

## Selected articles on international humanitarian law

# Lessons for human rights and humanitarian law in the war on terror: comparing *Hamdan* and the Israeli *Targeted Killings* case

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### **Abstract**

*The article examines and compares two recent judgments which provide some of the most valuable examples of the difficulties surrounding the application of international humanitarian law to the phenomenon of terrorism: the Hamdan judgment of the Supreme Court of the United States, and the Targeted Killings judgment of the Supreme Court of Israel. Both judgments deal with the thresholds of applicability of the law of armed conflict, as well as with the concept of unlawful combatancy and the relationship between human rights law and humanitarian law. Both judgments are at times inconsistent and lacking in analysis, with the Hamdan judgment in particular misinterpreting the relevant international authorities, including the Commentaries on the Geneva Conventions. Despite these flaws, or because of them, both of these judgments remain instructive. The purpose of this article is to present the lessons for the future that these two decisions might bring to ongoing debates on the impact of global terrorism on the law of armed conflict.*

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Many arguments have been made, both good and bad, regarding the impact on international humanitarian law of the “global war on terror” waged by the present US administration. Yet there always comes a time for these many different arguments to be tested, and at that in a court of law. In that regard, the past year has seen two very important judgments whose rulings can help us to assess the impact of global terrorism on humanitarian law.

First, in June 2006 the Supreme Court of the United States delivered its decision in *Hamdan v. Rumsfeld*.<sup>1</sup> Hamdan, a self-confessed one-time driver and bodyguard of Osama bin Laden, is now in custody at the US detention camp at Guantánamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (who then governed Afghanistan), Hamdan was captured by militia forces and turned over to the US military, and was later transported to Guantánamo Bay. Over a year later, the US president deemed him eligible for trial by military commission for then unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy to commit offences triable by military commission.<sup>2</sup> Hamdan then proceeded to challenge before a US federal court the validity of the military commissions set out to try him. After winning before the district court<sup>3</sup> and losing before the DC Circuit Court of Appeals,<sup>4</sup> Hamdan’s case finally came before the Supreme Court of the United States.

The Court held that the military commissions as set up by the president violate common Article 3 of the four Geneva Conventions of 1949,<sup>5</sup> to which the United States is a party and whose requirements are incorporated into US statutes, since these commissions do not provide to those accused before them the minimal judicial guarantees recognized as indispensable by civilized peoples. A plurality of the Court also held that conspiracy, with which Hamdan could have been lawfully charged, is not an offence against the law of war.

Then, in December 2006, the Israeli Supreme Court rendered its long-awaited decision in the *Targeted Killings* case, in an opinion by its outgoing president, Judge Aharon Barak.<sup>6</sup> In this case the petitioners, two human rights NGOs, challenged the Israeli Army’s use of the policy of targeted killings or assassinations – that is, limited military operations with the purpose of killing a specific person, usually a suspected terrorist.<sup>7</sup> The petitioners claimed that targeted

1 *Hamdan v. Rumsfeld*, US Supreme Court, 548 U.S. \_\_\_\_ (2006); 126 S. Ct. 2749; 2006 U.S. LEXIS 5185 (hereinafter *Hamdan*). All citations in this article will be to the slip opinion of the Court, available at <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf> (last visited 29 January 2007).

2 *Hamdan*, above note 1, Opinion of the Court, at p. 1.

3 344 F. Supp. 2d 152 (DC 2004).

4 415 F. 3d 33 (2005).

5 *Hamdan*, above note 1, Opinion of the Court, at pp. 49–72.

6 *The Public Committee against Torture in Israel et al v. The Government of Israel et al*, Supreme Court of Israel sitting as the High Court of Justice, Judgment, 11 December 2006, HCJ 769/02, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.HTM](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM) (last visited 29 January 2007) (hereinafter *Targeted Killings*).

7 The Israeli armed forces have resorted to targeted killings on several occasions, most notably in the 2004 assassinations of Hamas leaders Ahmed Yassin and Abdul Aziz Rantisi. Targeted killings have also been employed by the United States in the “war on terror”, which launched a missile attack in

killings are always, without exception, a violation of human rights and humanitarian law. The assassinations have also drawn widespread condemnation in the international community, being labelled as “contrary to international law” by the UN Secretary-General Kofi Annan,<sup>8</sup> as “unlawful killings” by the UK Foreign Secretary Jack Straw<sup>9</sup> and as “summary execution[s] that violate human rights” by the late Anna Lindh, then the Foreign Minister of Sweden.<sup>10</sup>

The Israeli Supreme Court disagreed with the absolute position forwarded by the petitioners, finding that targeted killings may indeed be lawful under certain restrictive conditions, which it then proceeded to define, drawing heavily, as we shall see, on human rights law.<sup>11</sup>

These cases from two countries which are among the most concerned with international terrorism today are certainly instructive. Even more so is the comparison between the reasoning of the two high courts. This article will engage in precisely this type of analysis, dealing, in turn, with three specific issues: the thresholds of applicability of international humanitarian law, the concept of unlawful combatancy and the relationship between human rights law and humanitarian law.

### **Hamdan: an armed conflict with al Qaeda?**

As is well known, the US administration has been arguing since 2001 that it is engaged in a “global war on terror”, in which the rules of the law of armed conflict apply, and in which the usual, criminal-law enforcement model of dealing with terrorism plays a much more subdued role. This legal qualification of the ongoing fight against international terrorism as a war or an armed conflict has been vigorously resisted by many legal scholars, especially outside the United States. The International Committee of the Red Cross (ICRC) has, among others, remarked that the “war on terror” is legally no more a war than the “war on

Yemen in 2002 on the organizer of the terrorist bombing of the USS *Cole*, and which recently unsuccessfully attempted in Somalia to kill the mastermind of the 1996 bombings of the US embassies in Kenya and Tanzania. See <http://edition.cnn.com/2007/WORLD/africa/01/11/somalia.ap/index.html> (last visited 29 January 2007).

8 See transcript of remarks of 22 March 2004 at <http://www.un.org/apps/sg/offthecuff.asp?nid=564> (last visited 29 January 2007).

9 Matthew Tempest, “UK condemns “unlawful” Yassin killing”, *Guardian*, 22 March 2004, available at <http://politics.guardian.co.uk/foreignaffairs/story/0,11538,1175312,00.html> (last visited 29 January 2007).

10 Brian Whitaker and Oliver Burkeman, “Killing probes the frontiers of robotics and legality,” *Guardian*, 6 November 2002, available at <http://www.guardian.co.uk/usa/story/0,12271,834311,00.html> (last visited 29 January 2007).

11 For a general overview of the Israeli policy of targeted assassinations, as well as for an exceptionally prescient analysis of the relevant legal questions, see David Kretzmer, “Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?”, *EJIL*, Vol. 16 (2005), p. 171; Orna Ben-Naftali and Keren R. Michaeli, ““We must not make a scarecrow of the law”: a legal analysis of the Israeli policy of targeted killings”, *Cornell International Law Journal*, Vol. 36 (2003), p. 233.

drugs”.<sup>12</sup> One of the reasons for this rejection of the US position was that, historically, war was always considered only to be a conflict between two or more states, not between a state and a non-state actor.<sup>13</sup> It was also a subjective notion, since not even all interstate conflicts *de facto* were considered to be wars *de jure*.<sup>14</sup>

According to the ICRC and numerous authors, the “global war on terror” must be split into its components, such as the ongoing armed conflicts in Iraq and Afghanistan, and only to these specific armed conflicts, and not to the whole, can the laws of armed conflict apply.<sup>15</sup> That armed conflict, and not war, is now the threshold of applicability of humanitarian law, has also been recognized by the US administration, which argued in its legal memoranda<sup>16</sup> and its submissions to the Supreme Court<sup>17</sup> that the United States is engaged in an international armed conflict with the al Qaeda terrorist organization. Since international armed conflicts are defined by Common Article 2 of the four Geneva Conventions only as conflicts between states, the administration resorted to a rather innovative argument, claiming that there are some international armed conflicts which are beyond the material scope of the Geneva Conventions, and which are not regulated by it:

Petitioner suggests that, if the Geneva Convention does not apply to al Qaeda, the law of war does not apply either. That suggestion is baseless. There is no field pre-emption under the Geneva Convention. The Convention seeks to *regulate* the conduct of warfare to which it applies with respect to nation-states that have entered the Convention and agreed to abide by its terms, but it does not purport to apply to every armed conflict that might arise or to crowd out the common law of war. Instead, as explained below, the Convention applies only to those conflicts identified in Articles 2 and 3. If an armed conflict, therefore, does not fall within the Convention, the Convention simply does not regulate it. Nothing in the Convention prohibits a belligerent

12 See Gabor Rona, “Official statement on behalf of the ICRC”, 16 March 2004, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5XCMNJ> (last visited 12 May 2007): “There is no more logic to automatic application of the laws of armed conflict to the “war on terror” than there is to the “war on drugs”, “war on poverty” or “war on cancer”. Thus, blanket criticism of the law of armed conflict for its failure to cover terrorism, per se, is akin to assailing the specialized law of corporations for its failure to address all business disputes.”

13 For example, Oppenheim defines war as “a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases”. Lassa Oppenheim, *International Law* (Hersch Lauterpacht ed., 7th ed., 1952) Vol. II, p. 202.

14 See generally Christopher Greenwood, “The concept of war in modern international law”, ICLQ, Vol. 36 (1987), p. 283; for the opposite view see Yoram Dinstein, *War, Aggression and Self-Defence*, 4th edn, Cambridge University Press, Cambridge, 2005, pp. 14–15.

15 See, e.g., the Official Statement by ICRC President Kellenberger, 14 September 2004, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/66EMA9> (last visited 12 May 2007).

16 Memorandum for the Vice President, signed by President Bush on February 7, 2002. Summaries and texts of all relevant memoranda are available at [http://lawofwar.org/Torture\\_Memos\\_analysis.htm](http://lawofwar.org/Torture_Memos_analysis.htm) (last visited 12 May 2007).

17 See *Hamdan v. Rumsfeld*, Government Brief on the Merits, available at <http://www.hamdanrumsfeld.com/HamdanSGmeritsbrief.pdf> (last visited 12 May 2007), at pp. 23–6.

party from applying the law of war to a conflict to which the Convention does not apply.<sup>18</sup>

The government cites only one authority for this rather remarkable proposition that there are, under customary law, other types of armed conflict than those regulated by the Geneva Conventions: Article 142(3) of the Third Geneva Convention, which contains the Martens Clause. It must be noted that it certainly takes some audacity to cite the Martens Clause, of all things, which embodies the humanitarian spirit of the laws of armed conflict, as support for the thesis that there are armed conflicts which are governed by the law of war but are not regulated by it, and all for the purpose of torturing suspected terrorists for information. It is certainly true that the Martens Clause is frequently invoked when there is no state practice or *opinio juris* to support the existence of a customary rule, but this has always been done for humanitarian purposes. Here we have the first example of the Martens Clause being cited by a government for purposes which are everything but humanitarian.

The US Supreme Court dealt with the government's position that the "war on terror" is an international armed conflict by saying that it

need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by ... detention."<sup>19</sup>

Yet, unfortunately, the Supreme Court does not specify how and why Common Article 3 applies. Does it apply as a matter of customary law, regardless of the legal qualification of the armed conflict between the United States and al Qaeda? This conclusion, which is certainly correct as a matter of law, is suspect because the Court does not once mention the word "custom." Or does it apply as treaty law even if the conflict is regarded as an international one, a reading which would clearly be contrary to the text of Common Article 3? Or is the Court saying that Common Article 3 applies because the conflict between the United States and al Qaeda is legally a non-international armed conflict, and if so, which one? Is the United States fighting al Qaeda in Afghanistan, as an ally of the Afghan government, or is this non-international armed conflict with al Qaeda somehow global in scope?<sup>20</sup>

18 *Ibid.*, p. 26.

19 *Hamdan*, above note 1, Opinion of the Court, p. 67 (citations omitted).

20 This is basically the position taken in Derek Jinks, "September 11 and the law of war", *Yale Journal of International Law*, Vol. 28 (2003), p. 20.

It is impossible to know exactly which of these readings of *Hamdan* was the one that the Court had intended. It is even possible that this ambiguity, which is the judgment's greatest weakness, was actually quite intentional on the Court's part. The reading adopted as a matter of course by many commentators is that the Court has ruled that the United States' "war" with al Qaeda is a global non-international armed conflict.<sup>21</sup> Indeed, this reading has seemingly also been adopted by the US Department of Defence in its memorandum regarding the implementation of *Hamdan*,<sup>22</sup> and most recently by John Bellinger, the Legal Adviser in the Department of State.<sup>23</sup> This is in fact the textually most plausible interpretation of *Hamdan*, as is indicated, for example, by the Court's discussion of Common Article 3, which

affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," i.e., a civil war, the commentaries also make clear "that the scope of the Article must be as wide as possible." In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.<sup>24</sup>

Clearly, this passage would be pointless if the Court was not distinguishing between Common Article 2 and Common Article 3 conflicts precisely in order to rule that there is indeed a Common Article 3, non-international armed conflict

21 See, e.g., the discussion by Marty Lederman at the Georgetown Law Faculty Blog, "Top ten myths about *Hamdan*, Geneva, and interrogations", 5 July 2006, available at [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/top\\_ten\\_myths\\_a\\_1.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/top_ten_myths_a_1.html) (last visited 12 May 2007); George P. Fletcher, "The *Hamdan* case and conspiracy as a war crime", *Journal of International Criminal Justice*, Vol. 4 (2006), pp. 442, 444; Harold Hongju Koh, "Setting the world right", *Yale Law Journal*, Vol. 115 (2006), p. 2350, at pp. 2365–6.

22 Memorandum on the Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense, signed on 7 July 2006 by the Deputy Secretary of Defense, Gordon England, available at <http://balkin.blogspot.com/CA3.DOD.memo.pdf> (last visited 12 May 2007), which states that "[t]he Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda" (emphasis added).

23 "[T]he Administration reads the *Hamdan* decision to accept that the US is in an armed conflict – and therefore that the laws of war are appropriate to apply – but that the armed conflict is not of an international character". Discussion at the *Opinio Juris* weblog, "Armed conflict with al Qaida: a response", 16 January 2007, available at <http://www.opiniojuris.org/posts/1169001063.shtml> (last visited 12 May 2007).

24 *Hamdan*, above note 1, Opinion of the Court, p. 68 (citations and quotations omitted).

between the United States and al Qaeda. Yet this conclusion is contradicted by the Court's discussion in footnote 61 of its opinion, where it says that "the question whether [Hamdan's] potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved".<sup>25</sup> This statement would make sense *only* if Hamdan was still possibly a combatant in an international armed conflict, as prisoner-of-war status exists only in such conflicts.

The judgment is therefore quite remarkable in its conceptual confusion. The Court could simply have said that Common Article 3 applies in all armed conflicts as a matter of customary law and therefore have been able to avoid the difficult question of qualifying the legal nature of any conflict with al Qaeda. This still remains a possible reading of the judgment,<sup>26</sup> however unlikely, as the Court instead seems to have applied Common Article 3 as treaty law to a non-international armed conflict. As that appears to be the case, it is even more remarkable how little support the Court actually invokes for such an ahistorical position. Non-international armed conflicts have always been regarded not just as conflicts between a state and a non-state actor, but as conflicts which are by their scope internal, occurring within a single state, as mandated by the text of Common Article 3 itself.<sup>27</sup>

The Court, on the other hand, has apparently adopted the view that only the former element matters, and has done so in a way which misinterprets the relevant international authorities. So, for example, the Court cites the Pictet Commentary on the 1949 Geneva Conventions<sup>28</sup> for the point that references to civil war were omitted from the text of Common Article 3, and for the proposition that "the scope of the Article must be as wide as possible".<sup>29</sup> Both of these points are indeed correct, but neither of them have the implications that the Court assigns to them.

References to "civil war" were omitted from the text of Common Article 3 not because the drafters had any misgivings about the internal nature of these conflicts, but because the term "civil war" denotes an internal conflict of particularly grave intensity, such as the American Civil War or the Spanish Civil War, while the drafters wanted Common Article 3 to apply to all situations of internal armed conflict which surpass the level of mere disturbances.<sup>30</sup> "Civil war"

25 Ibid., note 61.

26 This option seems to be entertained by John Cerone, "Status of detainees in non-international armed conflict, and their protection in the course of criminal proceedings: the case of *Hamdan v. Rumsfeld*", *ASIL Insight*, 14 July 2006, available at <http://www.asil.org/insights/2006/insights060714.html>, at Part II (last visited 12 May 2007).

27 Which speaks of a "conflict not of an international character occurring in the territory of one of the High Contracting Parties" (emphasis added). See also Lindsay Moir, *The Law of Internal Armed Conflict*, 2002, pp. 1–2.

28 Jean Pictet, ed., *Commentary on the Geneva Conventions of 12 August 1949*, 4 vols., ICRC, Geneva, 1952–9 (hereinafter ICRC Commentary). The full text of the Commentary is available at [www.icrc.org](http://www.icrc.org) (last visited 12 May 2007).

29 *Hamdan*, above note 1, Opinion of the Court, p. 68, quotation provided in full above, at note 24.

30 See, e.g., David A. Elder, "The historical background of Common Article 3 of the Geneva Conventions of 1949", *Case Western Reserve Journal of International Law*, Vol. 11 (1979), p. 37, at pp. 53, 68–9.

would today denote the much stricter conditions of application of Additional Protocol II, with parties to the conflict controlling distinct portions of territory and carrying out sustained and concerted military operations. Moreover, the Commentary does say that the scope of application of Common Article 3 should be as wide as possible, but it is clearly referring to the many situations in which states have refused to acknowledge that the internal strife they are experiencing has reached the level of non-international armed conflict and engaged the protections of Common Article 3,<sup>31</sup> as, for example, France did in respect of the Algerian conflict<sup>32</sup> and the United Kingdom did in respect of the conflict in Northern Ireland, or as Russia continues to do in respect of the conflict in Chechnya.<sup>33</sup> This wide scope of application of Common Article 3 has nothing to do with whether the conflict is or is not internal in scope. In reality, on the exact same page that the Court cites, the Commentary explicitly says that “[s]peaking generally, it must be recognized that the conflicts referred to in [Common] Article 3 are armed conflicts, with “armed forces” on either side engaged in “hostilities” – conflicts, in short, which are in many respects similar to an international war, *but take place within the confines of a single country.*”<sup>34</sup>

At one point the Court even mis-cites and misquotes the Commentary on the Additional Protocols,<sup>35</sup> quoting it as saying that “a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other, and citing it to page 1351 of the Commentary.<sup>36</sup> In fact, the quoted text is located not on the cited page, but on page 1319, and the sentence quoted is not given in full, as the Commentary continues to say that “the parties to the conflict are not sovereign States, *but the government of a single State in conflict with one or more armed factions within its territory*”.<sup>37</sup> The full quote is therefore contrary to the argument that non-international armed conflict can somehow be transnational, and not internal, as are all other ICRC authorities. The citation error in question fully reproduces the exact same error in citation in an *amicus* brief submitted to the Court in *Hamdan*,<sup>38</sup> which indicates beyond any doubt not only that the Court cited the

31 See, e.g., Yves Sandoz, “International humanitarian law in the twenty-first century”, *Yearbook of International Humanitarian Law*, Vol. 6 (2003), pp. 3, 13–15; Robert Kolb, *Ius in bello: Le droit international des conflits armés*, 2003, p. 83.

32 See, e.g., Eldon van Cleef Greenberg, “Law and the conduct of the Algerian Revolution”, *Harvard Journal of International Law*, Vol. 11 (1970), p. 37, esp. pp. 47–52.

33 See William Abresch, “A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya”, *EJIL*, Vol. 16 (2005), p. 741, at p. 754, n. 44.

34 ICRC Commentary on GC III, above note 28, p. 36 (emphasis added).

35 Yves Sandoz et al., eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987.

36 *Hamdan*, above note 1, Opinion of the Court, p. 68.

37 *Commentary on the Additional Protocols*, above note 35, p. 1319, para. 4339, also available at <http://www.icrc.org/ihl.nsf/COM/475-750999?OpenDocument>.

38 *Hamdan v. Rumsfeld*, Brief of Professors Ryan Goodman, Derek Jinks, and Anne-Marie Slaughter as Amicus Curiae Supporting Reversal (Geneva – Applicability), available at <http://hamdanvrumsfeld.com/GoodmanJinksSlaughter-FINALHamdanAmicusBrief-Jan52006.pdf> (last visited 12 May 2007), at p. 19.



commentaries for propositions that they do not support, but that it did so without even bothering to look at them itself.

Now, it is true that international law does recognize certain anomalous types of non-international armed conflicts, particularly those of the “internationalized” variety.<sup>39</sup> It is quite possible to argue *de lege ferenda* that new forms of armed conflict should evolve under customary law, or that international law should adapt in some other way in order to describe better the new realities of the modern world under threat of transnational terrorism.<sup>40</sup> There certainly are difficulties in applying the traditional binary paradigm of international and internal armed conflicts in situations which involve, for example, armed groups which operate simultaneously in two or more states, with hostilities transcending porous state borders. The 2006 Israeli–Hezbollah conflict is but one instance in which the legal qualification of the conflict is problematic. Consequently, there are some indications that the ICRC has, at least in its internal practice, dispensed with the geographical limitation of non-international armed conflict built into Common Article 3, although no official statement or public memorandum exists in that regard.<sup>41</sup>

It is, however, disingenuous to argue that the laws of armed conflict have somehow always recognized that non-international armed conflicts are not synonymous with internal conflicts, and can somehow be transnational in scope, when the opposite is true. This is particularly so when all the Supreme Court in *Hamdan* needed to do in order to avoid these issues was to apply Common Article 3 as customary law applicable in all kinds of armed conflicts, as did the International Court of Justice (ICJ) in the *Nicaragua* case,<sup>42</sup> regardless of the precise legal qualification of the conflict during which Hamdan was captured.

### **Targeted Killings: an abnormal occupation**

The petitioners in *Hamdan* did not argue that the “global war on terror” is not an armed conflict at all, since they actually wanted Common Article 3 to apply in order to provide some minimum humanitarian protection, such as the prohibition on torture and basic fair trial rights. The petitioners in the Israeli *Targeted Killings* case, however, did directly challenge the government’s position that Israel is engaged in an armed conflict with Palestinian terrorist groups, as the direct basis

39 See generally Kolb, above note 31, pp. 85–93; Eric David, *Principes de droit des conflits armés*, 3rd edn, 2002, pp. 137–85; Dietrich Schindler, “The different types of armed conflicts according to the Geneva Conventions and Protocols”, *Recueil des cours*, Vol. 163 (1979-II), p. 124; Hans-Peter Gasser, “Internationalized non-international armed conflicts: case studies of Afghanistan, Kampuchea, and Lebanon”, *American University Law Review*, Vol. 33 (1983), p. 145.

40 See, e.g., Roy S. Schöndorf, “Extra-state armed conflicts: is there a need for a new legal regime”, *New York University Journal of International Law and Politics*, Vol. 37 (2005), p. 1.

41 See Jelena Pejic, “Terrorist acts and groups: a role for international law?” *British Year Book of International Law*, Vol. 75 (2004), p. 71, at p. 86, n. 74.

42 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, paras. 218, 219 (hereinafter *Nicaragua*).

for the targeted killings policy was the qualification of the alleged terrorists as combatants in this conflict, and therefore as legitimate targets.

The Israeli Supreme Court disagreed with the petitioners, saying that “[t]he 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*.”<sup>43</sup> The conclusion that an armed conflict is occurring is not by itself controversial, bearing in mind the intensity of the violence and its protracted character.<sup>44</sup> Yet even more interesting is the qualification that the Court gave to the conflict:

The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its centre 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 (A. CASSESE, *INTERNATIONAL LAW* 420 (2nd ed. 2005), hereinafter CASSESE).

This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *ius in bello*. From the humanitarian perspective, it is part of international humanitarian law. 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.<sup>45</sup>

There are two fundamental problems with the Court’s reasoning.

First, it asserts that a continuous state of armed conflict has existed between Israel and the various terrorist organisations since the first *intifada*. Does this mean that an armed conflict existed even after the signing of the Oslo Accords in 1993, which ended the first *intifada*, and before the beginning of the second

43 *Targeted Killings*, above note 6, para. 16.

44 *Per* the well-known definition of armed conflict in the *Tadić* case: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. ICTY, *Prosecutor v. Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70.

45 *Targeted Killings*, above note 6, para. 18.

*intifada* in September 2000? If so, why? There were some sporadic terrorist attacks during that period, but they could hardly amount to protracted armed violence. The UN Inquiry Commission has expressed doubts even as to the protracted nature of the violence during the second *intifada*, though it (rightly) acknowledged the possibility of a non-international armed conflict taking place.<sup>46</sup> It just seems inconceivable, however, to classify the relatively peaceful inter-*intifada* period as a non-international armed conflict.

This brings us to the second problematic point – the Court finds that the armed conflict in the occupied territories is international in character. At first glance that does not seem to be a troublesome proposition, as international armed conflicts and belligerent occupation go hand in hand. Unfortunately, the issue is rather more complex.

Naturally, a condition of international armed conflict is indispensable for the imposition of a belligerent occupation on a foreign territory.<sup>47</sup> Indeed, Yoram Dinstein has argued that belligerent occupation can exist only insofar as the conflict in which it has been created continues to exist.<sup>48</sup> Such a position has direct bearing on Israel's occupation of the West Bank and Gaza, as Israel has concluded peace treaties with both Jordan and Egypt, thereby ending beyond any doubt the international armed conflicts during which these territories were occupied. The majority view, however, is that Israel continues to be the belligerent occupier of the Palestinian territories, and that it is additionally bound by the Fourth Geneva Convention in its administration of these territories.<sup>49</sup> Both of these questions have now been authoritatively settled by the ICJ in its *Wall* Advisory Opinion.<sup>50</sup>

What makes Israel's occupation of the Palestinian territories so abnormal, though, is not just that the armed conflict in which the occupation was effected has ended, but also that the occupation has lasted for so much time, now approaching 40 years, and that there is no displaced sovereign whose interests are to be considered, since both Jordan and Egypt have renounced any claims to the territories in favour of the Palestinian people's right to self-determination.<sup>51</sup> Both

46 UN Commission on Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Human Rights Inquiry Commission, UN Doc. E/CN.4/2001/121, paras. 39–40, available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=2260](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=2260) (last visited 12 May 2007).

47 It is axiomatic that a state can never occupy its own territory as a belligerent. See, e.g., Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 2nd edn, 2000, p. 257.

48 Yoram Dinstein, "The international law of belligerent occupation and human rights", *Israel Year Book of Human Rights*, Vol. 8 (1978), p. 105. Professor Dinstein apparently still holds this view – see Dinstein, above note 14, p. 169: "Belligerent occupation posits the existence of the enemy as a State and the continuation of the war."

49 The Israeli government has not disputed that it is the belligerent occupier of the Palestinian territories, but it has disputed the applicability of the Fourth Geneva Convention. See, e.g., Dinstein, above note 14, pp. 106–8. See more Eyal Benvenisti, *The International Law of Occupation*, 2nd edn, Princeton University Press, Princeton, 2004, pp. 109–12.

50 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, paras. 90–101 (hereinafter *Wall*).

51 See Benvenisti, above note 49, p. 112.

of these abnormalities have, of course, been noted in the literature.<sup>52</sup> Their relevance to the matter before us is simply in the fact that international law never needed to provide an answer as to what happens when protracted violence and armed hostilities emerge in an occupied territory which are not directly related to the initial armed conflict during which the territory was occupied.<sup>53</sup>

The original armed conflict can be distinguished from any subsequent, new armed conflicts occurring in an occupied territory. The two Palestinian *intifadas* are not legally a part of the international armed conflict in which the Palestinian territories were occupied, namely the 1967 Six Day War, which is now long over. It therefore does not seem at all obvious that the Israeli–Palestinian conflict should be regarded as an international, rather than as a non-international one, just because it is taking place, at least in part, in a territory which is under belligerent occupation. This is especially so since, as already stated, only states have traditionally been regarded as possible parties to an international armed conflict,<sup>54</sup> and Palestine is not a state. What is even more remarkable is that the Court seems to be defining international armed conflict as “one that crosses the borders of the state”,<sup>55</sup> when the single defining characteristic of international armed conflicts has not been their cross-border, but their interstate, nature.

Furthermore, the Israeli Supreme Court has never before qualified this conflict as one which is international in character. In many of its previous cases, most of them cited in the *Targeted Killings* judgment, it has applied the law of belligerent occupation and other rules of humanitarian law, but it has never said whether it considers the ongoing Palestinian–Israeli conflict to be international or non-international.<sup>56</sup> Indeed, the Court’s *dicta* had actually led some commentators to believe that the Court had characterized the ongoing conflict as a non-international one.<sup>57</sup>

The Court does not invoke any of the exceptions recognized under positive law which allow for the “internationalisation” of the conflict – that is, the application of the law of international armed conflicts to an internal conflict. It is not saying, for instance, that the Palestinians are under the overall control of a third state, or that belligerency has been recognized. Nor is the Court saying, quite understandably, that the Palestinians are engaged in a fight of national liberation against the Israeli occupiers, even if one were to consider the rule in Article 1(4) of Protocol I to be reflective of customary law.

The Court’s position therefore appears to be that whenever an armed conflict occurs within an occupied territory that conflict must be classified as

52 See, e.g., Adam Roberts, “Prolonged military occupation: the Israeli-occupied territories since 1967”, *AJIL*, Vol. 84 (1990), p. 44; Benvenisti, above note 49, pp. 144–8.

53 Such a scenario is, for example, not at all contemplated in the ICRC Commentary to the Conventions. ICRC Commentary, above note 28, pp. 18–25.

54 See, e.g., Green, above note 47, pp. 54–5.

55 *Targeted Killings*, above note 6, para. 18, quoted in full at note 45.

56 See, e.g., *Mara’abe v. The Prime Minister of Israel*, Supreme Court of Israel, HCl 7957/04, available at [http://elyon1.court.gov.il/files\\_eng/04/570/079/a14/04079570.a14.htm](http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm) (last visited 12 May 2007).

57 See David Kretzmer, “The Advisory Opinion: the light treatment of international humanitarian law”, *AJIL*, Vol. 99 (2005), p. 88, at p. 95, note 56.

international. The road it took to this position is, however, methodologically a very dubious one. Furthermore, the only authority that the Court cites for this proposition is that of Professor Cassese, who in his textbook on international law does say that “[a]n 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.”<sup>58</sup> One can only marvel at how positively clever the Court was in citing the authority of Professor Cassese, not only because of his indisputable eminence as a legal scholar, but also because of his position in the *Targeted Killings* case as an expert for the petitioners. At a single stroke the Court rejected the petitioners’ argument that no armed conflict was taking place by relying on their own expert, and, by seemingly handing a victory to the government, made it harder for it to complain at any restrictions on its actions it might impose later on, which are, as we shall see, quite substantial.

It is, of course, from a purely humanitarian standpoint desirable for the law of international conflicts to apply, since it provides significantly more protections than the law of internal armed conflicts. Yet it is hard to escape the impression that the Court was somewhat insincere, since the conclusion it has reached is in no way clear or obvious. Citing Professor Cassese does not make it any more so, and citation of an authority is not a substitute for a legal argument. Cassese himself actually does not rely on any other authority, but argues that new armed conflicts in occupied territories should be treated as international ones because (i) internal conflicts are those between a central government and a group of insurgents belonging to the same state, which is not the case with occupied territories; (ii) the protections guaranteed by humanitarian law must be as wide as possible, and the law of international armed conflicts provides for much greater protections; and (iii) since the belligerent occupation is governed by the Fourth Geneva Convention, a part of the law of international armed conflict, it would be contradictory to subject armed hostilities between the occupant state and insurgent groups to the law of internal armed conflict.<sup>59</sup>

Although this is certainly a well-argued, common-sense position, with which the present author agrees as a matter of desirability, it is hard to say that it is in any way established in state practice, as there is indeed very little state practice to go on.<sup>60</sup> The major humanitarian treaties are also of little help, since they relate only to the original armed conflict during which the territory was occupied, but not to a new armed conflict occurring long after the end of the initial one. Likewise, the new armed conflict could be regarded as an internal one, since (i) the occupying power is the only state for decades to exercise exclusive effective control over the territory; (ii) no other state is laying claim to the territory; and (iii) the

58 Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, Oxford, 2005, p. 420, as cited in *Targeted Killings*, above note 6, para. 18.

59 Ibid.

60 Lubell has also argued, albeit briefly, that the Israeli–Palestinian conflict should be classified as international – see Noam Lubell, “The ICJ Advisory Opinion and the separation barrier: a troublesome route”, *Israel Year Book of Human Rights*, Vol. 35 (2005), p. 283, at pp. 296–7, note 68.

insurgents themselves are not purporting to fight on behalf of any other state, nor is their struggle directly related to the initial international armed conflict.<sup>61</sup> It is also not entirely contradictory for both the Fourth Geneva Convention to regulate the belligerent occupation and for a non-international armed conflict to be occurring at the same time, as both the ICJ in *Nicaragua*<sup>62</sup> and the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*<sup>63</sup> recognized that an international and a non-international armed conflict can take place at the same time, running in parallel. There is no logical reason why this rule cannot also apply by analogy during an occupation, and the Court, unlike Professor Cassese, just does not provide any reasoning for the conclusion it has ultimately reached.

### Unlawful combatants

However fascinating the discussion of the thresholds of applicability of humanitarian law, or the lack thereof, in both the *Hamdan* and the *Targeted Killings* judgments, there is also the matter of the application of the substantive rules of humanitarian law by both high courts. Here, again, the parallels between the two cases are very instructive.

The US legal argument regarding the “global war on terror” is a story of three lacunae. The first one, as we have seen, is the alleged gap in the application criteria of the 1949 Geneva Conventions, since the United States was arguing that its conflict with al Qaeda is legally an armed conflict, but that it is neither a Common Article 2 nor a Common Article 3 conflict. The second gap comes in even if it is assumed that the conflict falls within the material scope of application of the Conventions, since the US government has claimed that al Qaeda terrorists are “unlawful enemy combatants”, who are, in this strange new type of international armed conflict, entitled neither to the protection of the Third Geneva Convention, since they do not fulfil the requirements set out by its Article 4, nor under the Fourth Geneva Convention, since they are combatants, not civilians. For its part, Israel has in 2002 rather opportunistically enacted its own law on the imprisonment of unlawful combatants, also claiming that unlawful combatants are not protected under either the Third or the Fourth Geneva Convention.<sup>64</sup> Finally, the US government has not claimed only that humanitarian

61 See also Kretzmer, above note 11, pp. 208–211.

62 *Nicaragua*, above note 42, para. 219.

63 *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, at para. 84.

64 *Incarceration of Unlawful Combatants Law, 5762–2002*, available in English at <http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf> (last visited 12 May 2007). The law has been heavily criticized, although it must be acknowledged that it is much more moderate when compared with the extremely broad powers of detention claimed by the US executive. See also Human Rights Watch, “Israel: Opportunistic Law Condemned”, 7 March 2002, at <http://hrw.org/english/docs/2002/03/07/isrlpa3787.htm> (last visited 12 May 2007); Hilly Moodrick–Even Khen, “Unlawful combatants or unlawful legislation? An analysis of the Imprisonment of Unlawful Combatants Law”, Israel Democracy Institute, Jerusalem, 2005, available at SSRN: <http://ssrn.com/abstract=902934> (last visited 12 May 2007).

law applies but provides no protections to those detained in the “war on terror”. It has also claimed that human rights law does not apply, since (i) it is inapplicable in times of war; and since (ii) human rights treaties do not apply extraterritorially, as in Iraq, Afghanistan or Guantánamo Bay.<sup>65</sup> Both these claims have been rejected by UN treaty bodies.<sup>66</sup>

It is hard to dispute the historical existence of the category of unlawful (unprivileged) combatants or belligerents.<sup>67</sup> That just begs the question, however, of how this historical category fits into the Geneva framework, the most basic issue being the fundamental humanitarian guarantees owed to all participants in a conflict, regardless of their exact legal status. In international armed conflicts the starting point has usually been Article 75 of Protocol I, which has long been regarded as reflective of customary law.<sup>68</sup> Even more importantly in this case, the customary status of Article 75 has been confirmed by at least two Legal Advisers of the US State Department.<sup>69</sup> Yet the current US administration has regrettably cast even this point into doubt, and its present Legal Adviser has stated that the administration is “looking at” whether Article 75 guarantees are applicable in the “war on terror”.<sup>70</sup>

For all its ambiguities, the *Hamdan* judgment is at least clear on one point: that the minimal guarantees of Common Article 3, including the protection of personal dignity and basic fair trial rights, are applicable to all terrorism detainees. The Court was unfortunately unable to reach the same conclusion with respect to Article 75 of Protocol I, with a plurality of four justices finding that some of the provisions of Article 75 are indisputably a part of customary law<sup>71</sup> and thereby informing the Court’s interpretation of Common Article 3, but with

65 See, e.g. the Opening Remarks by John Bellinger, Legal Adviser, US Department of State, before the UN Committee against Torture, May 5, 2006, available at <http://www.us-mission.ch/Press2006/0505BellingerOpenCAT.html> and the Opening Statement of Mathew Waxman, Head of US Delegation before the UN Human Rights Committee, 17 July 2006, available at <http://geneva.usmission.gov/0717Waxman.html> (last visited 12 May 2007).

66 See the Conclusions and Recommendations of the Committee against Torture: United States of America, CAT/C/USA/CO/2, 25 July 2006, paras. 14 and 15 and the Concluding Observations of the Human Rights Committee: United States of America, CCPR/C/USA/CO/3, 15 September 2006, para. 10, available at <http://www.unhcr.ch/tbs/doc.nsf> (last visited 12 May 2007).

67 For the classical treatment of the subject see Richard R. Baxter, “So-called “Unprivileged belligerency”: spies, guerrillas and saboteurs”, *British Year Book of International Law*, Vol. 28 (1951), p. 323. See also Green, above note 47, pp. 102–5, 107–8.

68 See, e.g. Jean-Philippe Lavoyer, “Should international humanitarian law be reaffirmed, clarified or developed?”, *Israel Year Book on Human Rights*, Vol. 34 (2004), p. 35, 42; Fausto Pocar, “Protocol I Additional to the 1949 Geneva Conventions and customary international law”, *Israel Year Book on Human Rights*, Vol. 31 (2001), p. 145; Kolb, above note 31, p. 158; David, above note 39, pp. 483–4.

69 See Michael J. Matheson, “The United States’ position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions”, *American University Journal of International Law & Policy*, Vol. 2 (1987), p. 419; William H. Taft IV, “The law of armed conflict after 9/11: some salient features”, *Yale Journal of International Law*, Vol. 28 (2003), pp. 319, 322.

70 Remarks by John Bellinger, Legal Adviser, US Department of State, at the Royal Institute of International Affairs (Chatham House), London, 9 February 2006. See Anthony Dworkin, “United States is “looking at” the place of fundamental guarantees in the war on terror”, *Crimes of War Project*, 1 March 2006, available at <http://www.crimesofwar.org/onnews/news-guarantees.html> (last visited 12 May 2007).

71 *Hamdan*, above note 1, Opinion of the Court, pp. 70–2.

Justice Kennedy, who provided the swing vote for the judgment as a whole, not joining that part of the opinion of the Court.

In contrast, the Israeli Supreme Court was much more forceful in relation to fundamental humanitarian guarantees. It unequivocally affirms the customary status of Article 75,<sup>72</sup> and adds some substantial rhetorical flourish:

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.<sup>73</sup>

One can only express agreement with such sentiment.

When it comes to the precise legal status of unlawful combatants, the ICRC and numerous authors have asserted that persons not entitled to protection under the Third Convention must consequently be entitled to protection under Articles 4(1) and 5 of the Fourth Geneva Convention.<sup>74</sup> Other authors have just as ably argued that unlawful combatants do indeed slip through the cracks, as it were, between the two conventions, and that they are entitled to protection only under customary humanitarian law.<sup>75</sup>

The US Supreme Court does not address this issue in *Hamdan*, although its judgment is again unclear and contradictory. As already mentioned, it “reserves” the issue of whether *Hamdan* is entitled to prisoner-of-war status, even though it apparently characterizes the underlying conflict as a non-international one.<sup>76</sup> The Court does not seem to realize that the concepts of combatants’ privilege and lawful or unlawful combatancy simply have no place in non-international armed conflicts. In Common Article 3 conflicts nobody has the right to take up arms against the state, and prisoner-of-war status as such does not exist at all, unless stipulated to the contrary by a special agreement between the parties to the conflict.<sup>77</sup>

72 *Targeted Killings*, above note 6, para. 25.

73 *Ibid.*

74 See ICRC Commentary on GC IV, above note 28, at p. 52, which states that “[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.” See also Luisa Vierucci, “Prisoners of war or protected persons *qua* unlawful combatants? The judicial safeguards to which the Guantánamo detainees are entitled”, *Journal of International Criminal Justice*, Vol. 1 (2003), p. 284; Hans-Peter Gasser, “Acts of terror, “terrorism” and international humanitarian law”, *International Review of the Red Cross*, Vol. 84 (847) (2002), p. 547; Knut Dörmann, “The legal situation of “unlawful/unprivileged combatants””, *International Review of the Red Cross*, Vol. 85 (849) (2003), p. 45; Kolb, above note 31, pp. 158–9; Cassese, above note 58, pp. 409–10.

75 See Adam Roberts, “The law of war in the war on terror”, in Wybo P. Heere, ed., *Terrorism and the Military*, 2002, p. 82; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, p. 29; Sean D. Murphy, “Evolving Geneva Convention paradigms in the “war on terrorism”: applying the core rules to the release of persons deemed “unprivileged combatants””, forthcoming, *George Washington Law Review*, Vol. 75 (2007), available at SSRN: <http://ssrn.com/abstract=958380> (last visited 12 May 2007).

76 *Hamdan*, above note 1, Opinion of the Court, note 61.

77 Common Article 3(3).



The Israeli Supreme Court, on the other hand, squarely deals with the issue: it finds that the separate category of unlawful combatants does not exist under positive law, and that in international armed conflicts either the Third or the Fourth Convention must apply. Unlawful combatants are, according to the Court, civilians who are taking a direct part in hostilities, and who are not protected while doing so. In so ruling, the Court has explicitly affirmed in its entirety the customary nature of the rule enshrined in Article 51(3) of Additional Protocol I, which it discussed in great detail.<sup>78</sup>

## Human rights and humanitarian law

But by far the most interesting part of the *Targeted Killings* judgment is the Court's application of international human rights law, and contrasting this decision to *Hamdan* then becomes like comparing night and day. On the one hand, the US Supreme Court's treatment of international human rights law is reduced to a single footnote in a 100-page opinion, with the Court invoking Article 14 of the International Covenant on Civil and Political Rights (ICCPR), just like Article 75 of Protocol I, only in order to elaborate on the more general fair trial provisions of Common Article 3.<sup>79</sup> On the other hand, the Israeli Supreme Court extensively uses human rights law in order to complement the applicable rules of humanitarian law. The Court indeed finds that civilians who are taking a direct part in hostilities may be lawfully targeted, but only if four conditions are met.

1. The state must possess well-based, thoroughly verified information regarding the identity and activity of the civilian who is allegedly taking part in the hostilities; the burden of proof on the state is heavy.<sup>80</sup>
2. 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. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed. In the words of the Court, "Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force."<sup>81</sup>
3. If a civilian is indeed attacked, a thorough and independent investigation must be conducted regarding the precision of the identification of the target and the circumstances of the attack, and in appropriate cases compensation must be paid for harm done to innocent civilians.<sup>82</sup>
4. Finally, combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the

78 The Court extensively analyses both the element of directness and the temporal element in applying Article 51(3). See *Targeted Killings*, above note 6, paras. 33–40.

79 *Hamdan*, above note 1, Opinion of the Court, p. 70, note 66.

80 *Targeted Killings*, above note 6, para. 40.

81 *Ibid.*

82 *Ibid.*

military advantage directly anticipated from harming the combatants and terrorists.<sup>83</sup>

What is so interesting here is that only the last of these conditions – that is, the principle of proportionality – is a rule of international humanitarian law. There is no rule of humanitarian law obliging states not to kill combatants if they can be arrested or detained – as long as the combatant is not *hors de combat*, he can be lawfully killed. There is likewise no rule of humanitarian law mandating an effective investigation into the circumstances of every attack, as such an obligation exists only in respect of possible grave breaches of the Geneva Conventions.<sup>84</sup> The first three conditions set by the Court for the lawfulness of targeted killings are therefore drawn solely from human rights law. The Court indeed cites to that effect three judgments of the European Court of Human Rights, including the well-known *McCann* case.<sup>85</sup>

The most remarkable thing about this judgment is precisely this use of human rights law to further humanize humanitarian law. The relationship between human rights law and humanitarian law is usually thought of in terms of *lex specialis*, per the ICJ's *Nuclear Weapons* Advisory Opinion.<sup>86</sup> To illustrate this relationship the ICJ itself gave the example of the rules of humanitarian law defining what an arbitrary deprivation of life is during an armed conflict, in the context of Article 6 of the ICCPR.<sup>87</sup> This decision of the ICJ has sometimes been interpreted as warranting a strict approach: if a specific provision of humanitarian law contradicts a more general provision of human rights law, the provision of humanitarian law must apply. In other words, it is humanitarian law which has a direct impact on human rights law, not the other way around.<sup>88</sup>

The situation in the *Targeted Killings* case is exactly the opposite, since the state's duties under human rights law are now reducing the freedom of action the state actually enjoys under humanitarian law. This is indeed precisely the type of

83 *Targeted Killings*, above note 6, paras. 40–46.

84 See, e.g., Art. 146(2) of GC IV.

85 *Targeted Killings*, above note 6, para. 40, citing *Ergi v. Turkey*, 32 EHRR 388 (2001), *McCann v. United Kingdom*, 21 EHRR 97 (1995) and *McKerr v. United Kingdom*, 34 EHRR 553 (2001).

86 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para. 25.

87 *Ibid.*

88 See, e.g., Louise Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons", *International Review of the Red Cross*, No. 316 (1997), p. 35: "This is a very significant statement, for it means that humanitarian law is to be used to actually interpret a human rights rule. Conversely, it also means that, at least in the context of the conduct of hostilities, *human rights law cannot be interpreted differently from humanitarian law*. Although this makes complete sense in the context of the arbitrary deprivation of life (a vague formulation in human rights law, whereas humanitarian law is full of purpose-built rules to protect life as far as possible in armed conflict), it is less clear whether this is also appropriate for human rights rules that protect persons in the power of an authority. This is particularly so when it is a human rights treaty body that is applying the text of the treaty. Practice thus far, in particular of the European Commission and Court of Human Rights, seems to show that such bodies apply the human rights text within its own terms" (text around footnotes 50–2, emphasis added). See also William Abresch, "A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya", *EJIL*, Vol. 16 (2005), p. 741, at pp. 743–5.

situation that the ICJ contemplated in its *Wall* Advisory Opinion, where it expanded on its own thinking in *Nuclear Weapons*:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.<sup>89</sup>

What flows both from the ICJ's opinion in the *Wall* case and the *Targeted Killings* judgment is that the relationship between human rights law and humanitarian law cannot be explained by the simple comparison of the general to the special, even if this relationship operates in both directions. For instance, Common Article 3(1)(d) refers, in a very general way, to "judicial guarantees recognized as indispensable by civilized peoples". It is then only natural to look at human rights law, among other sources, in order to provide more specific content to this general formula of humanitarian law. This is actually what was suggested by the experts gathered at the 2003 ICRC Round Table in San Remo<sup>90</sup> and, indeed, this is exactly what the US Supreme Court has done in *Hamdan*, even if it is referring to human rights law in a rather superficial way.

In *Targeted Killings* the Israeli Supreme Court is doing much more than that. It is not using a more specific rule of human rights law to interpret a general rule of humanitarian law. No, the rule of humanitarian law is very clear; states have quite deliberately left themselves the freedom to kill combatants, or civilians engaging in hostilities, and are under no obligation to capture them and put them on trial instead. The Israeli Supreme Court is therefore using a human rights norm not to interpret, but to restrict the application of the humanitarian one.

Anthony Dworkin has rightly criticized the Israeli Supreme Court for not providing more reasoning on the exact mechanics of this interface between human rights and humanitarian law.<sup>91</sup> The Court certainly could have been more explicit, but it is in the end for legal scholars to provide an appropriate theoretical

89 *Wall*, above note 50, para. 106.

90 ICRC, "International humanitarian law and other legal regimes: interplay in situations of violence", XXVIIth Round Table on Current Problems of International Humanitarian Law, held in San Remo, Italy, in September 2003, summary report available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/\\$File/Interplay\\_other\\_regimes\\_Nov\\_2003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/$File/Interplay_other_regimes_Nov_2003.pdf) (last visited 12 May 2007). See especially p. 9: "as human rights law is more precise than IHL [international humanitarian law] in certain domains, the relation of interpretation must also be able to operate in the other direction. For example, Article 3(1)(d) common to the Geneva Conventions explicitly refers to the "judicial guarantees recognized as indispensable by civilized peoples" but without further specifying the meaning of this expression. It was suggested that, in such a hypothesis, apart from the complementary elements contained in Additional Protocol II and in customary law, the interplay between these two bodies of law permits reference to be made to human rights law in order to deduce the substantive guarantees resulting from this general formula."

91 Anthony Dworkin, "Israel's High Court on targeted killing: a model for the war on terror?", *Crimes of War Project*, 15 December 2006, available at <http://www.crimesofwar.org/onnews/news-highcourt.html> (last visited 12 May 2007).

framework.<sup>92</sup> What the Court clearly did focus on as the primary basis for its expansive application of human rights law is Israel's continuing belligerent occupation of the Palestinian territories. For example, the Court says that targeted killings may not be used against terrorists if they can be arrested and tried, since this is "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".<sup>93</sup> This approach of the Court is commendable, and it is entirely consistent with the ICJ's position in the *Wall* case,<sup>94</sup> as further elaborated in *Congo v. Uganda*.<sup>95</sup>

The amount of control over the Palestinian territories and people that Israel has, as their belligerent occupier, gives it a wide variety of options it can use in order to deal with terrorists, and this in turn augments the obligations it has under human rights law. In a "normal" international armed conflict, without the presence of a prolonged occupation, human rights law would presumably not impose such additional obligations, and the state's relative freedom of action under humanitarian law would remain unrestricted.

## Conclusion

At the level of rhetoric and the affirmation of the rule of law the importance of both of the two judgments presented in this article cannot be denied. Both of them clearly stand against the proposition that law has no place in times of war. And, as we have seen, both of them are far from perfect, although not equally so, yet they provide valuable lessons for the future.

This applies foremost to both courts' examination of what qualifies as an armed conflict in international law. The US Supreme Court rightly rejected the US government's position that it is involved in an international armed conflict with the al Qaeda terrorist organization, as international armed conflicts can only be interstate ones. Yet, it did so only to find that this conflict is actually a non-international one, disregarding evidence that non-international armed conflicts have always been regarded as synonymous with internal conflict, and misinterpreting the relevant authorities while doing so. The Israeli Supreme Court, on the other hand, ruled that Israel is indeed involved in an international armed conflict with Palestinian terrorist organizations, in an apparent reflection of the US government's position. Yet it did so only in reference to belligerent occupation, basically holding that the occupation will transform even

92 See, e.g., Orna Ben-Naftali and Yuval Shany, "Living in denial: the application of human rights in the occupied territories", *Israel Law Review*, Vol. 37 (2003), p. 17; Adam Roberts, "Transformative military occupation: applying the laws of war and human rights", *AJIL*, Vol. 100 (2006), p. 580; Kretzmer, above note 11.

93 *Targeted Killings*, above note 6, para. 40.

94 *Wall*, above note 50, paras. 107–113.

95 *Armed Activities in the Territory of the Congo (Congo v. Uganda)*, ICJ, Judgment, 19 December 2005, paras. 216 and 220.

a non-international conflict into an international one. Even if this conclusion is perfectly defensible, the Court was still somewhat disingenuous in making it seem as if this conclusion was obvious, which it is not, and in stating that this was always its position, when it had actually refrained in the past from qualifying the ongoing armed conflict either as an international or as a non-international one.

Both *Hamdan* and, to a somewhat lesser extent, the *Targeted Killings* case, clearly show us the remarkable amount of conceptual confusion brought into the traditional framework of international humanitarian law by the ever-increasing impact of non-state actors which are able to operate across state borders with little restraint. This does not change the fact, however, that we are, as a matter of positive law and for historical reasons, still trapped in a binary conceptual mould of international and internal armed conflict. Whether this is a good thing or bad, and whether states will through their practice create new types of armed conflict, is beyond the scope of this article. Yet, if any change to the existing law is to be made, that change must be made clearly and openly, and it must be supported by adequate analysis and reasoning.

Of course, no matter how academically interesting this debate on the concept of armed conflict is, it also has significant practical consequences. Qualifying the “global war on terror” as a single, global non-international armed conflict, instead of splitting it up into its constitutive components, such as Iraq or Afghanistan, has repercussions on the issue of indefinite detention of those persons whom the US government designates as unlawful combatants in this war, and it also exposes them to potential targeted assassinations. The fact that the US government will not be trying to assassinate suspected terrorists living in London, or at least it says that it will not, does not mean that it is not claiming that it has legal authority to do so.<sup>96</sup> It also, of course, does not mean that it will not try to exercise this supposed authority in places like Yemen or Somalia, as it has indeed done so in the past.

The paradox that therefore emerges from comparing these two decisions is that *Hamdan*, the one which is on its face more favourable to the petitioners, might actually be less so in the long term. The Israeli Supreme Court is clearly superior to its US counterpart in applying humanitarian law to the phenomenon of terrorism, and it is even more so in its application of human rights law. This might actually prove to be the most enduring quality of the *Targeted Killings* judgment: that it shows so clearly how the relationship between human rights law and humanitarian law can be a two-way street, and how that relationship can be far more complex than is usually thought.

96 See, e.g., Charles Garraway, “Armed conflict with al Qaeda: a riposte”, *Opinio Juris* weblog, 15 January 2006, available at <http://www.opiniojuris.org/posts/1168895161.shtml> (last visited 12 May 2007).