

# The Israeli Approach to Detain Terrorist Suspects and International Humanitarian Law: The Decision *Anonymous v. State of Israel*

Henning Lahmann\*

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## 1. Background

In the aftermath of the September 11 attacks on New York and Washington, it was the US Supreme Court that most prominently had to deal with the executive branch’s subsequent policy of detaining non-state actors labeled “unlawful” or “enemy combatants”. However, although it has been unhesitant to interfere in some of the most controversial security measures, among international legal scholars the Court has frequently been criticized for choosing a strategy of avoidance regarding the application of norms of international law, in particular humanitarian law and human rights treaties. At the same time, another high court of a state belonging to the western hemisphere did not show such reservation. Due to the nature and the extreme duration of the conflict in the Middle East, the Supreme Court of Israel has a rather long history of dealing with issues involving terrorism.<sup>1</sup> The policies of the Israeli security authorities especially in the Occupied Palestinian Territories (OPT) have forced the Supreme Court at regular intervals to review

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\* Research Fellow, Walther-Schücking-Institute for International Law, University of Kiel. The author would like to thank Tim Stahlberg, Jonas Dörschner, Felix Macht, Robin Geiß and Lena Hocker for their most valuable comments on earlier drafts.

<sup>1</sup> For an overview of the Court’s jurisdiction see e.g. D. Kretzmer, The Supreme Court of Israel: Judicial Review during Armed Conflict, 47 *GYIL* (2004), 392-456; S. Navot, The Constitutional Law of Israel, *Alpen aan den Rijn* 2007, 242-50; S.J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, 102 *Michigan Law Review* (2004), 1906-58; for an English translation of the most important decisions before 2005 see Israel Ministry of Foreign Affairs (ed.), Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, available at <[http://www.mfa.gov.il/NR/rdonlyres/599F2190-F81C-4389-B978-7A6D4598AD8F/0/terrorism\\_law.pdf](http://www.mfa.gov.il/NR/rdonlyres/599F2190-F81C-4389-B978-7A6D4598AD8F/0/terrorism_law.pdf)>.

the lawfulness of particular measures taken in response to conducts by Palestinian non-state armed actors, *inter alia* due to the judicially recognized possibility of *actio popularis* before the High Court of Justice.<sup>2</sup> The Court's general self-concept in these cases was and remains to be rather interventionist, an approach that was explained by Justice Aharon Barak who presided over the Supreme Court from 1995 to 2006 and who left his mark on the Court's jurisprudence: "Is it proper for judges to review the legality of the war on terrorism? Many, on both extremes of the political spectrum, argue that the courts should not become involved in these matters. On one side, critics argue that judicial review undermines security; on the other side, critics argue that judicial review gives undeserved legitimacy to government actions against terrorism. Both arguments are unacceptable. Judicial review of the legality of the war on terrorism may make this war harder in the short term, but it also fortifies and strengthens the people in the long term. The rule of law is a central element in national security."<sup>3</sup> In accordance with the general interpretative presumption that Israeli law should realize the provisions of international law and ought not to be in conflict with them,<sup>4</sup> the Court has thereby generally not avoided questions of international human rights or humanitarian law. Notwithstanding this seemingly open approach towards international law, the Court's legal practice regarding the OPT under Justice Barak has sparked quite a lot of criticism. As David Kretzmer has observed, "the Court has rationalized virtually all controversial actions of the Israeli authorities, especially those most problematic under principles of international humanitarian law",<sup>5</sup> leaving the "interventionism" at a merely rhetorical level without real consequences for the governmental authorities.<sup>6</sup> At least in the eyes of many commentators,<sup>7</sup> the critical appraisal applies also to Barak's last landmark decision on non-state violence before he went out of office in 2006,<sup>8</sup> the much discussed *Targeted Killings* judgment.<sup>9</sup>

<sup>2</sup> Navot, *supra* note 1, para. 409.

<sup>3</sup> A. Barak, *The Judge in a Democracy*, Princeton 2006, 304.

<sup>4</sup> Navot, *supra* note 1, para. 24; for the legal status of international law in Israeli domestic law in general see, e.g., Y. Zilbershatz, *The Adoption of International Law into Israeli Law: The Real Is Ideal*, 25 *Israel Yearbook on Human Rights* (1995), 243-79.

<sup>5</sup> D. Kretzmer, *The Occupation of Justice. The Supreme Court of Israel and the Occupied Territories*, Albany 2002, 187.

<sup>6</sup> Kretzmer, *supra* note 1, 455.

<sup>7</sup> Cf. e.g. G. Levy, *An Enlightened Occupier*, Haaretz, Dec. 18, 2006: "The cruel reality of the occupation will not change in the wake of these rulings, but now these actions will have the court's seal of approval."

<sup>8</sup> Actually, when the decision was finally delivered in December 2006, Barak was already retired.

<sup>9</sup> *Public Committee Against Torture in Israel et al. v. Government of Israel et al.*, HCJ 769/02 (2006) (hereinafter *Targeted Killings*), available at <[http://elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf)>; for comments on the judgment see, e.g., A. Cassese, *On Some Merits of the Israeli Judgment on Targeted Killings*, 5 *JICJ* (2007), 339-45; W.J. Fenrick, *The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities*, 5 *JICJ* (2007), 332-8; R.S. Schondorf, *The Targeted Killings Judgment*, 5 *JICJ* (2007), 301-9; M. Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings case*, 866 *Int'l Review of the Red Cross* (2007), 373-93.

## 2. The Case: *Anonymous v. State of Israel* (June 11, 2008)

In June 2008, the same day their US colleagues issued *Boumediene v. Bush*, Israel's highest judges were faced with the first important decision dealing with issues of non-state Palestinian violence in the Court's post-Barak era. In some respects, particularly in terms of international humanitarian law and its applicability, *Anonymous v. State of Israel*<sup>10</sup> can be considered a sequel to the *Targeted Killings* judgment. The case came before the Supreme Court as an appeal by two inhabitants of the Gaza Strip who had been placed under administrative detention in 2002 and 2003, respectively, on the legal basis of the Internment of Unlawful Combatants Law which had passed Knesset legislation in March 2002.<sup>11</sup> The two Palestinians were alleged members of the Lebanese Hezbollah organization and had, according to the Israeli military authorities, participated in combat activities against citizens of Israel before they had been detained.<sup>12</sup> Nonetheless, neither of them had been charged with any criminal offences.

The disputed Unlawful Combatants Law, which was ultimately upheld by the Supreme Court in its judgment, had been legislated in the wake of the September 11 terrorist attacks at the culmination of the second *Intifada*. Initially, the bill had been introduced following a desire to obtain an instrument to lawfully hold detainees as bargaining chips for exchange with Israeli soldiers captured during missions in Lebanon or the OPT. Although this aim had been abandoned in the final draft,<sup>13</sup> the law was immediately and decisively rejected by human rights organizations, *inter alia* based on the allegation that it was still intended to permit the detention of enemy fighters as bargaining chips.<sup>14</sup> Hanny Megally, then divisional executive director of Human Rights Watch (HRW), condemned the law strongly as "disregarding basic principles of international law".<sup>15</sup> However, the Unlawful Combatants Law at any rate marked the first attempt of a western democracy in the struggle against the terrorist threat to enact legislation to preventively detain non-state enemy fighters while explicitly trying to meet the requirements set up by international humanitarian law. In spite of its being much less noticed than *Boumediene v. Bush*, that instance makes the decision at hand excep-

<sup>10</sup> *Anonymous v. State of Israel*, Crim. A 6659/06 (2008) (hereinafter *Internment*), available at <[http://www.elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://www.elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf)>; note that this article will only tackle issues of international law, questions regarding Israeli constitutional law will not be addressed.

<sup>11</sup> 5762-2002 (hereinafter Unlawful Combatants Law), available at <<http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf>>.

<sup>12</sup> *Internment*, para. 2.

<sup>13</sup> For a summary of the legislative history see *Internment*, para. 6 et seq.; H. Moordrick-Even Khen, Unlawful Combatants or Unlawful Legislation? An Analysis of the Imprisonment of Unlawful Combatants Law, Israel Democracy Institute, Jerusalem, 2005, available at <<http://www.ssrn.com/abstract=902934>>, 4 et seq.

<sup>14</sup> See e.g. Human Rights Watch, Israel: Opportunistic Law Condemned, 6.3.2002, available at <<http://www.hrw.org/english/docs/2002/03/07/isrlpa3787.htm>>.

<sup>15</sup> *Ibid.*

tionally significant for the evolution of international law regarding the “war on terror”.

### 3. Analysis of the Decision

#### a. Applicability of the Geneva Conventions

As already in the *Targeted Killings* judgment,<sup>16</sup> the judges were confronted with the question of the applicability of international humanitarian law. In its purpose section, the Unlawful Combatants Law itself states:

“This Law is intended to regulate the incarceration of unlawful combatants not entitled to prisoner-of-war status, in a manner conforming with the obligations of the State of Israel under the provisions of international humanitarian law.”<sup>17</sup>

Thus, while stressing the significance of international humanitarian law in general, the text omits the issue of which exact body of law should govern the incarceration of unlawful combatants. However, it follows from the wording that the law is based on the presupposition that at least there exists an armed conflict within the meaning of the Geneva Conventions and its Additional Protocols, “whose customary provisions constitute a part of the law of Israel”,<sup>18</sup> between Israel and the Palestinian non-state armed groups that fight against it.

The Supreme Court was therefore obliged to determine the exact legal character of the situation in the Palestinian territories, more precisely the Gaza Strip. It did so by stating that “the premise in this context is that an international armed conflict prevails between the State of Israel and the terrorist organizations that operate outside Israel”, thereby merely pointing to the Court’s previous *Targeted Killings* decision.<sup>19</sup> Unfortunately, this meagre reference to its own jurisprudence on this matter might not be sufficient to determine the governing legal regime. In fact, it bears serious problems and is ultimately not convincing.

At first, it is not at all obvious that there is an armed conflict occurring in Gaza, apart from periods of intensified hostilities as during the war between Israel and the Hamas from late December 2008 to January 2009. In 1995, the International Criminal Tribunal for the former Yugoslavia (ICTY) held that “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”.<sup>20</sup> Therefore the question is whether there has

<sup>16</sup> *Targeted Killings*, para. 16-21.

<sup>17</sup> Internment of Unlawful Combatants Law, section 1.

<sup>18</sup> *Internment*, para. 9; note that “an express provision of statute enacted by the Knesset overrides the provisions of international law”, *ibid.*; cf. Zilbershatz, *supra* note 4.

<sup>19</sup> *Ibid.*, (emphasis added).

<sup>20</sup> ICTY, *Prosecutor v. Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2.10.1995, para. 70.

been “protracted armed violence” inside the Gaza Strip between organized armed groups and Israeli forces or the use of force of the same quality that crossed the border between the Strip and Israel proper in the last couple of years. As Milanovic has pointed out correctly, the Court’s assertion in *Targeted Killings* that there has been an armed conflict since the first *Intifada*<sup>21</sup> is hardly convincing due to the low intensity of armed force during most of the 1990s.<sup>22</sup> Still, taking into consideration the constant shelling of rockets into Israel by Palestinian fighters, particularly since Israel’s withdrawal from the Gaza Strip in 2005, and the intensity of the Israel Defence Forces’ reactions to end these attacks, it could well be argued that the situation qualifies as an armed conflict, at least insofar as there appears to be no legal framework more adequately suiting these frequent incidents of the use of force than international humanitarian law.

However, assuming that an armed conflict within the meaning of the Geneva Conventions is indeed at hand, the second step the Court has made is even more questionable. The determination of the conflict as international is derived exclusively from *Targeted Killings*, as the reference in paragraph nine of the judgment shows. Thus it seems to be worthwhile to recall the Court’s legal reasoning in that case:

“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 2<sup>nd</sup> 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 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.*<sup>23</sup>

With this approach, the Israeli Supreme Court directly contradicted the one held by their US colleagues regarding the “war on terror”.<sup>24</sup> In the formers’ eyes, the conflict should be governed by the law of international rather than that of non-international armed conflict, in particular common article 3, thus simply equating “international” with “trans-border”.

Antonio Cassese, the Court’s sole authority on this matter, relies principally on the consideration that “since the belligerent occupation is governed by the

<sup>21</sup> *Targeted Killings*, para. 18.

<sup>22</sup> Milanovic, *supra* note 9, 382 et seq.

<sup>23</sup> *Targeted Killings*, para. 18, (emphasis added).

<sup>24</sup> Cf. *Hamdan v. Rumsfeld*, 548 U.S. 67 (2006).

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>25</sup> First of all, even this line of argumentation is not as stringent as it might seem at first glance. Milanovic has observed that there would not necessarily be a logical contradiction if the rules for international and non-international armed conflict were to be applied to the same conflict at the same time.<sup>26</sup> However, more importantly, Cassese's argument is obviously not suited to being expanded beyond situations of belligerent occupation.<sup>27</sup> This is not an issue with regard to the situation in the West Bank, as the International Court of Justice has held that the territory is indeed occupied within the meaning of the Fourth Geneva Convention (GC IV).<sup>28</sup> However, since September 2005, when Israel's unilateral withdrawal was completed, the situation in Gaza is different. In *Internment*, the Israeli Supreme Court itself held that "under such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner, the Gaza Strip should not be regarded as a territory that is subject to a belligerent occupation from the viewpoint of international law".<sup>29</sup> By now, this view has become well-established case law in the Court.<sup>30</sup> Still, the reference to the short passage from Cassese's textbook on international law was explicitly repeated in the present case to underline the Court's premise that an international armed conflict is indeed occurring in Gaza.<sup>31</sup> Quite ironically, the Supreme Court even implied in a hinted *obiter dictum* that the Unlawful Combatants Law would not be applicable to the West Bank, since that territory is still under the effective control of the State of Israel, or in other words, under belligerent occupation within the meaning of GC IV.<sup>32</sup>

<sup>25</sup> A. Cassese, *International Law*, 2<sup>nd</sup> ed., Oxford 2005, 420.

<sup>26</sup> Milanovic, *supra* note 9, 386.

<sup>27</sup> Cf. Schonendorf, *supra* note 9, 303.

<sup>28</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9.7.2004, paras. 90-101; available at <<http://www.icj-cij.org/docket/files/131/1671.pdf>>.

<sup>29</sup> *Internment*, para. 11.

<sup>30</sup> E.g. recently in *Bassiouni v. Prime Minister*, HCJ 9132/07 (30.1.2008), para. 12; for an affirmation of the Court's findings see Y. Shani, *The Law Applicable to Non-Occupied Gaza: A Comment On Bassiouni v. Prime Minister of Israel*, International Law Forum of the Hebrew University of Jerusalem Law Faculty, Research Paper No. 13-09, Jerusalem 2009, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1350307](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350307)>, 6 et seq.; M. Milanovic, *Is Gaza Still Occupied by Israel?*, EJIL Analysis, available at <<http://www.ejiltalk.org/is-gaza-still-occupied-by-israel/>>; this view is however not undisputed: see e.g. R. Nasri, *Article 51: Israel's False Claim*, Open Democracy (17.2.2009), available at <<http://www.opendemocracy.net/article/email/article-51-israels-false-claim>>; Nasri argues that Gaza remains occupied, thereby *inter alia* invoking SC Res. 1860 (8.1.2009), in which the UN Security Council stated that "the Gaza Strip constitutes an integral part of the territory occupied in 1967". To say the least, it seems not entirely compelling to suggest that with this declaration the SC attempted to determine Gaza's current legal status under international humanitarian law.

<sup>31</sup> *Internment*, para. 9.

<sup>32</sup> *Ibid.*, para. 11.

Summed up, the Supreme Court's position regarding Gaza is not what *Cassese's* consideration is able to support. Therefore, the reference made does not lead anywhere in the present case. This conclusion could only change if one adopted the view that Gaza is still under belligerent occupation. However, this does not appear viable for the Supreme Court as it would have to rule in explicit contradiction to its own case law.

Moreover, before *Targeted Killings*, the Court had routinely refused to determine the exact legal quality of the hostilities in the Palestinian Territories.<sup>33</sup> Thus, regarding its own case law, there is in fact no *ratio decidendi* to rely on. In contrast, a careful legal examination would have been indicated here. So far, the US Supreme Court's close analysis of the text of article 3 common to the Geneva Conventions seems to be more in line with the wording and arguably the intention of the Geneva Conventions.<sup>34</sup> And indeed, it has been commonly accepted that the capability to be party to an international armed conflict is limited to states, and until today there is no divergent state practice identifiable.<sup>35</sup>

Schondorf has noted in his comment on *Targeted Killings*, after likewise criticizing the Court for the lack of reasoning concerning the applicability of the norms ruling armed conflicts of an international character, that "in future cases, the Israeli Supreme Court will hopefully have an opportunity to further clarify how its position on this point relates to the basic treaties of the laws of armed conflict".<sup>36</sup> That opportunity lay in *Internment*, but regrettably the Court again avoided giving a legally sound justification for its opinion on this crucial issue.

## b. Compliance with the Rules of the Geneva Conventions

Howsoever, for the purpose of appraising the operational part of the Unlawful Combatants Law from the perspective of international humanitarian law, the applicability of the Geneva Conventions shall be assumed in the following remarks.

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<sup>33</sup> Kretzmer, *supra* note 1, 453.

<sup>34</sup> Cf. Hamdan, *supra* note 24.

<sup>35</sup> In this regard, the 2006 Lebanon war represents no exception. The qualification of that conflict as international was based on the fact that Israel used military means on the territory of another state, although the enemy was not that state itself but a non-state group operating on and from its territory, cf. A. Zimmermann, The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality, 11 Max Planck UNYB (2007), 99-141, 126 et seq., see under <[www.mpil.de/red/yearbook](http://www.mpil.de/red/yearbook)>; as Palestine is not a state, let alone the Gaza Strip, the above legal construction cannot be applied to the situation at hand.

<sup>36</sup> Schondorf, *supra* note 9, 304.

### (1) The Status of “Unlawful Combatants” under International Humanitarian Law

In its second paragraph, the Law gives a statutory definition of “unlawful combatant”. It stipulates the term comprising every “person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in article 4 of the Third Geneva Convention of 12<sup>th</sup> August 1949 with respect to prisoners-of-war status in international humanitarian law, do not apply to him”.

As regards the US approach on this matter, quite remarkably at least the lower courts’ attitude by now seems to bear some distinct resemblance to the mentioned definition. On 27 October 2008, US District Judge Leon declared the following in the Guantanamo detainees’ *habeas corpus* challenges led by *Boumediene v. Bush*: “An ‘enemy combatant’ is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”<sup>37</sup>

As the wording in section 2 of the Unlawful Combatants Law puts straight, the covered persons are explicitly excluded from being treated as prisoners-of-war within the meaning of GC III, while still rendering their preventive detention possible by virtue of the subsequent provisions of the Law. It is this construction that provoked the severest criticism among human rights groups and affiliated legal scholars after the Law’s enactment in 2002.<sup>38</sup> That criticism was principally based on the allegation that just as their US counterpart, the Israeli legislature with this definition aimed at establishing a “third category” in international humanitarian law, thus granting the enemy fighters neither the protections of the Third nor of the Fourth Geneva Convention by creating an uncovered intermediate status.

But whatever the original intention of the legislator might have been in that regard, the Supreme Court did not hesitate to clarify that “the term ‘unlawful combatant’ does not constitute a separate category but is a sub-category of ‘civilians’ recognized by international law. This conclusion is based on the approach of customary international law, according to which the category of ‘civilians’ includes everyone who is not a ‘combatant’.”<sup>39</sup> Thus, contrary to HRW’s accusation, the Unlawful Combatants Law does not dissolve the traditional dichotomy of interna-

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<sup>37</sup> *Boumediene v. Bush*, US District Court for the District of Columbia, No. 04-1166 (RJL), Memorandum Order (27 October 2008), 3 et seq.; available at <<http://www.scotusblog.com/wp/wp-content/uploads/2008/10/boumediene-order-10-27-08.pdf>>.

<sup>38</sup> HRW, *supra* note 14; Moodrick - Even Khen, *supra* note 13, 10 et seq.

<sup>39</sup> *Internment*, para. 12.

tional humanitarian law.<sup>40</sup> By that finding, the Court explicitly endorsed its conclusion in *Targeted Killings*.<sup>41</sup>

It has to be noted though that the Court itself emphasized that “*prima facie* the statutory definition of ‘unlawful combatant’ under section 2 of the law applies to a broader group of people” than in *Targeted Killings*.<sup>42</sup> This is consistent as due to the lack of explicit mentioning of the term in the Geneva Conventions, there need not be one determined category. Rather, according to the circumstances, the “unlawful combatant” has to be subsumed under the respective provisions of the treaties that deal with civilians who illegally join the combat against the State. In *Targeted Killings*, that provision was article 51 (3) of the First Protocol Additional to the Geneva Conventions.<sup>43</sup> In the case at hand, as the detained persons constitute civilians within the meaning of article 4 of the Fourth Geneva Convention, that treaty is pertinent. Thus, it is obvious that the two groups of persons, though both equally described as “unlawful combatants”, will not necessarily be congruent.<sup>44</sup>

## (2) The Scope of the Relevant Provisions of the Fourth Geneva Convention

The Supreme Court identified the relevant provisions as being articles 27, 41 to 43, and 78 GC IV.<sup>45</sup> The mentioning of the latter article merely served the object of showing that the Fourth Geneva Convention in general permits the detention of protected persons for security needs of the detaining power, as the clause itself deals with situations of belligerent occupation and is therefore not applicable to the situation in Gaza.<sup>46</sup> Article 27 (4) states that “the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war”, while articles 41 to 43 go on to specify those possible measures. Article 42 (1) reads: “The internment (...) of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”

But although that provision initially seems to be a perfect match to the purpose of the Unlawful Combatants Law due to its unambiguous wording, the appellants claimed that it is not applicable to the situation in question. Their point was that since they had been taken into detention inside Gaza before Israel’s disengage-

<sup>40</sup> See also ICTY, *Prosecutor v. Zdravko Mucic et al.*, Trial Judgment, ICTY-96-21 (16.11.1998) (hereinafter *Mucic*), para. 271: “There is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV.”

<sup>41</sup> *Targeted Killings*, para. 26.

<sup>42</sup> *Internment*, para. 12.

<sup>43</sup> *Targeted Killings*, paras. 33-40.

<sup>44</sup> *Internment*, para. 12.

<sup>45</sup> *Ibid.*, para. 16.

<sup>46</sup> *Ibid.*

ment, thus at a time when the Strip was still occupied territory, article 42 could not serve as the ground for detention.<sup>47</sup> The Court refuted this argument by stating that by virtue of the general rule of article 27 (4),

“The parties to a dispute may adopt security measures against protected civilians in so far as this is required as a result of the war. The principle underlying all the detention provisions provided in the Fourth Geneva Convention is that it is possible to detain ‘civilians’ for security reasons in accordance with the extent of the threat that they represent. According to the aforesaid convention, there is a power of detention for security reasons, whether we are concerned with the inhabitants of an occupied territory or one of the states involved in the dispute.”<sup>48</sup>

But nonetheless, as an analysis of the treaty’s system reveals, it is arguable whether the Court’s assertion is entirely convincing. Apart from the broad and rather vague wording of article 27 (4), articles 41 to 43 are part of Part III, Section II of the convention, which deals with “aliens in the territory of a party to the conflict”. It is therefore concluded that apart from situations of belligerent occupation, which is covered by article 78, the convention authorizes belligerents to intern a civilian by virtue of article 42 only if he is an (enemy) foreigner on the belligerent’s own territory.<sup>49</sup> This fact can be explained with the history and the original intention behind the rule. Pictet remarks that the section attempts to cover “the legal status of civilians of enemy nationality living in the territory of belligerent States”, as due to “the general adoption of a system of compulsory military service, (...) nowadays every enemy national is a potential soldier” and thus “his internment becomes understandable”.<sup>50</sup> On that account, the provisions in Section II merely serve to “give protected persons a legal status in the form of a comprehensive series of safeguards set out in detail”.<sup>51</sup> However, while clarifying that the Unlawful Combatants Law indeed only applies to persons who are not Israeli citizens,<sup>52</sup> the Supreme Court considered article 42 applicable although Gaza is apparently beyond the norm’s territorial scope, since the Strip is not Israeli territory – a fact that is not in dispute. As regards the original purpose, to date there seems to be no contradicting subsequent state practice in the sense of article 31 (3) (b) VCLT that could have altered the rule’s scope. Thus, the permission of administrative detention of Gaza inhabitants can hardly be subsumed under article 42 GC IV, as the above analysis shows.

On the other hand, barring the wording of the heading of Section II, it could perhaps be argued that nothing in the subsequent text explicitly proscribes the Court’s reading. Moreover, protected persons can be lawfully detained on the

<sup>47</sup> *Internment*, para. 17.

<sup>48</sup> *Ibid.*

<sup>49</sup> M. Sassoli, *Internment*, in R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford 2008, online edition <www.mpepil.com>, para. 8.

<sup>50</sup> J.S. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva 1958, Section II: Introduction, 232.

<sup>51</sup> *Ibid.*, 233.

<sup>52</sup> *Internment*, para. 11.

state's own territory in accordance with article 42 GC IV and on territory that is subject to belligerent occupation pursuant to article 78 GC IV due to imperative security reasons. Traditionally, these were the only two scenarios where it was considered possible that a belligerent power might encounter civilians of an enemy nationality.<sup>53</sup> That assumed, one might conclude *a fortiori* that a broad interpretation of the territorial scope of the general rule in article 27 (4) is indeed expedient if further situations of likewise quality occur. After all, that provision expressly covers the status of protected persons "in all circumstances". On that basis, the Supreme Court's construction could be considered supportable. But again, at least a more thorough analysis of the relevant provisions of international humanitarian law by the Court would have been indicated.

### (3) Detention Due to a Threat Posed by an Individual

Subsequently, the Court went on to examine whether the respective provisions of the Unlawful Combatants Law meet the requirements of article 42 GC IV. First of all, the most striking aspect of section 2 of the Law is its twofold definition of "unlawful combatant". According to this definition, someone is subject to administrative detention under the law if he either participated in hostile acts against Israel, or if he is a member of a group that conducts such acts. It is obvious that it is in particular the second alternative that distinguishes the affected group from the one in *Targeted Killings*. Needless to say, the Law has to be in accordance with the relevant provisions of the Fourth Geneva Convention relative to both alternatives. In addition to the statutory definition, section 3 (a) of the Law reads: "Where the Chief of General Staff has reasonable cause to believe that a person being held by the State authorities is an unlawful combatant and that his release will harm State security, he may issue an order under his hand, directing that such person be incarcerated at a place to be determined (...)."

As article 42 GC IV states that "the internment of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary", the question therefore was what exact level of threat is required to emanate from a person for his detention to be justified. First of all, the Court stated that the threat needs to be situated in the detainee himself.<sup>54</sup> To support this finding, it affirmatively cited *Pictet* who emphasizes in his commentary that "to justify recourse to such measures, the state must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security".<sup>55</sup> Moreover, the Court derived from this assertion that the state itself is liable to prove "that the detainee himself took part or belonged to a force

<sup>53</sup> This can be derived from the wording of the headings of Part III ("Status and Treatment of Protected Persons") and Its Section I ("Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories").

<sup>54</sup> *Internment*, para. 19.

<sup>55</sup> *Ibid.*, citing *Pictet*, *supra* note 50, 258-9.

that is carrying out hostilities against the State of Israel”.<sup>56</sup> And finally, it was followed that “it is not sufficient for [the detainee] to have made a remote, negligible or marginal contribution to the hostilities (...). In order to prove that someone is an ‘unlawful combatant’, the state needs to prove that the detainee made a contribution to the waging of hostilities against the state, whether directly or indirectly, in a manner that can indicate his individual threat”.<sup>57</sup> The Judges hence implied that a certain threshold has to be exceeded in order to be lawfully considered an “unlawful combatant”. This stipulation of minimum requirements to specify the Law is in line with article 42 GC IV. As Pictet emphasizes, measures of internment and assigned residence are the severest measures of control that a belligerent may apply to protected persons and are therefore of an exceptional character.<sup>58</sup> But it is fair to conclude that if the authorities are willing to adopt these requirements when it comes to detain terrorist suspects, these measures thus are generally in compliance with article 42 GC IV regarding the first alternative of the definition of “unlawful combatant”.

#### (4) Detention on Grounds of Mere Membership?

However, this assessment is not as unequivocal concerning the so-called “membership criterion” of the second alternative. The appellants claimed that “relying upon a vague ‘membership’ in an organization that carries out hostilities against the State of Israel as a basis for administrative detention under the law makes the requirement of proving an individual threat meaningless, which is contrary to (...) international humanitarian law”, while the state’s agents argued that “it is sufficient to prove that a person is a member of a terrorist organization in order to prove his individual threat to the security of the state in such a manner that gives rise to a ground for detention under the law”.<sup>59</sup>

Quite obviously, the extent of the notion of “unlawful combatant” to mere membership intends an analogy to regular combatants. The Third Geneva Convention that deals with prisoners-of-war is based on the consideration that members of the regular armed forces are a threat for the enemy’s security merely by virtue of their function. Thus, detaining combatants is permitted at all times during the state of armed conflict to hinder their further direct participation in hostilities.<sup>60</sup> The same consideration underlies the second alternative in the definition given in section 2 of the Unlawful Combatants Law. According to that, membership in an organization that conducts hostile acts against Israel equals the function soldiers have in state armies. However, it is doubtful whether this analogy is utterly convincing. It is particularly controversial whether the criterion allows the

<sup>56</sup> Ibid., para. 20.

<sup>57</sup> Ibid., para. 21.

<sup>58</sup> Pictet, *supra* note 50, 258-9.

<sup>59</sup> *Internment*, para. 20.

<sup>60</sup> Sassoli, *supra* note 49, para. 4.

deduction of an individual threat posed by a particular member, as required by article 42 GC IV in compliance with the above analysis. The main problem appears to be that non-state organizations cannot easily be compared to regular armed forces. Especially Israel's main antagonist actors such as Hamas and Hezbollah pursue a threefold set of activities, operating as political and social organizations in addition to their armed combat. It follows that hardly every member of such an entity can be subsumed under the wording of article 42 GC IV, if detention is only permitted as a measure of last resort under international humanitarian law, as established above.

The Supreme Court therefore was obliged to discuss the issue in detail. It concluded that it would be insufficient for the state to show "any tenuous connection with a terrorist organization".<sup>61</sup> Still, it shall not be necessary for the detained person to have taken part in the hostilities against Israel themselves. Rather, "it is possible that [the person's] connection and contribution to the organization will be expressed in other ways that are sufficient to include him in the cycle of hostilities in its broad sense".<sup>62</sup> At least at first glance this seems to suggest that also members of the organizations' non-military wing might be subject to administrative detention under the Unlawful Combatants Law. Unfortunately, the Court left open the exact meaning of "the cycle of hostilities in the broad meaning of this concept", and at this point of the judgment degenerated to a somewhat blurry reasoning. Although apparently constraining the scope of the second limb of the definition of "unlawful combatant" by stating that in cases of mere membership, the Court "should consider the detainee's connection and the nature of his contribution to the cycle of hostilities of the organization",<sup>63</sup> the notion remains ultimately obscure. Nonetheless, as seen above, Pictet has argued that the measure of detention is of an ultimate and exceptional character within the system of the Fourth Geneva Convention. And as a general rule, exceptions ought to be interpreted narrowly. Thus, regarding the Court's explication, it seems safe to say that the "membership criterion" goes beyond what article 42 GC IV was meant to cover.<sup>64</sup>

### (5) Judicial Safeguards

Finally, the Supreme Court was obliged to review the judicial safeguards provided by the Unlawful Combatants Law in view of the requirements set out by the Fourth Geneva Convention. The pertinent article 43 (1) GC IV stipulates that "any

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<sup>61</sup> *Internment*, para. 21.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> In this context, it is worth noting that in the civil case *Boumediene v. Bush* before the District Court, cf. *supra* note 37, the petitioners advocated the argument that for administrative detention in the war on terror, the prerequisite should be direct participation in hostilities within the meaning of article 51 (3) of the First Additional Protocol, thereby apparently bearing in mind the Israeli Supreme Court's decision in *Targeted Killings*. However, Judge L e o n rejected this claim as being too narrow for the purpose of preventive internment.

protected person who has been interned (...) shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment (...) is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favorable amendment of the initial decision, if circumstances permit.” Considering the wording, it seems as if the Knesset attempted to compose an exact replication in the Unlawful Combatants Law. Section 5 (a) at first provides that “a prisoner shall be brought before a judge of the District Court no later than fourteen days after the date of granting the incarceration order”. The petitioners in *Internment* argued that this period of time excessively violates the detainee’s rights and is not in accordance with the norms applicable in international law.<sup>65</sup> The Supreme Court refuted this reasoning by stating that “international law does not stipulate the number of days during which it is permitted to detain a person without judicial involvement, but it determines a general principle that can be applied in accordance with the circumstances of each case on its merits”.<sup>66</sup> And indeed, as long as the applicability of the rules of international humanitarian law is assumed, this finding is quite uncontroversial. Article 43 was designed to leave a great deal to the discretion of the state regarding the concrete procedure.<sup>67</sup> Of course, the regime of international human rights would be more restrictive on that matter.

In addition to the period of time that may pass until a detention is reconsidered by a judge, the petitioners objected to the frequency of judicial review.<sup>68</sup> According to section 5 (c) of the Unlawful Combatants Law, “once every six months from the date of issue of an order (...) the prisoner shall be brought before a judge of the District Court”. The petitioners claimed that this period of time is too long and thus disproportionate. But apart from academic voices who argue that “the six-monthly review requirement is outdated and must be replaced by the much shorter delays that have developed in international human rights law”,<sup>69</sup> here again the Law is in line with the clear wording of the Fourth Geneva Convention, as article 43 (1) provides that a reconsideration of the detainee’s case ought to be undertaken “at least twice a year”.<sup>70</sup> Consequently, the Supreme Court rejected the petitioners’ claim right away.

Furthermore, the Court did not forget to stress that “whereas section 43 GC IV is satisfied with the holding of an administrative review that is carried out by an administrative body, [the Law] provides that a District Court judge is the person who should carry out a judicial review of the detention orders (...), and his deci-

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<sup>65</sup> *Internment*, para 40.

<sup>66</sup> *Ibid.*, para. 41.

<sup>67</sup> Pictet, *supra* note 50, 260.

<sup>68</sup> *Internment*, para. 40.

<sup>69</sup> Sassoli, *supra* note 49, para. 10.

<sup>70</sup> *Internment*, para. 42.

sion may be appealed to the Supreme Court (...).<sup>71</sup> And indeed, compared to the US approach towards this issue, which had merely established so-called “Administrative Review Boards” in Guantanamo on 11 May 2004 to periodically reconsider the threat emanating from the detainees,<sup>72</sup> the arrangement made in the Israeli law appears to be much more favorable to the rights of the individual.<sup>73</sup>

As for the judicial safeguards that article 43 (1) GC IV provides, the ICTY has concluded that in order to be actually of any value at all, the court or administrative board ought to be authorized to order the release of the detainees if their harmlessness has been determined.<sup>74</sup> Section 5 (c) of the Unlawful Combatants Law explicitly states that “where the Court finds that [the prisoner’s] release will not harm State security or that there are special grounds justifying his release, it shall quash the incarceration order”.

Thus, all in all, the part of the Unlawful Combatants Law regarding judicial review of the internment order and the subsequent detention marks a mostly uncontroversial part of the bill and hence of the Supreme Court’s judgment. However, one has to bear in mind that this conclusion still depends on the questionable assumption that the Fourth Geneva Convention is at all applicable in the situation at hand.

#### 4. Assessment

To conclude, the Israeli Supreme Court has resolutely reconfirmed its approach from the *Targeted Killings* judgment that no person shall find himself in a position outside the laws that protect the individual during armed conflict, even if the state is in a constant state of emergency. Nonetheless, as the above analysis has shown quite clearly, the decision of the Court in *Internment* has its flaws when it comes to the application of international humanitarian law. Concerning this, the Court

<sup>71</sup> Ibid.

<sup>72</sup> Set up by an order of the US Department of Defense; for a critical assessment of the procedure see Human Rights Watch, Making Sense of the Guantanamo Bay Tribunals, 16.8.2004, available at <<http://www.hrw.org/english/docs/2004/08/16/usdom9235.htm>>; HRW *inter alia* criticized the fact that the order provided for only an annual review.

<sup>73</sup> Sassoli, *supra* note 49, para. 10, hints that access to *habeas corpus* should be mandatory even under international humanitarian law, as it is a non-derogable right under international human rights law; for the latter conclusion cf. Inter-American Court of Human Rights, Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations (30.1.1987).

<sup>74</sup> *Mucic*, para. 1137; also cf. US Supreme Court, *Boumediene v. Bush*, 553 U.S. 50 (2008): “We do consider it uncontroversial (...) that (...) the habeas court must have the power to order the conditional release of an individual unlawfully detained.” However, it is noteworthy that on 18.2.2009, the US D.C. Circuit Court of Appeals decided in *Kiyemba v. Obama*, No. 08-5424, that the federal courts do not have the power to order the release of Guantanamo detainees into the United States, even if no other remedy is at hand. Though expressly not disputing the finding in *Boumediene*, Judge Randolph declared the question of where detainees may be released as being political and not judicial, thereby bluntly stating: “Not every violation of a right yields a remedy, even when the right is constitutional” (p. 9).

has missed the obvious opportunity to clarify the position it held in *Targeted Killings*, since already the reasoning given there was thoroughly criticized in the academic sphere.

But apart from that, the judgment is not entirely persuasive regarding the individual provisions of the applied Fourth Geneva Convention, either. In particular the upheld possibility of preventive detention on grounds of mere membership in a non-state hostile organization arguably overstretchers the limits of possible interpretation of article 42 GC IV. The Judges should have had the heart to be more restrictive on this point, as their argumentation clearly shows some discomfort with the Law's potentials. However, in this context it is worth noting that many western states have by now adopted laws that actually make membership in foreign terrorist organizations subject to criminal prosecution, even before any hostile act has been conducted.<sup>75</sup> Arguably, penalizing membership can be considered an even severer intervention into a person's basic rights, as the administrative detention does not include any allegation of wrongdoing and thus constitutes no punishment.<sup>76</sup> Still, without doubt the perspective of potentially indefinite detention is one of the gravest possible restrictions of the individual's right to liberty.<sup>77</sup>

Nevertheless, despite this apparent misconception of the scope of article 42 GC IV, the general approach of the Israeli legislator to keep the issue of combating terrorism on a preventive level appears defensible. The (Continental) European method of re-designing criminal codes to comprise abstract terrorist threats and make them indictable offences indeed interferes with the original repressive purpose of criminal law. As a result, it has sparked heavy criticism among legal scholars.<sup>78</sup>

Although the two situations are actually hardly comparable, Israel, along with the United States, is the main proponent in the western hemisphere to consider the struggle against contemporary terrorism a new kind of armed conflict; and consequently makes an effort to squeeze the issue into the framework of international humanitarian law. But in distinction from their North American ally, no attempt

<sup>75</sup> Cf. e.g. section 129 b of the German Criminal Code.

<sup>76</sup> However, in view of the preventive detention that is carried out by the United States in Guantanamo Bay, this conclusion is not undisputed. C. Maierhöfer, Die Guantanamo-Rechtsprechung des U.S. Supreme Court zum Anspruch "feindlicher Kämpfer" auf richterliche Haftprüfung, EuGRZ 2008, 449-52, 451, argues that the circumstances of the detention indeed indicate such an allegation. This admitted regarding the language used by the former US administration, at least the same cannot be said about the Israeli situation, as already the legislative history of the Unlawful Combatants Law shows.

<sup>77</sup> Nevertheless, the European Court of Human Rights has held recently that indefinite detention does not amount to inhuman or degrading treatment within the meaning of Article 3 ECHR, as long as detainees have access to remedies to challenge it; see ECtHR, *A and others v. United Kingdom*, App. No. 3455/05, para. 131.

<sup>78</sup> The *travaux préparatoires* of section 129 b of the German Criminal Code, BT-Drs. 14/8893, 1, explicitly invoke "the effective fight against international terrorism" as the main goal of the new provision; nevertheless, despite some discomfort, it was upheld as being constitutional, cf. Higher Regional Court of Munich, Criminal Chamber, Court Order, 6 St 01/07 (8.5.2007).

has ever been made, either by the Knesset or the Israeli judicial branch, to construct any “legal black holes”.<sup>79</sup> Still, David Kretzmer has argued that “the way the [Supreme] Court has interpreted the Geneva Convention shows that it has consistently favored the government’s interpretation, even when this has forced it to change its theory of interpretation from one case to the next”.<sup>80</sup> However, since *Targeted Killings* it is at least clarified that the Court regards the armed conflict as an international one. Despite the obvious problems inherent in this approach, the Court deserves some approval, as without question the laws of international armed conflict provide for a larger degree of protection than those of non-international armed conflict.<sup>81</sup> Thus, it is fair to admit that Israeli authorities are willing to grant their enemies considerably more privileges when it comes to judicial safeguards than their US counterparts, although their country is by far more severely threatened by terrorism.

After all, with the interpretation given by the Supreme Court, the lower Israeli courts do have all the necessary means to check decisions of the authorities regarding detention of enemy fighters under the Unlawful Combatants Law. Needless to say, another question is whether the courts are actually willing to use their judicial independence vis-à-vis the administrative and military authorities during a state of emergency.<sup>82</sup> But at any rate, contrary to the accusations brought forward by certain human rights groups, the Law together with the clarifications delivered by the Court mark an honest attempt to frame the struggle against 21<sup>st</sup> century terrorism in a legally balanced way.

Ultimately, from a merely theoretical perspective, it appears paradoxical to enact legislation that is expressly based on the premise that a state of armed conflict prevails, without letting the law’s applicability depend on the precondition of the respective factual situation. As a consequence, allowing the Unlawful Combatants Law to be permanently appropriate for the detention of terrorism suspects hence establishes the legal necessity to perpetuate the hostilities with the enemy groups. But admittedly, this is a theoretical reflection.

However, in light of the twists the Israeli Supreme Court had to take to determine the positive international humanitarian law applicable to the situation at hand, after all it seems hard to escape the sneaking suspicion that this body of law simply might not offer the adequate legal architecture for the “war on terror”. Thus, it appears more convincing that in regard to the preventive detention of ter-

<sup>79</sup> Cf. Schulhofer, *supra* note 1, 1918-31; see also Kretzmer, *supra* note 1, 439 et seq., regarding the controversial case *Marab v. IDF Commander*, HCJ 3239/02 (5.2.2003): “The right to apply to the Supreme Court for *habeas corpus* was maintained at all times.”

<sup>80</sup> Kretzmer, *supra* note 1, 411.

<sup>81</sup> Cf. Milanovic, *supra* note 9, 385; whereas the US government argued that terrorist suspects neither fall into the scope of the Third nor of the Fourth Geneva Convention, the US Supreme Court held that Common Article 3 was indeed applicable to the non-international armed conflict with al-Qaeda, see *Hamdan v. Rumsfeld*, 548 U.S. 67 (2006), 67.

<sup>82</sup> Kretzmer, *supra* note 1, 455, has diagnosed a “natural tendency of (...) courts, as organs of the State in question, to give support to the executive branch of government in times of crisis”.

rorist suspects, international human rights law should govern the required legal procedures. Needless to say, here, too, a lot of questions on how to apply the corresponding standards remain to be answered.<sup>83</sup>

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<sup>83</sup> For some of the issues of human rights law *vis-à-vis* international terrorism, *inter alia* the legality of derogation measures during a state of emergency and questions of necessity, see ECtHR, *supra* note 77.