



International Law
Legal Issues in
Lea & Samaria
Military Justice

Home page | Areas of Practice | International Law | Operational Law

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Targeted Killings

Israel's "targeted killings" mode of operation targets specific terrorist operatives, who plan, launch or commit terrorist attacks against Israel's soldiers and civilians.

Table of contents

[Summary](#) | [Background](#) | [Legal Analysis](#) | [Applicable Law](#)
| [Taking "Direct Part in Hostilities"](#) | [The Formation of Armed Forces in the Gaza Strip](#)

Summary

The legality of Israel's "targeted killings" mode of operation, i.e., the direct attack of persons who plan, launch or commit terrorist acts against both Israeli civilians and soldiers, was reviewed by the Israeli Supreme Court in its judgment of December 2006. The Court rendered unanimously a decision enabling Israeli security forces to target terrorist operatives, subject to the following requirements:

- ▶ Existence of reliable information that the targeted person is a civilian taking direct part in hostilities;
- ▶ Absence of less harmful alternatives by which the civilian taking part in hostilities can be thwarted;
- ▶ If the attack caused civilian casualties (except for civilians taking a direct part in hostilities) – the conduct of an independent investigation (ex-post facto), regarding the precision of the identification of the target and the circumstances of the attack;
- ▶ The collateral damage expected to be caused by the attack is not excessive in relation to the military advantage anticipated (i.e., the attack must meet the principle of proportionality).

[back to the top](#)

Background

In September 2000, Palestinian terrorist organizations launched a massive terror campaign against the State of Israel. Palestinian terrorist organizations such as Hamas and Islamic Jihad deliberately attacked innocent Israeli civilians, targeting, inter alia, people sitting in cafes with their families, students riding the bus home from school, and teenagers going for a night out at dance-clubs. In a defensive response to these cruel and unremitting attacks, Israeli security forces

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Go

SEP OCT NOV

◀ 21 ▶

2012 2013 2014



▼ About this capture

[1 capture](#)

21 Oct 2013

the terrorism plaguing Israeli society. This mode of operation proved to be a success – as a result its implementation, terrorist activity was reduced significantly, and the mean proved to be an effective tool for Israeli Security forces to thwart Palestinian terrorism directed against Israel's citizens.

[back to the top](#)

Legal Analysis

In December 2006, the Israeli Supreme Court, headed by former Chief Justice Aharon Barak, was faced with evaluating the legality of this policy, and ultimately rendered a decision which in principle enabled Israeli security forces to continue the practice of targeted killings of terrorist operatives, subject to certain requirements (HCJ 769/02). In its ruling, the Court unanimously rejected the petitioners' position that the practice of targeted killings was illegal, stating that "it cannot be determined in advance that every targeted killing is prohibited according to customary international law," nor can it be determined in advance that every targeted killing is so permissible. Thus, the court did not issue a blanket ban on targeted killings but instead ruled that each specific case must be examined on its merits, a practice which was already being carried out at the time by the Israeli security forces.

[back to the top](#)

Applicable Law

In its ruling, the court determined that the law applicable to the armed conflict between Israel and the Palestinian terrorist organizations is the international law governing armed conflicts of an international nature. Accordingly, the court rejected the petitioners' claim that the conflict should be subjected to law enforcement rules. More specifically, the Court held that the laws applicable to the conflict were the 1907 Hague Regulations, the humanitarian provisions of the Fourth Geneva Convention of 1949, and those provisions of the First Additional Protocol to the Geneva Conventions (1977) which constitute customary law.

The Law of Armed Conflict (International Humanitarian Law) is premised on a balance between humanitarian considerations on the one hand and military considerations on the other, a balancing act primarily dictated by the principles of distinction and proportionality. The principle of distinction demands that both parties to a conflict distinguish between combatants and military objectives, as opposed to civilians not taking part in hostilities and civilian objects. Combatants are, in principle, legitimate targets for direct attacks. Civilians, on the other hand, are immune from attack, unless and for such time as they take a direct part in hostilities. The principle of proportionality demands that an attack shall be cancelled if it becomes apparent that the attack may be expected to cause collateral damage to civilians and civilian objects, which would be excessive in relation to the military advantage anticipated.

While terrorist operatives participate in combat, they do not comply with the laws of war, because, inter alia: (1) by directing their attacks

<http://www.mag.idf.il/592-1523-en/Patzar.aspx>

Go

SEP OCT NOV

◀ 21 ▶

2012 2013 2014



▼ About this capture

[1 capture](#)

21 Oct 2013

that of combatants, and (3) terrorist operatives refrain from distinguishing themselves from the civilian population, wearing civilian dress and operating from within civilian areas. In light of the aforementioned, the Court determined that terrorist operatives should be deemed in effect "unlawful combatants", stripped of the privileges of lawful combatants (for example, they can be tried for their participation in hostilities, judged, and punished). However, as far as targeting is concerned, the Court deemed these terrorists to be civilians who, as a result of their participation in terrorist activity, lose the protections to which civilians not engaged in hostilities are entitled.

While Israel is not a party to the First Protocol Additional to the Geneva Convention, the Court determined that the principle according to which civilians lose protection afforded to them under the Protocol for such time as they take a direct part in hostilities represent customary international law, and therefore applies to the case at hand. Thus, the Court determined that terrorist operatives who participate in combat meet the criteria of "civilian taking direct part in hostilities", and thus lose all protection afforded to civilians, and become exposed to the risks faced by combatants, without being afforded the protections to which combatants are entitled.

[back to the top](#)

Taking "Direct Part in Hostilities"

The Court noted that "participating in hostilities" does not necessarily require the use of arms, and includes hostile acts against both the State and the civilian population. Thus, the Court interpreted "direct" participation in hostilities to mean, inter alia, "[terrorist-operatives] who decide on terrorist acts or plan them, and those who enlist others, guide them and send them to commit terrorist acts", "a person who collects intelligence on the army", and "a person who operates weapons which unlawful combatants use, or supervises their operations, or provides service to them". However, the court concluded that individuals who sell food or medicine to unlawful combatants, engage in general strategic analysis, supply general logistical support or distribute propaganda, are not considered to be taking direct part in hostilities.

The Court also noted that there lacked a general agreement as to the significance, duration-wise, of the qualification "for such time" as a civilian takes direct part in hostilities, and therefore determined that each case must be examined on its own merits. Regardless, the Court did note that a civilian taking direct part in hostilities once, or even sporadically, should be treated as a civilian (and therefore be immune from attack) during such time that he has detached himself from such activity. In contrast, a civilian who joins a terrorist organization and consistently participates in terrorist activity and commits hostilities, with short breaks between them ("the revolving door" phenomenon), loses immunity from attack for the entire scope of his activity. As the Supreme Court reasoned, for such a "civilian" terrorist, any rest between terrorist activities is nothing other than preparation for the next act of hostilities. Were the terrorist to be immune from attack so long as he was not directly participating in hostilities, in practice this would grant such terrorist civilian immunity so long as he was not on his way to carry out an attack with bombs strapped to his waist. Clearly, this would be an insufficient result, granting terrorists civilian

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Go

SEP OCT NOV

◀ 21 ▶

2012 2013 2014



▼ About this capture

[1 capture](#)

21 Oct 2013

Thus, the Court's decision rendered the policy of targeted killings subject to individual case-by-case examinations into its legality, based on the following requirements, inter alia: (a) the existence of reliable information on which there is a basis to believe the targeted person is a civilian taking direct part in hostilities; (b) the absence of less reasonable harmful means, such as detention and trial, by which the civilian taking direct part in hostilities can be thwarted (here, the additional danger presented to IDF soldiers' lives through arrest operations in Palestinian controlled territories might be legitimate factor in determining the reasonableness of the less harmful mean); (c) a thorough ex-post facto investigation regarding the identity of the target and the circumstances of the attack; (d) whether or not the principle of proportionality is met, meaning that the expected harm to civilians and civilian objects must be proportional in relation to the expected military advantage resulting from the attack.

Thus, determined the Court, the legality of targeted killings requires that the principles of necessity, distinction and proportionality be upheld. The decision necessitates striking a balance between the State's duty to protect its own civilians' lives from terrorism on the one hand and its duty to protect the lives of innocent civilians from being harmed in an attack against terrorist(s), on the other hand. Accordingly, the legality of targeted killings must be examined on a case-by-case basis with regard to the circumstances of the attack and the identity of the target. The Court recognized that the decision did not necessarily make Israel's fight against terror easier, but noted that a democracy such as Israel must fight terror with one hand tied behind its back; while in the short-run it may make the fight against terrorism more difficult, in the end, democracy and respect for the law will triumph over terrorism.

[back to the top](#)

The Formation of Armed Forces in the Gaza Strip

By June 2007, the Hamas terrorist organization violently took over the Gaza Strip (which, until then, was under the control of the Palestinian Authority). Since then, Hamas' military wing (the Izzedine al-Qassam Brigades) and security forces underwent a massive military buildup, in preparation for a military confrontation with the IDF. Hamas substantially increased the size of these forces, which at the outset of Operation "Cast Lead" were estimated to comprise of approximately 20,000 armed operatives, organized in semi-military formations throughout the Gaza Strip and deployed in the form of territorial brigades and designated units. They regularly conduct large-scale training operations and are supplied with various kinds of weaponry, including military-grade rockets and advanced anti-tank weapons.

According to the Laws of Armed Conflict, persons who belong to the armed forces of a State party to an armed conflict (i.e., its regular army) are considered to be legitimate military objectives, and may thus be directly attacked at any time regardless of their function within the armed forces. Similarly, where an armed conflict exists between a State and a Non-State Actor (such as the conflict between Israel and Hamas, in the Gaza Strip), persons who belong to the armed forces of the Non-State party to the conflict are also ought to be considered as legitimate military objectives, based solely on their membership in the armed forces, for as long as they are still, in fact, members thereof.

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Go

SEP OCT NOV

◀ 21 ▶

2012 2013 2014



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[1 capture](#)

21 Oct 2013

[back to the top](#)