

On Some Merits of the Israeli Judgment on Targeted Killings

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Abstract

The recent judgment by the Israeli Supreme Court on targeted killings is a landmark decision in many respects. Its main merit lies in trying to give precision to, and therefore make concretely applicable by the belligerents, some loose standards of international humanitarian law on the conduct of hostilities. In particular, the judgment is significant because (i) it concluded that the issue of targeted killings did not amount to a non-justiciable question, (ii) it suggested a novel and imaginative way of narrowing down the vague scope of imprecise international rules on methods of combat, and in addition (iii) it set out a range of measures that belligerents must take both before and after armed attacks against civilians participating in hostilities, so as to avoid damage to innocent civilians as far as possible. The measures authoritatively suggested in the judgment may serve both to turn some unclear international rules into workable standards of conduct, and also to open the way to the possible prosecution of individuals (superiors and subordinates) who do not comply with such standards.

1. Introduction

The judgment handed down by the Israeli Supreme Court on 13 December 2006 in *Public Committee against Torture in Israel v. The Government of Israel* on the legality of the Israeli 'targeted killings'¹ policy belongs to a rare species of significant and important judicial decisions that break new ground by both tackling difficult and intricate problems and also providing imaginative and deeply thought-out interpretations of legal rules, thus illuminating hitherto unexplored areas of the law. It should therefore come as no surprise that this

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1 H.C.J. 769/02 *The Public Committee against Torture in Israel v. Government of Israel et al.* (online in English at: <http://elyon1.court.gov.il/files.eng/02/690/007/a34/02007690.a34.pdf>).

judgment lends itself, like all major decisions, to both praise and criticism, depending on the angle from which it is perceived.

In this brief note I shall confine myself to underlining what I consider to be some major merits of the judgment.

2. The Justiciability of the Choice of Means of War

In its response to the arguments of petitioners, the Government of Israel had among other things argued that the choice of means of war made by the Israeli military authorities to prevent ‘murderous terrorist attacks before they happen’ was not a justiciable issue, for it fell within the exclusive remit of the executive power (§§ 9 and 47). This preliminary question was considered by President Barak (the author of the judgment) at the end of his opinion. He dismissed the Respondent’s submissions with compelling arguments. In short, Barak first distinguished between normative non-justiciability (when a matter does not fall within the realm of law) and institutional non-justiciability (when, although a matter is covered by law, it is not desirable or appropriate for it to be dealt with by a judicial body rather than a parliamentary or executive institution). He then held that from both viewpoints the question at issue was indeed justiciable. It was justiciable from a normative viewpoint because

there is always a legal norm according to which the dispute can be solved, and the existence of a legal norm provides the basis for the existence of legal standards for such decision. It may be easy to identify the norm and the standards behind it; it may be difficult to do so. However, at the end of the day, a legal norm will always be found, and legal standards will always be found. That norm can be general, *e.g.* “a person is permitted to do everything except that which has been forbidden, and the government is permitted to do only what it has been permitted to do”. At times the norm is much narrower. So it is in the case before us. There are legal norms which deal with the case before us, from which we can derive standards which determine what is permitted and what is forbidden. (§ 48)

He then held that the issue was equally justiciable from an institutional viewpoint, on four grounds: (i) the question brought before the court impinged upon human rights, in particular the right to life; (ii) it was not a question of policy or a military question, but a legal one (for it revolved around whether it was permissible to employ against terrorists a policy of preventive strikes which could also involve killing innocent civilians); (iii) similar questions had already been decided by international courts; (iv) the issue required *ex post* examination of the conduct of the army, and it was best for such examination to be objective and based on judicial standards or guidelines (§§ 49–54).

Holding that a state’s military conduct affecting fundamental human rights of individuals may be subjected to judicial scrutiny is legally reasonable and justified, from the viewpoint of both national and international law. In a true democracy, the rule of law and respect for human rights (two pillars of democracy) require that the conduct of the executive be subjected to oversight

as much as possible; in many cases it is appropriate for that oversight to be judicial in nature — particularly when fundamental rights are at stake. In addition, such judicial scrutiny is fully consonant with, and indeed implicitly required by, the very purpose and object of international humanitarian law. The more frequently courts of law pronounce upon the permissibility or impermissibility of military actions, the more extensive and forceful are preventive restraints on military behaviour; hence the greater the effective protection of the basic values that international humanitarian law aims at safeguarding (such as shielding life and limb of non-combatants from the devastations of war, and introducing a modicum of humanity into the conduct of hostilities).

3. The Need for Judicial Fleshing Out of the Loose Rules of International Humanitarian Law on the Conduct of Hostilities

It is common knowledge that most rules of international humanitarian law on the conduct of hostilities (means and methods of combat) are rather broad and ambiguous; hence they do not offer great certainty in the guidance they provide to combatants. There are two reasons for these rules' haziness. First, it is objectively difficult to lay down precise and specific legal standards in the area at issue. How can one specifically define the precautions that a belligerent must take before launching an attack in order to spare civilians as much as possible? How can one lay down well-defined standards for evaluating *ex post facto* the proportionate or disproportionate nature of damage caused to innocent civilians? Clearly, we are here in an area where law-makers face tremendous hurdles. Second, states, in particular major powers, have demonstrated themselves prepared to leave these standards as loose as possible, in order to retain a broad margin of manoeuvre when engaged in combat. Were states prone to respect and ensure respect for international rules on the conduct of hostilities, they could of course set up compulsory monitoring mechanisms designed to verify — if not in the heat of the battle, at least afterwards — alleged deviations from legal standards, or at any rate the most conspicuous and blatant of such deviations. Since this is not the case, states retain much freedom, at the expense of innocent civilians.

One further consequence of this state of affairs is that those rules, which only minimally regulate states' conduct and in effect serve only to prevent extreme cases, may not be amenable to serving as parameters for an assessment of the criminality of the conduct of individual combatants. In other words, those rules may serve for the purpose of establishing state responsibility in the most glaring instances of their violation, but may not serve as criminal rules: criminalization of conduct contrary to those rules might be contrary to the principle of specificity prevailing in international criminal law. This is borne out by the fact that so far cases involving the alleged breach of rules of international humanitarian law on the conduct of hostilities have primarily been brought before inter-state courts,

pronouncing on state responsibility.² In contrast, criminal cases on the alleged infringement of international rules on methods or means of warfare are extremely rare: such cases, brought before either national or international criminal courts, can be counted on the fingers of one hand.³

As things stand, since individual states are unlikely to pass legislation at the domestic level to define these international standards with a view to their implementation and application by national courts, it falls to judicial bodies to try to flesh out those provisions of international humanitarian law as much as possible, by setting out guidelines which give content to the restrictions on the broad freedom of states in this area. This is precisely what President Barak has done in this judgment. He has delineated a set of fairly specific standards for the application of international rules on attacks on civilians taking an active part in armed hostilities. His decision is a commendable contribution to the judicial clarification of these rules, which also narrows down the excessively loose scope of the rules.

4. How Can a Judge Construe Vague International Rules in such a Manner as to Restrain States' Freedom as much as possible?

The judgment is also important methodologically. President Barak has identified and used a method for delimiting the scope of those international

- 2 For instance, see some cases brought before the Eritrea-Ethiopia Claims Commission, *Partial Award, Central front, Ethiopia's Claim 2*, judgment of 28 April 2004 (online: www.pca-cpa.org/ENGLISH/RPC/# Eritrea-Ethiopia%20% 20 Commission), as well as the judgment of 19 December 2005 (*Partial Award, Western and Eastern Fronts, Ethiopia's Claims 1 and 2*), *ibid.* See also two cases brought before the European Court of Human Rights: *Isayeva, Yusupova and Bazaieva v. Russia*, judgment of 24 February 2005, and *Isayeva v. Russia*, judgment of 24 February 2005. See also some cases brought before the Inter-American Court of Human Rights: *Bámaca-Velásquez v. Guatemala*, judgment of 25 November 2000; *Las Palmeras v. Colombia*, judgment of 6 December 2001; *Mapiripán Massacre v. Colombia*, judgment (only in Spanish) of 15 September 2005. Seldom have national courts pronounced upon the conduct of hostilities, and always within the context of civil, not criminal, action. See for instance *Ryuichi Shimoda and others v. The State of Japan*, judgment of the District Court of Tokyo of 7 December 1963 (on the atomic bombing of Hiroshima and Nagasaki), in L. Friedman, *The Law of War – A Documentary History*, Vol. II (New York: Random House, 1972), 1688–1702.
- 3 For instance, see the *General Jacob H. Smith* case, decided by a US Court Martial on 3 May 1902, concerning the order that no quarter should be given (in L. Friedman, *The Law of War – A Documentary History*, *supra* note 2, Vol. I, at 799–813). See also the *William L. Calley* case, revolving around the killing of Vietnamese civilians in the village of Mi Lay (see the Instructions of the Military Judge to the Court Martial, March 1971, in Friedman, *ibid.*, Vol. II, 1703–1727, as well as the decision of 16 February 1973 of the US Army Court of Military Review, 46 CMR 1131; 1973 CMR LEXIS 843, and the decision of 21 December 1973 by the US Army Court of Military Appeals, 22 USCMA 534; 1973 CMA LEXIS 627). As for international courts, see ICTY, Trial Chamber, *Galić*, judgment of 5 December 2003 (on sniping and shelling at civilians in Sarajevo), and *Strugar*, judgment of 31 January 2005 (on the shelling of Dubrovnik).

standards that are notable for being vague and imprecise. This method consists of identifying *two extremes* (§ 34) or *two ends of a spectrum* (§ 56) and then trying to determine, by dint of a prudent balancing of opposing requirements, how the law regulates the various instances that lie *within the space* between the two extremes (or the two ends). Let me briefly recall how the eminent Israeli Judge has relied upon this method.

In examining the question of how to define those who ‘take a direct part in hostilities’ (and consequently are not immune from attack), President Barak has first determined that *at one end* lies the civilian bearing arms (openly or concealed) on his way to (or back from) the place where he uses them against the enemy. He is patently to be held as taking a direct part in the hostilities. *At the other end of the spectrum* we find — President Barak argues — the civilian generally supporting the hostilities against the enemy army but not directly participating in combat action, as well as the civilian selling food or medicine to ‘unlawful combatants’: clearly, both classes may not be held to constitute persons taking a direct part in the hostilities. To determine how to classify all those that are *within the grey area* between the two extremes, one must balance — according to the judgment — the need to protect innocent civilians as much as possible, against the need to take into account the goal of combatants effectively to operate to defeat the enemy.

This balancing leads President Barak to conclude that the class of civilians taking a direct part in the hostilities embraces: (i) persons collecting intelligence about the enemy army; (ii) persons transporting unlawful combatants to or from the place of combat; (iii) persons who, wherever they are located, operate weapons to be used by the unlawful combatants, or supervise such operation, or provide service to them; (iv) civilians driving trucks with ammunition to the place of combat; (v) civilians deliberately serving as a human shield to terrorists; (vi) persons who enlist unlawful combatants or send them to commit hostilities and (vii) civilians who decide upon or plan armed hostilities.

In contrast, the class of civilians not taking part in the hostilities includes (i) persons who aid the unlawful combatants by general strategic analysis, as well as (ii) those who give them general logistical or monetary support or (iii) those distributing propaganda for the unlawful combatants (§§ 34–37).

One may agree or disagree with this classification. Nevertheless, we are at least presented here with an enumeration of illustrative cases that may help all those involved in determining what to do in combat, whether to act or refrain from acting against the adversary depending on the class to which a person to be targeted belongs or is presumed to belong.

President Barak employs the same approach in interpreting the expression ‘for such time’ included in the rule whereby a civilian taking part in hostilities forfeits his protection from attacks for such time as he is directly taking part in armed hostilities. Here, in his search for the two extremes, the distinguished Judge points, *at the one end of the spectrum*, to civilians who take part in the hostilities one single time or sporadically and then detach themselves from

the hostilities. He then indicates, as *the other end of the spectrum*, civilians who have joined a terrorist organization that has become their 'home', and then engage in a spate of attacks on behalf of the organization, with short periods of rest between them (§ 39). As for the identification of the *grey zone* between the two extremes, Barak suggests, rather than illustrative instances, a set of safeguards to be taken by belligerents: (i) the need for thorough verification of the identity and activity of the civilians suspected of engaging in hostilities; (ii) the attempt to use methods, such as arrest, other than and alternative to the employment of lethal weapons; (iii) a thorough investigation of the attack, after its occurrence, so as to determine whether the civilians were innocent or instead engaged in armed hostilities; (iv) payment of compensation if afterwards it appears that the persons attacked were innocent civilians (§ 40). Plainly, these safeguards do not seek to describe or map the 'grey zone' between the two ends of the spectrum; they are intended to provide guidance on how combatants ought to respond to the fact of the 'grey zone'.

President Barak returns to the same approach when discussing the issue of how to appraise proportionality. There again he points to two extremes. On *the one hand* there is the combatant or sniper shooting at civilians or soldiers from his porch; in this case shooting him alone meets the legal standard of proportionality. At *the other end* of the spectrum there is the bombing of a whole building to kill a suspected terrorist. There, in his view, the military advantage pursued and the use of force to attain it, are disproportionate to the resulting killing of scores of civilians.

Again, one can disagree with the legal solution suggested. But the method is convincing and helpful. It may be used in other cases, subject to the condition that any conclusions derived from using this methodology should be well reasoned and supported by compelling legal arguments.

5. The Need for *Ex Ante* and *Ex Post* Verification

It has been stated that no practice or evidence supports the proposition set out in the judgment of a need for both preventive verification of the permissibility and legality of attacks on civilians, and *ex post* monitoring of such legality and the issuance of compensation, if it turns out that a breach of humanitarian law was committed.⁴

I respectfully disagree. The interpretation of vague legal standards is not limited to construction on the basis of prior state practice or the authoritative opinion of states, courts, or organizations. True, in interpreting legal rules, cases or state pronouncements may prove useful as authoritative determinations of the meaning of those rules. However, one should shun taking what we might call a typically 'common law' approach to legal interpretation, always searching for cases or precedents. General legal principles may prove of

4 For example see R.S. Schondorf, 'The *Targeted Killings* Judgment: a Preliminary Assessment', in this issue of the *Journal*, at part 5.

assistance, if need be. If cases or other pronouncements are lacking, jurists may legitimately and justifiably draw upon the whole system of the body of law to which the legal standards at issue belong. In our case, the whole spirit of international humanitarian law, as well as its principal object and purpose, suggest that, when faced with vague legal standards, the interpreter should take the following course of action: he or she ought to endeavour to draw from the whole body of the law those means, devices or mechanisms that may ensure respect for this body of law and attainment of its main purpose, namely protection of innocent civilians and other persons not taking an active part in hostilities. Pointing to a set of *ex ante* and *ex post* monitoring mechanisms, as done in the judgment, is therefore fully warranted by the very spirit and demands of international humanitarian law, although unsupported by state practice or case law.

It also bears noting that compensation for a breach of international humanitarian law is expressly envisaged in Articles 51/52/131/148 of the 1949 Geneva Conventions as well as Article 91 of the First Additional Protocol. Admittedly, the Geneva Conventions hardly touch upon means and methods of combat; and Article 91 of the Protocol, which does deal with the wrongful use of those means or methods, is not binding on Israel, which is not party to the Protocol. However, the argument can be made that the obligation of belligerents to pay compensation for violations of international humanitarian law has now acquired customary law nature. Article 3 of the IVth Hague Convention of 1907, although it laid down the obligation to pay compensation only with regard to breaches of the Convention, has now turned into customary international law. A general principle has evolved, which arguably also extends to the whole body of international humanitarian law applicable in modern times. The 2004 British *Manual of the law of Armed Conflict* authoritatively confirms this trend.⁵

5 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), at § 16.15.