilians participating in combat. The righteousness of the war is examined only in the framework of *jus ad bellum*, in which the right to go to war is accorded to or taken away from the authority responsible for going to war (and is not examined in respect to each individual). In any event, once the war against terrorism is examined according to the laws that govern its actual carrying out (*jus in bello*), the question of the righteousness of the war is not relevant. All of the rights accorded to combatants and to civilians, among which is also the right to a fair trial, are granted to those same terrorists—with the restrictions set forth in IHL and (according to our argument) in some of the cases also with the restrictions set forth by human rights law. On the other hand, breaching *jus ad bellum* (as terrorists tend to do) influences their status and derogates from their rights pursuant to these laws.

Turning now from the normative considerations for the integration of IHL and human rights law, I will consider whether the integration is possible in the context of an international armed conflict or a noninternational one. Although the interpretation of the norms of humanitarian law through the human rights law is possible in any situation of armed conflict, international or noninternational,[197] as we shall see below, the procedural applicability of the oversight apparatuses of human rights law on IHL is generally more effective in the framework of the latter.[198] Human rights law allows the law enforcement authorities in a state to deal with criminals, through various means, and to limit their rights to an extent that is not greater than necessary. This is done through surveillance, detention, and imprisonment subject to processes of a fair trial. The ability to use such means stems from the sovereignty of the state or from its effective control of territories over which it is sovereign. This means of action is thus possible in occupied territories as well.

In addition, the application of IHL to noninternational armed conflicts is subject, to a certain degree, to standards of human rights law, in the spirit of the provision of

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[196] See API, Article 1, which applies the Protocol to the situations in which nations fight their wars against foreign occupation to realize their right to self-determination, and Common Article 2 of the four Geneva Conventions (1949), which applies the provisions of the Conventions to situations of occupation.

[197] The terms "not international" or "noninternational" are preferable to the term "internal," because the combat against terror is also defined as a nonintenrational armed conflict even though it sometimes occurs outside of the borders of one state.

[198] This determination is not unequivocal. Thus, for example, in the matter of Case No. C1/2005/0461 B, *Al-Skeini & Ors, R. v. Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005) para. 81, the court of appeals noted that the European Convention on Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights) is likely to be applicable with respect to people who are under the control of occupying forces of a state that is a member of the Convention. Thus, for example, the European Court for Human Rights is likely to have jurisdiction over the actions of Great Britain in Iraq.

Common Article 3 to the Geneva Conventions, which imposes upon the state that is a party to a noninternational armed conflict the obligation to apply "minimal standards of humane treatment." This connection between IHL and human rights law in the framework of a noninternational armed conflict, like the meagerness of the arrangement proposed by humanitarian law in relation to a conflict of this type, strengthens the argument for integrating the legal systems and for the use of human rights law where IHL is lacking. This conclusion serves as a basis for my proposal to implement human rights law with respect to the war against terror, where IHL brings about an undesirable result. The argument is not that IHL is unsuitable for dealing with terrorism. The opposite is true: the normative framework of the paper sets out the existence of armed international conflict, or a noninternational one, between states and terrorist organizations. However, to the extent that we are speaking of democratic states that respect the basic rights of every human being, we must examine how human rights law, which is charged with insuring these rights, can assist in choosing the proper means to deal with the war against terrorism.

Of course, one asks whether and how the norms of human rights law may be applied to the actions of one state on the territory of another state. This question is relevant to the war against international terrorism occurring outside of the territory of one state and even in places in which the state has no effective control.[199] The answer is not unequivocal and is subject to controversy. The European Court of Human Rights gives a narrow interpretation to the conditions under which the European Convention on Human Rights will apply extraterritorially, limiting it to cases in which the state has effective control in the territory through occupation or when it uses the sovereign authorities in that territory in accordance with the agreement of the local government.[200] As opposed to this, an expansive approach, based upon the universal characteristic of human rights (the conventions insuring them having been adopted by the vast majority of the states of the world) and upon the fact that most human rights have become customary and absolute norms, permits the application of human rights norms with regard to everyone affected by the actions of one state or another.[201] According to this approach, the norms of human rights law will also apply to the acts of a state towards those who use terror against it outside of its territory.[202]

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[199] Indeed, the war against terrorism can also take place in an occupied territory, as stated above, in which the state has effective control. This simplifies questions regarding some of the human rights conventions, such as the European Convention on Human Rights, which were intended to apply to every person under the legal jurisdiction of a state that is a member of the Convention. Regarding the approach that denies the automatic application of the Convention in an occupied territory and conditions it on the extent of the effective control of the occupying power, see ibid. For the approach according to which the ICCPR applies to an occupied territory, see Orna Ben-Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Is. L. Rev., 17 (2004).

[200] *Bankovic v. Belgium & Others* (2001) 11 BHRC 435, para. 71 (hereinafter, *Bankovic*).

[201] See the argument of the petitioners in *Bankovic* (paras. 74-75), according to which, because they are under the influence of the belligerent acts performed by the NATO states in Yugoslavia, they remain in the jurisdiction of the member states of the European Convention on Human Rights.

[202] Kretzmer, *supra,* fn. 160, 184-185.

The connection noted above that the courts and the human rights commissions have made between human rights law and IHL has occurred, in general, at the normative level. The courts either applied the norms of human rights to situations of armed conflict or applied norms of IHL where they had to interpret situations of infringement of human rights. However, with respect to certain subjects, the International Court of Justice has ruled that human rights law should not be applied where the IHL set of norms is exhaustive. With respect to any issue concerning legal means for coping with terror, I propose implementing, in an interpretive manner, the apparatuses for supervising the accountability of human rights law to IHL in order to overcome the failures enumerated above. However, I also wish to implement these apparatuses with respect to the subject that IHL governs as *lex specialis*: that is, the permission to strike targets considered legitimate. On the face of the matter, in view of the existence of special provisions, the applications of human rights law is not necessary. However, as we have seen above, IHL cannot govern this issue appropriately without endangering the principle of distinction between combatants and civilians. But as we shall see below, the apparatuses of human rights law are likely to assist in solving this problem.

It must be clarified why the supervisory apparatuses of human rights law are preferable to those of IHL. Indeed, IHL has independent apparatuses for supervision, among which may be counted, first, the principle of personal criminal liability and liability of commanders. These apparatuses were recently implemented by the Ad-hoc International Criminal Tribunals that had jurisdiction to impose criminal liability upon the perpetration of war crimes and crimes against humanity in armed conflict, and they are expected to be implemented by the permanent International Criminal Court.[203] Also worthy of note are the system of disseminating the provisions of IHL among military personnel through military manuals and the integration of legal advisors who are charged with transmitting international law in military units.[204]Additional apparatuses with rather low levels of effectiveness include the authority to establish an international commission of inquiry[205]; the authority of a third, neutral state to intervene; and the establishment of neutral commissions of understandings whose objective is to clarify breaches of IHL, especially breaches of the Geneva Convention.[206] Although most of the means enumerated are relevant primarily to international armed conflicts, recently the need to expand the use of the supervisory tool to noninternational armed conflicts has been recognized.[207] However, some stumbling blocks to these apparatuses remain. For

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[203] These include API, Articles 86 and 87—Articles of the grave breaches of the Protocol—and Article 8 of the Statute of the International Criminal Court, which deals with war crimes.

[204] For further discussion of this subject, see Leslie C. Green, *The Contemporary Law of Armed Conflict* at 279-280 (Manchester University Press**,** 2nd ed. 2000).

[205] API, Article 90. However, such a commission has never been established.

[206] See, for example, the commission to clarify arguments of both of the parties that was established after the Grapes of Wrath Operation in Lebanon.

[207] Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 October 1994, SC Res. 955, Art. 4 (8 November 1994) 33 ILM 1958 (1994).

example, the implementation of supervisory means is not sufficient. This is the case, due to, *inter alia*, the absence of supervisory bodies such as a human rights committee or the Human Rights Commission that operates alongside the European Court for Human Rights.[208] Therefore, the Human Rights Committee and the subcommittees for human rights have, since the 1970s, been examining subjects related to the infringement of human rights in armed conflicts.[209]We also mentioned above the attempt to adopt minimal humanitarian standards that are valid in every situation.[210] Despite the fact that the criticism of the Turku Declaration focused on the fear that other human rights standards that were not mentioned in it would be neglected and would not be respected, it could strengthen the international supervision of how IHL is implemented, especially by organizations involved in noninternational armed conflicts.[211]

It is indeed true that the supervisory apparatuses of the human rights commission also operate, at times, somewhat ineffectively, especially with respect to the duty of states to report on the implementation of the Human Rights Convention. Similarly, they operate from an orientation of protection of human rights, even at the price of "distorting" IHL or shackling it with the norms of human rights law. However, adding apparatuses to supervise the implementation of humanitarian law is likely to add to the complications of the system and the inefficiency that already plagues it. It seems, therefore, preferable to seek assistance from the existing apparatuses and to work for better implementation of them.[212] Thus, for example, one apparatus for enforcing human rights law (the strengthening of which is important in the context of implementing humanitarian law in general, and in the context of the war against terror in particular) is the reporting system on applications for a state of emergency. According to Article 4 of the Covenant on Civil and Political Rights, the declaration of a state of emergency must be reported and accompanied by assurance that the rights that are not to be deviated from will be respected.[213]Acts of terror that rise to the level of an armed conflict also justify the operation of Article 4 of the Covenant. As we shall see below, it is possible to require that the duty to report on a state of emergency includes the duty to report on an act of self-defense, under certain conditions.

Oversight Apparatuses for the Means of Response to Terror Activists

This subsection, which concludes the discussion of direct participants in hostilities and the means of response towards them, considers the problems discussed at the beginning of this section—the fear of mistake and the question of repentance—and puts forward a possible solution, subject to a major reservation. As stated above, I intend to object to the accepted position in IHL that in every situation of armed conflict direct

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[208] Watkin, *supra*, fn. 181, 23.
[209] Thus *rapporteurs* were appointed to investigate the use of mercenaries, sexual violence, and children's rights in the framework of armed conflicts, which is also the procedure of regional human rights bodies. See, Meron, *supra*, fn. 168, 270.
[210] *Turku Declaration*, *supra*, fn. 183.
[211] Meron, *supra*, fn. 168, 275.
[212] See the examples for the delay in filing reports cited by Heintze, *supra*, fn.166, 798-799.
[213] Ibid., 800.

participants in hostilities may be attacked to kill, as well as to propose oversight apparatuses for the means of response. It should be noted that the above objection is relevant only with respect to activists in terror organizations (regarding whom, as we shall see, IHL cannot insure the principle of distinction) and it is not relevant regarding the leaders of terror organizations. However, this paper's proposal respecting the oversight apparatuses is valid with respect to both groups: activists as well as leaders.

On the basis of this, those at the top rungs of leadership of the terror organizations will be considered legitimate targets: they may be attacked as long as they serve as leaders of the organization, on the basis of the expansive interpretation of the concept of direct participation in combat. This is due to the fact that the analogy between them and commanders in a regular army is far more valid than the analogy between activists in terrorist organizations and soldiers in a regular army. As a result (and similar to the working assumptions regarding the senior commanders of a regular army) there is almost no possibility of a mistake in identification, and only a remote possibility that the leader might repent or surrender. The fear of a mistake in the appraisal of their role should be weighed against the risk foreseen from them. Furthermore, these difficulties do not arise when activists and minor activists in terrorist organizations are located at the moment they take direct and physical part in combat (as in the restrictive interpretation of Article 51[3] of the API). In such situations, according to IHL, they can serve as legitimate targets.

As opposed to this, activists (who are not leaders) in terrorist organizations, against whom actions are planned in advance on the basis of intelligence gathering and exacting preparation, can be killed only as a last resort—where other means were considered and proven unreasonable or inapplicable. This argument is based upon three central components. The first is the basic principle of IHL: that is, the duty of distinction between combatants and civilians, the principle of proportionality, and the duty of caution imposed upon the commanders. The goal of all of these is to distance the population that does not participate in combat from the battle areas and to reduce the injury to it. The second component is that the failure to fulfill these duties was caused by i) the absence of practical possibilities for members of the terrorist organizations to surrender and to repent, and ii) the existence of a reasonable possibility that the information possessed by the security officials on the role and the identity of the person sought is not precise. The first two components of the argument are linked by the third component: which is the connection between human rights law and IHL. This connection allows interpretation of the principles of IHL—military necessity, the principle of prevention of unnecessary suffering, and the principle of distinction between targets—such that they support a claim to choose the least serious means that provides the military advantage. This interpretation is also consistent with the spirit of IHL, even when it is not connected to human rights law: that is, the manner in which IHL focuses upon the victims of war or armed conflict and seeks to reduce the suffering of the individual in the campaign. This spirit is expressed through the emphasis on the principle of distinction and on the duties of caution imposed upon the attackers and those attacked to insure the protection of civilians on the battlefield.

Of course I do not intend to make the absurd argument that the killing of terror activists in the course of a battle must (or may) be subject to *ex ante* judicial or administrative review. Furthermore, the oversight apparatus proposed above may need to be restricted or reduced if the military necessity increases the frequency of the actions such that no time remains to hold a full oversight process. However, for the most part, the nature of the war against terrorism permits choosing military targets in advance, and precise preparation of military actions is also consistent with the demand to establish oversight of these actions, as described below.

The first means for coping with the fear of a mistake and examining the possibility of repentance of members of the terrorist organizations is the creation of an administrative process to evaluate the role in acts of terrorism of those chosen for killing or preventive killing. The possibility of mistake, which exists even where legal processes are carried out, increases in the absence of such processes and in the absence of the right to argue for one who is marked as a target.[214] The optimal law would require, therefore, a process that would enable prior notification to targets for killing, warning them and inviting them to defend themselves and present evidence to contravene the information in the possession of the security forces, or to surrender. The argument that giving such a warning will impair the element of surprise is invalid, for in most cases these people are aware that they are likely to be a target of the enemy army.[215] However, in the province of the *lex lata*, it seems that in most cases it is impossible to carry out such a process. Frequently there is no operational possibility to give prior notice of the targets and to permit them to appear for a judicial process. Even if such an option is provided, it is reasonable to assume that the people who are targets for killing will choose not to appear for a judicial process before the state against which they are fighting, both because they do not at all view their deeds as crimes and because they fear that the process will be prejudiced and unfair.[216] In these cases, the decision to act with military means must be made on the basis of a thorough and documented process, in which the opposing version and the arguments that contravene the information presented against the suspect are given expression. The data should be presented to the deciding body by a civil law body and be

[214]Indeed, the criminal process is a democratic regime's most important process for arriving at the truth. However, it is not appropriate in our case. In a criminal process, guilt is examined in relation to a criminal offense; one cannot use it to clarify whether or not a person is dangerous enough to be targeted for preventive killing. Administrative detention is the legal proceeding to deal with the question of future dangerousness, and its foundational rationales are more similar to those of the process proposed by this paper than are those of the criminal process.

[215] In comparison, Sanjero points out that the importance of a warning is recognized in the possibility raised by the Israeli Supreme Court of preceding the shooting of a person with warning shots in the air. See, Boaz Sanjero, *Self-Defense in the Criminal Law* fn. 660 at 182 (2000), and the references there.

[216] The criminal law allows that detention proceedings and even a trial can be held in the absence of the defendant or the suspect (for example, where there is a suspicion of a security crime) or through the use of confidential evidence. However, the process must be carried out with the suspect's knowledge and the confidentiality of the evidence must be explained by the court.

taken into consideration at the time of deliberating whether to carry out the act of preventive killing or to refrain from it.[217]

Since a criminal proceeding is not at issue, when evidence regarding the future intentions of the suspect is presented, it is possible to make do with the rule of administrative evidence, which lowers the level of the evidence required for proof. This level does not deviate from that required by IHL regarding the considerations according to which it must be decided if a particular target is military. On the other hand, where evidence is brought regarding the *past* deeds of the suspect, and this is only where it can be instructive as to the suspect's methods of action and future intentions, they must be at a level of certainty beyond a reasonable doubt[218] and the rule of administrative evidence is not sufficient.

I shall again emphasize that I propose to set up the process of operational oversight as well as the administrative process with respect to the decision regarding preventive killing both of leaders (with actual organizational control) and of other activists. Such a process will reduce the risk of mistaken identity and repentance problems with regard to leaders of terror organizations as well. Additionally, it will clarify the military-operational aspects and the question of the benefit of the killing of the wanted person. Of course, such clarification is necessary with regard to the killing of wanted persons as well as leaders. The following questions must be considered: What is the significance of taking such persons out of the combat cycle, and is neutralizing them critical to preventing concrete acts of terrorism being actively considered? Will these occur even without them? What will be the effect of the deed on the motivation to perform acts of terrorism? Is there an alternative to killing that will neutralize them, and will this alternative cause endangerment of human life?

However, the possibility must be considered that in general the decision makers (that is, the defense officials and the government or the limited security cabinet that approves such actions) tend to assume that the level of proof required to carry out the preventive action indeed exists. It is appropriate, therefore, to establish apparatuses of

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[217] Kremnitzer proposes guidelines according to which such processes should be performed, including inclusion of a "devil's advocate"; independent civil legal involvement, documentation; and providing the suspect with a warning as well as the choice surrender to the authorities. See, Kremnitzer *supra*, fn.140.

[218] However, this is not identical to the level of proof demanded in a criminal procedure, because no opposing party appears here. Professor Emanuel Gross argues that because the decision to carry out a targeted killing is a decision of the administrative authority and not a judicial decision, the level of evidence required for carrying it out must be that of near certainty and not beyond a reasonable doubt. See, Emanuel Gross, *Terrorists Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens,* 15 Temp. Int'l L.J. 195, 224 (2001). Requiring a level of certainty beyond a reasonable doubt is justified both by the severity of the special means and in view of the fact that I recommend that judicial bodies or quasi-judicial bodies be involved in the decision regarding the very carrying out of the action. See the discussion below on the supervision of the decision of the operating branch. However, as stated above, in appraising future actions of the suspect, it is not possible to demand evidence at the level of beyond a reasonable doubt.

judicial and legal review prior to carrying out the act.[219] For example, the action may require approval not only from operational figures but from legal figures as well, including the Attorney General, the Chief Military Prosecutor, and experts in the law of war under the auspices of the military.[220] The reasons for establishing a review body are twofold: first, the fear that security and governmental officials will tend to reduce the weight accorded to the operational and legal evidence negating the reasonableness, the essentialness, or the necessity of the action as well as to the evidence to the benefit of the suspect and controverting his liability; and second, the natural tendency of the deciding officials to favor one party, which is likely to blind them to the negative repercussions (mainly the injury to the civilian community and those innocent of wrongdoing) of the action for the other party.

Great care must be taken that the information gathered and which served as a basis for carrying out the action with respect to any targeted person, along with the transcripts dealing with the decision on the action, are documented and preserved. This is to allow for retrospective judicial review by the courts or, as we shall see below, by international bodies with regard to the legality of the action, to the verification of the evidence on which the action was based, and to the examination of its sufficiency. This is likely to increase the extent of responsibility in the making of decisions and thus deter hasty decisions.

Of course, the above-described process is the optimal law, but circumstances may obscure the ability to implement it. The requirement for holding a quasi-judicial review process prior to carrying out an act of assassination is often conditioned upon there being sufficient time to hold such a process and the danger is not being imminent. At times, such conditions are not characteristic of the war against terrorism, which necessitates an immediate action when a "window of opportunity" is opened. In such cases, there will not be enough time to carry out a full review process; however, it is possible to require that the state record and document all of the evidence and the manner of decision making that brought it to carry out the action. Similarly, it may be that holding up the decision for some sort of examination, even retrospectively, will require the decision makers to take greater caution and pay attention to the possible reservations.

Additional means to deal with dangers that are not imminent can be found on the international level. Thus, for example, international oversight can be strengthened prior to carrying out an act of self-defense. This is where the state has sufficient time to bring the evidence it has of the danger against which it wishes to defend itself before the international community. States could conceivably adopt this type of an arrangement, at least with respect to actions that are not controversial from the perspective of international law. The United States, for example, sought approval from the Security

[219] This is opposed to the retrospective criticism that the Supreme Court carries out. Compare with Watkin's paper surveying the apparatuses of human rights law in the retrospective examination of cases, in which use was made of force by the state authorities. Watkin, *supra*, fn. 181, 17-22.

[220] In Israel, for example, only general permission has been given by the Attorney General on the use of means of preventive killing, and approval is not required for each separate action.

Council for its action in Afghanistan,[221] this in order to renew international faith in, and support for, its actions and to refute charges of inappropriate use of force. The possibility also exists that complete disclosure of the evidence will deter terrorism activists who intend to carry out mass murder. On the other hand, if attempts at negotiations fail and the actions are carried out solely in the military sphere, it is not reasonable to require the state to present preliminary evidence on each case, because this would impair the element of surprise and it would strengthen the argument that the danger is not immediate. In this context, it may also be necessary that the state reveal the decision-making process behind the actions already carried out to present them before an international oversight body, even retrospectively, if the state refuses to reveal evidence about its future intentions. The disclosure of the evidence is also likely to impair the confidentiality of sources and to expose secret methods of intelligence gathering. Therefore, disclosing evidence should be subject to these confidentiality requirements.

Another problem regarding the considerations of the decision-making echelon in the carrying out of acts of preventive killing is when preventive killing is seen as an act of self-defense. Despite the fact that the killing of terror activists is often presented as a preventive act,[222] the decision to carry out the action is often rooted in considerations of punishment and revenge, stemming from outrage over past deeds of the enemy. It is clear that, in the best circumstances, considerations of both punishment and prevention are used together.[223] In other words, even though the rationale for carrying out an action of self-defense against terror activists is supposed to be based solely on the objective of preventing future danger, it is also based upon past deeds.[224] Indeed, focusing attention on the requirement of immediacy of the necessary act while questioning (even retrospectively) whether each act was immediately necessary is likely to assist in distinguishing between punishment/deterrence and prevention. However, it is more difficult to make this distinction in a framework where the decision makers consider the objective of deterrence, in a general fashion, of nonspecific future acts.[225]

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[221] It is doubtful, however, that states will bring actions of preventive killing up for approval where the position of the international community regarding them is not unequivocal and tends to be critical.

[222] The expressions themselves, "preventive killing" and "targeted frustration," emphasize their objective: to frustrate or to prevent.

[223] Thus, for example, after the assassination of Sheik Salach Shachada on 23 July 2002, Prime Minister Sharon said in the government meeting, "We struck the most senior Hammas official, the one *who organized and rebuilt* the Hammas forces in Sumeria" (my emphasis: H.M.E.: notice the past tense in his statement). The Minister of Defense, Shaul Mofaz, added that Shachada was involved in directing tens of attacks against Israelis. Indeed, the Minister of Defense also pointed out that the killing was intended to prevent many additional attacks; however, it was not clear if these were concrete incidences of attack that were known to the upper echelons of the defense establishment. See, www.ynet/co/il/articles/1,7340/L-2017413,00.html.31k. Similar statements were also made with regard to the attack upon senior members of Hammas. See, www.ynet/co/il/articles/0,7340-274337,00.html.

[224] It should be noted that the Human Rights Committee's position is that punitive or deterrent assassinations are not legal. See, *Concluding Observations of the Human Rights Committee on Report of Israel*, 21/8/2003, CCPR/CO/78/ISR.

[225] See *supra*, fn. 116, on the attempted assassination of senior Hammas officials on September 6, 2003, and the successful assassination of Abed el Aziz Rantisi on 10 June 2003.

The importance of distinguishing between types of considerations lies in the need to critically assess the of the act that was undertaken. It is only when we know the considerations underlying an act that we can retrospectively criticize the decision and determine whether it was appropriate. However, the difficulty lies, as stated above, in that in most cases the type of considerations cannot be precisely identified. This is, therefore, a further reason to demand the transcribed documentation of the hearings that precede the decision to assassinate any person. Bringing these considerations before a judicial body, even with the conditions of privilege and confidentiality, can shed light upon the question of the justness of the action.

Before summarizing the contour of the action against terrorists this paper puts forward, I shall comment on the Israeli policy of preventive killing.[226] Israel's position is that acts of preventive killing, termed "targeted frustration," are justified according to the laws of war of international law. Israel rejects the applicability of human rights law to the issue, opining that the sole relevant regime in the application of focused frustration is the laws of war of international law (LOAC).[227]As stated above, I reject Israel's position, both with respect to the applicability of human rights law and with respect to the question of the permissibility of preventive killing in international law. Indeed, my argument is that the principles of humanitarian law do not express an explicit prohibition of preventive killing, and from the rule "what has not been prohibited is permitted,"[228] it is possible to infer that preventive killing is permissible according to the laws of humanitarian law. However, as stated above, the interpretation of the provisions of humanitarian law through the norms of human rights law leads to the opposite conclusion—that the permissibility to kill on the basis of a suspicion compels permission

[226] I take this step, although this paper does not focus on the Israeli case and its objective, in order to formulate a proposal with respect to a general policy on the question of preventive killing. In this context it is important to point out that the case of Israel is also unique because until Israel's withdrawal from the Gaza Strip, the actions of frustration were carried out on territory that had indeed attained a certain independent status in the wake of the Oslo Accords, but portions of which were at times occupied by the IDF in several campaigns. This fact is likely to have an impact upon the policy of preventive killing. Above, we discussed the fact that preventive killing is not to be approved where there is absolute effective control of the state. The question is what the policy of preventive killing should be in territories in which, at times, there is a certain degree of effective control. Under these circumstances, the degree of effective control must be examined, and to the extent that it is greater, preference will be accorded to the applicability of the laws of armed combat over the laws of enforcement. In such situations, it may also be possible to approve preventive killing under the circumstances that I noted and that shall be noted below. However, to the extent that the effective control is less, preference should be given to the laws of enforcement, in the framework of which, of course, a policy of preventive killing cannot be carried out. In this regard, see Ben-Naftali and Michaeli, *supra*, fn. 15. In their view, the duties of the occupier to insure the rights of the occupied population, which are derived from this preference, require preferring the means of arrest of leaders of terror organizations, where this is possible, and narrowly interpreting Article 51(3) of API on the killing of terror activists, so that they can only attack them when, and for the duration of the time in which they are holding weapons.

[227] In the matter of *The Public Committee against Torture in Israel***,** supplemental notice on behalf of the State Attorney's Office (unpublished), paras. 69-84.

[228] *Lotus*, *supra*, fn. 50. Indeed, regarding the negation of the right to life, express permission is required, and the absence of a prohibition is not sufficient. However, this conclusion is valid in human rights law and is not valid precisely with regard to IHL, in which the right to life of the direct participants in hostilities is not of the utmost importance.

and that the absence of a prohibition is not sufficient. This is both in order to ensure the right to life and the right to a fair trial and in order to uphold the rule that in the case of doubt as to whether persons are combatants or civilians, they will be considered civilians.[229]In addition, Israel ignores the problems that make the preventive killing of civilians participating directly in terror acts unique, and it does not acknowledge the need for special caution beyond what is required by the rules of humanitarian law regarding the approval of acts of preventive killing. As stated above, my argument is that the special problems involved in approving such acts against civilians participating directly in acts of terror—and to a certain extent, against leaders of terror organizations—require special processes of approval and review derived from human rights law apparatuses. However, Israel recognizes that the acts of targeted frustration are extraordinary acts, which, according to it, may not be carried out as a matter of course. Therefore, it declares that they should be carried out only where the terrorist cannot be arrested through reasonable means.[230] I am inclined to agree with this position, which constitutes, in effect, the first principle in the scale of reactions towards terror activists (as distinguished from the leaders, with respect to whom the third principle is also valid) proposed below.

Scale of reactions towards terror activists:

Other means of frustration should be preferred. The preferred means of frustrating terrorists is to arrest and bring them to trial or administer detention. It does not constitute sentencing without a judicial process and it allows for better protection of the basic rights of every person to life and to a fair trial. The process allows for dealing with any problems of a mistake in the identity or role of the wanted person. Thus, it assists in preserving the distinction between civilians and combatants because it prevents attack of a nonlegitimate target: that is, of a regular civilian who did not take direct part in acts of combat. Similarly, it provides every wanted person with the opportunity to bring evidence to controvert the appraisals of the operational apparatuses on their intentions and thus accords the right to due process.[231] Arrest also prevents escalation and reactions of retribution and allows receipt of information from the suspect, thus increasing the military advantage. Therefore, enforcement officials should be granted a broad mandate to deal with criminal aspects of terrorism (such as organizing terrorist cells, aiding and abetting terrorists, or financing, lobbying, and inciting terrorists) through the criminal law. All of these participants should be arrested and brought to trial. Additionally, in terms of response in the context of armed conflict, attack on the armament infrastructure of those carrying out the attacks is preferable if this is sufficient to bring about the desired military advantage.

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[229] This permission is found, in my opinion, in the broad interpretation of Article 51(3).

[230] *State's Second Response*, *supra*, fn. 152, para. 269.

[231] Indeed, it may be that the implementation of this right will not be particularly effective, due to the fear that terror activists will not choose to appear before the authorities of the state combating them in order to protect their rights.

Preventive killing should be the last recourse. First, the operational apparatuses responsible for carrying out preventive killing must be required to invest the maximum resources to insure that persons slated for assassination have not ceased work and intend to carry out their plans. The suspect should be under surveillance until the last possible and reasonable moment. Second, the possibility of arrest must have been proven to be operationally impossible to carry out, within the assumption that soldiers, as combatants, can be put at a reasonable risk. In other words, preventive killing is likely to be the preferable means in those limited situations in which near certainty exists that the action will frustrate a concrete attack and implementing other means has proven to be impossible. In these cases, it is possible to absorb the negative implications of the action. It should be noted that the spirit of IHL and its principles, surveyed above, are likely to suggest that the nonfatal neutralizing (injury) of the enemy soldier or the civilian who took a direct part in the combat should be preferred to killing in every case. However, it is not clear that this principle can be implemented on the battlefield. This is especially the case in view of the fact that most acts of preventive killing are carried out by air or at a distance, preventing the one operating the weapons from determining whether the neutralizing was fatal or not. Additionally, the review and ratification processes proposed above are directed at the question of permitted preventive *killing*, and thus it is also possible to permit killing and not merely injury where the act in question has passed all of the processes proposed above.

Holding a precise process of review and ratification (to the extent the circumstances permit) prior to carrying out a decision of preventive killing. First, in order to prevent a situation in which a decision to carry out preventive killing is based upon the appraisal of intelligence information alone, and in cases in which it is not possible to hold a legal process in the presence of the suspect, one can carry out a legal proceeding in the suspect's absence to examine the level of evidence the defense entities possess. This would be done together with a process of operational oversight on the killing's expected efficacy. The operational decision will be based, in the final analysis, on a thorough and documented process, in which the opposing version and the arguments that undermine the information presented against the subject will be expressed. It is possible to require that the version be presented to the deciding entity by a civilian legal body, and that it be taken into consideration at the time that the question of whether to carry out the act of preventive killing or to refrain from it is discussed. These oversight apparatuses, in which some of the legal and operational officials will take part, will reduce the inclination of the security officials and the government to favor the need to carry out an action of preventive killing. Additionally, effective retrospective criticism must be enabled, and this will be done by gathering the information that preceded the decision, documenting it, and preserving it.

With respect to the permissibility of killing of leaders of terrorist organizations, the third principle—the establishment of the review apparatuses—should be applied as mandatory, and the other principles should be guiding, but not mandatory, principles. That is, one should aspire to arrest or the use of other means of frustration; however, the operational systems responsible for carrying out preventive killing cannot be required to perform exacting surveillance of suspects in order to ascertain that the leaders have ceased their work, because these possibilities of repentance are less reasonable. Therefore, in balancing the need to frustrate acts of terrorism with the duty to protect the human rights of the leaders of terrorist organizations, the test of the risk derived from the principles of IHL should be preferred, and, subject to the processes of oversight, the act of killing of a leader can be approved when the danger expected from the leader is proven. In these cases, it is also appropriate to absorb the negative implications of the act.

I again note that although the above proposal of principles is found within the sphere of the *lex ferenda*, it does not ignore the fact that reality is likely not to allow for it to become the *lex lata*. This is especially the case for acts that are immediately necessary, where it is not possible to hold a broad process of oversight prior to the act. Under these circumstances, at a minimum, the state must be required to record and document each piece of evidence and the decision-making process that brought about the performance of the act. Holding up the decision to some kind of oversight, even retrospective, may obligate the deciding officials to exercise extra caution and pay greater attention to the possible objections.

Indirect Participants in Hostilities

This section considers the response towards indirect participants in hostilities. This category does not appear in the documents of IHL, and I suggest basing it on the customary norms with respect to direct participants in hostilities while creating the necessary distinctions.[232] Indirect participants in hostilities are civilians who assisted in acts of combat but whose level of assistance does not allow for them to be regarded as legitimate targets. Therefore, on the one hand they will be considered to be civilians who are entitled to the protection accorded to civilians pursuant to IHL but, on the other hand, their participation in combat (even though it is not direct) means that they will be denied some of the protections accorded to civilians. It will thus be possible to arrest them, try them, and punish them in accordance with international law and internal law. However, it will not be possible to deny their immunity from attack, and this is, therefore, the central difference between them and the direct participants in hostilities. The latter category can be denied both immunity from attack and immunity from being put on trial if captured by the enemy. On the other hand, indirect participants may only be denied immunity from being put on trial.

As a matter of principle, the status of civilians participating indirectly in combat must be settled according to IHL, which determines the treatment of civilians who are

[232] Of course, if this is not a category created on the basis of customary law, it must be rooted in a future law of agreement.

found at the heart of the armed combat. There is no doubt that IHL seeks to accord as broad protection as possible to these civilians,[233]as was reflected in the expansive interpretation that the International Tribunal for Former Yugoslavia used with respect to the principle of nationality. This permitted expanding the protection of IHL to include persons in the hands of the enemy when they are its civilians as well as refugees.[234]

Two sources can be found in IHL for the denial of protections and the use of means of enforcement against indirect participants in hostilities. The first source is in the international laws of occupation and armed conflict. We discussed above the fact that the Fourth Geneva Convention allows some of the protections accorded to civilians pursuant to the Convention to be denied to civilians who carried out acts of espionage or sabotage (and are considered, for the most part, to be direct participants in hostilities)—and this is for the time period during which it is necessary for reasons of security.[235] These arrangements are valid, *mutatis mutandis,* with respect both to those protected in the occupied territory and to enemy citizens who are in an area that is not occupied. We also discussed above the articles of the Fourth Geneva Convention that permit arrest and administrative detention of civilians in occupied territory. We clarified that the means of law enforcement both in the occupied territory and with respect to enemy citizens who are not in the occupied area may also be relevant when the civilians took direct part in hostilities. *A fortiori,* they should be used with respect to persons aiding the combat in an indirect fashion. The second source for denying civilians who indirectly aided combat immunity from the use of law enforcement measures is found in the laws of noninternational armed conflicts. The authority to use these means is found in the domestic law. According to the laws of noninternational armed conflicts, means of law enforcement may be undertaken against groups or organizations that act against the state. We pointed out that the laws of the war against terrorism in the context of armed conflict derive their source of authority from the laws of both international and noninternational armed conflict, and thus it is possible to analogize from the latter arrangements regarding the response towards those assisting terror.

In addition to the above, the protections enumerated in Article 75 of API should be applied to civilians who took an indirect part in combat and who are not protected by the Fourth Geneva Convention (for example, if they do not satisfy the requirement of nationality). This would give them protection equal to that given to civilians who did not participate at all in hostilities and with civilians who took a direct part in hostilities. Article 45(3) of API provides that persons who directly participated in combat and who are not entitled to either the protections accorded to prisoners of war pursuant to the Third Geneva Convention or those of the Fourth Geneva Convention (for example, where they do not satisfy the nationality criterion) will be entitled to the protections accorded pursuant to Article 75 of the Protocol. This enumerates most of the basic rights given to a

[233] See, for example, API, Articles 48, 50-51, 57 which set forth rules for taking civilians out of the area of combat, and Article 33 of the Fourth Geneva Convention, which prohibits acts of frightening and terrorizing civilians.
[234] *Prosecutor v. Dlalic*, Judgment, ICTY Case No. IT-96-21,, Nov. 16, 1998, paras. 263-266.
[235] Article 5 of the Fourth Geneva Convention.

prisoner at the time of detention and ensure a fair trial.[236] Hence it transpires that civilians who took indirect part in hostilities and against whom, according to our proposal, means of law enforcement may be taken will be entitled to all of the rights accorded to detainees and those being tried, including the right not to be arbitrarily detained, the presumption of innocence, and the right to a fair trial.[237]

The rights enumerated above can also be accorded to civilians participating indirectly in hostilities by virtue of the view of the concurrent and supplementary applicability of IHL and human rights law. Against this, one can argue that as a formal matter the thresholds of the applicability of the two branches of the law regarding civilians are different, and therefore an approach which differentiates between them is preferable. The protection of human rights law is accorded, for the most part, to all people, whereas the protection of IHL with respect to civilians relates to "protected persons," which is a more restricted status than that of a civilian or a resident.[238] However, the tendency of IHL to expand the protection of civilians as stated above "lowers" the threshold of applicability of IHL and brings it closer to the threshold of human rights law.[239] Moreover, the applicability of human rights law is important precisely in situations in which IHL does not extend its protection, and this is in order to ensure that persons are not left without any kind of protection of their rights. Of course, the question of the applicability of the human rights conventions is conditioned upon the articles of applicability of the conventions, which subject it, in general, to the place of jurisdiction of the state that is a party to the convention or to the place in which it has effective control. Interpreting the applicability articles of the human rights conventions is beyond the scope of this paper; however, it is worth noting the trend of broadly interpreting the concepts of the place of jurisdiction and effective control, which is consistent with the conventions' objective of protecting the dignity and rights of the largest number of people possible.[240] The position of the Inter-American Commission in the Guatanamo Bay case is an example of this trend. The Commission held that in situations of armed conflict, the laws of human rights and laws of armed conflict

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[236] In this context, see the Supreme Court's rejection of the decision of the court in the District of Columbia that was affirmed by the Court of Appeals for the District of Columbia, according to which the court does not have jurisdiction to adjudicate petitions of detainees in Guatanamo Bay on the conditions of their detention because they are not on sovereign territory of the United States. See *Rasul v. Bush, President of the United States*, 159 L. Ed. (2d 548 2004).

[237] These rights were recognized by the Committee on Human Rights as rights that may not be deviated from. See United Nations Human Rights Committee General Comment on Reservations No. 24, para 8. U.N. Doc. CCPR/C/21/Rev 1/Add.6, 2 November 1994.

[238] Of course, examples exist of a more restricted applicability of human rights law. See, Ben-Naftali and Shany, s*upra*, fn. 199.

[239] However, it bears noting that this "lowering" is likely to have implications that infringe upon human rights, because the laws of war grant states broad authority.

[240] See, Inter-American Commission on Human Rights, Decision on Request for precautionary Measures (Detainees at Guantanamo Bay, Cuba) (12 March 2002), 41 ILM 532 (2002); Response of the United States to Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba) (15 April 2002), 41 ILM 1015, 1019 (hereinafter: *Guantanamo Bay Decision*). However, in this context it is interesting to note the position of the British Court of Appeals regarding Al-Skeini, *supra*, fn. 199, which narrowly interpreted the concept of "effective control" with respect to the areas occupied by Britain in Iraq. As a result, the Court ruled that the European Convention for Human Rights had no applicability in these areas.

supplement each other. This is because both regimes have rights that cannot be deviated from and because of their common objective to promote the defense of human dignity and human life.[241] Therefore, where civilians are in the hands of a state in situations of armed conflict, their basic rights will be determined according to human rights law and IHL concurrently.[242]An echo of this approach may be found in the current decisions of the American Supreme Court in the *Hamdan* case. The Court based its conclusions upon the position that the armed conflict between Al-Qaeda and the United States is a noninternational armed conflict, and thus it applied Common Article 3 of the Conventions to the situation. On the basis of the requirement of this Article, that the detainees shall be entitled to a trial before "a regularly constituted court," the Court ruled against the plan of the American administration to set up special military commissions at Guatanamo Bay to judge the detainees there. It also held that basic rights could not be denied to the detainees, such as perusal of the evidence against them.[243] It seems that the Supreme Court's interpretation of Common Article 3 is derived from the fundamentals of human rights law and that it also may approve the approach of the concurrent applicability of human rights law and of humanitarian law.

Conclusion

This paper considered the proper relationship to the various "actors" on the battlefield of the war against terror. My conclusion is that the special situation created by the armed conflict with terror requires revisiting norms and rules that govern both the relation to civilians who do not participate in hostilities and the relation toward direct participants and indirect participants in hostilities. I pointed out how terrorism makes it difficult to distinguish between civilians and combatants because it operates from within civilian surroundings and does not make much effort to separate that population from the combatants. This fact imposes many more limitations and a greater duty of caution upon the forces fighting terrorism, requiring them to formulate rules of military intervention that will insure better protection of civilians on the battlefield, while at the same take into consideration the principle of military necessity and concern for the security of the fighting forces.

Regarding direct participants in hostilities, I propose differentiating between two kinds of participants: leaders and rank and file activists. With regard to the former, I propose applying the rules of humanitarian law, on the basis of the expansive interpretation of the concept "direct participation in hostilities" so that it includes not only one who carries weapons openly but also one who plans and organizes or one who has organizational control. However, I propose that the rules of humanitarian law be interpreted to apply to the situation in which the danger expected from the leaders must be prevented in the spirit of the principles, which, in my view, should be applicable with

[241] Organization of American States, Washington, D.C., 2006, Ref. Detainees in Guantanamo Bay, Cuba.
[242] The United States objected to the conclusion of the Commission, asserting that a court authorized for this decision making would determine the status of the Guatanamo Bay detainees. See, *Guatanamo Bay Decision*, *supra,* fn. 240.
[243] The Court also ruled that the establishment of such tribunals violated the American Statute. See, *Hamdan v. Rumsfeld*, 548 U.S 557 (2006).

respect to the rank and file activists, detailed below. Similarly, the approval given for preventive killings of leaders must be made subject to processes of quasi-judicial and operational review. With regard to the second group—rank and file activists—after they have been defined as direct participants in hostilities, I propose deviating on the side of leniency from the accepted paradigm in humanitarian law, according to which the default option is shooting in order to kill. According to this paper's proposal, which is based upon the influence of human rights law upon IHL, the default option towards those considered to be legitimate targets would rather be attempts to arrest and means of law enforcement. However, I have not ruled out the possibility of killing or preventive killing of terror activists under limited conditions, in which there is near certainty that the act will prevent a concrete terror attack and other means have been proven to be impossible to implement. In addition, a process of review prior to carrying out preventive killing will be established that will involve operational figures in addition to lawyers to examine the necessity of each preventive killing and its legality, both of leaders and of rank and file activists. Finally, a new category of *indirect* participants in hostilities is proposed, towards whom only means of law enforcement should be used and who cannot be regarded as legitimate targets for shooting to kill.

In conclusion, the analysis of the change that terrorism has generated on the battlefield with respect to the principle of distinction between combatants and civilians, which is expressed mainly in the formulation of new rules of targeting, is just one aspect of the changes that terrorism has wrought in the battlefield and in international law. There is no doubt that terrorism influences many norms of IHL as well as subjects in other branches of international law: human rights law, extradition law, and international criminal law. Whether these changes require international law to create a new system of laws—the "laws of terrorism"—is a serious one, and it depends upon the future development of international law and the various interests of the state (such as how relevant the threat of terrorism is to the government and to the daily life in each of the states, the degree of cooperation between the states harmed by terror, the international influence and status of the states that support terror, etc.) However, it appears that even in the absence of an independent system of terrorism laws, international law has not remained silent regarding the phenomenon. Making the rules of international law and its frameworks more flexible to accommodate them to the changes that terrorism creates in the international arena allows international law to appropriately cope with the phenomenon.