# Adapting the Laws of War to Low Intensity Warfare

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In the early twentieth century and following the Second World War, the international community designed a legal system regulating what is and what is not permitted in war, based on initial treaties developed at the end of the nineteenth century, mainly the Geneva and Hague Conventions. These laws of war were intended to regulate a variety of war-related issues, including: the conduct of warfare through limitations on means and methods of war; the protection of the civilian population; and the treatment of soldiers and prisoners of war. Since the end of the Cold War the involvement of the international community in laws of war has increased significantly, through surveillance, critical examination, the use of diplomatic pressure, and criminal prosecutions. This critical attitude has made the laws of war, which limit or prohibit certain courses of action, an increasingly salient issue for civil and military leaders.

Laws of war were established initially for wars fought by regular militaries between states, and were based on the ability and obligation to distinguish between fighting forces/zones and the civilian population. For political reasons, international law consistently refrained from dealing with low intensity conflicts, conflicts in which one side is not a regular military subject to a sovereign government but rather a guerrilla force, a terrorist organization, or an irregular militia.[1] These bodies are not bound by international law, given that they operate from within civilian populations. Under these circumstances, international law has

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become less a justified and reasonable constraint and more a severe operational limitation.

In light of this phenomenon, politicians and jurists are divided on the subject. There are those who argue that the laws of war in their current format are outdated and limit more than necessary the ability of regular armed forces to deal with the operational difficulties they face in low intensity conflicts. According to this approach, the laws of war in their current format are not suited to this mode of warfare and should be changed as soon as possible. There are even those who argue that militaries should be allowed to deviate from these laws until the issues are resolved. Ignoring the urgency of the issue is to bury one's head in the sand.[2]

Others argue that the laws of war in their current format have withstood the test of time against challenges raised by low intensity conflicts. In their view, these challenges do not justify ignoring the laws of war that were first and foremost intended to protect civilians, even if there are specific regulations that should be changed. According to this approach the fundamental problem is not the need to update the laws of war, rather the lack of their strict observance. Many of those who support this argument fear that the very raising of the issue for discussion might create a snowball effect that would significantly threaten what has been achieved thus far by laws of war.[3]

This essay disputes the status quo approach and accepts the principle of change, based on the universal observation that reality always precedes legislation, which consequently needs to evolve and adapt. The essay briefly reviews the principles of the laws of war and the problems arising from their current application to low intensity conflicts, and proposes a way of adapting the laws to the new reality.

## Laws of War – Principles and Problems

The laws of war are based on "a balance between two magnetic poles: military needs on the one hand, and humanitarian considerations, on the other hand."[4] These laws rest on four basic principles intended to create and maintain this balance.[5]

1. The principle of military necessity: the use of force is permitted as long as it is intended to achieve a military purpose as part of the campaign against the enemy. Attacks for the purpose of destroying

property or injuring people, i.e., neither for a military purpose nor intended to injure the enemy population, are prohibited.

2. The principle of humanity: acts that are likely to cause unnecessary damage and suffering should be avoided, even if the objectives in question are permissible for attack. The wellbeing of civilians is pivotal, and the effects of armed conflict on them should be kept to a minimum.
3. The principle of distinction: there is a duty to distinguish between combatants and military objectives, and civilians and civilian targets. The latter should be left outside the circle of fighting as much as possible, and the effects of the fighting on them should be minimized to the utmost.
4. The principle of proportionality: injury to civilians or civilian sites resulting from an assault on a legitimate military objective does not in itself render the attack illegal, as long as the anticipated loss of civilian life or damage to civilian targets is not excessive in relation to the specific direct military advantage anticipated.

The characteristics of a low intensity conflict (mainly fighting against and from among civilians) challenge traditional distinctions and classifications anchored in laws of war, and place substantial operational difficulties and dilemmas before states and jurists. Even the very classification of the conflict generates difficulties for international law. Traditionally, international law divides armed conflicts into two categories: international armed conflict, i.e., between sovereign states, and non-international armed conflict, i.e., intra-state conflict.[6] Conflict between a sovereign state and an illegal armed non-governmental organization (henceforth illegal organization) acting outside its territory apparently does not fall under these definitions. The status quo approach argues that the conflict should be classified according to one of the traditional categories, the most suitable based on the circumstances.[7] The change approach deems that it should be seen as a completely new type of conflict.[8] Classification of the conflict is not merely an academic question; it dictates the substantive laws that apply to the said conflict.

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The main difficulty with regard to low intensity conflicts is the distinction between civilians and combatants. The laws of war distinguish between combatants and non-combatants, i.e., civilians.[9] In terms of customary international law, those who are not "combatants" are "non-combatants."[10] Combatants are defined as persons with "a set recognisable mark which can be distinguished from afar…openly carrying weapons…with a chain of command…and managing their actions in accordance with the laws of war."[11] In an attempt to make it easier for illegal organizations to be bound by international law, the articles demanding that combatants wear recognizable markings and openly carry weapons were suspended.[12] The distinction between these combatants and non-combatants is of course critical, since the latter have wide ranging rights and protections while the former have rights only after they have ceased taking an active part in the combat.

Combatants in low intensity conflicts, guerrilla-militia-terrorist combatants, do not fit the traditional distinction between combatants and non-combatants: only partially do they move around with identifiable markings and openly carry weapons; they do not clearly differentiate themselves from the civilian population; and they also knowingly and blatantly breach the laws of war, as well as exploit the obligation of regular militaries to international law in order to harm them. The difficulty, therefore, is not only in defining the status of these combatants-non-combatants. The problem is an enemy that cynically exploits the protection afforded by the laws of war to civilians in order to use them as a human shield, and sometimes even tries to draw the opposing regular army to attack these civilians in order to cause damage to its image. In any case, the difficulty in defining their status has of course implications for the basic issues of war: who can be attacked, and what is the status of those who fall captive during the battle.

The change approach argues for the creation of a third category – unlawful combatants, based on the conviction that combatants of illegal organizations are not entitled to the rights given to combatants or the protection afforded to non-combatants.[13] The existence of this third category has yet to be recognized in customary international law, and it is problematic since those classified within it are completely defenseless and find themselves outside the boundaries of international law.[14] It is therefore doubtful if this approach is compatible with the concept

of the laws of war, the essence of which was intended to regulate all stratums of the war. At the same time, non-recognition of this category underscores the obsolescence of international law.

The status quo approach holds that laws of war already distinguish between the complementary classes of lawful and unlawful combatants, first and foremost in order to preserve the distinction between combatants and civilians. Since the goal is to keep civilians outside the cycle of violence, it is imperative to ensure that the distinction between them and combatants is clear and unequivocal. On the one hand, unlawful combatants are denied the protection afforded to civilians since they "take direct part in acts of hostility"; on the other hand, they are not recognized as lawful combatants.[15] Therefore, instead of creating an equivocal third category, unlawful combatants should be prosecuted in military or civilian courts (as civilians who have committed crimes), and should not be put into a third category that denies them any rights.[16] The severity of this problem is exemplified by the American policy in the Guantanamo detention center.[17]

Implementing the principle of distinction in low intensity conflicts where one side acts from within a civilian population, not only with regard to combatants as opposed to civilians but also with regard to military objectives versus civilian targets, is acutely difficult. According to international law military objectives are only those "which by their nature, location, purpose or use make an effective contribution to military action and whose…destruction, capture or neutralization…offers a definite military advantage."[18] Combat should be waged against military capabilities of the enemy and not against its civilian population. Therefore, parties to the conflict may target only military objectives.[19] In addition, it is "prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the

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motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."[20] When the objectives are military installations (e.g., outposts, headquarters, weapons, arsenals, barriers) within the civilian population, the difficulty of maintaining the principle of distinction arises anew. At issue is an operational difficulty as well as a complicated challenge to international law.

The difficulty in distinguishing between combatants and non-combatants and between military and civilian objectives has major ramifications for the ability to implement the other principles: military necessity, humanity, proportionality. Combat in low intensity conflicts is generally carried out within the civilian population, and on the basis of the principle of proportionality, laws of war severely limit attack of targets under these circumstances: "Those who plan or decide upon an attack shall…refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[21] This is perhaps the most prominent example of the clear advantage given by international law to the party to the conflict that ignores and/or exploits the rules of war.

## Proposal for Change

Guerrilla-militia-terrorist warfare waged by "civilians" and from civilian zones against enemy civilians breaches the traditional military-humanitarian balance underlying the laws of war. Adherence to the existing laws and their accepted interpretations not only gives operational advantage to one side (something a neutral legal system is meant to avoid), but even encourages it to ignore the law and continue to exploit it. Therefore, with regard to low intensity conflicts, new rules should be established. These rules would not completely cancel existing qualifications, but rather adjust some of them in order to create a more suitable balance "between military necessity and the humanitarian consideration" in low intensity conflicts.

### *Defining the Combatants*

Unlawful combatants should be defined under a third, separate category, in accordance with the 2002 Israeli law that "a person who has

participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him" (i.e., lawful combatants).[22]

The status quo approach, whereby the clear distinction between civilians and combatants is required in all areas – even within the framework of low intensity conflicts – is unacceptable, precisely because unlawful combatants are those who create a reality within which there is no such practical distinction. In fact, unlawful combatants are civilians who either continuously or sporadically engage in combat; the prohibition of treating them as combatants solely because they are not formally called by this term is blatantly unjust and unrealistic. At the same time, the change approach whereby unlawful combatants are not entitled to the rights afforded to combatants or the protection afforded to civilians should also not be accepted. As human beings, and possibly also enjoying a presumption of innocence, they have inalienable rights. According to the proposed new category, unlawful combatants will be afforded the basic rights of lawful combatants, first and foremost the rights to life and human dignity.[23] If captured in the course of ongoing security activity, they are afforded the right to trial.[24] With regard to acts of war, unlawful combatants taken prisoner have the right to food, medical care, and visits by the Red Cross, and they may not be tortured.[25] On the other hand, in contrast to existing laws of war, it would be possible: to deny them the rights to postal services, contact with their families, and release at the cessation of hostilities; to prosecute them for war crimes; and to place them in solitary confinement for extended periods of time.[26] In addition, with regard to international law rather than the laws of war, detaining and kidnapping members of unlawful organizations from enemy countries or from among occupied people not at a time of war for whatever reason, even for negotiation purposes, should not be prohibited.[27]

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This category will afford unlawful combatants basic humanitarian rights, and will deny them privileges beyond that. In order to maintain

the distinction between unlawful combatants and civilians, a captive who is not clearly a combatant will be entitled to judicial process (similar to a detainee of ongoing security operations) that will determine whether the person in question is an unlawful combatant or a civilian caught in a combat zone.[28] Herein lies a pivotal point that differentiates this proposal from the policies of the United States government with regard to Guantanamo detainees.

***Combat Zone***

Just as unlawful combatants obliterate the distinction between themselves and civilians, their method of fighting and their combat sites limit the distinction between a military and civilian objective. When unlawful warfare is waged from within the civilian population for refuge and other purposes, almost any civilian territory becomes "an effective contribution to military operations," and therefore in targeting it there is a justifiable "clear military advantage." This is all the more so when the civilian population in question collaborates with unlawful combatants. Therefore, in order to maintain the balance at the heart of the laws of war, consideration must be given to the military necessity to conduct extensive and intensive operations within civilian zones, while strictly adhering to basic humanitarian standards. Sharpening existing rules and setting new ones, consistent with a stricter interpretation of the spirit and incomplete letter of existing international law (thus strengthening it), offers at least a limited solution to this problem. Accordingly:

1. Responsibility for loss of civilian lives and property resulting from action taken against unlawful combatants or attacks lies with the unlawful organization operating within that civilian population. Those who initiate, encourage, finance, or allow fighting within the civilian population, be they the actual combatants or their commanders, are guilty of war crimes. This wording makes explicit the prohibition that already exists in law, implicit in such action: "The presence of a protected person may not be used to render certain points or areas immune from military operations."[29]
2. The operating country must officially and publicly define the territory within which military action against unlawful

combatants or attacks is taking place. Civilians must be allowed to leave the area, on their own initiative or as a response to a call to do so.

3. Civilians may be evacuated against their will in order to deny unlawful combatants the opportunity to use their "immunity" or in order to allow the regular army freedom of operation, as long as the evacuation is carried out with strict adherence to safeguarding the lives and property of the evacuees and is not intended as a permanent deportation.[30]
4. Attacking a static objective within a civilian zone may occur only after a warning has been issued to the population to evacuate the area.
5. Attack on unlawful combatants within a civilian population will be carried out in a focused manner, while avoiding or minimizing incidental "loss of civilian life, injury to civilians and damage to civilian objects" in general, and specifically "those… which would be excessive in relation to the concrete and direct military advantage anticipated."
6. Responsibility for unlawful warfare from within a country lies with its sovereign government. If the government fails to stop such warfare immediately because it is unwilling and/or incapable of doing so, that government bears the responsibility for a de facto state of war. The attacked country is then entitled to act outside the immediate combat zone, in order to pressure directly or indirectly the responsible government to cease the unlawful warfare emanating from its territory, as long as warning is given to evacuate non-combatants from areas intended for attack.[31] This concretizes and lends substance to the most recent Security Council resolution on the subject (1373) adopted in 2001.[32]

Seemingly little new is implied here, since a country has the right to defend itself. However, actions of unlawful organizations are deemed legally as actions of the state hosting them only if they are acting on the instructions or under the control of that state.[33] This article strongly implies that when this is not the case, the host state is not responsible and therefore no actions should be taken against it. On the other hand, the

Security Council determined that the United Nations charter places on its member states the duty to refrain from organizing, encouraging, aiding, participating in, or acquiescing to acts of terror within their territories against another state.[34] This should indeed be so, and it is the right of the country under attack to take military steps of self-defense towards the host country even if it is only "acquiescing" with the acts initiated from within its territory.

7. The list of civilian objects prohibited for attack for humanitarian reasons should be limited to those intended directly for food, water, and medical care. Electricity, transport and communication installations, and all other infrastructure in the combat zone are permissible for attack, if they aid unlawful warfare. So too are civilian houses and facilities used (i.e., militarized) by unlawful combatants, since current international law permits attacks on "temporary camps…deployment positions…launching sites… military equipment …raw materials for military use…[and] local command-control-communication centers."[35]

## Military Necessity and Proportionality

According to the laws of war, use of force is allowed only for achievement of military purpose and not for destruction of property or harm to the civilian population. Based on traditional interpretation, legitimate military purposes are destruction of the military force of the enemy or occupation of territory. This definition of military purpose does not suit low intensity conflicts, in which often the occupation of territory is irrelevant and the destruction of "military forces" impossible since they are easily "civilianized." Military purpose in low intensity conflicts is to deny warring illegal organizations the will or the ability to conduct unlawful warfare from within their civilian population. There is no way to achieve this legitimate purpose without extracting a heavy toll from that civilian sphere. Proportionality in low intensity conflicts can thus not be measured "in relation to the concrete

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and direct military advantage anticipated," such as the destruction of a number of tanks or occupying an important hill. It needs to be measured also in relation to the overall and indirect advantage of removing the threat of unlawful warfare to the country's civilians. This can be attempted by neutralizing the civilian zone from which it is waged (for example by evacuating the population), or by exerting pressure (for example by targeting infrastructure objectives or conducting a "disproportionate" responsive-attack in the traditional-conventional meaning of the term).

Therefore, in low intensity conflicts a very broad interpretation of the principle of proportionality should be adopted. Accordingly, "incidental loss of civilian life, injury to civilians, [or] damage to civilian objects" will not be considered "excessive in relation to the concrete and direct military advantage anticipated," as long as civilians are not attacked indiscriminately and as long as they are not denied immediate humanitarian needs. Both these prohibitions are limited in scope. On the one hand, civilians in the combat zone, especially those who are willing participants/supporters, will understand that focused attacks, enforced evacuation, and the denial of other than basic needs are legitimate and foreseeable steps. On the other hand, the attacking army must allow humanitarian supplies and must not allow indiscriminate attacks or the targeting of humanitarian installations.

## Conclusion

This proposal is not an academic exercise. Israel is confronted with terrorism and guerrilla and militia warfare, from Lebanon via Hizbollah and from the Palestinian territories through a myriad of organizations. Facing this challenge, the laws of war are a significant limitation on both the strategic and the techno-tactical levels, and this legal limitation is treated as if it were written in stone. It is not. Law is a human invention; it can and should be changed, in order to adapt it to a new reality. Moreover, in most instances there is no need to change the law but rather to adopt a different interpretation. It should not be taken for granted that the accepted liberal interpretation, which is unfavorable to defending states and exceedingly lenient towards unlawful armed organizations, is the binding one.

The State of Israel should initiate such a change in international law. A draft of a new/refined set of laws, one that balances anew between military necessity and humanitarian considerations, should be prepared by representatives from the IDF, the General Security Services, and the Foreign and Justice Ministries.[36] This draft should be promoted along two tracks simultaneously. An international track should be used to submit it for discussion in relevant forums, in accordance with accepted procedures.[37] This is a long and cumbersome process, which is unlikely to succeed. Yet its very setting in motion will aid Israel from a public diplomacy point of view, in particular vis-à-vis nations dealing with similar problems or those that regard jihad terrorism seriously (including the United States, some of the European countries, India, Turkey, and Russia). On the other hand, the direct approach could prove counterproductive, and promoting this track indirectly and covertly should be considered. Since any Israeli proposal will elicit automatic and sweeping opposition, it is perhaps better to persuade other countries to lead the endeavor, leaving Israel behind the scenes. Concomitantly, the draft that does not contradict treaties to which Israel is party but that legislates an Israeli interpretation of international law for low intensity warfare should also be submitted to the Knesset.

The legal situation must not be left as it is. There is neither military nor moral justification for doing so. The accepted liberal interpretation of existing law affords an advantage to unlawful combatants over their victims. In the words of the rabbinic sages, "he who is merciful to the cruel, in the end is cruel to the merciful."

## Notes

Our thanks to Tobias Finkelstein for his assistance with this research.

1. There is no mention in the 1899 Hague Convention of unconventional warfare, because small powers (concerned about future occupation) opposed the great powers' demand to outlaw civilian resistance. See F. Kalshoven, *Constraints on the Waging of War*, International Committee of the Red Cross, 1987, p. 14. A similar scenario recurred in the 1999 drafting of the Rome Statute (the international treaty establishing the International Criminal Court – ICC), when no agreement on the definition of terrorism could be reached and resolution of the issue was postponed to a later date. See R. E. Fife, *Review Conference: Scenarios and Options*, Assembly of State Parties, ICC, 2006.
2. One of the most prominent people calling for an update to the existing

laws is former British secretary of state for defense John Reid, who argued (April 3, 2006): "The Geneva Conventions were created more than half a century ago, when the world was almost unrecognizable to today's citizens…we need now to…re-examine these conventions. If we do not, we risk continuing to fight a 21st century conflict with 20th century rules," http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/SofS/2006040320thcenturyRules21stcenturyConflict.htm. Many leading jurists, especially in the United States, endorse this position. With regard to the September 2001 bombings, Christopher Greenwood argues that "a challenge on this scale by a non-state actor to the one superpower calls for entirely new thinking about the nature of international law." See C. Greenwood, "International Law and the 'War against Terrorism,'" *International Affairs* 78, no. 2 (2002): 301. Eric Posner, "War, International Law, and Sovereignty: Re-evaluating the Rules of the Game in a New Century: Terrorism and the Laws of War," *Chicago Journal of International Law* 5, no. 2 (2005): 423-34, recommends that "the US should not consider itself governed by the laws of war in its conduct with Al Qaeda, as they are normally understood, but it should be alert for opportunities for creating implicit norms of conduct that serve the American interest. If such opportunities arise, the traditional laws of war may serve as a useful source for creating these norms," p. 434.

3. The International Red Cross, responsible for international conventions on the subject, leads the status quo approach: "In current armed conflicts, the problem is not a lack of rules, but a lack of respect for them…..Despite certain shortcomings in some of the rules governing the conduct of hostilities, mostly linked to imprecise wording, these rules continue to play an important role in limiting the use of weapons. Any further erosion of IHL may propel mankind backwards to a time when the use of armed force was almost boundless," ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 30th International Conference of the Red Cross and Crescent, Geneva, 2007, 30IC/07/8.4, pp. 14-15. Many leading jurists, especially European, agree: For example, "existing IHL – treaty and customary international law – has shown its continued relevance and overall adequacy in application to the conflict in Iraq throughout its various phases," K. Dörmann and L. Colassis, "International Humanitarian Law in the Iraq Conflict," *German Yearbook of International Law* 47 (2004): 342.
4. Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), p. 16.
5. Though not detailed as such, these principles are elicited from the conventions and were defined in professional literature, such as L. C. Green, *The Contemporary Law of Armed Conflict*, (Manchester: Manchester University Press, 2nd ed., 2000), pp. 347-57. To these four principles can be added a principle known as the Martens Clause, which states that "until there

is a more complete codex of the laws of war, the engaged parties find it necessary to declare, in those cases not covered by the regulations adopted by them, the civilians and combatants remain under the protection and control of the principles of the international law, as they are derived from the set customs between cultured people, from the laws of humanity and the demands of the public conscience," Hague Convention Respecting the Laws and Customs of War on Land, 1907, pp. 101-2. See also Dinstein, *The Conduct of Hostilities,* p. 56.

6. Y. Dinstein, *War, Aggression and Self Defence* (Cambridge: Cambridge University Press, 4th ed., 2005), p. 5.
7. Anrtonio Cassese, for example, argues that an "armed conflict which takes place between an Occupying Power and Rebel Insurgent Groups whether or not they are terrorist in character – in an occupied territory, amounts to International armed conflict." A. Cassese, *International Law* (Oxford: Oxford University Press, 2nd ed., 2005), p. 420. Another example can be seen in the argument of Cherif Bassiouni and the Inter American Commission on Human Rights: "IHL determines that a sustained 'war' between one or several states, on the one side, and a transnational terrorist group, on the other, may fall under the concept (and law) of a non international armed conflict. Inter American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser. L/V/II.116 Doc. 5 rev. 1 corr., October 22, 2002, www.cidh.oas.org/Terrorism/Eng/toc.html, para 7; C. Bassiouni, "Legal Control of International Terrorism: A Policy Oriented Assessment," *Harvard International Law Journal* 43, (2002): 100.
8. For example, Marco Sassoli argues that "despite all risks connected to creating and defining a new category of armed conflict, the international community may wish to legislate a new category of transnational armed conflicts." M. Sassoli, *Transnational Armed Groups and International Humanitarian Law*, Program on Humanitarian Policy and Conflict Research, Harvard University, 2006. See also J. Yoo and R. J. Delahunty, "The Geneva Convention Is Not the Last Word," *Los Angeles Times*, February 1, 2005. Posner (p. 423) argues that the "laws of war might sensibly be applied… though most likely in a highly modified form."
9. Article 48, the First Protocol added to the Geneva Convention of 1977. There are countries (including the United States and Israel) that have not signed this protocol, but most of its articles are accepted as customary international law. This article was recognized by the International Court of Law in the Hague as such: "The 'principle of distinction' between combatants and non-combatants (civilians) as a fundamental and 'intransgressible' principle of customary international law," advisory opinion on the *Legality of the Threat of Use of Nuclear Weapons*, [1996] ICJ Rep. 26, 257. In addition, the work of Henckaerts and Doswald-Beck on customary international humanitarian law prepared for the Red Cross found that "the Parties to the Conflict must at all times distinguish between civilians and

combatants. Attacks must not be directed against civilians." J. Henckaerts, and L. Doswald-Beck, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," *International Review of the Red Cross* 87 no. 857 (March 2005): 198.

10. Article 50 (1) of the First Protocol. The matter was emphasised by the Yugoslavia International Crimes Tribunal, which determined that civilians are "persons who are not, or no longer, members of the armed forces," *Prosecutor v. Blaskic*, Case IT95-14-T, ICTY, Judgment 3rd March 2000, para 180. This was also quoted in the Supreme Court ruling 769/02, The Public Committee against Torture in Israel against the State of Israel, p. 23.
11. Article 13 of the First and Second Geneva Convention of 1949.
12. Article 43 (1) of the First Protocol.
13. "Members of al Qaeda and the Taliban militia are not legally entitled to the battery of special rights and protections designed for professional soldiers," J. C. Yoo, "The Status of Soldiers and Terrorists under the Geneva Convention," *Chinese Journal of International Law* 3 (2004): 137.
14. Supreme Court ruling 769/02, The Public Committee Against Torture in Israel against the State of Israel, p. 24.
15. Cassese argues that "clearly, this category of persons does not constitute a third class (those of combatants and civilians making up the other two classes). These combatants are to be regarded as civilians (hence protected persons) who, by taking up arms without possessing the status of lawful combatants, have committed war crimes, and may thus be tried and punished," pp. 408-9. This statement is based in part on Clause 51 (3) of the first protocol: "Civilians will enjoy the protection granted to them according to this sign, unless and for the duration of the time they take direct part in acts of hostility."
16. K Dörmann states: "It is generally accepted that unlawful combatants may be prosecuted for their mere participation in hostilities, even if they respect all the rules of international humanitarian law," in "The Legal Situation of 'Unlawful/Unprivileged Combatants,'" *International Review of the Red Cross* No. 849, p. 70. And (p. 73), "It can hardly be maintained that unlawful combatants are not entitled to any protection whatsoever under international humanitarian law."
17. Detainees are incarcerated without due process. According to the US administration's position, this policy is based on the precedent of *Ex Parte Quirin* (1942).
18. Article 52 (2) of the First Protocol. In addition, with regard to civilian objectives the customary judge determined that "the parties to the conflict must at all times distinguish between civilian objectives and military objectives. Attacks must not be directed against civilian objects," Henckaerts and Doswald-Beck, p. 198.

19. Article 48 of Additional Protocol I of 1977, in Dinstein, *The Conduct of Hostilities*, p. 82.
20. Article 54 (2), of the First Protocol.
21. Article 57 (2) (iii) of the First Protocol. This concept was strengthened by a ruling of International Crimes Tribunal Yugoslavia (ICTY) *Prosecutor v. Zoran Kuperekic et al*. case IT-95-16 Trial Chamber II, ICTY, Judgment 14th January 2000, para 527. It is also manifested by the establishing convention of the International Criminal Court, which is not binding for countries that have not ratified it, but is an indication of this article becoming part of the customary international law. ICC Statute, article 8.2 (b) (iv), Rome Statute of the International Criminal Court, 1998.
22. The imprisonment law of unlawful combatants, 2002, 1834, of the statutes of the State of Israel, 192. This law deals with incarceration of unlawful combatants, in conditions of ongoing security.
23. In accordance with Article 5 of the Fourth Geneva Convention, 1949. There is broad consensus on this point, endorsed even by those advocating a harsher judicial approach to unlawful combatants.
24. Universal Declaration on Human Rights, 1948, article 8. Here we agree with the status quo approach, exemplified by Cassese (an unlawful combatant may be punished "only after judicially establishing that he is liable to punishment"), and diverge from Dinstein (international law "takes off a mantle of immunity from…unlawful combatants…[who] may be subjected to administrative detention without trial"). See A. Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law*, p. 11); Dinstein, *The Conduct of Hostilities*, p. 31.
25. The rights are anchored in Article 3 (2) and the prohibition of torture is anchored in Article 3 (1a), common to all the Geneva Conventions of 1949.
26. Article 25, 119, 133 of the Fourth Geneva Convention of 1949.
27. Clause 34 of the Fourth Geneva Convention, and Clause 3 (1b) shared by all the Geneva Conventions of 1949 prohibit the taking of hostages, but they refer only to "people who are not taking actual part in the acts of hostility." Of course members and combatants of unlawful organizations do take an active part in the acts of hostility, and therefore the prohibition on taking hostages does not apply to them.
28. The term 'clearly combatant' means a captive caught in the act, for whom there is no doubt that he was involved in the armed conflict as a combatant.
29. Article 28 of the Fourth Geneva Convention as well as Article 51 (7) of the First Protocol of the Geneva Convention.
30. Article 49 of the Fourth Convention states that "individual or mass forcible transfers…are prohibited. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may

not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."

31. Given that justified humanitarian concerns prohibit military actions that can directly vanquish unlawful warfare from within civilian zones, it should be legitimate to use military attacks as means of quasi-political pressure to indirectly end the said warfare. This is not in line with international law as is interpreted nowadays, which stipulates that "the advantage gained [by military attacks] must be military and not…political." Dinstein, *The Conduct of Hostilities*, p. 86.
32. *"Reaffirming* the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts*."*
33. "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct," International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Article 8.
34. See n. 31.
35. This partial list is from Dinstein, *The Conduct of Hostilities*, p. 86. Our proposal limits the applicability of Article 54 (2) of the First Protocol prohibiting the attack or destruction of "objectives vital to the survival of the civilian population, such as… agricultural fields" by limiting the definition of what is vital for civilian survival.
36. Such as the "Dirani Law," intended to enable the imprisonment of unlawful combatants.
37. One opportunity to do so would be during the next inter-governmental conference dealing with the Rome Statute, in 2009-2010. See Fife, R. E. *Review Conference: scenarios and options*, Assembly of State Parties, ICC, 2006.