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Expert Opinion
On Whether Israel’s Targeted Killings of Palestinian Terrorists is
Consonant with International Humanitarian Law

This Opinion has been written at the request of the Petitioners in *The Public Committee Against Torture et al. v. The Government of Israel et al.*

The legal issues raised in this case are of crucial relevance to international humanitarian law. The ruling of the Supreme Court of Israel will no doubt be of exceptional importance for the application and development or, instead, the undermining, of international humanitarian law.

This Opinion is premised on the legal assumption that the applicable law in the discussion of the relevant issues is the body of international customary and treaty rules relating to international armed conflicts, in particular to *occupatio bellica* of foreign territory.

I. THE FUNDAMENTAL DISTINCTION BETWEEN COMBATANTS AND CIVILIANS

1. The principle of distinction between combatants and civilians is one of the most fundamental tenets of international humanitarian law (IHL). In order to reduce as much as possible the adverse consequences of the war for the civilian population, it is essential that combatants distinguish themselves from civilians. For such reason, as the US Supreme Court appositely held in *Ex Parte Quirin*, “[b]y universal agreement and practice the laws of war draws a distinction between the armed forces and the peaceful populations of belligerent nations”.¹ Many IHL rules, such as those concerning prisoner of war status or identification of military objectives, are but corollaries of such principle.

¹ US Supreme Court, *Ex Parte Quirin*, 317 U.S. 1 (1942) at 31. Cf. also General Assembly resolution 2765(XXV) on ‘Basic Principles for the Protection of the Civilian Populations in Armed Conflicts’.

A. DEFINITION OF COMBATANT

2. Pursuant to articles 1, 2 and 3 of the Regulations annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land (Hague Regulations) a ‘combatant’ is a person who falls into one of the following categories:

- 1) Member of the regular armed forces of a belligerent party;
- 2) Member of militia and volunteer corps fulfilling the following conditions:
 - a. to be commanded by a person responsible for his subordinates;
 - b. to have a fixed distinctive emblem recognizable at a distance;
 - c. to carry arms openly;
 - d. to conduct operations in accordance with the laws and customs of war; and
 - e. to be linked to a party to the conflict;
- 3) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves, provided they carry arms openly and they respect the laws and customs of war (*levée en masse*).

3. The same definition of ‘combatant’ may be inferred from the categories of persons who have the right to prisoner of war status if they fall into the power of the enemy pursuant to art. 4 of the Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War. The article takes on almost *verbatim* the relevant provisions of the Hague Regulations, besides clarifying the status of non-combatant members accompanying the armed forces.

4. The definition of ‘combatant’ is crucial to IHL because of the consequences attached to that status. A combatant may (1) be made the object of attack; (2) if captured, is entitled to prisoner of war protection and hence immune from prosecution for participating in hostilities; and, (3) may not be punished for the mere fact of taking part in hostilities but only if he violates the laws and customs of war.

B. DEFINITION OF CIVILIAN

5. A civilian is a person who is not a member of the armed forces of a Party to the conflict. The category of civilians is therefore defined in the negative and is residual in relation to that of combatants. Civilians are all those persons who (1) do not belong to one of the categories of combatants mentioned above, and in addition (2) do not take a direct part in armed hostilities.

II. CIVILIANS NOT TAKING A DIRECT PART IN HOSTILITIES

6. Civilians not taking a direct part in hostilities are ‘protected persons’ according to the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War, thus enjoying a special status under IHL. Such status entails also immunity from attack because, and so long as, civilians do not take up arms. This principle is recognised in Art. 25 of the Hague Regulations² and in numerous military manuals.³

² The article reads as follows: “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited”.

³ For instance, the British Military Manual is clear on the point: “it is a generally recognised rule of international law that civilians must not be made the object of attack directed exclusively against them”, War Office, *The Law of War on Land: Part III of the Manual of Military Law*, London, HMSO, 1958, par. 13, and further: “Civilian inhabitants [...] may not be killed or wounded, nor as a rule taken prisoner”, *ibidem* par. 88. Along the same line, the Swiss Military Manual specifies that: “La population et les personnes civiles isolées ne doivent pas être attaquées”, Armée Suisse, *Lois et Coutume de la Guerre*, Règlement 51.7/II f, 1987, art. 25(2). Similarly, the German Military Manual states that: “The civilian population as such, as well as individual civilians, shall not be attacked, killed, wounded or without sufficient reason be taken prisoner” (par. 502).

III. CIVILIANS TAKING A DIRECT PART IN HOSTILITIES

A. GENERAL

7. Civilians who take a direct part in hostilities are ‘protected persons’ under the Fourth Geneva Convention but forfeit immunity from attack and become lawful targets for the duration of their engagement in hostilities. These civilians retain the same protection as combatants during the conduct of hostilities (e.g. protection from attack if *hors de combat*) except for immunity from prosecution. They are referred to in some judicial decisions and in the legal literature as “unlawful combatants”,⁴ namely combatants who fight outside the laws of war. However the term ‘unlawful combatant’ is merely descriptive and is by no means intended to create a *third status* between those of combatant and civilian. Most importantly, when civilians taking a direct part in hostilities lay down their arms, they re-acquire non-combatant immunity and may not be made object of attack although they are amenable to prosecution for unlawfully participating in hostilities (war crimes).⁵

8. Several considerations support the above proposition. 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.

⁴ For an analysis of the origin and development of the notion of ‘unlawful combatant’ cf. Casey, Rivkin, Bartram & Bartram, Unlawful Belligerency and its Implications Under International Law, available at <http://www.fed-soc.org/Publications/Terrorism/unlawfulcombatants.htm>.

⁵ See on this point the apposite remarks of Dinstein, The Distinction between Unlawful Combatants and War Criminals in Y. Dinstein (ed.), *International Law at a Time of Perplexity*, 1989, p. 112.

9. Secondly, the prohibition against giving no quarter, as spelled out in art. 23(d) of the Hague Regulations and reiterated in art. 40 of Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), prevents a belligerent from declaring that there shall be no survivors. This prohibition is also included in the Israel Military Manual.⁶ In this respect the ICRC Commentary to Protocol I may be quoted:

“[a]ny order of “liquidation” is prohibited, whether it concerns commandos, political or any other kind of commissars, irregular troops or so-called irregular troops, saboteurs, parachutists, mercenaries or persons considered to be mercenaries, or other cases. It is not only the order to put them to death that is prohibited, but also the threat and the execution, with or without orders”.⁷

10. Thirdly, it may be contended that a customary rule corresponding to art. 51, par. 3, of Protocol I⁸ has developed, according to which civilians who take a direct part in hostilities temporarily lose their immunity from attack.⁹ In this regard the ruling of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia that art. 51 of Protocol I lays down IHL principles of customary nature is particularly relevant.¹⁰

11. The proposition that civilians may be targeted only so long as they take a direct part in hostilities is borne out also by some military manuals. According to the

⁶ Art. 7 of the Israel Military Manual.

⁷ Y. Sandoz, C. Swinarski, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Nijhoff, Geneva, 1987, p. 476.

⁸ The article provides that: “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”.

⁹ See the position of Aldrich: “I believe that these provisions of Protocol I [articles 48, 51 and 52] for the protection of civilians have either codified or progressively developed customary law in a way that has now become customary law and, consequently, are binding today upon all parties to international armed conflicts, including non parties to the Protocol”, Aldrich, *The Laws of War on Land*, *American Journal of International Law*, 2000, p. 53.

¹⁰ Cf. paragraphs 9 and 10 of the Appeals Chamber decision in *Strugar and others*, of 22 November 2002 which uphold the Trial Chamber’s finding that article 51 of Protocol I “constitute a reaffirmation and reformulation [. . .] of the existing norms of customary international law, which prohibit attacks on civilian and civilian objects”, 7 June 2002, par. 21. See also the Trial Chamber decision in *Martic*, 8 March 1996, where it was affirmed that art. 51 of Protocol I and art. 13 of Protocol II (prohibition of attacks against the civilian population) constitute customary international law which must be observed in all circumstances.

British Army instructions: only those civilians who are “actually engaged in combat” may be attacked.¹¹

The ICRC Model Manual provides that:

“Civilians are not permitted to take a direct part in hostilities and are immune from attack. If they take a direct part in hostilities they forfeit this immunity.” (par. 610).

B. MEANING OF THE EXPRESSION “TAKING A DIRECT PART IN HOSTILITIES”

12. The question arises of the meaning of the term “direct participation” in hostilities. A factual test should be applied in order to determine whether a person is taking direct part in combat. A person who is engaged in armed action (for instance, firing upon enemy civilians or combatants, planting a bomb in a coffee shop, launching a missile against an enemy tank or other military objective) is certainly taking a direct part in combat. This concept is well expressed in the ICRC Manual which specifies that:

“Taking part in hostilities means **engaging in hostile action against enemy armed forces but not assisting in the general war effort**” (par. 601.1).

13. Also a civilian who is engaging in a military deployment preceding the launching of an attack in which he is to participate, is to be considered as participating in combat in so far as he carries arms openly during the military deployment. It follows that weapons must be visible. As the Israel Military Court affirmed in *Kassem*:

“The phrase ‘carrying arms openly’ is not to be understood to mean carrying arms in places where the arms and the persons carrying them cannot be seen”.¹²

14. **In no other circumstances may a civilian be targeted.** A civilian who, after carrying out military operations, is in his house or is going to a private home or to a

¹¹ UK Ministry of Defence, The Law of Armed Conflict, D/DAT/13/35/66, Army Code 71130, 1981, Annex A, par. 8.

¹² Israel Military Court sitting in Ramallah, *Military Prosecutor v. Omar Mahmud Kassem and Others*, 13 April 1969, 42 International Law Reports, 1971, p. 479.

market, may not be the object of attack, but may be arrested and prosecuted (IHL even prohibits *belligerents* from targeting and killing enemy *lawful combatants*, such as uniformed soldiers, who are no longer on the battlefield, but are resting at home or taking their family to the cinema, the principle being that the enemy may only be attacked when he is engaging in combat, not when he has laid down his arms¹³).

15. Similarly, 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 (the need for a civilian to carry out arms openly while engaged in a military deployment preceding an attack is laid down in Article 44(3) of Protocol I; this provisions may be deemed to reflect a general principle of humanitarian law: for a belligerent lawfully to fire at a civilian it is necessary that such civilian carry arms openly before and during an armed action; if it were not so, belligerents would be authorized to shoot at any civilian, *on the mere suspicion* of their being potential or actual unlawful combatants. As a consequence, civilians would eventually be deprived of any protection and, by the same token, the distinction between combatants and civilians would be nullified).

Similarly, combatants may not attack a civilian who has taken direct part in hostilities but has surrendered, or is wounded or sick.

Any indirect participation in armed hostilities may make the civilian liable to arrest and punishment according to the law; it may not make him the

¹³ Cf. art. 23(b) and (c) of the Hague Regulations. Plainly, the contention made by some commentators that ‘lawful targeting in wartime has never required that the individual actually be engaged in combat’ is not supported by legal arguments. See Zengel, Assassination and the Law of Armed Conflict, *Military Law Review*, 1991, who generally states that changes in society “have changed the focus of the law of war” so that “it makes little sense to preserve a special and unique provision of law that protects the life of single individuals –regardless of their prominence- at the possible expense of the lives and well-being of hundreds or thousands of others”. While these may be *de lege ferenda* proposals, their potential risk of undermining the IHL foundations shall not be underestimated. A string of commentators, mainly in the United States, share the Zengel’s arguments in favour of restricting the scope of assassination in time of war but fail to advance any legal justification for their proposition, cf. Schmitt, State-Sponsored Assassination in International and Domestic Law, *Yale Journal of International Law*, 1992, p. 628 ss. and Pickard, Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law, *Georgia Journal of International and Comparative Law*, 2001, pp. 18-19.

object of a lawful attack. Targeting such civilian would constitute mere ‘assassination’.

16. One should however realistically take account of the current circumstances of the armed conflict in Israel and Palestine, where increasing resort is being made to so called “**kamikaze” attacks by civilians** who, far from openly carrying weapons, are intent on concealing explosives on their body so as to suddenly blow themselves up together with Israeli civilians or servicemen. Plainly, it would be preposterous to require that Israelis be authorized to open fire against such Palestinians only if they carry their explosives openly.

It would seem that a proper way of accommodating the military and security requirements of Israel with the demands of international humanitarian law may consist in requiring Israeli authorities, when they suspect that a civilian may carry on his or her body explosives destined to blow up Israeli targets, to summons the civilian to show that he or she is not carrying explosives. Only if the civilian refuses to comply, may the military open fire against him or her.

The fundamental importance of the general principle of distinction between combatant and civilians especially when lethal force is involved is corroborated by the international rules and case law on human rights. See for instance the important decision of the European Court of Human Rights in *McCann and others v. the United Kingdom*, of 5 September 1995,¹⁴ concerning the use of lethal force, by British enforcement officials, against terrorists. The Court stressed that (1) a very strict and compelling test of “necessity” must be employed when determining if lethal force is necessary to fight terrorism (para. 149); (2) there must be a proportionality between the State’s response to the perceived threat of a terrorist attack and the threat in question (para. 156); and (3) it is always necessary to take into account whether there are acceptable alternatives to the use of lethal force (paras. 205-214).

17. However, allowance should also be made for the case where there is no time for such summons. The contention could be warranted that under such circumstances it would be admissible for a serviceman to fire at the civilian, provided that two conditions are met: (1) it is manifest that the civilian is concealing on his or her body

¹⁴ The text of the decision is available at: <http://www.coe.int>.

explosives; (2) there is absolutely no time for issuing a summons, for it is most likely that the civilian will use the explosives forthwith to attack enemy civilians or combatants.

C. RATIONALE BEHIND THE PROHIBITION TO ATTACK CIVILIANS (UNLESS THEY TAKE A DIRECT PART IN HOSTILITIES)

18. The rationale behind the prohibition to target a civilian who does not take a direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the **need to avoid killing innocent civilians**. Before firing at enemy civilians it is necessary to identify the person allegedly responsible for acts of violence, i.e. establish whether he is an innocent civilian or an unlawful combatant. If the civilian is caught while engaging in armed action on the battlefield, carrying arms openly, there may be no doubt about his status and his personal responsibility for unlawfully attacking the enemy belligerent. In other circumstances, the law enforcement authorities of the enemy belligerent must satisfy themselves that the civilian is unlawfully engaging in the preparation and/or execution of a specific crime, that is, **he is not an innocent civilian**.

Clearly, if a belligerent were allowed to fire at any enemy civilians **simply suspected** of in some sort planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of IHL would be undermined. The **fundamental distinction between civilians and combatants** would be called into question and the whole body of IHL would eventually be eroded.

19. The other rationale behind the prohibition to attack civilians who do not take a direct part in hostilities **aims at protecting irregular combatants fulfilling the legal requirements for participating in belligerent action**. Whenever a civilian (member of a paramilitary or guerrilla unit or militia corps or terrorist group) engages in military action and carries arms openly before and during any attack on the adversary, the fact of carrying arms openly **shields him from war crimes prosecution**. In other words, if captured, the civilian will not be liable to prosecution for the mere fact of taking part in combat, and must be granted prisoner of war status.

20. For all the above reasons it is absolutely unsound to contend that killing an individual who is suspected of dispatching orders to kill, or planning an hostile act while at home, or driving in a private car or in a taxi, is lawful on the grounds that such a killing would not constitute a breach of confidence and thus be in keeping with art. 23 (b) of the Hague Regulations.¹⁵

D. CONSEQUENCES ENSUING FROM A CIVILIAN'S DIRECT PARTICIPATION IN HOSTILITIES: THE NEED FOR A REGULAR TRIAL

21. As stated above, civilians who take a direct part in hostilities become liable to prosecution for the acts they have committed in combat. However, they may not be punished without trial. A **basic requirement of IHL** is that unlawful combatants caught in action, unless they are wounded or killed, **may not be punished without proper judicial process**. The obvious rationale of this requirement is **the need to prevent arbitrary action by belligerents, or in other words, the need to protect innocent civilians from unwarranted execution**. A belligerent may punish, even by death, a person who has unlawfully taken active part in hostilities **only after judicially establishing that he is liable to punishment for engaging in prohibited action**.

In this respect it is noteworthy that art. 30 of the Hague Regulations, dealing with a specific category of unprivileged or unlawful combatants, **spies**, prescribes that: "A spy taken in act shall not be punished without previous trial".¹⁶ A spy is a member of the armed forces who, acting clandestinely or on false pretences, crosses enemy lines to obtain information with the intent of communicating it to the hostile party.¹⁷ If caught in *flagrante delicto*, a spy loses entitlement to prisoner of war status and may be tried. He may be sentenced to the death penalty according to law. However, if he is caught after rejoining his armed forces, he shall be treated as

¹⁵ This provision states that it is "especially forbidden" to "kill or wound treacherously individuals belonging to the hostile nation or army". The term 'treacherously' means that an act is carried out through a breach of confidence. See on this point the bibliography quoted supra in footnote 16.

¹⁶ This customary law principle is reiterated in art. 46 of Protocol I.

¹⁷ Cf. art. 29 of the Hague Regulations and art. 46 of Protocol I. The Israel Military Manual retains this definition of spy in art. 21.

prisoner of war and may be not punished for his previous acts.¹⁸ Similar rules apply to **saboteurs**.¹⁹

22. It must also be stressed that unlawful participation in hostilities does not deprive civilians of the protection of the Fourth Geneva Convention. Subject to the nationality requirements of art. 4, the said Convention extends by virtue of art. 5 also to persons “definitely suspected of or engaged in activities hostile to the security” of the enemy State or the Occupying Power, as well as to an “individual protected person [...] detained as a spy or saboteur” by the Occupying Power. The only derogation admissible to the rights afforded to those categories of protected persons is forfeiture of the rights of communication “where absolute military security so requires”. Art. 5 specifies that **the right to “humane treatment” and of “fair and regular trial” may not be derogated from**²⁰ (in any case, communication rights shall be granted again “at the earliest date consistent with the security of the State or the Occupying Power”²¹).

23. A rich line of authority exists to the effect that spies and saboteurs have to be brought to trial and punished for violation of the laws of war. The best illustration of the need to capture and punish spies and saboteurs following a proper trial is offered by the US Supreme Court judgment in *Ex parte Quirin*.²² There the Supreme Court held that:

¹⁸ Art. 31 of the Hague Regulations.

¹⁹ Cf., for instance, par. 96 of the British Manual, according to which: “Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies”.

²⁰ Cf. K. Dörmann, The Legal Situation of Unlawful/Unprivileged Combatants, *International Review of the Red Cross*, 2003, pp. 64-66.

²¹ Art. 5, par. 3, Fourth Geneva Convention.

²² US Supreme Court, *Ex Parte Quirin*, 317 U.S. 1 (1942). The case concerned the legality of the conviction of eight members of the German armed forces for acts of sabotage and espionage before a US military commission. The German soldiers landed on US coasts and immediately buried their uniform. They were taken into custody by FBI agents while dressing in civilian clothes before they could accomplish their mission to destroy war industries and facilities in various parts of the United States. In order to decide on the question whether the US government had the constitutional power to place the petitioners on trial before a military commission for the offences with which they were charged, the Supreme Court had first to inquire whether the offences charged constituted violations of the laws of war triable by US military tribunals. In its decision of 31 July 1942, the Supreme Court held, *inter alia*, that enemy persons entering the US secretly, donning civilian clothes and acting on behalf of an enemy State with the intention of committing acts of sabotage, espionage and other hostile acts, commit an offence against the laws of war.

“By passing our boundaries for such purposes [sabotage and espionage] without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.”²³

Also the judgement passed by the Israel Military Court in *Kassem* is a clear example of arrest and punishment of saboteurs.²⁴ In *Kassem* the Court held that:

“International Law is not designed to protect and grant rights to saboteurs and criminals. The defendants have no right except to stand trial in court and to be tried in accordance with the law and with the facts established by the evidence, in proceedings consonant with the requirements of ethics and International Law”.

Similarly in *Mohamed Ali*²⁵ the Privy Council upheld the conviction of two members of the Indonesian armed forces for entering in Malaysian territory wearing civilian clothes and committing acts of sabotage.

24. A number of manuals confirm the rule that civilians suspected of having taken part in hostilities or planning to do so **may be arrested and brought to trial.**

According to the British Military Manual:

[“It is one of the purposes of the laws of war to ensure that an individual who belongs to one class or the other [the armed forces and the peaceful population] shall not be permitted to enjoy the privileges of both. Thus he must not be allowed to kill or wound members of the army of the opposing belligerent and subsequently, if captured, to claim that he is a peaceful citizen” (par. 86).]

And further:

“If private persons take up arms and commit hostilities without having satisfied the conditions under which they may acquire the privilege of members of the armed forces, they are guilty of unlawful acts” (par. 634). [...

²³ Ibidem, p. 37.

²⁴ In *Kassem*, the accused were members of the Organization of the Popular Front for the Liberation of Palestine captured by Israeli forces while wearing green clothing and carrying arms. They were denied prisoner of war status because the organization was illegal in its country of origin and they did not conduct their military operation in accordance with the laws and customs of war, *supra* note 12.

²⁵ Privy Council on appeal from the Federal Court of Malaysia, *Osman Bin Haji Mohamed Ali and al. v. Public Prosecutor*, 28 July 1969, 1 *Law Reports*, 1969, Appeal Cases, p. 430.

] If [...] they commit or attempt to commit hostile acts, they are liable to punishment, after a proper trial”(par. 88).

Similarly, the Swiss Manual provides that:

“Tous ceux qui, luttant en corps ou isolément, n’appartiennent pas à une catégorie de combattants, peuvent être punis” (art. 66(1)).

According to the German Manual:

“Whereas combatants may not be punished for the mere fact of fighting, persons, who take a direct part in the hostilities without being entitled to do so (unlawful combatants) have to face penal consequences” (par. 302).

25. The penal consequences which ensue from unlawfully taking active part in hostilities may amount to the most severe penalties, provided they are inflicted in accordance with the law. Also death penalty may be imposed following a proper trial where due process guarantees recognised in international law are respected. For example, in *Attorney General for Israel v. Sylvester*,²⁶ the District Court of Jerusalem ruled that espionage “is a crime recognised by international law” for which death sentence can be imposed.²⁷

E. SUMMING UP: THE FUNDAMENTAL DICOTHOY BETWEEN COMBATANTS AND CIVILIANS

26. It must be underlined again that no “intermediate status”²⁸ exists between that of combatant and the status of civilian.²⁹ A civilian who takes a direct part in hostilities does not forfeit his or her civilian status but may become the lawful object of attack for the duration of his or her participation in combat. The term

²⁶ Excerpts quoted in the Israel Supreme Court’s judgment in the same case, 8 February 1948, *Annual Digest and Reports of Public International Law Cases*, 1948, p. 574.

²⁷ Moreover, the US Army Field Manual recognises the power of a Party to the conflict “to impose the death penalty and lesser punishments on spies, saboteurs, and other persons not entitled to be treated as prisoners of war” (chapter 5, Section I, art. 248(c)). The Swiss Code pénal militaire²⁷ establishes that: “Celui qui, en temps de guerre, aura entrepris des actes d’hostilité contre l’armée suisse, sans appartenir à la force armée ennemie reconnue par la Suisse, sera puni de mort ou de réclusion pour trois ans au moins” (art. 88).

²⁸ International Committee of the Red Cross, *Commentary to the Fourth Geneva Convention*, Geneva, 1958, p. 51.

‘unlawful combatant’ is a shorthand expression useful for describing those civilians who take up arms without being authorized to do so by international law. It has an exclusively *descriptive* character. It may not be used as proving or corroborating the existence of a third category of persons: in wartime a person is either a combatant or a civilian; *tertium non datur*.

F. APPLICATION OF THE ABOVE PRINCIPLES TO IRREGULAR FIGHTERS

27. All the above is confirmed by the rules on irregular fighters. Irregular fighters are those persons who take a direct part in hostilities but do not comply with one or more combatant requirements set forth in art. 4 of the Third Geneva Convention³⁰. They are generally referred to as ‘guerrilla fighters’, as they often mix with the civilian population and adopt hit-and-run tactics. Because of their failure to qualify as combatants, irregular fighters are liable to attack for the duration of their participation in combat. Most importantly, when they lay down arms they may be arrested and tried for the acts committed.³¹

28. Some judicial precedents of prosecution and conviction of persons taking part in hostilities as irregular fighters may be referred to. In the *Hostages* and *German High Command* trials carried out by the US Military Tribunals sitting at Nuremberg after World War two it was made clear that guerrilla fighters, like spies, could not be punished without trial.³²

In the above mentioned *Kassem* case, the Court did not grant the accused lawful combatants status nor, as a consequence, prisoner of war status, because they did not fulfil the combatant’s criteria. In this respect the Court noted that:

“a person or body of persons not fulfilling the conditions of Article 4 A (2) of the Convention can never be regarded as lawful combatant if they proclaim

²⁹ See Sassoli, La “guerre contre le terrorisme”, le droit international humanitaire et le statut de prisonnier de guerre, *Canadian Yearbook of International Law*, 2001, p. 211.

³⁰ Draper, The Status of Combatants and the Question of Guerrilla Warfare, *British Yearbook of International Law*, 1971, 173.

³¹ Guerrilla fighters have been granted international law protection by Protocol I provided that they respect certain conditions, see art. 44, par. 3, Protocol I.

³² United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1949, respectively vol. VIII, p. 58 and vol. XII, p. 86.

their readiness to fight in accordance with its terms. He who adorns himself with peacock's feathers does not thereby become a peacock".³³

As unlawful combatants, in *Kassem* the accused were brought to trial and punished in accordance with domestic law. In *Yunis*,³⁴ the US Court of Appeals for the District of Columbia Circuit reached a similar conclusion and convicted the accused for conspiracy, hostage taking and air piracy because he did not belong to a military organisation which satisfied the combatant's requirements.

29. All the above bears out the conclusion that those civilians who take a direct part in hostilities, but are not shot at while directly participating in combat operations, may not be preventively or subsequently subjected to attack. However, they may be arrested and prosecuted for the unlawful acts they may have committed, provided that due process guarantees are applied.

IV. CONSEQUENCES FOR PALESTINIAN TERRORISTS

A. TERRORISTS COMMIT WAR CRIMES

30. Palestinian civilians are not entitled to take a direct part in the hostilities. If they do so without distinguishing themselves from the population during each armed confrontation, or while in the process of committing an hostile act, they commit a war crime. There can be no doubt that placing or throwing bombs, grenades or other explosives among the civilian population, taking hostages and murdering civilians are acts which disregard the most fundamental rules of IHL and thereby amount to war crimes.

³³ *Kassem*, *supra* note 12, p. 481.

³⁴ US Court of Appeals for the District Court of Columbia Circuit, *United States of America v. Fawaz Yunis, A/K/A Nazeeh*, 29 January 1991, 1991 U.S. App. LEXIS 1098. The appellant challenged his conviction on conspiracy, aircraft piracy and hostage taking charges stemming from the hijacking of a Jordanian aircraft from Beirut. Although the crimes did not take place during an armed conflict, the case is relevant because, according to the instructions given to the jury, the defence based on military orders entailed ascertaining whether the Amal militia to which the accused claimed to belong fulfilled IHL combatant's requirements.

31. It should also be emphasised that acts of terrorism are prohibited by international law both in peacetime and wartime. Three main elements are required for the crime of international terrorism: “(i) the acts must constitute a criminal offence under most national legal system (for example assault, murder, kidnapping, hostage-taking, extortion, bombing, torture, arson, etc.); (ii) they must be aimed at spreading terror (that is, fear and intimidation) by means of violent action or the threat thereof directed against a State, the public, or particular groups of persons; (iii) they must be politically, religiously, or otherwise ideologically motivated, that is not motivated by the pursuit of private ends”.³⁵ In brief, acts of terrorism consist of an “attack or a threat of an attack on civilians (civilian objects), or the adoption of other intimidatory measures” which are accompanied by “a *special criminal intent*, that is, to bring about terror (fear, anxiety) among civilians.”³⁶

32. In wartime, IHL unambiguously prohibits acts of terrorism against the civilian population.³⁷ Art. 33 of the Fourth Geneva Convention prohibits “all measures of intimidation and terrorism” against protected persons. The language of the relevant provisions of the Protocol I (art. 51(2)) and Protocol II³⁸ (art. 13) takes account of the fact that during an armed conflict some degree of terror among the civilian population may hardly be avoided. As a consequence, only those acts or threats of violence whose “primary purpose” is to spread terror among the civilian population are prohibited under IHL.³⁹ The customary nature of art. 51 of Protocol I has already been established above in par. 10. Finally, commission of such acts may amount to war crimes when consisting in attacks against civilians which cause death or serious injury to body or health.⁴⁰

³⁵ Cf. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), p. 124.

³⁶ *Ibidem*, p. 127.

³⁷ See art. 2 of the 1923 Hague Rules on Aerial Warfare prohibited “aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants”.

³⁸ Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 1977.

³⁹ Cf. Gasser, Prohibition of Terrorist Acts in International Humanitarian Law, *International Review of the Red Cross*, 1986, p. 7, and Stein, How Much Humanity Do Terrorists Deserve? in A. Delissen and G. Tanja, *Humanitarian Law of Armed Conflict: Challenges Ahead (Essays in Honour of Frits Kalshoven)*, Dordrecht, 1991, pp. 571-574.

⁴⁰ Cf. art. 85(3)A of Protocol I.

33. For the acts referred to above in par. 32 and those amounting to terrorism, civilians may be brought to trial according to international law. As the Court forcefully stated in *Kassem*:

“The attack upon civilian objectives and the murder of civilians [...], the placing of grenades and destructive charges in Tel Aviv Central Bus Station, etc., were all wanton acts of terrorism aimed at men, women and children who were certainly not lawful military objectives. They are utterly repugnant to the principles of International Law and, according to the authorities quoted, are crimes for which the perpetrators must pay the penalty.” (p. 483)

34. In addition, not only perpetration of a war crime, but also conspiracy and complicity to commit a such acts may be punished according to law.

B. TERRORISTS MAY BE ATTACKED WHILE ENGAGED IN FIGHTING

35. As civilians who take a direct part in hostilities, Palestinian terrorists forfeit non-combatant immunity. Hence they may be made the object of attack, but only for as long as they are actually engaged in fighting.

Palestinians concealing on their own body explosives destined to blow up Israeli civilians or combatants, may be attacked if, after being summonsed to show that they do not carry arms, they refuse to do so, or if they *manifestly* conceal weapons destined to blow up enemy persons or installations and *there is absolutely not time for a summons*.

C. TERRORISTS MAY BE ARRESTED AND BROUGHT TO TRIAL

36. Terrorists who plan or prepare, or somehow aid and abet in the planning or preparation of an attack, may not be targeted as long as they are not engaging in a military operation on the battlefield. Also those terrorists who, after committing an hostile act, lay down arms, may not be made object of attack. However, they may be

arrested and brought to trial. The trial must afford the relevant internationally recognised judicial safeguards.

D. THE KILLING WITHOUT PROPER TRIAL OF TERRORISTS WHO ARE PLANNING, OR HAVE PARTICIPATED IN, AN ATTACK MAY AMOUNT TO A WAR CRIME

37. It is worth underlining that acting in disregard of the fundamental IHL principle of distinction between combatants and civilians may undermine the very foundations of IHL. Such behaviour may amount to a war crime. For example, the US Military Manual is explicit on the point by listing the “killing without trial [of] spies or other persons who have committed hostile acts” among war crimes (par. 504(1)).

SUMMARY

According to the fundamental distinction of international humanitarian law between combatants and civilians, only the former may constitute lawful objects of attack.

However, if civilians **take a direct part in hostilities**, they may be targeted while they are actually engaging in combat, or while carrying arms openly during a military deployment preceding an attack in which they participate, or (exceptionally) if they are manifestly concealing on their own body the explosives they intend to use against enemy civilians or combatants and do not comply with a summons to show that they are innocent civilians not carrying arms.

Both principles of international humanitarian law and military manuals lead to the conclusion that **civilians may not be attacked while planning or preparing an attack or after committing it**. In such cases, if suspected of directly engaging in military operations, **they may be arrested**. It has to be proved by judicial means, that is, **through a proper trial**, that they intended to commit an hostile act or had done so. In other words, suspected persons may be arrested in order to **ascertain their**

responsibility, as is the case for other combatants who do not distinguish themselves from the civilian population, namely **spies, saboteurs and irregular fighters**. Such civilians unlawfully participating in armed hostilities may be tried and punished for **war crimes**.

To hold that killing civilians suspected of terrorism, while they are not engaged in military action, is internationally lawful, would involve **a blatant departure from the fundamental principles of international humanitarian law**. It would entail the undermining of the very foundation of that body of law, namely the distinction between combatants and civilians.

Under current international humanitarian law and international criminal law attacking civilians not taking a direct part in hostilities may amount to a **war crime**.