International Human Rights Law and Lethal Force

1. The ICCPR

The International Covenant on Civil and Political Rights
Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles: …

> ***Article 2***
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> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Consider the various locations and contexts in which the United States government might use military force (for detention, for targeting, or otherwise), and give thought to how Article 2 or might not apply in that scenario.

> ***Article 4***
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> 1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
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> 2. No derogation from articles 6 … may be made under this provision.
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> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.
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> …
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> ***Article 6***
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> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. The 2006 Report of the UN Human Rights Council's "Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions"

The U.N. Human Rights Council (today retitled as the Human Rights Committee) is a United Nations entity tasked with monitoring compliance with the ICCPR. It meets in Geneva, usually convening three times per year. It has 18 members, each of whom must be from an ICCPR member-states (technically, however, the members do not formally represent their own governments). From time to time, the HRC designates someone to serve as a "special rapporteur," tasked with conducting an investigation into a topic and then reporting back to the HRC with recommendations.

In 2004, the HRC created the post of Special Rapporteur on Extrajudicial, Summary, or Arbitrary Execution," and appointed NYU Law Professor Philip Alston to the position. The excerpt below is from a 2006 report he produced; it provides a pithy but representative summary of the doctrinal elements involved when the state's use of lethal force is called into question as a violation of the ICCPR Article 6's prohibition on arbitrary killing:

> 32. *Under human rights law:* A State killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force *necessary*). The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others. The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture.
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> 33. This means that under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation. Thus, for example, a "shoot-to-kill" policy violates human rights law. This is not to imply, as some erroneously do, that law enforcement is incapable of meeting the threats posed by terrorists and, in particular, suicide bombers. Such an argument is predicated on a misconception of human rights law, which does not require States to choose between letting people be killed and letting their law enforcement officials use lethal force to prevent such killings. In fact, under human rights law, States' duty to respect and to

ensure the right to life65 entails an obligation to exercise "due diligence" to protect the lives of individuals from attacks by criminals, including terrorists. Lethal force under human rights law is legal if it is strictly and directly necessary to save life.

Can you extract the separate elements of the analysis? Be prepared to answer how each element compares to LOAC rules on the intentional use of lethal force.

3. The European Convention on Human Rights ("ECHR")

Unlike the ICCPR, the United States of course is not party to the ECHR. So why study the latter? Because our NATO allies are party to it, and also because it is common for those interpreting the ICCPR to pay at least some attention to interpretations of similar rules contained in the ECHR.

ARTICLE 1 Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

ARTICLE *2* Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

…

ARTICLE 15 Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

How do these provisions compare to the comparable provisions of the ICCPR? How do both compare to the LOAC rules you have studied?

Imagine that the United States is a party to the ECHR (to be clear, it is not). Could it derogate from Article 15 in connection with drone strikes in Afghanistan? Would your answer differ as to drone strikes in, say, Somalia?

4. *ECHR Article 2 in the Counterterrorism Setting: McCann v. United Kingdom* (ECHR 1995)

The British government suspected that a group of Irish Republican Army (IRA) members had traveled to Gibraltar to carry out a bombing. The government tasked soldiers with surveilling the group, but the IRA members noticed the surveillance while at a gas station. Believing the IRA members were armed, the

soldiers opened fire. Ultimately, the European Court of Human Rights concluded that the soldiers had acted lawfully in the circumstances, but that the United Kingdom nonetheless violated Article 2 because the information and instructions it gave to its soldiers made the use of lethal force inevitable.

Here are the passages in the opinion declining to find an Article 2 violation as to the actions of the soldiers:

> 150. … the Court must…subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.
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> ... 198. It was subsequently discovered that the suspects were unarmed, that they did not have a detonator device on their persons and that there was no bomb in the car (see paragraphs 93 and 96 above).
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> 199. All four soldiers admitted that they shot to kill. They considered that it was necessary to continue to fire at the suspects until they were rendered physically incapable of detonating a device ….
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> 200. The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.
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> It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.
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> It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision.

And here are the passages finding that the United Kingdom nonetheless violated Article 2 thanks to its larger approach to the situation:

> 201. The question arises, however, whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.
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> 202. The Court first observes that…it had been the intention of the authorities to arrest the suspects at an appropriate stage. Indeed, evidence was given at the inquest that arrest procedures had been practised by the soldiers before 6 March and that efforts had been made to find a suitable place in Gibraltar to detain the suspects after their arrest.
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> 203. It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar and why…the decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation. Although surprised at the early arrival of the three suspects, they had a surveillance team at the border and an arrest group nearby. In addition, the Security Services and the Spanish authorities had photographs of the three suspects, knew their names as well as their aliases and would have known what passports to look for.
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> 204. On this issue, the Government submitted that at that moment there might not have been sufficient evidence to warrant the detention and trial of the suspects. Moreover, to release them, having alerted them to the authorities' state of awareness but leaving them or others free to try again, would obviously increase the risks. Nor could the authorities be sure that those three were the only terrorists they had to deal with or of the manner in which it was proposed to carry out the bombing.
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> 205. The Court confines itself to observing in this respect that the danger to the population of Gibraltar in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial. In its view, either the

authorities knew that there was no bomb in the car…or there was a serious miscalculation by those responsible for controlling the operation. As a result, the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood.

The decision not to stop the three terrorists from entering Gibraltar is thus a relevant factor to take into account under this head.

206. The Court notes that at the briefing on 5 March attended by Soldiers A, B, C, and D it was considered likely that the attack would be by way of a large car bomb. A number of key assessments were made. In particular, it was thought that the terrorists would not use a blocking car; that the bomb would be detonated by a radio-control device; that the detonation could be effected by the pressing of a button; that it was likely that the suspects would detonate the bomb if challenged; that they would be armed and would be likely to use their arms if confronted.

207. In the event, all of these crucial assumptions, apart from the terrorists' intentions to carry out an attack, turned out to be erroneous. Nevertheless, as has been demonstrated by the Government, on the basis of their experience in dealing with the IRA, they were all possible hypotheses in a situation where the true facts were unknown and where the authorities operated on the basis of limited intelligence information.

208. In fact, insufficient allowances appear to have been made for other assumptions. For example, since the bombing was not expected until 8 March when the changing of the guard ceremony was to take place, there was equally the possibility that the three terrorists were on a reconnaissance mission. While this was a factor which was briefly considered, it does not appear to have been regarded as a serious possibility.

In addition, at the briefings or after the suspects had been spotted, it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture. It might also have been thought improbable that at that point they would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted.

Moreover, even if allowances are made for the technological skills of the IRA, the description of the detonation device as a "button job" without the qualifications subsequently described by the experts at the inquest, of which the competent authorities must have been aware, over-simplifies the true nature of these devices.

209. It is further disquieting in this context that the assessment made by Soldier G, after a cursory external examination of the car, that there was a "suspect car bomb" was conveyed to the soldiers, according to their own testimony, as a definite identification that there was such a bomb. It is recalled that while Soldier G had experience in car bombs, it transpired that he was not an expert in radio communications or explosives; and that his assessment that there was a suspect car bomb, based on his observation that the car aerial was out of place, was more in the nature of a report that a bomb could not be ruled out.

210. In the absence of sufficient allowances being made for alternative possibilities, and the definite reporting of the existence of a car bomb which, according to the assessments that had been made, could be detonated at the press of a button, a series of working hypotheses were conveyed to Soldiers A, B, C and D as certainties, thereby making the use of lethal force almost unavoidable.

211. … Against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.

212. …it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.

Their reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement.

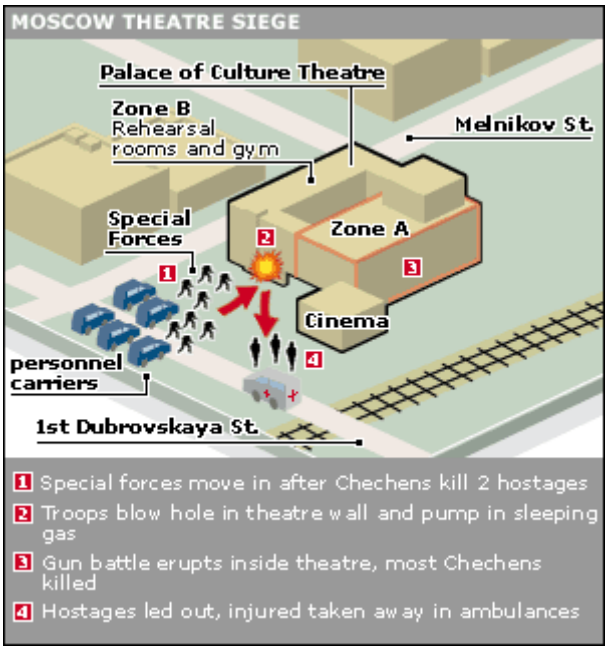
This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) of the Convention.

214. Accordingly, the Court finds that there has been a breach of Article 2 (art. 2) of the Convention.

Do you agree with the court's analysis? If not, be prepared to identify specific paragraphs with which you disagree.

5. ECHR Article 2 in the Counterterrorism Setting: *Finogenov and Others v. Russia* (ECHR Chambers Judgment 2011)



In 2002, a horrific incident occurred in Moscow. Some 40 to 50 Chechen terrorists entered a crowded theater and took more than 800 people hostage. On the third day of the crisis, two hostages were killed. Russia decided at this point to intervene, pumping a gas of some kind into the theater in order to incapacitate the terrorists as special operations forces entered the building. Ultimately, all of the terrorists were killed on the scene, but 130 of the hostages succumbed to the gas.

A large group of the former hostages, or their survivors, thereafter brought a suit against Russia for violation of ECHR Article 2. The chambers decision sided with the applicants. The following excerpt is from a summary of the decision prepared by the ECHR's Registry:

Whether the gas used by the authorities could be described as "lethal force"

The authorities on numerous occasions declared that the gas had been harmless, and that according to the official medical examinations of the bodies, no direct causal link had existed between the use of the gas and the death of the hostages. The Court was not given an exact formula of the gas. It was prepared to accept that some of the victims had indeed died of pre-existing health problems. However, it is contrary to common sense to conclude that 125 people of different ages and physical conditions had died almost simultaneously and in the same place because of various illnesses, immobility, stress and lack of fresh air. Even if the gas had not been a "lethal force" but rather a "non-lethal incapacitating weapon", it had been dangerous and even potentially fatal for a weakened person, so the case clearly falls within the ambit of Article 2.

Decision to storm the theatre and use gas

More important than the question of the use of force during the storming of the theatre, which could be justified on the ground of "defending any person from unlawful violence" (Article 2 § 2 of the Convention), is the question of whether less drastic means could have been used to resolve the hostage crisis.

The Court stressed that in situations of such a scale and complexity, it was prepared to grant the domestic authorities a margin of appreciation, even if now, with hindsight, some of the decisions taken by the authorities could appear open to doubt, It was too speculative to assert that the terrorists would not carry out their threats: everything suggested the contrary. The situation – heavily armed, well-trained terrorists who were dedicated to their cause making unrealistic demands such as the withdrawal of Russian troops from Chechnya – had been

alarming. The first days of negotiations had failed and the hostages were becoming more and more vulnerable both physically and psychologically. There had therefore been a real, serious and immediate risk of mass human losses and the authorities had every reason to believe that a forced intervention had been "the lesser evil".

Although the solution, using a dangerous and even potentially lethal gas, had put at risk the lives of hostages and hostage-takers alike, it had left the hostages a high chance of survival. Indeed, the use of gas facilitated the liberation of the hostages and reduced the likelihood of an explosion.

The Court therefore concluded that, in the circumstances, the authorities' decision to end the negotiations and resolve the hostage crisis by force by using gas and storming the theatre had not been disproportionate and had not, as such, breached Article 2.

Note: a later part of the ECHR opinion concluded that Russia *had* violated Article 2 by failing to take all feasible precautions in order to avoid civilian deaths, given the refusal of the Russian government to provide information to first responders regarding the nature of the gas used or possible antidotes. The Court also concluded that Russia's own investigation into the matter was inadequate.

Is the ECHR's approach in *Finogenov* compatible with its approach in *McCann*?

6. Can LOAC and IHRL norms be integrated?
The Israeli Example

The Public Committee against Torture in Israel [PCATI] v. Israel
(High Court of Justice 2005)

… 2. In its war against terrorism, … the State employs what it calls "the policy of targeted frustration" of terrorism. Under this policy, the security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel… According to the data relayed by petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them. … Approximately one hundred and fifty civilians who were proximate to

the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded. **…**

16. The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter "the area") a continuous situation of armed conflict has existed since the first *intifada*. …

18. The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its center stands the international law regarding international armed conflict. Professor Cassese discussed the international character of an armed conflict between the occupying state in an area subject to belligerent occupation and the terrorists who come from the same area, including the armed conflict between Israel and the terrorist organizations in the *area*, stating:

"An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict"

… That humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law. … Alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law…may apply….

Are terrorist organizations and their members combatants, in regards to their rights in the armed conflict? Are they civilians taking an active part in the armed conflict? Are they possibly neither combatants nor civilians?...

24. What makes a person a combatant? This category includes, of course, the armed forces. It also includes people who fulfill the following conditions:

"The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;

2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

…We need not discuss all of them, as the terrorist organizations from the *area*, and their members, do not fulfill the conditions for combatants. It will suffice to say that they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war.

…Indeed, the terrorists and the organizations which send them to carry out attacks are unlawful combatants. They do not enjoy the status of prisoners of war. …

The Imprisonment of Unlawful combatants Law, 5762-2002 authorizes the chief of the general staff of the IDF to issue an order for the administrative detention of an "unlawful combatant". That term is defined in the statute as "a person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force which commits hostilities against the state of Israel, who does not fulfill the conditions granting prisoner of war status in international humanitarian law, as determined in article 4 of III Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949."

Needless to say, unlawful combatants are not beyond the law. They are not "outlaws". God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law…

Does it follow that in Israel's conduct of combat against the terrorist organizations, Israel is not entitled to … kill them even if they are planning, launching, or committing terrorist attacks? If they were seen as (legal) combatants, the answer would of course be that Israel is entitled to harm them. Just as it is permissible to harm a soldier of an enemy country, so can terrorists be harmed. Accordingly, they would also enjoy the status of prisoners of war, and the rest of the protections granted to legal combatants. However, as we have seen, the terrorists acting against Israel are not combatants according to the definition of that term in international law; they are not entitled to the status of prisoners of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army. Are they seen as civilians under the law?...

In the *Blaskic* case, the International Criminal Tribunal for the former Yugoslavia ruled that civilians are –

"Persons who are not, or no longer, members of the armed forces"

That definition is "negative" in nature. It defines the concept of "civilian" as the opposite of "combatant". It thus views unlawful combatants – who, as we have seen, are not "combatants" – as civilians.

Does that mean that the unlawful combatants are entitled to the same protection to which civilians who are not unlawful combatants are entitled? The answer is, no.

Customary international law regarding armed conflicts determines that a civilian taking a direct part in the hostilities does not, at such time, enjoy the protection granted to a civilian who is not taking a direct part in the hostilities…he is a civilian who is not protected from attack as long as he is taking a direct part in the hostilities. …

…We shall take no stance regarding the question whether it is desirable to recognize this third category. The question before us is not one of desirable law, rather one of existing law. In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category. …However, new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them…. In the spirit of such interpretation, we shall now proceed to the customary international law dealing with the status of civilians who constitute unlawful combatants.

… On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the "revolving door" phenomenon…to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided. In the wide area between those two possibilities, one finds the "gray" cases, about which customary international law has not yet crystallized. …

In that context, the following four things should be said: first, well based information is needed before categorizing a civilian as falling into one of the discussed categories. …

Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be

arrested, interrogated, and tried, those are the means which should be employed …

That question arose in McCann v. United Kingdom, 21 E.H.R.R. 97 (1995), hereinafter *McCann*. ….

Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required. However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities. Of course, given the circumstances of a certain case, that possibility might not exist.

At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used.

Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent….

In appropriate cases it is appropriate to pay compensation as a result of harm caused to an innocent civilian….

Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test. …

As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal.