

COMMENT

On Target? The Israeli Supreme Court and the Expansion of Targeted Killings

Israel has used “targeted killings” against suspected terrorists since the al-Aqsa *intifada* began in September 2000. By the end of 2005, almost 300 terrorist organization members and 150 civilian bystanders had been killed in targeted killings, in addition to hundreds of civilians wounded.¹ The policy has received wide international condemnation² and has sparked vigorous debate among scholars about its lawfulness. After four years of consideration,³ the Israeli Supreme Court recently weighed in with the world’s first judicial decision on targeted killings in *Public Committee Against Torture in Israel v. Government of Israel (PCATI)*. In *PCATI*, the court held that terrorists are civilians under the law of armed conflict and thus are lawfully subject to attack only when they directly participate in hostilities.⁴ But the court also expanded the traditional definition of “direct participation” and the time period during which civilians may lawfully be attacked. By disregarding the “direct participation” requirement’s important evidentiary function, the court weakened the protections that international law affords to all civilians, not just to terrorists.

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1. See HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. (*PCATI*) [Dec. 11, 2005] slip op. para. 2, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.
 2. See, e.g., Press Release, Office of the Spokesman for Sec’y-Gen. Kofi Annan, Secretary-General Urges Israeli Government To Cease Targeted Assassinations, U.N. Doc. SG/SM/7878 (July 5, 2001), available at <http://www.un.org/News/Press/docs/2001/sgsm7878.doc.htm>.
 3. The case was first filed on January 24, 2002. *PCATI*, slip op. para. 14. Proceedings were then stayed between February and December 2005 because Israel suspended targeted killings. *Id.*
 4. *Id.* para. 26.

I. INTERNATIONAL LAW AND THE ISRAELI SUPREME COURT'S DECISION

The international law of armed conflict, principally enshrined in custom, the Hague Convention,⁵ the Fourth Geneva Convention,⁶ and the First Additional Protocol to the Geneva Conventions (Protocol I),⁷ prohibits deliberate attacks on civilians⁸ but does not give them total immunity from attack. Rather, international law embraces a balancing of military necessity against the rights of the individual.

This balancing is primarily effectuated through the principle of distinction—an “intransgressible principle[] of international customary law”⁹—which obliges belligerents to distinguish between combatants and civilians. Article 51(3) of Protocol I provides that civilians enjoy immunity from deliberate attack “unless and *for such time* as they take a *direct part* in hostilities.”¹⁰ The debate over targeted killings has centered on whether suspected terrorists are civilians or combatants and, if they are civilians, what constitutes the “time” of their “direct” participation in hostilities. The authoritative International Committee of the Red Cross Commentary on Protocol I suggests that a civilian may directly participate in hostilities by using a weapon, carrying a weapon for use in hostilities, or “undertak[ing] hostile acts without using a weapon.”¹¹ In an expert opinion in *PCATI*, scholar Antonio Cassese suggested that in addition to a person engaged in combat, a civilian “engaging in a military deployment” preceding an attack is directly participating if “he carries arms openly during the military deployment.”¹²

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5. Convention Respecting the Laws and Customs of War on Land (Fourth Hague Convention), Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.
 6. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
 7. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3.
 8. *Id.* art. 51(2), 1125 U.N.T.S. at 26.
 9. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).
 10. Protocol I, *supra* note 7, art. 51(3), 1125 U.N.T.S. at 26 (emphasis added).
 11. CLAUDE PILLOUD ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 1943 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY], available at <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=470&t=com>.
 12. Antonio Cassese, Expert Opinion on Whether Israel’s Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law paras. 12-13,

The Israeli Supreme Court, however, took a broader view. As a threshold matter, the court held that the law of international armed conflict applies to the Occupied Territories¹³ and that Article 51(3) of Protocol I binds Israel as custom.¹⁴ It also held that terrorists are civilians and therefore may be attacked only while taking a direct part in hostilities,¹⁵ subject to the customary international law requirement of proportionality.¹⁶ The court then set out a novel and expansive definition of “direct” participation, encompassing all civilians “performing the function[s] of combatants.”¹⁷ It defined these functions to include not only bearing arms before, during, or after an attack—the limits identified by the Red Cross and Cassese—but also providing services to unlawful combatants and participating voluntarily as a human shield.¹⁸ Further, the court included the actions of terrorist leaders in holding that direct participation “should not be narrowed merely to the person committing the physical act of attack”; instead, “[t]hose who have sent him, as well, take ‘a direct part’. The same goes for the person who decided upon the act, and the person who planned it.”¹⁹

To give practical effect to its expansion of “direct participation,” the court also expanded the traditional understanding of the “for such time” requirement in Article 51(3). If “for such time” were limited only to the time preceding, during, or following an attack, then many terrorist organization members covered by the court’s definition of direct participation—particularly terrorist leaders—could never be attacked.²⁰ The court redefined the outer bound of “for such time,” stating that

a civilian who has joined a terrorist organization which has become his ‘home’, and in the framework of his role in that organization . . . commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack ‘for such time’ as he is committing the

<http://www.stoptorture.org.il/eng/images/uploaded/publications/64.pdf> (last visited May 1, 2007).

13. HCJ 769/02 *PCATI* [Dec. 11, 2005] slip op. paras. 16, 21, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.
14. *Id.* paras. 20, 30.
15. *Id.* para. 26.
16. Protocol I, *supra* note 7, art. 57(2)(a)(iii), 1125 U.N.T.S. at 29.
17. *PCATI*, slip op. para. 35.
18. *Id.* paras. 34-36.
19. *Id.* para. 37.
20. *Cf.* Cassese, *supra* note 12, paras. 14-15.

chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.²¹

Because the court did not temporally limit the “chain of acts” committed or specify a maximum duration for “short periods of rest,” a target could theoretically be attacked during rest periods lasting days or even weeks—far longer than under traditional conceptions limiting “for such time” to the period (usually hours) immediately surrounding an attack.

II. THE EVIDENTIARY FOLLY OF THE MEMBERSHIP MODEL

As the first authoritative judicial treatment of targeted killings, *PCATI*'s expansion of “direct” participation and its loosening of the “for such time” requirement are likely to influence others analyzing targeted killings, including the United States—the only state besides Israel to conduct targeted killings openly.²² But *PCATI*'s interpretation of Article 51(3)—a fundamental provision protecting civilians in armed conflict—may be applied beyond targeted killings to other armed conflicts where Article 51(3) applies, and it may thus dangerously weaken civilians' protections.

As noted above, the court broadened the definition of direct participation to include those who decide upon or plan attacks and send attackers.²³ This position seems reasonable given that a narrower reading of direct participation would leave low-level terrorist organization members subject to frequent attack while immunizing terrorist leaders simply because they did not carry weapons on missions.²⁴ But the court also took a broad view of *when* terrorists are “taking a direct part in hostilities,” thereby expanding the temporal horizon for lawful attacks.

Under the court's definition of “for such time,” the military is no longer required to ask what the terrorist is doing at the time that he is targeted, but only whether he is still an active member of a terrorist organization.²⁵ The military does not have to show that the target poses an immediate threat

21. *PCATI*, slip op. para. 39.

22. For discussion of the 2002 U.S. targeted killing of Qaed Seynan al-Harithi in Yemen, see Evan Thomas & Mark Hosenball, *The Opening Shot*, NEWSWEEK, Nov. 18, 2002, at 48.

23. *PCATI*, slip op. para. 37.

24. See Cassese, *supra* note 12, paras. 12-15 (providing a narrower interpretation of “direct participation”).

25. Because terrorist organizations do not issue membership cards, the military might have difficulty proving that an individual is a member. (But it will be even more difficult for a suspected terrorist to prove that he is *not* a member.)

rendering the use of force necessary²⁶ – that is, a threat so imminent as to allow “no choice of means and no moment for deliberation.”²⁷ Thus, a terrorist may be permissibly targeted for weeks instead of for the hours immediately surrounding a terrorist attack.

In accepting a membership-based model, the court erred in treating the “for such time” requirement as merely a timing issue rather than as an evidentiary matter. Its interpretation thereby destroys the temporal nexus between lawful attack and the threat posed by the target. International law traditionally has interpreted “for such time” narrowly to include only preparation, participation, and return from an attack.²⁸ This narrow reading assures that the target poses an immediate threat (the timing of the attack signals the proximity of the threat) and is therefore consonant with the customary principle of distinction, which allows civilians to be harmed only when they pose a threat. But under the court’s expansive reading of “for such time,” direct participation provides no evidence that the target poses an immediate threat that cannot be thwarted without force. The court’s interpretation thus provides the armed forces with a low evidentiary safe haven to justify targeted killings: if they can prove that the target is an active terrorist organization member, direct participation and an immediate threat are presumed.

The disagreement over Article 51(3)’s scope is analogous to the larger debate over preventive uses of force. While some support a state’s right to use force preventively to remove a non-imminent threat that might develop in the future,²⁹ others contend that international law permits only a narrower right to anticipatory self-defense (i.e., to counter an attack that is certain and imminent).³⁰ The greatest concern regarding the preventive use of force is the difficulty of *proving* that a threat exists and that it cannot be neutralized by

26. The customary international law standard of necessity is typically defined using language employed by Secretary of State Daniel Webster when he wrote to a British emissary to protest the burning of an American ship, the *Caroline*, by British troops. See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938).

27. *Id.* (quoting Webster).

28. See, e.g., ICRC COMMENTARY, *supra* note 11, para. 1943.

29. See, e.g., THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 23 (2006), available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf> (preserving the possibility of using force “before attacks occur, even if uncertainty remains as to the time and place of the enemy’s attack”); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563 (2003) (redefining imminence to justify preventive war).

30. See, e.g., Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599 (2003).

non-forceful means.³¹ While in anticipatory self-defense, the imminence of the attack is evidence that force is necessary, in preventive uses of force, the lack of an imminent threat is evidence that the use of force may be *unnecessary*.³²

As the international legal community has resisted shifting to preventive action writ large,³³ so should it resist shifting from anticipatory to preventive force in the realm of targeted killings, and for many of the same reasons. The preeminent concern in both contexts is that allowing self-defense against non-imminent attacks will lead to uses of force that are not necessary. In the broad use of force context, force may not be necessary because diplomacy remains feasible, through either negotiation or sanctions; in the targeted killing context, the targeted killing may not be necessary because arrest or negotiation could be feasible. The guarantee to the military that targeting a terrorist organization member will carry a presumption of threat, leading to a presumption of necessity, may cause the military to engage in more targeted killings that do not satisfy the international legal standard for necessity. Additionally, moving away from the evidence provided by a narrow reading of “for such time” may increase the likelihood of “collateral damage.” If terrorist organization members may be targeted even when they are not preparing for or conducting an attack, then they will more frequently be targeted while surrounded by civilians who are not directly participating in hostilities. Thus,

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31. See, e.g., Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 16 (2003) (arguing that self-defense justifies force “only where there is sufficient evidence . . . not only of the possession of weapons but also of an intention to use them”); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 526 (2006) (arguing that in moving from reactive to anticipatory to preemptive self-defense the “interpretive latitude of the unilateralist becomes wider, yet the nature and quantum of evidence that can satisfy the burden of proof resting on the unilateralist becomes less and less defined and is often . . . extrapolative and speculative”); Miriam Sapiro, *Preempting Prevention: Lessons Learned*, 37 N.Y.U. J. INT'L L. & POL. 357, 367 (2005) (“The further a decision to use force moves away from the requirement of imminence, the more likely the possibility of a mistake.”).
32. Cf. Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 435, 442-43 (A. Cassese ed., 1986) (contrasting international reactions to Israel's 1981 preventive strike on Iraq's nuclear reactor and to Israel's anticipatory use of force against Egypt in 1967).
33. See, e.g., U.N. HIGH-LEVEL PANEL ON THREATS, CHALLENGES & CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY paras. 188-91, at 54-55, UN Doc. A/59/565 (2004) [hereinafter A MORE SECURE WORLD], available at <http://www.un.org/secureworld/report.pdf>. Such resistance is visible in the widespread condemnation of the U.S. invasion of Iraq. See, e.g., Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 104-05 (2006); Sapiro, *supra* note 31.

civilians who could not themselves be lawfully targeted may inadvertently become the victims of targeted killings.

Finally, the international system in the post-World War II era has worked hard to prohibit unnecessary, nondefensive uses of force. The prohibitions of the use of force in Article 2(4) of the U.N. Charter and the human rights rules against arbitrary deprivation of life³⁴ both espouse goals of decreasing violence but also recognize self-defense exceptions based on necessity. Decreasing the evidentiary threshold for necessity in the international arena or in the context of targeted killings—as the Israeli court’s decision arguably does—may lower the historic international legal standard for necessity. The Israeli court’s laxer definition of necessity may be exploited by other states in other contexts to justify force against non-imminent threats at progressively earlier stages of conflict. If the accepted standards begin to slip downward, then the likelihood that states will undertake unlawful uses of force may increase: what state would have the moral fortitude to be the last adherent to a strict definition of necessity? A definitional slippage may precipitate a race to the bottom for an important legal standard, resulting in the resort to force at earlier stages of conflict.

The Israeli Supreme Court’s recognition of the requirement of proportionality between harm to civilians and military necessity does little to remedy these concerns. Although the court accepted proportionality as a limitation on targeted killings,³⁵ its expanded definition of direct participation hampers a proportionality analysis. Because, according to the court, active membership is equivalent to direct participation, all terrorist organization members are now “proper military objectives” for targeted killings. Thus, a lower standard for threat now justifies the use of force, adding weight to the military’s side of the balance against individual rights. The likelihood of collateral damage will increase because the military will now perceive a terrorist organization member who is not engaging in an attack to be a legally cognizable threat, and it will balance that threat—though it is not imminent—against the civilian harm that a targeted killing would cause. In other words, although the threat is less immediate, a military advantage will be perceived that could trump the likely harm to civilians, even when no lawful military advantage would have existed under the previous standard.

34. *E.g.*, International Covenant on Civil and Political Rights art. 6, cl. 1, *adopted* Dec. 19, 1966, S. EXEC. DOC. E, 95-2, at 25 (1978), 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976).

35. HCJ 769/02 *PCATI* [Dec. 11, 2005] slip op. para. 45, *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

III. IMPLICATIONS AND ALTERNATIVES

PCATI will likely be influential in shaping the international legal rules on targeted killings. Although the court's opinion is not binding outside Israel, it has taken years for *any* court to adjudicate the issue of targeted killings. It is unlikely that any party would have standing to challenge targeted killings before the International Court of Justice,³⁶ and any such challenge before a U.S. court would likely be ruled a political question or decided in view of the President's power as Commander in Chief rather than on the merits of the international legal claims.³⁷ The immediate consequence of the court's decision will be to legitimize more targeted killings by the Israeli government,³⁸ but the long-term consequences of the court's novel interpretation of Article 51(3) are potentially even more problematic.

Some may argue that the narrow interpretation of "for such time" has become outdated in the war on terrorism, but this argument lacks foundation. The principle of distinction was codified in Protocol I in 1977 as a response to decolonization movements and nationalist struggles, some of which employed terrorism.³⁹ The Israeli-Palestinian conflict—in which terrorism has been a recurring issue—was a paradigm case for the application of Protocol I when it was promulgated.⁴⁰ The claims of necessity that the Israeli government has put forth to justify changing the legal standards are not new arguments, and the legal standards for protection of civilians that it protests are far from outmoded. Indeed, asymmetrical warfare was exactly what the legal rules were designed to address.

The Israeli court's quandary was how to reach terrorist leaders without undermining public order and longstanding restrictions on the use of force. Ideally, the law would allow strikes on terrorist leaders but would still limit such strikes to periods during which the leaders pose an imminent threat. One could argue that leaders pose a threat sufficient to justify attack when they meet with terrorist organization associates, discuss attack plans, or give orders.

36. The International Court of Justice only has jurisdiction over disputes between consenting states; thus, another state would have to bring suit against Israel or the United States, which presumably would not consent.

37. U.S. CONST. art. 2, § 2, cl. 1.

38. The implications of an increase in targeted killings are outside the scope of this Comment. For discussion, see Kristen Eichensehr, *On the Offensive: Assassination Policy Under International Law*, HARV. INT'L REV., Fall 2003, at 36.

39. Protocol I, *supra* note 7, art. 1(4), 1125 U.N.T.S. at 7.

40. Cf. George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1 (1991).

But given intelligence limitations, such precise timing could be difficult, if not impossible, to achieve.

Alternatively, attacks on terrorist leaders could be required to satisfy an extremely strict proportionality requirement. To illustrate, if ten innocent deaths would normally be “proportional” to the targeted killing of one terrorist leader, the allowance could be lowered to five, or to two, in recognition of the fact that the threat posed by the leader, though grave, was not imminent. Compared to the broad interpretation the Israeli court gave to the “for such time” requirement, either of these alternatives would better account for the realities faced by Israel and the potential for damage to international law in lowering the legal standards for the use of force.

CONCLUSION

The Israeli Supreme Court should be applauded for addressing an extremely complicated and contentious issue, and one that other judicial bodies are unlikely to address. But the court’s definition of direct participation, coupled with its broadening of the “for such time” requirement in disregard of that requirement’s evidentiary function, threaten to undermine international law’s protection of civilians in armed conflict by shifting the balance toward military advantage and increasing the likelihood of collateral damage. Justice Barak emphasized the rule of law throughout his opinion. Perhaps echoing Justice O’Connor’s “blank check” line in *Hamdi v. Rumsfeld*,⁴¹ he wrote: “There is always law which the state must comply with. There are no ‘black holes.’”⁴² But states must not be allowed to change the law in order to comply with it.

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41. 542 U.S. 507, 536 (2004) (plurality opinion) (“[A] state of war is not a blank check for the President . . .”).

42. HCJ 769/02 *PCATI* [Dec. 11, 2005] slip op. para. 61, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.