

Volume 10 | Issue 2

Summer 2007

The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspective on Selected Legal Issues

David Turns
Cranfield University

Follow this and additional works at: <https://academicworks.cuny.edu/clr>



Part of the [Law Commons](#)

Recommended Citation

David Turns, *The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspective on Selected Legal Issues*, 10 N.Y. City L. Rev. 435 (2007).
Available at: [10.31641/clr100214](https://academicworks.cuny.edu/clr/10.31641/clr100214)

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact cunylr@law.cuny.edu.

The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspective on Selected Legal Issues

Acknowledgements

I am indebted to Adam Clark for research assistance and to Charles Garraway for comments on the original draft of this paper; any errors or omissions are entirely my own.

THE “WAR ON TERROR” THROUGH BRITISH AND INTERNATIONAL HUMANITARIAN LAW EYES: COMPARATIVE PERSPECTIVES ON SELECTED LEGAL ISSUES

*David Turns**

INTRODUCTION

To say that public international law in general—and international humanitarian law in particular—has been in a state of ferment since the onset of the “War on Terror” in September 2001 would be an understatement. The early use, by officials of the United States from the President on down, of rhetoric and terminologies fashioned from the condition of war¹—while explicable in a political context²—has helped spawn a large-scale animated debate about the significance of that language in law.³ That debate has had both national and international legal aspects. The latter, after an initial focus on the legality of the extraterritorial use of force against terrorist organizations (*jus ad bellum*),⁴ has tended to

* Senior Lecturer in International Humanitarian Law, Defence Academy of the United Kingdom (Cranfield University). I am indebted to Adam Clark for research assistance and to Charles Garraway for comments on the original draft of this paper; any errors or omissions are entirely my own. Views expressed herein are likewise my own and do not necessarily reflect those of the British Government or Ministry of Defence.

¹ The day after the terrorist attacks on New York and Washington, the President said, “The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war.” President George W. Bush, Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>. The following day, the President issued a Proclamation in which he described the attacks as “a series of despicable acts of war.” President George W. Bush, National Day of Prayer and Remembrance for Victims of the Terrorist Attack on September 11, 2001, A Proclamation (Sept. 13, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010913-7.html>.

² See Jens Meierhenrich, *Analogies at War*, 11 J. CONFLICT & SECURITY L. 1 (2006).

³ E.g., Stephen P. Marks, *Branding the “War on Terrorism”: Is There a “New Paradigm” of International Law?*, 14 MICH. ST. J. INT’L L. 71, 72 (2006). See also articles cited *infra*, notes 14–16.

⁴ See Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT’L & COMP. L.Q. 401 (2002); Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT’L L. 341 (2003); Greg Travalio & John Altenburg, *Terrorism, State Responsibility and the Use of Force*, 4 CHI. J. INT’L L. 97 (2003); Major Joshua E. Kastenber, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV. 87 (2004); Kimberley N. Trapp, *Back to Basics:*

concentrate on the application *in concreto* of the laws of armed conflict on extraterritorial military operations against terrorist organizations (*jus in bello*)⁵ or—much more frequently—on the use of human rights law and standards in the detention and treatment of alleged members of those organizations captured in the aforementioned military operations.⁶ At the same time, some have questioned the very applicability of the international law of armed conflict (also known as “international humanitarian law”) to such operations on the grounds that a “war on terrorism,” being a war primarily of a rhetorical nature akin to the “war on drugs” or the “war on crime,” calls more for the application of criminal law.⁷ There is no doubt that some aspects of the prosecution of the “War on Terror” have been more in the nature of police, rather than military, operations. Some of these police operations, however, have acquired a definite military component, thereby blurring the legal boundaries between police and military operations in the sense that military forces are deployed to operate in a situation in which there is no armed conflict.⁸ Others have accepted that the

Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors, 56 INT'L & COMP. L.Q. 141 (2007).

⁵ E.g., Robert Cryer, *The Fine Art of Friendship: Jus in Bello in Afghanistan*, 7 J. CONFLICT & SECURITY L. 37 (2002).

⁶ E.g., Luisa Vierucci, *Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to Which Guantánamo Bay Detainees Are Entitled*, 1 J. INT'L CRIM. JUST. 284 (2003); Luigi Condorelli & Pasquale De Sena, *The Relevance of the Obligations Flowing from the UN Covenant on Civil and Political Rights to US Courts Dealing with Guantánamo Detainees*, 2 J. INT'L CRIM. JUST. 107 (2004); George P. Fletcher, *Black Hole in Guantánamo Bay*, 2 J. INT'L CRIM. JUST. 121 (2004); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2004–2005); James G. Stewart, *Rethinking Guantánamo: Unlawful Confinement as Applied in International Criminal Law*, 4 J. INT'L CRIM. JUST. 12 (2006).

⁷ According to a legal adviser in the International Committee of the Red Cross, The counter-terrorist effort is being carried out by a variety of means, including law enforcement, intelligence gathering, police and judicial cooperation, extradition, financial investigations, the freezing of assets, diplomatic démarches and criminal sanctions. ‘Terrorism’ is a phenomenon. Both practically and as a matter of law, war cannot be waged against a phenomenon.

Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRITISH Y. B. INT'L L. 71 (2004), 87–88.

⁸ An example of this may be found in “Operation Active Endeavour,” implemented after the North Atlantic Treaty Organization (NATO) invoked Article 5 of the Washington Treaty in collective self-defense against terrorism. “Operation Active Endeavour” is executed by the Allied Joint Force Command Naples; since April 2003 they have been boarding ships and checking manifests against actual cargoes carried. Operation Active Endeavour, Allied Joint Force Command Naples, http://www.afsouth.nato.int/JFCN_Operations/ActiveEndeavour/Endeavour.htm (last visited July 14, 2007).

law of armed conflict is appropriate, but have called for its reform on the basis that it is outmoded, "obsolete," "quaint," and inappropriate for the type of conflict now taking place.⁹ The confusion—and its exploitation by the administration of President George W. Bush—were neatly summarized by U.S. Senator Jeff Bingaman in a debate on provisions for the review of detainees' status:

The administration has gone to great lengths to avoid the legal restraints that normally would apply under our legal system. They have argued that the laws of war are not applicable because we are fighting a new type of enemy. They have argued the criminal laws are not applicable because we are fighting a war.¹⁰

This debate cannot be dismissed as a dry, abstract exercise in academic legalisms. With the commitment of troops to military combat operations against terrorist organizations abroad, beginning with the deployment of U.S. and Coalition (including British) forces to Afghanistan in October 2001, it is inevitable that *some* rules of the law of armed conflict are applicable at least to *certain* aspects of the "War on Terror." It is therefore essential for both soldiers and commanders to know what those rules are. The practical conundrum has been succinctly summed up by Senator John McCain, in introducing his amendment to the Department of Defense Appropriations Bill for 2006¹¹ in the wake of the Abu Ghraib torture scandal:

I can understand why some administration lawyers might have wanted ambiguity so that every hypothetical option is theoretically open, even those the President has said he does not want to exercise. But war doesn't occur in theory and our troops are not served by ambiguity. They are crying out for clarity.¹²

Thus, if it is accepted that the international law of armed conflict may be applied to military operations in the "War on Terror," there are further legal definitions and distinctions that need to be

⁹ The terms "obsolete" and "quaint" were famously used to dismiss much of the 1949 Geneva Conventions by then White House Counsel, (and later U.S. Attorney General) Alberto R. Gonzales. Memorandum from Alberto Gonzales to President George W. Bush, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (Jan. 25, 2002), http://www.humanrightsfirst.com/us_law/etn/gonzales/memos_dir/memo_20020125_Gonz_Bush.pdf.

¹⁰ 151 CONG. REC. S12657-58 (daily ed. Nov. 10, 2005) (statement of Sen. Bingaman).

¹¹ The McCain Amendment became the Detainee Treatment Act of 2005, Pub. L. No. 109-48, 119 Stat. 2739 (2005), in accordance with which the latest U.S. Army *Field Manual on Human Intelligence Collector Operations* has since been revised. See *infra* note 165.

¹² 151 CONG. REC. S11062 (daily ed. Oct. 5, 2005) (statement of Sen. McCain).

made. Is the armed conflict, for legal purposes, international or non-international in nature? Which rules govern the behavior of troops in the field? How, and in what circumstances, are terrorists and other militants to be targeted? How are detainees classified in terms of their international law status, and what standards govern their treatment in detention?

To a certain extent, debate within similar parameters has been taking place in the United Kingdom. Some aspects of the debate are more limited. For instance, the United Kingdom does not carry out “targeted killings” or “assassinations” of terrorists or militants, and detention of foreign nationals captured in the “War on Terror” has been less of an issue for the United Kingdom than for the United States, not least because the United Kingdom has no facility directly analogous to Guantánamo Bay. There has generally been less conceptual uncertainty over the nature of the “War on Terror” in the United Kingdom, and—in purely military terms—British operational doctrine has on the whole been clearer than its U.S. equivalent in respect to the legal standards that govern the behavior of British forces deployed overseas on anti-terrorist operations. In the spring of 2006, however, the then-Defense Secretary of the United Kingdom, John Reid, caused something of a stir when he gave a speech in which he stated:

We owe it to ourselves . . . to constantly reappraise and update the relationship between our underlying values, the legal instruments which apply them to the world of conflict, and the historical circumstances in which they are to be applied, including the nature of that conflict. . . .

Until recently it was assumed that only states could cause mass casualties—and our rules, conventions and laws are largely predicated on that basis. That is quite plainly no longer the case. I believe we need now to consider whether we . . . need to re-examine these conventions. If we do not, we risk continuing to fight a twenty-first century conflict with twentieth-century rules. . . .

The Geneva Conventions were created more than half a century ago, when the world was almost unrecognizable to today’s citizens. . . .

The Conventions were supplemented, of course, by Additional Protocols, but even those—with one exception—were drafted almost thirty years ago. Of course, just because a law is decades old it does not mean that it is redundant. . . .

However, when we think of the massive changes which the

military have undergone to deal with new threats in the last decade alone, we get some idea of the scale of that change where armed conflict is concerned. In the light of those changes I believe we must ask serious questions about whether or not further developments in international law in this area are necessary."¹³

Its occasionally incoherent phraseology notwithstanding, the import of Reid's speech was plain enough and it was quickly seized on by the media.¹⁴ It appeared to mirror, for the United Kingdom, certain trends in the interpretation and application of international humanitarian law to the "War on Terror" that were being reported in other countries as well, notably in the United States¹⁵ and Canada.¹⁶ At the same time, its confusion is symptomatic of the disarray in which international law found itself in the aftermath of the attacks on the World Trade Center and the Pentagon.

This Article presents comparative British and international perspectives on selected problems posed by the legal classification of the "War on Terror" as a matter of public international law. The starting point is not the specific technical questions concerning classification and treatment of detainees—although those questions will indeed be considered later in the course of the paper—rather, it is the more theoretical, but no less important, issue of the fundamental nature of the "War on Terror." The confusion and tension between the paradigms of armed conflict and criminal law enforcement lie at the heart of the question of what legal framework governs the various actors in the "War on Terror." This paper examines the British experience in relation to the "Troubles" in Northern Ireland (hereinafter "Troubles")—in which organized and systematic terrorist insurgency was dealt with fundamentally by policing operations, albeit with large-scale military involvement—and compares the Troubles with current experiences. The com-

¹³ John Reid MP, Secretary of State for Defence, *20th-Century Rules, 21st-Century Conflict*, speech at the Royal United Services Institute for Defence (Apr. 3, 2006), <http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/SofS/20thcenturyRules21stcenturyConflict.htm>.

¹⁴ See, e.g., Sam Coates, *Reid Backs US on Guantanamo*, THE TIMES, Apr. 4, 2006, at 2; Kim Sengupta, *Geneva Convention 'Should Be Updated'*, THE INDEPENDENT, Apr. 4, 2006.

¹⁵ See, e.g., Julian E. Barnes, *Army Manual to Skip Geneva Detainee Rule*, L.A. TIMES, June 5, 2006, at A1. But see *infra* note 165, for the sequel to this particular controversy.

¹⁶ See Paul Koring, *Troops Told Geneva Rules Don't Apply to Taliban*, THE GLOBE AND MAIL, 31 May 2006, at A1. Note that the allegations in this article were immediately contradicted by the Minister of National Defence in the Canadian House of Commons. *Canadian House of Commons Debates, 1st Session, 39th Parliament, Official Report (Hansard)*, Wednesday, May 31st, 2006, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=&Mode=1&Parl=39&Ses=1&DocId=2234500>.

parison encompasses policy and military doctrine in the application of the laws of armed conflict to military operations against terrorists abroad, combined with the U.K. courts' human rights-oriented approach. Also considered is a comparative perspective from Israel, where the armed forces are routinely engaged in anti-terrorist operations (often on a very substantial scale) and where the Supreme Court of Israel, in its capacity as a high court of justice hearing petitions from and relating to the Occupied Palestinian Territories, has developed an extensive jurisprudence on various aspects of international humanitarian law. This Article will integrate in its analysis two selected aspects of military operations in the "War on Terror," namely the classification and treatment of detainees, and the policy of "targeted killings" of terrorists, which has been used by both the U.S. and Israel in the current scenario and—in the modified form of the "shoot to kill policy"—by the U.K. in Northern Ireland. This Article will consider the implications of these developments in policy and doctrine for the international law of armed conflict.

I. CONFUSION IN THE *LEX GENERALIS*: THE "GLOBAL WAR ON TERROR" AS WAR OR PEACE?

Over five years into the "War on Terror," much of the initial debate about the nature of the "war"¹⁷ has subsided. Although he was extremely curt in his dismissal of the use of the term "war" to describe the terrorist attacks of September 11, 2001 and their consequences in international law, one eminent scholar summed up the significance of the use of such language succinctly:

Admittedly, the use of the term 'war' has a huge psychological impact on public opinion. It is intended to emphasize both that the attack is so serious that it can be equated in its evil effects with a state aggression, and also that the necessary response exacts reliance on all resources and energies, as if in a state of war.¹⁸

Apart from its psychological effects, use of the term "war" from the

¹⁷ See Crimes of War Project, *Is this a New Kind of War? September 11 and Its Aftermath*, expert analysis, <http://www.crimesofwar.org/expert/paradigm-intro.html> (last visited, July 14, 2007); Frederic L. Kirgis et al., *Terrorist Attacks on the World Trade Center and Pentagon*, American Society of International Law (ASIL) Insights (Sept. 2001), <http://www.asil.org/insights/insigh77.htm>.

¹⁸ Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 993 (2001); see also Meierhenrich, *supra* note 2, at 7–25; Frédéric Mégret, *'War'? Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361 (2002); Bruce Ackerman, *This Is Not a War*, 113 YALE L. J. 1871 (2004).

perspective of public international law would normally have implied the existence of a state of armed conflict. This in turn would have effects at the level of both the *jus ad bellum* (the international law governing resort to the use of force) and the *jus in bello* (the international law of armed conflict). The latter context will be considered in the next section of this Article.

In terms of the *jus ad bellum*, a state of "war" would presuppose an armed attack within the sense of a violation of Article 2(4) of the U.N. Charter or an act of aggression as understood in customary international law,¹⁹ such that would give rise to a right of self-defense under Article 51 of the Charter. Recognition of the latter right, to the benefit of the U.S., was expressly given by the U.N. Security Council in the resolution which it passed on September 12, 2001.²⁰ Although I do not believe that it can be said with complete certainty that the terrorist attacks on the World Trade Center and the Pentagon actually constituted an "armed attack" within the strict meaning of customary international law,²¹ contemporary State practice does indicate that there is a fairly uncontroversial right of self-defense against such attacks²²—at which point an armed conflict would generally be said to be taking place. This approach, however, is not universal: when it has struck back against Palestinian militants by means of missile strikes or air raids, Israel has typically denied that it is engaged in an armed conflict with the

¹⁹ This presupposition is evidenced by the U.N. General Assembly's definition of aggression. *Declaration on the Definition of Aggression*, G.A. Res. 3314 (XXIX), U.N. Doc A/RES/29/3314 (Dec. 14, 1974).

²⁰ S.C. Res. 1368, ¶ 1, U.N. Doc S/RES/1368 (Sept. 12, 2001).

²¹ *Definition of Aggression*, *supra* note 19, requires *inter alia* that the activities amounting to aggression be either the direct action of a State (if involving regular armed forces) or be in the form of "sending by or on behalf of a State . . . or its substantial involvement" (if involving irregular forces, guerrillas etc.). G.A. Res. 3314 (XXIX), *supra* note 19, Annex art. 3. Al Qaeda, on the other hand, is not acting on behalf of any State.

²² This is notwithstanding the International Court of Justice's statement that a State cannot invoke the Article 51 right of self-defense against terrorist attacks not imputable to a foreign State and emanating from a territory over which it "exercises control." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, ¶¶ 138–39 (July 9). The court addressed only the right of self-defense under Article 51, without considering the "inherent right" under customary international law, to which Article 51 refers. The opinion also failed to consider the specific aspects of Israel's situation in responding to acts of terrorism emanating either from Palestinian territory under Israeli belligerent occupation, or from areas under the control of the Palestinian Authority (which is not a State but is equally not an area where Israel legally "exercises control"). For criticism of the Advisory Opinion on these points, see Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case*, 16 EUR. J. INT'L L. 963 (2005).

Palestinian Authority, but insists that it is lawfully exercising its right of self-defense.²³ This position is not impossible to sustain. For instance, two States might have a tit-for-tat exchange of bombardments or raids across their mutual frontier while simultaneously attempting to maintain peacetime relations and avoid an escalation of hostilities into a general armed conflict.²⁴ Conversely, the U.K. and Argentina formally denied that they were “at war” during the Falklands/Malvinas Conflict of 1982, which saw sustained military combat operations taking place on a substantial scale over a period of several weeks.²⁵ Legally, however, an armed attack that leads to self-defense will normally involve a resulting armed conflict, even if very limited in scope and of very short duration. If the notion of an armed conflict is accepted as applicable in such circumstances, does it cover the entire geographical and temporal spectrum of the “War on Terror,” or is it more limited than that?

Historically—certainly until the advent of the U.N. Charter regime governing the use of force in 1945—armed conflict was limited temporally. Conflicts normally began with mutual declarations of war and ended with one or more treaties of peace. Even in cases where military hostilities began without a declaration of war, as in the surprise Japanese torpedo attack on the Imperial Russian Navy’s Pacific Squadron at Port Arthur in 1904,²⁶ formal declarations of war still followed as a matter of course. Without these declarations, the formal peacetime relations of the belligerents, such as diplomatic relations, could not legally be altered in

²³ See Frederic L. Kirgis, *Israel’s Intensified Military Campaign Against Terrorism*, ASIL Insights (December 2001), <http://www.asil.org/insights/insigh78.htm> (last visited July, 14 2007).

²⁴ An example might be the situation between India and Pakistan, which is permanently tense along much of their shared frontier, particularly in the disputed region of Kashmir. Periodically the tension escalates into episodes of terrorist bombings, counter-insurgency operations and localized artillery bombardments, yet the two countries have not considered themselves to be in an armed conflict with each other since the 1971 war that resulted in the creation of Bangladesh. Even during episodes of heightened tension, India and Pakistan maintain diplomatic and commercial relations. See generally Anthony Wanis St. John, *Mediating Role in the Kashmir Dispute Between India and Pakistan*, 21 FLETCHER F. WORLD AFF. 173 (1997).

²⁵ For example, in response to a parliamentary question on the repatriation of captured Argentinian soldiers to Argentina under the terms of Geneva Convention III, Prime Minister Margaret Thatcher stated, “I should make one point clear. These are not prisoners of war. A state of war does not exist between ourselves and the Argentine.” 22 PARL. DEB., H.C. (6th ser.) (1982) 616.

²⁶ The Japanese naval attack on Port Arthur, on the night of February 8/9, 1904, preceded the formal Imperial Proclamation of War on February 10. *Imperial Proclamation of War*, available at <http://www.russojapanesewar.com/imp-proc-04.html>.

the way required by the replacement of a state of peace with a state of war. Likewise, absent a treaty of peace, a state of war formally subsists, even if no organized hostilities between the belligerents are taking place. Thus, those Arab States—Lebanon, Syria, and Iraq—whose armed forces participated in military action against the new State of Israel in 1948-1949, but which have not since concluded peace treaties with the Jewish State, may be considered to be technically still in a state of war with it because the various armistice agreements concluded between Israel and those States in 1949 suspended, but did not terminate, the state of war between them.²⁷

It is self-evident that the "War on Terror" does not fit within such a state-centric paradigm of international relations. For all the rhetorical references to al Qaeda "declaring war" on the U.S., on democracy, on liberty, or on the West, al Qaeda has done no such thing in any legal sense of the term. A concept which may be of assistance in formally classifying the "War on Terror" in international law, however, is the so-called *status mixtus*, wherein relations between States sometimes "deteriorated to a point where neither peace nor war in the strict sense existed, and states observed for some purposes the law of peace, and for others the law of war."²⁸ Adapting the *status mixtus* framework to the context of dealing with international terrorism, it is clear that the "War on Terror," for all its militaristic rhetoric, actually comprises several legal mechanisms. Writing nearly two decades ago, Antonio Cassese posited two basic frameworks for responding to terrorism in international law: the "peaceful" way, by enforcing criminal law on the national and transnational levels, sequestering assets, and securing international police and judicial co-operation in the investigation, extradition, and prosecution of terrorist networks and individual terrorist suspects; and the "coercive" way, by engaging State armed forces in military operations against terrorist organizations.²⁹ Within this "framework" approach to the problem, the correct position must be that:

²⁷ For a detailed discussion of various legal interpretations of the 1949 Arab-Israeli Armistice Agreements, see Asher Maoz, *War and Peace—An Israeli Perspective*, 14 CONSTITUTIONAL FORUM, no. 2, at 35 (2005).

²⁸ LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 70 (2d ed. 2000). See also YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 16-20 (2001).

²⁹ Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L. Q. 589 (1989). The tags "peaceful" and "coercive" are used purely for convenience. See also Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499 (2004-2005).

[War] exists, and the laws of war apply, when facts on the ground establish the existence of armed conflict, regardless of any declaration or lack thereof While . . . true armed conflicts and the so-called “global war against terror” may—or may not—overlap, the law of armed conflict can only be applied to that which is truly armed conflict. That which is not truly armed conflict remains, and should remain, governed by domestic and international criminal and human rights laws.”³⁰

In practice, different States have taken different approaches to the legal treatment of situations involving terrorism in different places and at different times. Useful comparators for the present analysis are the positions taken by the U.K. in respect to the Northern Ireland “Troubles” (1969 to date), and by Israel in confronting armed violence by militant groups in the Occupied Palestinian Territories, particularly during the “Second Intifada,” which has been ongoing since 2000. What these situations have in common, while obviously quite diverse in their precise aspects, is that they have both involved the deployment of armed forces on active operations of a counterinsurgency or counterterrorist nature. Additionally, the legal classification of the current “War on Terror” as war or peace has recently been addressed by the supreme courts of two nations prominently and actively engaged in that “War,” especially with its military aspects: the U.S. and Israel.³¹ These decisions are particularly interesting for a number of reasons. Both deal with fundamental issues of whether action against terrorist organizations should be considered to fall within the peacetime or wartime paradigm for international law purposes, and both deal with different aspects of technical detail in the prosecution of such action. The American decision concerns the status and treatment of detainees at Guantánamo Bay, Cuba, and therefore concentrates on the protection of victims of conflict,³² while the Israeli decision deals with the legality of a particular method of prosecuting military operations against individual terrorist leaders, namely the pol-

³⁰ Rona, *supra* note 29, at 503.

³¹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); HCJ 769/02 *Public Comm. Against Torture in Israel v. Gov't of Israel*, [2006], available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

³² The term “protection of victims of conflict” is used here in its international humanitarian law sense, namely, that once an individual, whether combatant or civilian, has been captured by the opposing side in hostilities, that individual is regarded as a victim of the conflict. He or she is no longer actively participating in hostilities (if a combatant) or free of the control of one of the parties to the conflict (if a civilian). The term does not imply that such a person, though considered a “victim,” cannot be held liable for illegal acts committed before capture or detention. See Additional Protocol I, *infra* note 48.

icy of "targeted killings" (or assassinations, depending on one's point of view).³³ Neither decision is of purely academic interest. With U.S. forces engaged in theaters like Afghanistan and Iraq, and Israeli forces undertaking a variety of operations against Palestinian militants in the West Bank and Gaza, court decisions from both countries are likely to have a very real practical impact on the behavior of troops on the ground.

II. THE U.K. EXPERIENCE: THE NORTHERN IRELAND "TROUBLES" AND THE ARMED CONFLICT PARADIGM

The experience of the U.K. in dealing with Northern Ireland offers one of the best known and most studied situations in recent and contemporary history of a Western liberal democracy using military force to suppress a terrorist insurgency and the associated violence within a framework governed, at least ostensibly, by the rule of law. The use of the term "the Troubles" to refer to the situation in Northern Ireland during the period between the general breakdown in law and order in August 1969 (which led to the initial deployment of British troops on the streets of the province) and the conclusion of the Good Friday Peace Agreement of April 1998, despite its bare adequacy as a euphemism for the violence of that period, carefully avoids any specific categorization of the Northern Ireland situation. The refusal of both the British and Irish governments to treat Northern Ireland as an international issue that should, for instance, have been placed on the agenda of the U.N., along with the authorities' policy of police primacy in dealing with the situation, meant that most people have not traditionally viewed the Troubles as an armed conflict in any international law sense of the term. Nevertheless, the language of armed conflict was expressly used, at least rhetorically, in relation to the Troubles. The last Prime Minister of Northern Ireland before the introduction of direct rule from London in 1972, Brian Faulkner, said categorically when he introduced the power of internment without trial that Northern Ireland was "quite simply at war with the terrorist."³⁴ Various Irish nationalist movements, and notably the Irish Republican Army (IRA), expressly made a point of seeing their struggle as nothing short of a war of self-determination and

³³ HCJ 769/02 *Public Comm. Against Torture in Israel v. Gov't of Israel*, [2006].

³⁴ BBC On This Day, 1971: Northern Ireland Activates Internment Law, Aug. 9, 1971, http://news.bbc.co.uk/onthisday/low/dates/stories/august/9/newsid_4071000/4071849.stm.

national liberation from a foreign army of occupation.³⁵ Yet, for all that, the prevailing analysis of the Troubles is not conducted within the armed conflict paradigm (or even within any international law paradigm, except as regards the application of human rights norms). Admittedly, the Troubles are not directly comparable to the current “War on Terror” by virtue of their location almost entirely within the territorial jurisdiction of one State and their perpetrators mostly having the nationality of that State, namely the U.K. However, certain legal aspects of the use of military forces in Northern Ireland are of interest for the reasons indicated at the beginning of this section.

The most striking feature of the deployment and use of British military forces in Northern Ireland, to a lawyer, is its apparent lack of any clear basis in U.K. law. The use of forces was an executive decision of the British Government, made in response to a political request from the Prime Minister of Northern Ireland in August 1969. At the time, paramount responsibility for the maintenance of public order in Northern Ireland rested with the province’s Minister of Home Affairs, under Section 1(2) of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922.³⁶ British Army troops had been present in Northern Ireland continuously since the independence of the Free State in the south of the island and its *de facto* partition in 1921, but prior to the rapid escalation in sectarian communal violence in mid-1969, their numbers had been very small (only around 2,500), confined to barracks as in other parts of the U.K., and only occasionally deployed to guard certain public utilities.³⁷ Law enforcement duties on the streets of Northern Ireland were entirely in the hands of the regular police force of the province, the Royal Ulster Constabulary (RUC), and the so-called “B Specials,” a leftover from the Ulster Special Constabulary whose task it had been, since the turmoil of the early 1920s, to augment the normal police force during times of tension.³⁸ The common law has always permitted the military to react to a request for assistance from the civil authority.³⁹ This was precisely the method used in the small hours of August 14, 1969 when the RUC in Belfast and Londonderry, confronted with large-scale and worsening rioting by elements of the local Catholic population in both

³⁵ See C.P. Walker, *Irish Republican Prisoners—Political Detainees, Prisoners of War or Common Criminals?*, 19 THE IRISH JURIST 189, 189–90 (1984).

³⁶ See ROBIN EVELEGH, PEACE KEEPING IN A DEMOCRATIC SOCIETY 14 (1978).

³⁷ COLONEL MICHAEL DEWAR, THE BRITISH ARMY IN NORTHERN IRELAND 32 (1996).

³⁸ *Id.* at 20–21.

³⁹ See EVELEGH, *supra* note 36, at 8–11.

cities, concluded that all police reserves (including the B Specials) had been committed and that the violence could not be contained without military assistance.

The RUC asked the Minister of Home Affairs in Belfast to request deployment of the Army on the streets to help suppress the disturbances. The request was not transmitted to London until after midday on August 14th, but British Cabinet approval for the deployment of troops was given within a couple of hours, and the soldiers were deployed on the streets by nightfall.⁴⁰ The process was subsequently recorded in an official Communiqué in the following terms:

In a six-hour discussion the whole situation in Northern Ireland was reviewed. It was agreed that the GOC [General Officer Commanding] Northern Ireland will with immediate effect assume overall responsibility for security operations. He will continue to be responsible directly to the Ministry of Defence but will work in the closest co-operation with the Northern Ireland Government and the Inspector-General of the Royal Ulster Constabulary [RUC]. For all security operations the GOC will have full control of the deployment and tasks of the [RUC]. For normal police duties outside the field of security the [RUC] will remain answerable to the Inspector-General who will be responsible to the Northern Ireland Government.

The GOC will assume full command and control of the Ulster Special Constabulary for all purposes including their organisation, deployment, tasks and arms. Their employment by the Northern Ireland Government in riot and crowd control was always envisaged as a purely temporary measure. With the increased deployment of the Army and the assumption by the GOC of operational control of all the security forces, it will be possible for the [B Specials] to be progressively and rapidly relieved of these temporary duties at his discretion . . .⁴¹

The appended Declaration then stated, *inter alia*:

(2) The United Kingdom Government again affirm that responsibility for affairs in Northern Ireland is entirely a matter of domestic jurisdiction. . . .

(3) The United Kingdom Government have ultimate responsibility for the protection of those who live in Northern Ireland when, as in the past week, a breakdown of law and order has occurred. In this spirit, the United Kingdom Government responded to the requests of the Northern Ireland Government

⁴⁰ *Id.* at 6–7; DEWAR, *supra* note 37, at 33.

⁴¹ NORTHERN IRELAND: TEXT OF A COMMUNIQUÉ AND DECLARATION ISSUED AFTER A MEETING HELD AT 10 DOWNING STREET, Aug. 19, 1969, Cmnd. 4154.

for military assistance in Londonderry and Belfast in order to restore law and order. They emphasise again that the troops will be withdrawn when law and order has been restored.

(4) The Northern Ireland Government have been informed that troops have been provided on a temporary basis in accordance with the United Kingdom's ultimate responsibility. . . .⁴²

Thus began the first of three broad phases identified in the Troubles: the "militarization" phase, which lasted from 1969 to 1976; followed by the "criminalization" (1977-1994) and "transition" (1995-2004) phases,⁴³ culminating in the return of devolved rule to Northern Ireland in December 1999 under the provisions of the Northern Ireland Act 1998.⁴⁴ In the early stages of the "militarization" phase, there was much initial use of "war talk" by the British authorities, but this sort of language was quickly abandoned as it was seen to be counterproductive.⁴⁵ Likewise, the IRA made use of the language of armed conflict in its unsuccessful attempts to claim prisoner of war (POW) status for its members who had been interned by the security forces.⁴⁶ Nevertheless, at no time did the U.K. accept the categorization of the situation in Northern Ireland as any kind of armed conflict in an international law sense of the term.⁴⁷

The Northern Ireland situation was in fact instrumental in the United Kingdom's inordinate delay in ratification of the two Additional Protocols to the 1949 Geneva Conventions.⁴⁸ Although it

⁴² *Id.*

⁴³ Colm Campbell, 'Wars on Terror' and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict, 54 INT'L & COMP. L.Q. 321, 326 (2005).

⁴⁴ Northern Ireland Act, 1998, c. 47 (U.K.). Although the institutions of devolved government in Northern Ireland were suspended and direct rule from London reintroduced in February 2000, the continuing near-total cessation of paramilitary activity and progressive demilitarization of the province provide a strong case for asserting that the Troubles effectively ended in 1999. Full devolution was restored to Northern Ireland in May 2007 following the election of an Executive with ministers representing both Unionist and Nationalist political parties.

⁴⁵ See Campbell, *supra* note 43, at 325.

⁴⁶ *Id.* at 330; Walker, *supra* note 35, at 208-21. It is highly unlikely, to say the least, that any State would ever be prepared to consider its own nationals as POWs, given that the whole regime of the Geneva Conventions is intended to apply protection to those persons of the hostile party (meaning hostile *State*) who are *hors de combat*. For the same reason—that they hold the nationality of the same State (i.e. the U.K.)—IRA detainees could not have been considered "protected persons" in terms of the Geneva Conventions.

⁴⁷ Campbell, *supra* note 43, at 333; Walker, *supra* note 35, at 190-92. Also note the terms of the U.K.'s reservation to the Additional Protocols, *infra* text accompanying note 49.

⁴⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125

signed the Protocols in 1977, the U.K. was sufficiently put off by the threat, however intangible, that either of them might actually be applied to the situation in Northern Ireland, that it avoided ratifying them until 1998.⁴⁹ It is no coincidence that this was the very year in which de-escalation and demilitarization in Northern Ireland really began to take effect.⁵⁰ At eventual ratification, the U.K. was still careful to enter *inter alia* the following reservation, which would have precluded the Northern Ireland situation from being considered an international armed conflict within the scope of application of Additional Protocol I:

It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes *including acts of terrorism whether concerted or in isolation*. The United Kingdom will not, *in relation to any situation in which it is itself involved*, consider itself bound in consequence of any declaration purporting to be made under [Article 96(3) of the Protocol] unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which [Article 1(4)] applies.⁵¹

U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

⁴⁹ Corrected Letter of 28 January 1998 sent to the Swiss Gov't by Christopher Hulse, HM Ambassador of the U.K. (July 2, 2002) [hereinafter Corrected Letter], available at <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>.

⁵⁰ It was in 1998 that all the major paramilitary organizations in Northern Ireland, both Nationalist and Unionist, variously announced ceasefires or "suspension of military operations." See Cain Web Service, The Irish Peace Process—Chronology of Key Events (Apr. 1998 – Dec. 1999), <http://cain.ulst.ac.uk/events/peace/pp9899.htm> (last visited July 14, 2007).

⁵¹ Corrected Letter, *supra* note 49 (emphasis added). The significance of Article 1(4) is that it includes within the scope of application of the Protocol, "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination"; Article 96(3) then provides for an "authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in [Article 1(4)]" to make a unilateral declaration undertaking to apply the Geneva Conventions and Additional Protocol I. The IRA, in claiming to be fighting a war of national liberation/self-determination in Northern Ireland, clearly was positioning itself to make such a declaration, although in fact it never did so. No doubt this was at least partly due to the fact that the rights and obligations of the Conventions and Protocols only take effect following a unilateral declaration under Article 96(3) on a basis of reciprocity, i.e. the High Contracting Party in question must also have assumed the same rights and obligations under the same instruments. In the case of Northern Ireland, not only had the United Kingdom avoided ratifying the Additional Protocols, it had also

Likewise, the U.K. never accepted that the violence in Northern Ireland, although intermittently severe, reached the threshold required for the application of Additional Protocol II as a non-international armed conflict. This requires that the hostilities take place:

[I]n the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁵²

The various paramilitary organizations might be said to have been under responsible command, at least in theory; the IRA's leadership, in particular, consisted of an "Army Council," whose directives were clearly obeyed by IRA operational units, designated as "commands," "brigades," and "battalions."⁵³ There were times and places during the Troubles where the conditions of de facto control over territory were arguably met by the IRA, such as the "No-Go" areas, which were basically Republican enclaves with controlled access in certain parts of Londonderry and Belfast,⁵⁴ and the "bandit country" of South Armagh,⁵⁵ where British Army patrols were regularly ambushed by snipers and field units similar to the Flying Columns employed by the IRA during the Anglo-Irish War and the subsequent Irish Civil War between 1919 and 1922. However, these episodes were too sporadic and unrelated to the overall situation elsewhere in the province, and they were generally of insufficient consistency for them to be said to have constituted a non-international armed conflict within the meaning of Protocol II. In the words of Article 1(2) of Protocol II, the Troubles never consistently rose above the intensity of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" such that they could be considered as amounting to a non-international armed conflict; this was a fortiori the case in respect to it being an international armed conflict. As it has been suggested, "the Northern Ireland conflict [*sic*] is generally viewed as having hovered in the grey area between some

made it clear that it did not accept the IRA's right to claim that it was an "authority" of the type required. Even a commentator generally unsympathetic to the U.K.'s position notes that, "[i]n retrospect . . . it is difficult to see how Protocol I's conditions of applicability could be said to have been met." Campbell, *supra* note 43, at 332.

⁵² Additional Protocol II, *supra* note 48, art. 1(1).

⁵³ See DEWAR, *supra* note 37, at 49-51.

⁵⁴ *Id.* at 69-70.

⁵⁵ *Id.* at 123.

form of non-international armed conflict . . . and the lower intensity category of 'situations of internal disturbances and tensions.'"⁵⁶

For all that the situation in Northern Ireland was not considered to amount to an armed conflict, the fact remains that there were troops on the ground undertaking military operations. In any such situation, the actions of armed forces must be subject to rules of law; otherwise, the potential for abuse is obvious. If the situation had been an armed conflict within the meaning of international law, then the applicable rules would have been those of international humanitarian law, as discussed above. But in a case where the situation is not judged to amount to an armed conflict, then, irrespective of how the situation is characterized (i.e. as an "emergency"), the actions of British soldiers remain at all times subject to military law. In the U.K., military law basically encompasses two things: (1) the "service legislation," namely Acts of Parliament and associated secondary legislative instruments or non-binding administrative instructions specifically promulgated for the regulation of all aspects of the armed forces; and (2) the ordinary criminal law of the land, both statutes and common law rules. Throughout the period of the Troubles, the service legislation consisted of the Army Act 1955, the Royal Air Force Act 1955, and the Naval Discipline Act 1957; the administrative instructions consisted of the Queen's Regulations for the Army.⁵⁷

British forces deployed on military operations overseas during an armed conflict are obviously entitled to use lethal force against hostile forces. However, because the territory of Northern Ireland is part of the U.K., and because the urban setting caused the "hostile forces" to be mixed in with civilians (most of whom were British nationals, and, in any given situation, may or may not have been IRA operatives) the actions of British troops were subject to the ordinary criminal law. If a British soldier shot a foreign enemy combatant in an armed conflict, that would obviously be a permissible use of lethal force, but if the same soldier shot a British or foreign national on British territory in time of peace, that would potentially be murder or manslaughter.⁵⁸ So, to govern the use of

⁵⁶ Campbell, *supra* note 43, at 331. Although I would dispute that this was necessarily the "general" view, as asserted (with little evidence) by Campbell, it is one that I readily subscribe to myself.

⁵⁷ The Queen's Regulations for the Army 1975 [including Amendment 27], IAC 13206, available at http://www.army.mod.uk/linkedfiles/servingsoldier/termsofserv/discmillaw/ref/queens_regulations_incl_a27.pdf.

⁵⁸ A very extensive case law has accumulated since the early 1970s concerning the use of excessive or lethal force by security forces in Northern Ireland, in most of

force by British soldiers on duty in Northern Ireland, the security forces in the province were issued rules of engagement in the form of the so-called "Yellow Card," a set of internal instructions indicating the circumstances in which the use of force was permissible. The Yellow Card provided, *inter alia*, as follows:

General Rules

2. Never use more force than the minimum necessary to enable you to carry out your duties.

3. Always try to handle the situation by other means than opening fire.

...

Warning before firing

6. Whenever possible a warning should be given before you open fire.

...

You may fire after due warning

8. Against a person carrying what you can positively identify as a firearm, but only if you have reason to think that he is about to use it for offensive purposes; he refuses to halt when called upon to do so, and there is no other way of stopping him.

9. Against a person throwing a petrol bomb if petrol bomb attacks continue in your area against troops and civilians or against property, if his action is likely to endanger life.

10. Against a person attacking or destroying property or stealing firearms or explosives, if his action is likely to endanger life.

11. Against a person who, though he is not a person attacking, has:

a. in your sight killed or seriously injured a member of the security forces or a person whom it is your duty to protect and

b. not halted when called upon to do so and cannot be arrested by any other means.

12. If there is no other way to protect yourself or those whom it is your duty to protect from the danger of being killed or seriously injured.

You may fire without warning

13. When hostile fire is taking place in your area and a warning is impracticable:

a. against a person using a firearm against you or those whom it is your duty to protect

which the relevant soldiers have been charged with murder or manslaughter under the criminal law of Northern Ireland. For discussion and analysis, see DERMOT P.J. WALSH, BLOODY SUNDAY AND THE RULE OF LAW IN NORTHERN IRELAND 157-83 (2000); Brice Dickson, *The House of Lords and the Northern Ireland Conflict—A Sequel*, 69 MODERN L. REV. 383 (2006).

b. against a person carrying what you can positively identify as a firearm if he is clearly about to use it for offensive purposes.

14. At a vehicle if the occupants open fire or throw a bomb at you or those whom it is your duty to protect or are clearly about to do so.

15. If there is no other way to protect yourself or those whom it is your duty to protect from the danger of being killed or seriously injured.⁵⁹

The rules for opening fire in the Yellow Card clearly encapsulated, on a micro level, "the British tradition of minimum force to solve any given situation."⁶⁰ At the macro level, this traditional approach was also evidenced by such large-scale military actions as Operation Motorman, the name given to the July 31, 1972 reoccupation by the British security forces of the "No-Go" areas in West Belfast, the Bogside, and Creggan (Londonderry). The security forces had been under orders not to enter these areas, which were barricaded and entirely controlled by IRA gunmen, for several months. For Operation Motorman, some 21,000 troops were deployed, including Royal Navy and Marine units who participated in a beach landing on the Foyle Estuary near Londonderry. However, the impending operation was publicly announced beforehand by the British authorities in Northern Ireland with the explicit intention of preventing or minimizing civilian casualties.⁶¹ As a direct result of the broadcast warnings, the IRA left the "No-Go" areas before the start of Operation Motorman, which then met with virtually no armed resistance.⁶² The success of Operation Motorman has been compared to other counter-insurgency operations by the British military, notably the reoccupation of the Crater in Aden in 1967, which took place by night when the South Arabian Army insurgents who had occupied the area were sleeping; again, there was virtually no opposition as a result.⁶³

The British approach to the Troubles in Northern Ireland, as to various other counter-insurgency or anti-terrorist operations elsewhere in the world like the Malayan Emergency (1948–1960),⁶⁴

⁵⁹ WALSH, *supra* note 58, at 184–85.

⁶⁰ DEWAR, *supra* note 37, at 69.

⁶¹ *Id.* at 66–69.

⁶² *Id.*

⁶³ *Id.* at 70.

⁶⁴ See SAM C. SARKESIAN, UNCONVENTIONAL CONFLICTS IN A NEW SECURITY ERA: LESSONS FROM MALAYA AND VIETNAM 55–78 (1993); Richard Stubbs, *The Malayan Emergency and the Development of the Malaysian State*, in *THE COUNTER-INSURGENT STATE: GUERRILLA WARFARE AND STATE BUILDING IN THE TWENTIETH CENTURY* 50 (Paul B. Rich & Richard Stubbs eds., 1997).

was essentially that the situation in the province constituted an “emergency,” subject to special legal regulation, in which the Army was assisting the police in maintaining law and order. In modern doctrinal terms, this is classified as Military Aid to the Civil Power.⁶⁵ From 1957 to 1984, and again from 1988 to 2001, the “emergency” was considered to justify continuous derogations from the U.K.’s obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms, and there were many occasions on which British soldiers were accused of using excessive force—judged by the standards of the ordinary criminal law and European human rights law.⁶⁶ Nevertheless, this was not an armed conflict in the sense of international law. After the “militarization” phase of the Troubles had passed its height between 1971 and 1975, when the policy of internment was in place and terrorist suspects were detained without trial⁶⁷ and subjected to “in-depth interrogation”⁶⁸ which resulted in claims of torture,⁶⁹ the British Government’s approach to the problem was increasingly characterized by the treatment of terrorist activity associated with Northern Ireland as criminal offenses and their prosecution under the ordinary criminal law.

⁶⁵ See UK Ministry of Defence, *Joint Warfare Publication—British Defence Doctrine* (2d ed.), JWP 0-01, 6–9.

⁶⁶ The most famous of these during the later stages of the Troubles was undoubtedly *Regina v. Clegg*, [1995] 1 A.C. 482 (H.L. 1995) (appeal taken from the Court of Appeal in Northern Ireland) (convicting a British soldier who, while manning a checkpoint in Belfast, shot dead a “joy rider” who failed to stop a stolen car at the checkpoint); and *McCann v. United Kingdom*, [1995] Eur. Ct. H.R. 31 (holding the U.K. liable for the shooting, by British special forces, of three IRA suspects in Gibraltar). For a general overview of these and other criminal law cases relevant to the use of force by the security forces during the Troubles, see WALSH, *supra* note 58. It should be noted that, despite the considerable negative publicity generated by these and other similar cases, they actually constituted only a tiny percentage of operations overall in relation to Northern Ireland.

⁶⁷ See DEWAR, *supra* note 37, at 52–55.

⁶⁸ This included use of the so-called “five techniques,” namely: sensory deprivation, disorientation, the “standing position,” sleep deprivation, and subjection to “white noise.” See *id.* at 55. The Parker Committee, established by the British Government to consider the legality of such interrogations, studiously avoided any conclusive determination of the applicability of either Geneva Convention III or IV to the situation in Northern Ireland. *Report of the Committee of Privy Councillors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism*, Mar. 1972, Cmnd. 4901, Majority Report, ¶¶ 4–6.

⁶⁹ In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), the European Court of Human Rights held that there was an emergency in Northern Ireland that justified the United Kingdom’s derogation from human rights standards in respect of powers of arrest and internment without trial, and that the “five techniques” applied in interrogation constituted inhuman and degrading treatment but did not amount to torture. *Id.* at 86.

III. CONFUSION IN THE *LEX SPECIALIS*: THE "GLOBAL WAR ON TERROR" AS INTERNATIONAL OR NON-INTERNATIONAL ARMED CONFLICT, AND WHETHER IT MATTERS

In the same way that the classical concept of war traditionally had temporal parameters set by declarations of war and treaties of peace, the legal classification of armed conflicts has also always depended on the identities of the belligerent parties and the territorial extent of hostilities. Again, the classical doctrine has recognized two types of armed conflict: international and non-international.⁷⁰ The former traditionally constitutes wars between States,⁷¹ the latter constitutes wars between a government and insurgent forces in its own territory or between dissident armed groups within the territory of a single State.⁷² In modern jurisprudence, these traditional distinctions have become blurred somewhat, a development that was precipitated by the armed conflicts that accompanied the dissolution of the former Yugoslavia. Within the two major conflicts, namely the civil war in Bosnia and Herzegovina on the one hand, and the inter-State conflict between Croatia and the Federal Republic of Yugoslavia (FRY) on the other, there were various "sub-conflicts," notably between Serbs and Croats, Muslims and Croats, and Muslims and Serbs within Bosnia. The intermittent involvement of the regular armed forces of both the FRY and Croatia only added to the complexity of the situation. The International Criminal Tribunal for the Former Yugoslavia (ICTY), in its very first case,⁷³ was faced with a challenge to its jurisdiction in which, *inter alia*, it was suggested that either the situation in Bosnia did not amount to an armed conflict in the international law sense of the term, or in the alternative that it was a non-international armed conflict. The distinction was of crucial importance for determining the applicability of criminal charges, since the ICTY Statute contains provisions for jurisdiction over grave breaches of the 1949 Geneva Conventions⁷⁴ and customary

⁷⁰ See GREEN, *supra* note 28, 54–55.

⁷¹ Note that the conventions formally applicable to international armed conflicts nowhere define what is meant by this scope of application; the common understanding stated herein, therefore, might be said to constitute the customary international law definition of such conflicts. See *infra* text accompanying notes 74–82.

⁷² This definition is taken from Article 1(2) of Additional Protocol II, *supra* note 48.

⁷³ *Prosecutor v. Tadić*, Case No. IT-94-I-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

⁷⁴ Statute of the International Tribunal for the Former Yugoslavia, art. 2, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council

law war crimes⁷⁵ (which at the time were generally thought to be applicable only in international armed conflicts),⁷⁶ but does not expressly cover violations committed in non-international armed conflicts. The ICTY Appeals Chamber, holding that it was not necessary for it to determine the nature of the armed conflict in Bosnia—since the U.N. Security Council, in its resolution establishing the Tribunal,⁷⁷ had refrained from doing so—found that:

[A]n 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. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party [to the conflict], whether or not actual combat takes place there.⁷⁸

The importance of the distinction between international and non-international armed conflicts is both formal and normative. The formal difference is that an international armed conflict requires there to be at least two State parties to the conflict. Historically, only conflicts between States were considered as “wars” and were therefore subject to regulation by the international law of armed conflict;⁷⁹ whereas non-international armed conflicts traditionally were civil wars, typically fought between a governmental authority and an insurgent movement in rebellion against that authority.⁸⁰ Such conflicts traditionally were outside the scope of regulation by the international law of armed conflict,⁸¹ although historically there were always exceptions, wherein conflicts that were substantively civil in nature were “internationalized” by acts of

Resolution 808, May 19, 1993, U.N. Doc S/25704, reprinted in 32 INT'L LEGAL MATERIALS 1159, 1192 (1993).

⁷⁵ *Id.* at art. 3.

⁷⁶ See David Turns, *War Crimes Without War?—The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts*, 7 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ 804 (1995).

⁷⁷ S.C. Res. 827, U.N. Doc S/RES/827 (May 25, 1993).

⁷⁸ *Tadić*, *supra* note 73, ¶ 70. For discussion and analysis of this and subsequent ICTY jurisprudence on point, see Christine Byron, *Armed Conflicts: International or Non-International?*, 6 J. CONFLICT & SECURITY L. 63 (2001).

⁷⁹ See GREEN, *supra* note 28, 54–55.

⁸⁰ *Id.* at 65–67.

⁸¹ See Turns, *supra* note 76.

third parties.⁸² On this formalistic level, the "Global War on Terrorism" is clearly neither international nor non-international in nature, although certain episodes within the "War" might fall into one category or the other. For instance, the fighting in Afghanistan in late 2001 and early 2002 was clearly international inasmuch as the Coalition forces were fighting against Taliban militia who represented the de facto government of Afghanistan.

The normative difference between international and non-international armed conflicts is, in my analysis, of much greater importance. This difference, in essence, is that the precise legal rules applicable in each type of conflict are slightly different. Specifically, the law of international armed conflicts is highly regulated, with a large number of very detailed treaties, while the law in non-international conflicts is considerably more vague and of greater generality.⁸³ Such concepts as combatant and POW status, protected persons, and grave breaches are unknown to the legal regulation of non-international armed conflicts. Until the seminal ICTY decision in *Tadić*⁸⁴ a dozen years ago, there was no notion of individual criminal responsibility for violations of the law in internal conflicts. Regulation of the methods and means of warfare in non-international conflicts was rudimentary;⁸⁵ weaponry conventions, with very few exceptions, did not apply in non-international armed conflicts.⁸⁶ Although this state of affairs—particularly in regards to humanitarian protection in non-international armed conflicts—has not survived the trend towards greater humanitarianism

⁸² The classic example of such a conflict is the American Civil War: were the Confederate States of America a separate State in the international law sense of the term? If they were, then, notwithstanding popular nomenclature, the conflict would be classified as international in nature by today's standards. The more traditional view, though, is that through lack of international recognition *de jure*, the Confederate States of America never constituted a State in international law. Therefore the conflict was non-international in nature, although the U.S. institution of a maritime blockade around the Southern coastline and the British and French Declarations of Neutrality strongly suggested that the conflict was to a certain extent "internationalized." See Lindsay Moir, *The Historical Development of the Application of Humanitarian Law in Non-international Armed Conflicts to 1949*, 47 INT'L & COMP. L. Q. 337, 343, 345 & 348–49 (1998). Similar characteristics could be said to have attached to the Spanish Civil War (1936–1939), despite the general non-recognition of belligerency: *id.* at 352–353.

⁸³ See GREEN, *supra* note 28, 54–69.

⁸⁴ *Prosecutor v. Tadić*, *supra* note 78.

⁸⁵ See David Turns, *At the "Vanishing Point" of International Humanitarian Law: Methods and Means of Warfare in Non-international Armed Conflicts*, 45 GERMAN Y. B. INT'L L. 115 (2002).

⁸⁶ See David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 208–11 (2006).

that took place in approximately the last quarter of the twentieth century,⁸⁷ it remains the case that non-international armed conflicts are distinctly under-regulated in comparison with their international siblings. The significance of this is highly practical and is perfectly illustrated by the problem of combatant status.

Soldiers fighting in an international armed conflict against the armed forces of a foreign State know very well, albeit perhaps at a somewhat “basic” level, that enemy soldiers whom they capture are combatants, and therefore prisoners of war upon capture, entitled to certain privileges and standards of treatment. The rules of engagement, or “soldier’s card,” with which they are issued at the start of each conflict make that clear.⁸⁸ The rules applicable in international armed conflict specify that everyone is either a combatant or a civilian, and that enemy combatants are entitled to POW status provided that they satisfy the requirements of lawful belligerency.⁸⁹ In the event of any doubt, they should be treated as if they are POWs, pending a determination of their status by a competent tribunal.⁹⁰ If they are POWs, the Detaining Power may only hold them until the end of the conflict, whereupon they must be released and repatriated.⁹¹ The prisoners may be charged as war criminals for specific offenses allegedly committed prior to capture,⁹² but not for mere participation in hostilities, as lawful combatants are permitted to engage in hostile activities.⁹³ Soldiers fighting against insurgents in an internal conflict, however, know no such certainty. A captured insurgent may very well not be a POW, but he must be *something* in legal terms—what is he? What rights does he have? These conundrums apply *a fortiori* in the case of “terrorists” captured on the battlefield, at which point the theo-

⁸⁷ See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000).

⁸⁸ For example, the Rules of Engagement for U.S. Forces state, *inter alia*, “Do not engage anyone who has surrendered or is out of battle due to sickness or wounds. . . . The use of force, including deadly force, is authorized to protect the following: . . . Enemy Prisoners of War . . .” U.S. Central Command Combined Forces Land Component Commander, *The Rules of Engagement for U.S. Forces*, http://www.hrw.org/reports/2003/usa1203/11.htm#_Toc57442300 (last visited July 14 2007). Note that the document reproduced at this source, although described as “Rules of Engagement,” is actually only the “soldier’s card,” a summary of the essential rules printed on a small laminated card and distributed to all U.S. Army and Marine Corps personnel deployed in Iraq.

⁸⁹ Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁹⁰ *Id.* art. 5.

⁹¹ *Id.* art. 118.

⁹² See GREEN, *supra* note 28 at 210.

⁹³ *Id.* at 102–14.

retical gap between the law in international and non-international armed conflicts becomes an acute problem of practical application. We thus return to the fundamental problem highlighted in the introduction to this article.⁹⁴

A. *Contemporary perspectives (I): the US, Israel, the UK and the "Global War on Terror" as an armed conflict*

Within six months of each other in the second half of 2006, the Supreme Courts of two of the countries most actively engaged in military operations against terrorist organizations handed down decisions in which they addressed the fundamental issues of whether those military operations amounted to an armed conflict, in the international law sense of the term, and if so, the nature of that conflict. One of the decisions was concerned with what might be termed the strictly humanitarian side of humanitarian law, namely, the treatment of detainees captured by U.S. forces and held at Guantánamo Bay, Cuba. The other decision dealt with a specific issue in the context of the conduct of hostilities—methods and means of warfare or the technical "rules of the game" as between opposing belligerents—namely, the Israeli practice of carrying out "targeted killings" or "assassinations" (the precise terminology adopted depends on whether one agrees with the practice or not) against Palestinian militants in the West Bank and Gaza Strip. The decisions form an interesting pair and contrast quite sharply with each other since, in effect, the two courts arrived at quite different conclusions. It is important to remember, however, that they were actually considering different aspects of the scenario, for all their apparent similarity: the U.S. decision produced a sweeping statement of the law applicable in the "Global War on Terror" as a whole, whereas the Israeli court's concern was limited to one specific theatre of operations.

On June 29, 2006, in the case of *Hamdan v. Rumsfeld*,⁹⁵ the U.S. Supreme Court gave its long-anticipated decision on the legality of the procedures designated for the Military Commissions established by President Bush for the prosecution of foreign nationals captured in the "War on Terror."⁹⁶ This debate, which had been pursued with avid interest among specialists and non-specialists alike for nearly five years and generated an enormous

⁹⁴ See *supra* text accompanying notes 11–12.

⁹⁵ 126 S. Ct. 2749 (2006).

⁹⁶ Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

amount of legal literature,⁹⁷ was not *per se* really about international law at all. Rather, it was about the President's constitutional authority to create such Commissions in the manner and form that were used. The discussion of whether defendants' rights were being violated largely centered on whether they had any remedies under U.S. law or any residual protections under the U.S. Constitution. Within the parameters of this debate, the controversy over the detainees' international law status was initially secondary, as it was only started subsequent to the President's 2002 determination that Geneva Convention III was not applicable to Taliban and al Qaeda detainees captured in Afghanistan.⁹⁸ However, it rapidly acquired a notoriety all of its own, parallel to that of the Military Commissions themselves, and generated even more legal literature in international (as well as U.S.) circles.⁹⁹

Salim Ahmed Hamdan is a Yemeni citizen who was detained by U.S. forces in Afghanistan, where he had apparently been working as a driver, in November 2001. Incarcerated at Guantánamo Bay, he was charged in July 2004 with conspiracy to commit the offenses of attacking civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism.¹⁰⁰ In particular, it was alleged that he became Osama Bin Laden's personal driver and bodyguard, in which capacity he alleg-

⁹⁷ E.g., Daryl A. Mundis, *Agora: Military Commissions*, 96 AM. J. INT'L L. 320 (2002); Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantánamo Bay Naval Base*, 25 HARV. J. L. & PUB. POL'Y 591 (2002); Jesselyn A. Radack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. REV. L. & SOC. CHANGE 525 (2005).

⁹⁸ See 151 CONG. REC. S12, 657-58 (daily ed. Nov. 10, 2005) (statement of Sen. Bingaman).

⁹⁹ The literature on this topic is vast, so the following is only a representative sample: George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002); Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 HARV. INT'L L.J. 301 (2003); Lieutenant Colonel (s) Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1 (2004); John C. Yoo, *The Status of Soldiers and Terrorists Under the Geneva Conventions*, 3 CHINESE J. INT'L L. 135 (2004); Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367 (2004); Marco Sassòli, *The Status of Persons Held in Guantánamo Under International Humanitarian Law*, 2 J. INT'L CRIM. JUST. 96 (2004); Luisa Vierucci, *Is the Geneva Convention on Prisoners of War Obsolete? The Views of the Counsel to the U.S. President on the Application of International Law to the Afghan Conflict*, 2 J. INT'L CRIM. JUST. 866 (2004); Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667 (2006).

¹⁰⁰ U.S. Dep't of Defense, *Military Comm'n Complete Changes Against Salim Ahmed Hamdan*, <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf> (last visited July 7, 2007).

edly collected and delivered weapons and other supplies, purchased trucks and served as a driver for Bin Laden and other high-ranking members of al Qaeda.¹⁰¹ After having been labeled an unprivileged belligerent subject to trial by Military Commission,¹⁰² Hamdan applied for habeas corpus relief.

Nowhere in its opinion did the Supreme Court address the existence of an armed conflict as a matter of any uncertainty, much less one of dispute; it is at the very least implicit in the opinion of the plurality, the concurring, and the dissenting opinions that there is, in fact, an armed conflict between the U.S. and al Qaeda. Indeed, the very parameters of the argument—suggesting that Hamdan be considered as a prisoner of war—indicate that the court accepted a presupposition of the factual existence of an armed conflict. The opinion of the Court expressly uses the terms “hostilities,”¹⁰³ “active combat,”¹⁰⁴ “armed conflict,” and “war”¹⁰⁵ in such a way as to suggest that it never entered the Justices’ heads to consider whether there really was an armed conflict in the international law sense at all. Justice Kennedy, concurring, referred to “our Nation’s armed conflict with the Taliban and al Qaeda—a conflict that continues as we speak.”¹⁰⁶ In his dissenting opinion, Justice Thomas stated that the government’s position was “supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy”¹⁰⁷ He also referred to the “ongoing war.”¹⁰⁸ The comments made by the plurality and by Justice Thomas, in his dissenting opinion, as to the applicability of Geneva Convention III shed some light on the *nature* of the conflict, which is the next issue to be considered,¹⁰⁹ but that there *was* a conflict, no one doubted.

Half a world and half a year away from the Supreme Court in

¹⁰¹ *Id.*

¹⁰² U.S. Dep’t of Def., Office of the Chief Prosecutor, Office of Military Def., *Memo-
randum for Detainee Salim Ahmed Hamdan 0149: Notification of the Swearing Charges*, Feb.
2, 2007, ¶ 2–3, [http://www.defenselink.mil/news/d2007Hamdan%20-%20Notifica-
tion%20of%20Sworn%20Charges.pdf](http://www.defenselink.mil/news/d2007Hamdan%20-%20Notifica-
tion%20of%20Sworn%20Charges.pdf) (citing the “final determination of Combatant
Status Review Tribunal of 3 October 2004” that Hamdan is an unlawful enemy com-
batant as a member of, or affiliated with, al Qaeda, and stating that the accused’s
charged conduct is subject to trial by military commission).

¹⁰³ *Hamdan*, 126 S. Ct. at 2753.

¹⁰⁴ *Id.* at 2760.

¹⁰⁵ *Id.* at 2757.

¹⁰⁶ *Id.* at 2804 (Kennedy, J., concurring).

¹⁰⁷ *Id.* at 2838 (Thomas, J., dissenting).

¹⁰⁸ *Id.* at 2839.

¹⁰⁹ See *infra* text accompanying notes 124–54.

Washington, the Supreme Court of Israel gave quite a different decision in the case of *Public Committee Against Torture in Israel v. Government of Israel*.¹¹⁰ This case originated in a petition to the Supreme Court, in its capacity as the High Court of Justice, challenging the legality of the policy of “targeted frustration of terrorism,” whereby individual members of terrorist organizations who are believed to be involved in the planning, launching, or execution of terrorist attacks against Israeli targets are killed in targeted strikes by the Israel Defense Forces (IDF). The policy has been the subject of considerable academic debate for a number of years,¹¹¹ both as to the legal and ethical principles involved and the practical effects of execution of the policy (the IDF strikes have often resulted in substantial collateral damage to Palestinian civilians and civilian objects). The petition—which was originally submitted in January 2002 during an escalation in violence in the context of the second or Al-Aqsa *intifada*, which had begun in September 2000—was set aside by the Supreme Court when the Government of Israel unilaterally decided to suspend operation of the policy in light of possible developments in the Israeli-Palestinian peace process in February 2005. With the renewed escalation of violence in June 2005, however, the State resumed its implementation of the policy, with the result that the case was once again placed on the Court’s active list.¹¹²

¹¹⁰ HCJ 769/02, *Public Comm. Against Torture in Israel v. Gov’t of Israel*, [2006].

¹¹¹ Alongside the Israeli context, the literature has also focused on the same policy as conducted by the U.S. since September 11, 2001. See, e.g., J. Nicholas Kendall, *Israeli Counter-Terrorism: “Targeted Killings” Under International Law*, 80 N.C. L. REV. 1069 (2002); Joshua Raines, *Osama, Augustine and Assassination: The Just War Doctrine and Targeted Killings*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 217 (2002); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667 (2003); Louis René Beres, *The Newly Expanded American Doctrine of Preemption: Can It Include Assassination?*, 31 DENV. J. INT’L L. & POL’Y 157 (2002–2003); Robert F. Turner, *It’s not Really “Assassination”: Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 U. RICH. L. REV. 787 (2002); Chris Downes, *‘Targeted Killings’ in an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SECURITY L. 277 (2004); Jonathan Ulrich, *The Gloves Were Never on: Defining the President’s Authority to Order Targeted Killings in the War Against Terrorism*, 45 VA. J. INT’L L. 1029 (2005); Vincent-Joël Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801 (2005); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171 (2005); Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677 (2005); Daniel Byman, *Do Targeted Killings Work?*, 85 FOREIGN AFF. 95 (2006).

¹¹² HCJ 769/02, *Public Comm. Against Torture in Israel v. Gov’t of Israel*, [2006], ¶ 14. On the fate of a previous petition along the same lines, see *id.* ¶ 9; Kretzmer, *supra* note 111 at n.7.

As with the U.S. Supreme Court in *Hamdan*, it was common ground before the Israeli Supreme Court that IDF actions against Palestinian militant organizations were taking place within the framework of an armed conflict. Both petitioners and the State acknowledged this in their pleadings, although both parties showed somewhat more subtlety and inventiveness in their arguments than was apparent in *Hamdan*. The petitioners suggested that, “within [the] framework [of the armed conflict], military acts to which the laws of war apply are not allowed” and argued that,

the practice employed by states fighting terrorism unequivocally indicates international custom, according to which members of terrorist organizations are treated as criminals, and the penal law, supplemented at times with special emergency powers, is the law which controls the ways [in which] the struggle against terrorism is conducted.¹¹³

The U.K.’s example in dealing with terrorism in Northern Ireland was cited as a case in point.¹¹⁴ The State argued in response that,

there is no longer any doubt that an armed conflict can exist between a state and groups and organizations which are not states. That is due, *inter alia*, to the military ability means which such organizations have, as well as their willingness to use them. The current conflict between Israel and the terrorist organizations is an armed conflict, in the framework of which Israel is permitted to use military means.¹¹⁵

The Court, for its part, had no trouble at all accepting, “[t]he general, principled starting point . . . that between Israel and the various terrorist organizations active in Judea, Samaria and the Gaza Strip . . . a continuous situation of armed conflict has existed since the first *intifada*,” citing an earlier judgment to the effect that the “severe combat” taking place in the Occupied Palestinian Territories “is not police activity. It is an armed conflict.”¹¹⁶ Much more controversy centered on the nature of the armed conflict, but the Court’s acceptance of this “starting point” makes sense in light of

¹¹³ HCJ 769/02, *Public Comm. Against Torture in Israel v. Gov’t of Israel*, [2006], ¶ 4.

¹¹⁴ *Id.*

¹¹⁵ *Id.* ¶ 11. This approach had consistently been reflected in Israel’s statements to the United Nations. See U.N. Econ & Soc. Council [ECOSOC], Comm’n on Human Rights, Civil and Political Rights, Including the Question of Disappearances and Summary Executions, 130–31, U.N. Doc E/CN.4/2006/53/Add.1 (Mar. 27, 2006) (Report of Special Rapporteur, Philip Allston).

¹¹⁶ HCJ 769/02, *Public Comm. Against Torture in Israel v. Gov’t of Israel*, [2006], ¶ 16, (citing HCJ 7015/02, *Ajuri v. IDF Commander*, [2002], ¶ 1). Note that in the English translation of the Hebrew original in *Ajuri*, the phrases “fierce fighting” and “armed struggle” replace “severe combat” and “armed conflict,” although the sense is clearly identical.

the duration and intensity of much of the combat since September 2000. To this extent, the petitioners' comparison of the situation to Northern Ireland seems misplaced: at no time did the IRA engage the British security forces with the regularity and consistency of the various Palestinian armed groups.¹¹⁷ The penal law is undoubtedly *one* way in which terrorism may be combated, but military measures may also be appropriate, depending on the severity of the situation. In this respect the State's argument was entirely correct.

There is no comparable judicial decision from the U.K. as to the general parameters of the "War on Terror" or its status as an armed conflict or otherwise, as no similar cases have been brought in the British courts. The U.K. does not have an extraterritorial detention facility comparable to Guantánamo Bay, and persons temporarily detained by British forces in theaters of operations in the "War on Terror"—principally Afghanistan and Iraq, which the U.K. formally considers to be "military operations abroad that do not amount to International Armed Conflict"¹¹⁸ . . . must be handed over to the [Host Nation] authorities as soon as practicable in order that detainees can be dealt with according to the local criminal justice system."¹¹⁹ The U.K. does not engage in assassinations or targeted killings as a method of dealing with terrorists overseas (although it accepts that assassination may be lawful in the context of military operations, subject to certain conditions),¹²⁰ while within the national territory the prevalent approach is always sequestration of assets, arrest and prosecution under the ordinary criminal law.¹²¹

Generally the approach of the U.K. authorities is to be as vague as possible concerning the legal classification of military operations in which British forces are engaged, and to concentrate instead on the legal basis for such operations. Thus, for instance, statements from the British Ministry of Defence on the deployment

¹¹⁷ See *supra* text accompanying notes 54–58.

¹¹⁸ U.K. MINISTRY OF DEFENCE, JOINT DOCTRINE PUBLICATION: DETAINEES, 2006, JDP 1–10.3, ¶ 101.

¹¹⁹ *Id.* ¶ 116.

¹²⁰ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, ¶ 5.13 (2004). Notwithstanding this approach, the U.K. position on Israel's use of targeted killings is that they are contrary to international law. See, e.g., 675 PARL. DEB., H.L. (5th ser.) (2005) WA23.

¹²¹ The principal legislative authorities for such procedures are: the Terrorism Act, 2000, c. 11 (U.K.); The Anti-terrorism, Crime and Security Act, 2001, c. 24 (U.K.); The Prevention of Terrorism Act, 2005, c. 2 (U.K.); and the Terrorism Act, 2006, c. 11 (U.K.). None of these relate in any way to military operations.

and use of British troops in Afghanistan do not refer to their participation in an armed conflict in that country, merely to the fact that they are present as part of the International Security Assistance Force (ISAF) under the aegis of the North Atlantic Treaty Organization (NATO), with a brief to aid reconstruction under the seal of approval of the U.N. Security Council.¹²² The deployment and use of British forces in Iraq since the end of the period of belligerent occupation in June 2004 is likewise stated to be on the legal basis of a mandate from the U.N. Security Council;¹²³ again there is no reference to any state of armed conflict in Iraq today. The general position in the U.K. is that the determination of a state of armed conflict is a policy decision to be made by the government; it "depends upon the status of the parties to the conflict, and the nature of the hostilities."¹²⁴ Within the context of the "Global War on Terror," thus, each individual situation needs to be examined separately on the basis of its own facts—the actors and the nature of the hostilities—to determine if it amounts to an armed conflict or not.¹²⁵ The concept of the entirety of the "War on Terror" as a global phenomenon, in all its multifarious aspects, being tantamount to an armed conflict of any kind in the sense of international law is completely unknown to British law and doctrine.

¹²² *E.g.*, Adam Ingram, Minister of State, Speech to the All-Party Parliamentary Army Group: U.K. Military Operations in Afghanistan (Oct. 24 2006), *available at* <http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/MinAF/UkMilitaryOperationsInAfghanistan.htm>, U.K. MINISTRY OF DEFENCE, OPERATIONS IN AFGHANISTAN: BACKGROUND BRIEFING 2, <http://www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInAfghanistanBackgroundBriefing2.htm> (last visited July 7, 2007).

¹²³ *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence*, [2006] EWCA Civ. 327 (regarding a challenge to the legality of indefinite detention without charge of a British–Iraqi dual national by British forces in Iraq since October 2004).

¹²⁴ MINISTRY OF DEFENCE, JOINT DOCTRINE PUBLICATION: PRISONERS OF WAR, INTERNEES AND DETAINEES, 2006, JDP 1–10 ¶ 403.

¹²⁵ In an extradition case in recent years, a U.K. judge was faced with a Russian claim that the situation in Chechnya in 1995–1996 "amounted to a riot and rebellion, 'banditry' and terrorism." It was held, however, that "the events in Chechnya . . . amounted in law to an internal armed conflict." In support of that determination, the judge listed the following factors: "the scale of the fighting —the intense carpet bombing of Grozny within excess of 100,000 casualties, the recognition of the conflict in terms of a cease-fire and a peace treaty." *The Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates' Court, Decision of Judge T. Workman, Nov. 13, 2003, *available at* <http://www.tjetjenien.org/Bowstreetmag.htm>.

B. *Contemporary perspectives (II): the US, Israel, the UK and the “Global War on Terror” as an international or non-international armed conflict*

In its decision on the final appeal in *Hamdan*, the Supreme Court, in considering the legality of the Military Commission established to try him, addressed *inter alia* the applicability of the Geneva Conventions to his case in light of the nature of the “Global War on Terror” as an armed conflict—a point that had been argued in both the first instance¹²⁶ and previous appellate¹²⁷ decisions. The district court had dismissed the government’s claim that there were two separate armed conflicts in Afghanistan—one between the United States and the Taliban, and one between the United States and al Qaeda—and that, Hamdan having been captured in the course of the second one, Geneva Convention III did not apply to him.¹²⁸ The district court had held that,

the government’s attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, *which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with* Thus . . . the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there.¹²⁹

The court of appeals had then reversed the district court, holding that the Geneva Convention was not judicially enforceable in U.S. federal courts;¹³⁰ and that in any event for the purposes of the Geneva Conventions the armed conflict in Afghanistan was effectively neither international nor non-international in nature. On the one hand al Qaeda was neither a State nor a “High Contracting Party” to the Convention (as required by Common Article 2 thereof). On the other, the conflict was not confined to the territory of “a single country” (as required by Common Article 3 as interpreted), but was “international in scope,” as determined by the President, whose constitutional authority to make such a determination had

¹²⁶ *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

¹²⁷ *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

¹²⁸ *Hamdan*, 344 F.Supp.2d at 160.

¹²⁹ *Id.* at 161 (emphasis added). In my analysis, although the Judge’s ultimate conclusion on this point was correct, his reason was wrong: it is not the geographical location of a conflict that determines the applicability of the Geneva Conventions, but the identity of the parties. In this sense the U.S. administration was not in my opinion wrong *ab initio* to differentiate between Taliban and al Qaeda; they should have respected Article 5 of Geneva Convention III and treated al Qaeda detainees as if they were POWs until a competent tribunal decided otherwise.

¹³⁰ *Hamdan*, 415 F.3d at 39–40.

to be judicially respected.¹³¹

The Supreme Court reversed the appeals court, finding conclusively that, as to the generalities of the case, the Military Commissions in the form in which they had been created by President Bush were illegally established and did not conform procedurally to the requirements of the Uniform Code of Military Justice.¹³² For the purposes of this discussion, the most interesting part of the Supreme Court's decision was the passage in which the plurality addressed the conformity of the Military Commissions to the requirements of the Geneva Conventions. The opinion, as written by Justice Stevens, declared that it was not necessary to deal with the merits of the government's argument (on the applicability of the Geneva Conventions) that had been so successful in the Appeals Court, "because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories."¹³³ This the plurality identified as Common Article 3, which applies as a "minimum yardstick" of protection in all conflicts¹³⁴ but *prima facie* is directed specifically to "armed conflicts not of an international character," in which it provides basic protections to persons taking no active part in hostilities, including those placed *hors de combat* by wounds or sickness and those who have surrendered or been otherwise detained.¹³⁵ The key to this part of the decision, for the plurality, was the phrase "conflict not of an international character." This, the Court held to have a meaning "in contradistinction to a conflict between nations," or, effectively a negative definition of the phrase, such that it could be interpreted as bringing within its ambit any and all armed conflicts that do not fit within the inter-State armed conflict paradigm. The plurality asserted that this was the "literal meaning" of the phrase, and that in any event the intention behind the provision, whilst ostensibly restricted specifically to non-international armed conflicts *stricto sensu*, was for its scope of application to be "as wide as possible."¹³⁶ Of the dissenting opinions, only that of Justice Thomas dealt directly with the issue of the nature of the conflict. He held that "[t]he conflict with al Qaeda is international in char-

¹³¹ *Id.* at 41.

¹³² *Hamdan*, 126 S. Ct. at 2851.

¹³³ *Id.* at 2756-2757.

¹³⁴ The phrase is taken from the International Court of Justice's famous decision in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (merits) ¶ 218. In *Tadić*, the ICTY also held that, "the character of the conflict is irrelevant" in terms of the application of Common Article 3. *Tadić*, *supra* note 73, ¶ 102.

¹³⁵ *Hamdan*, 126 S. Ct. at 2795.

¹³⁶ *Id.* at 2796 (quoting Geneva Conventions Commentary 36-37).

acter in the sense that it is occurring in various nations around the globe. Thus, it is also ‘occurring in the territory of’ more than ‘one of the High Contracting Parties.’”¹³⁷ Although he described the plurality’s interpretation of the meaning of the phrase “armed conflict not of an international character” as “admittedly plausible,” he nevertheless felt constrained by the judicial duty of deference to the Executive’s determination of the matter.¹³⁸ The plurality departed spectacularly from that presumption of deference, given that the administration has tended to take the explicit line that the conflict was international in character.¹³⁹

The plurality in the U.S. Supreme Court thus identified the totality of the “Global War on Terror” as an “armed conflict not of an international character” within the meaning of Common Article 3. The decision proceeded from an essentially functionalist perspective—the necessity to decide the legality of President Bush’s Military Commissions—and applied a literalist reading of the letter of the law. The U.S. Supreme Court’s Israeli counterpart, considering a much more limited scenario—namely, IDF actions against Palestinian militants in the Occupied Palestinian Territories and areas under the jurisdiction of the Palestinian Authority—applied a much more holistic approach in seeking to explain the whole legal framework underpinning IDF operations in this theater, and reached the diametrically opposite conclusion: that the armed conflict between Israel and the Palestinian armed groups is an international armed conflict. This would have been thought by most international lawyers (outside Israel, at least) to be counter-intuitive: the conflict between Israel and the Palestinians cannot be international in nature because the Palestinians are not a State in international law. Conversely, nor could it have been considered a non-international armed conflict, since some parts of the Palestinian Territories are under belligerent occupation by Israel, whilst other parts are under the jurisdiction of the Palestinian Authority; in neither case are they legally part of the State of Israel.¹⁴⁰ But even if those views were correct, it could never be the position that the conflict was subject to no rules of humanitarian law at all.

¹³⁷ *Id.* at 2846 (Thomas, J., dissenting).

¹³⁸ *Id.* at 2846.

¹³⁹ *E.g.*, John Bellinger III, U.S. Department of State, *Oral Statements by the United States Delegation to the Committee Against Torture*, at 4 (May 8, 2006), <http://www.state.gov/documents/organization/66173.pdf>.

¹⁴⁰ Although, for an interesting argument to the contrary, see Kretzmer, *supra* note 111 (suggesting that this conflict be regarded as being of mixed character, neither fully international nor fully non-international).

Probably the default position would then have been to fall back on Common Article 3 of the Geneva Conventions, as the U.S. Supreme Court did.

The classification of the Israeli-Palestinian conflict was initially a point of agreement between the petitioners and the State of Israel, but both sides modified aspects of their submissions on point as the case proceeded. The petitioners made the obscurantist suggestion that, "the conflict under discussion is an international armed conflict, however . . . within its framework, military acts to which the laws of war apply are not allowed"¹⁴¹—a point of which it is hard to make any particular sense. The State, on the other hand, shifted its legal position from simply saying that the conflict was international in nature, "to which the usual laws of war apply,"¹⁴² to claiming that:

the question of the classification of the conflict between Israel and the Palestinians is a complicated question, with characteristics that point in different directions. In any case, there is no need to decide that question in order to decide the petition. That is because according to all of the classifications [of armed conflict], the laws of armed conflict will apply to the acts of the State. These laws allow striking at persons who are party to the armed conflict and take an active part in it, whether it is an international or a non-international armed conflict, and even if it belongs to a new category of armed conflict which has been developing over the last decade in international law—a category of armed conflicts between states and terrorist organizations. According to each of these categories, a person who is party to the armed conflict and takes an active part in it is a combatant, and it is permissible to strike at him.¹⁴³

The State's argument at this point is extremely interesting, as it amounted to saying that many of the rules in armed conflicts are now the same, irrespective of the classification of the conflict in question. This is a tendency that has been gathering apace in the last twelve years, and is evidenced by the jurisprudence of international criminal tribunals (notably the ICTY)¹⁴⁴ as well as the practice of States as expressed in their military law manuals and instructions.¹⁴⁵ To the extent that the State of Israel expressed the

¹⁴¹ HCJ 769/02, *Public Comm. Against Torture in Israel v. Gov't of Israel*, [2006], ¶ 4.

¹⁴² *Id.* ¶ 11.

¹⁴³ *Id.*

¹⁴⁴ See Turns, *supra* note 85, at 127–31.

¹⁴⁵ *E.g.*, U.S. Dep't of Def. Directive No. 5100.77, Dec. 9, 1998, ¶ 5.3.1 (U.S. personnel are required to "comply with the law of war during all armed conflicts, however such conflicts are characterized . . ."); German Central Service Manual, ZDv 15/2 ¶

same view, through its legal counsel in this litigation, it could clearly be viewed as another example of the accumulation of *opinio juris* on this point.

The Court did not choose to go down the particular path that the State's submissions opened for them on the character of the armed conflict between Israel and the Palestinians. It ruled simply that the applicable law was that governing international armed conflicts, and it did so on two distinct grounds: (1) the fact of the armed conflict crossing the frontiers of the State and taking place within a context of belligerent occupation (which by definition constitutes international armed conflict);¹⁴⁶ and (2) the military capabilities of modern terrorist organizations. The latter point, which would seem to be of rather more general application than just to the specific situation with which the Court was dealing, is an innovative view, which the Court expressed in the following terms:

the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict. . . . Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character.¹⁴⁷

The decisions of the U.S. and Israeli Supreme Courts in *Hamdan v. Rumsfeld* and *Public Committee against Torture in Israel v. Government of Israel*, respectively, represent two alternative classifications of the "Global War on Terror" as an armed conflict. While the common sense analysis adopted by the Israeli court is commendable, the American approach seems rather literalist by comparison. Nevertheless, it could signal a resurgence of importance and usefulness for Common Article 3 of the Geneva Conventions. The perceived vagueness, generality, and lack of enforceability of that provision

211, reprinted in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 48 (Dieter Fleck ed., 1999), ("German soldiers like their Allies are required to comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts however such conflicts are characterized."). See Turns, *supra* note 85, at 139–41. U.K. doctrine does not go so far in its acceptance of the trend, but does expressly provide for the use of the provisions of Additional Protocol I (which on the face of it is applicable to international armed conflicts only) for targeting operations, "[w]hether a state of international armed conflict exists or not." U.K. Ministry of Defence, *Joint Warfare Publication—Legal Support to Joint Operations*, Apr. 2005, JWP 3-46, ¶ 221.

¹⁴⁶ HCJ 769/02, *Public Comm. Against Torture in Israel v. Gov't of Israel*, [2006], ¶ 18.

¹⁴⁷ *Id.* ¶ 21.

were largely what prompted the drafting of Additional Protocol II in 1977, an instrument which in turn became quasi-impossible to apply in practice because of the extremely high threshold for its scope of application—along with the fact that most States with non-international armed conflicts in their territories studiously avoided signature or ratification. What is innovative about the decision in *Hamdan* is its application of Common Article 3 to a transnational armed conflict—meaning one that crosses international frontiers—that is nevertheless not primarily one between States. In this context, Common Article 3 is viewed as a fundamental baseline or “lowest common denominator,”¹⁴⁸ which in any event was always intended by its drafters to have the widest scope of application possible,¹⁴⁹ and which has been acknowledged as applying to all armed conflicts.¹⁵⁰

The Israeli decision is seductive in the clarity and logic of its analysis, but it is quite clear that the Court there was only classifying the situation as between Israel and armed militants operating from the Occupied Palestinian Territories and areas under the jurisdiction of the Palestinian Authority. Nevertheless, the passage

¹⁴⁸ For a similar argument, developed in much more detail, see the interesting discussion in Geoffrey S. Corn, “*Snipers in the Minaret—What Is the Rule?*” *The Law of War and the Protection of Cultural Property: A Complex Equation*, 2005 ARMY LAW. 28, DA PAM 27-50-386, n.27. Corn argues cogently for a pragmatic characterization of military operations by States against non-State transnational terrorist elements as either “simply ‘armed conflicts’” or transnational armed conflicts, reflecting the global reach of such operations. Such characterization would trigger the application of the basic principles of military necessity and humanity (the latter as reflected in Common Article 3 and Additional Protocol II) as a matter of customary international law. There is much to commend this analysis: in its application of Common Article 3, at least, it uses principles of humanitarian law on which there is universal agreement, while simultaneously respecting the peculiar characteristics of such conflicts.

¹⁴⁹ See JEAN DE PREUX, INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (A.P. de Heney trans., 1960). In fact, this commentary is sufficiently ambivalent as to be potentially useful to either side of an argument as to the applicability of Common Article 3 to transnational armed conflicts by States against terrorist elements. On the one hand, it is stated as applying “to non-international armed conflicts only.” *Id.* at 34. This is a phrase which in the modern understanding is narrower than the phrase “armed conflicts not of an international character,” contained in the text of the Article itself. On the other hand, one of the criteria suggested for distinguishing a genuine armed conflict from mere “acts of banditry,” *id.* at 36, or an unorganized and short-lived insurrection is “that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.” *Id.* The latter criterion was satisfied, in the case of the U.S. response to the attacks of September 11, 2001, by Security Council Resolution 1368 (2001).

¹⁵⁰ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (merits).

quoted above from the opinion of the Court suggests that a broader, more sweeping statement of law might have been intended. The only other counter-terrorist operations in which the IDF has been engaged in recent years have been against Hezbollah in Lebanon—a situation that in July and August 2006 undoubtedly escalated into full-scale armed conflict. Official Israeli publications related to that conflict refer to international humanitarian law exclusively in terms of the law applicable in international armed conflict.¹⁵¹ Likewise, it was the position of the IDF that “decisions were taken on the basis of the law on international armed conflicts, in particular the Geneva Convention [IV], and those provisions of the Additional Protocol I that are declaratory of customary international law.”¹⁵² In any event, an argument could be made that as Hezbollah was part of the coalition government in Lebanon at the time, conceivably the conflict was in some sense directed against the Lebanese state.¹⁵³ The extraterritorial dimension of the conflict in Lebanon—as compared to IDF operations in areas that are either under Israeli belligerent occupation or under the jurisdiction of the autonomous (but not independent in terms of statehood) Palestinian Authority—would be another obvious reason to argue for the international character of the conflict. As far as the characterization of the Israeli-Palestinian conflict as international is concerned, however, inasmuch as it relates to IDF operations being carried out in areas that are not under Israeli belligerent occupation, the obvious criticism from an international law perspective is that that conflict is not between two or more *States*.

As far as British practice and doctrine are concerned, any determination as to the type of armed conflict must be done on a case-by-case basis, depending on the facts in each given situation.¹⁵⁴ The legal basis of the decision in any event, for the U.K. authorities, will be the international law definitions of international and non-international armed conflicts, in conjunction with the facts on the ground. If British forces are in action against the government or other official forces of any other State, the situation will be classified as one of international armed conflict—a decision

¹⁵¹ *E.g.*, Press Release, Israeli Ministry of Foreign Affairs, Responding to Hezbollah attacks from Lebanon—Issues of Proportionality (July 25, 2006) (on file with the author).

¹⁵² See U.N. General Assembly, Implementation of General Assembly Resolution 60/351 of 15 March 2006 entitled “Human Rights Council”, 23, U.N. Doc A/HRC/2/7 (Oct. 2, 2006) (Report of Mission to Lebanon and Israel).

¹⁵³ This argument was not made officially by Israel.

¹⁵⁴ See U.K. MINISTRY OF DEFENCE, *supra* note 120, ¶¶ 3.1–3.13.

made all the easier by the fact that every State in the world is now a High Contracting Party to the Geneva Conventions. In any other situation in which British troops are deployed, the situation will be regarded as one of de facto non-international armed conflict. Thus, from the point of view of the U.K., the ongoing hostilities in Afghanistan and Iraq are in effect treated as internal conflicts in which U.K. forces are participating on the side of the governments of those States. The conflict in Iraq, for example, is not one between the British and Iraqi States; it is between Iraqi insurgents and the Iraqi State, and the latter (with the sanction of the U.N. Security Council) invited British troops to assist them in combating the insurgency and maintaining or restoring law and order. This position might seem counter-intuitive: how can forces of one State be engaged in hostilities in another State, against foreign nationals, yet the conflict not be regarded as an international one? However, the position is in fact not devoid of sense from a strictly legal perspective, in the same way that the U.S. Supreme Court's decision in *Hamdan* has a certain logic to it. If the British and Iraqi States are not at war with each other, but there is a conflict going on in Iraq, it cannot be international according to the definitions in the Geneva Conventions or Additional Protocol I. Therefore, by default almost, it must be *not international*, or effectively internal. Whether it is then governed by Common Article 3 or by Additional Protocol II will depend, as far as the British authorities are concerned, on whether the non-State party to the conflict is fighting under responsible command, has control of territory, and is able to implement the Protocol.¹⁵⁵ Again, this will be a policy decision made by the Government.¹⁵⁶

SOME CONCLUSIONS: TOWARDS AN ACCEPTABLE
COMPROMISE ON THE APPLICABLE LAW?

Is the "Global War on Terror" an armed conflict or not? And, if it is, what *kind* of armed conflict is it for the purposes of the application of humanitarian law? This Article presents the views adopted in recent decisions by the highest courts in the U.S. and Israel, alongside a comparative perspective from the U.K., informed by the historical experience of dealing with terrorist insurgency in Northern Ireland. I would suggest that there are six options:

¹⁵⁵ Art. 1(1), Additional Protocol II.

¹⁵⁶ U.K. MINISTRY OF DEFENCE, *supra* note 120, ¶¶ 4.3.3–4.3.4.

- (i) there is a conflict and it is international in nature, as indicated by the Supreme Court of Israel;
- (ii) there is a conflict and it is non-international in nature, as indicated by the U.S. Supreme Court;
- (iii) there is a conflict with a new kind of hybrid status, which might be described as a trans-national armed conflict, as suggested by Corn;¹⁵⁷
- (iv) there is a conflict and its precise classification in terms of humanitarian law does not really matter, as long as the “minimum yardstick” of Common Article 3, which is applicable as a minimum in all armed conflicts, is used to govern States’ and soldiers’ behavior when conducting military operations against terrorist non-State actors;
- (v) there is no overarching conflict: the various counter-terrorist military operations which have taken place since September 2001 should be viewed as primarily criminal law enforcement operations undertaken with military support; and
- (vi) there is no overarching conflict, but each individual counter-terrorist military operation in the context of the “War on Terror” should be designated separately as either international or non-international in nature, in accordance with international humanitarian law and depending on the facts on the ground.

Each of these possibilities has advantages and disadvantages. If option (i) is adopted, that would entail an obligation to apply the full corpus of the law of international armed conflicts—at a minimum, the four Geneva Conventions and the customary law of international armed conflict, together with those provisions of Additional Protocol I that are accepted as having attained customary status (for States that have not ratified Protocol I) or the entirety of the Protocol for States that are parties thereto. The question of personal status is of crucial importance in international armed conflicts: are individual fighters legally combatants? Are they prisoners of war upon capture? Therefore, some agreement would need to be reached about the status to be accorded to terrorists captured by troops on the battlefield. The U.S. and the U.K., the two closest coalition partners in the “War on Terror,” fundamentally disagree about this. The Americans consider such detainees to be “unlawful combatants,” a category which the U.K. does not recognize as legally valid.¹⁵⁸ The preferred British position would be to regard

¹⁵⁷ Corn, *supra* note 148 at 32.

¹⁵⁸ MINISTRY OF DEFENCE, JOINT DOCTRINE PUBLICATION: DETAINEES, 2006, JDP 1–10, ¶¶ 110–11.

such persons as basically civilians who have lost their entitlement to special protection under Geneva Convention IV by virtue of having illegally taken part in hostilities.¹⁵⁹ These individuals may be targeted as legitimate hostile military targets, and upon capture are entitled to treatment according to the "fundamental guarantees" specified in Article 75 of Additional Protocol I (but not as prisoners of war under Geneva Convention III).¹⁶⁰ For my part, I would suggest that there is not necessarily any harm in according combatant—and, therefore, prisoner of war—status, on a *de facto* basis, to terrorists captured in the "War on Terror." On the contrary, doing so would send an important message about the values and the intrinsic humaneness of our societies. However, because of the perception that it would give terrorists a privileged legal status and rights to which they technically should not be entitled, and because of the reciprocal basis of the law of armed conflict (a conception of hostilities that is not generally shared by the terrorist organizations), it is unlikely in the extreme that there would be agreement on such a position.¹⁶¹ But there should be no objection in logic to treating captured terrorists, at the very least, *as if they were* POWs until a competent tribunal has properly determined their status: that would ensure compliance with both the letter and the spirit of Article 5 of Geneva Convention III.

Options (ii) and (iii) share a similar problem that differentiates between them primarily as a question of degree. In the event of the law of non-international armed conflicts being applied, an immediate difficulty is that there is not very much of it. What provisions exist are vague, of the utmost generality, and overwhelmingly concerned with the protection of victims, but not with methods and means of warfare. In order for Additional Protocol II to be applicable, the State in question would have to be a party thereto—ruling out its application by U.S. or Israeli forces, for example—and the high threshold for scope of application in its Article 1(1) would have to be satisfied. This is rarely the case for

¹⁵⁹ *Id.* ¶ 111.

¹⁶⁰ See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 299–383 (Rules 87–105) (2005).

¹⁶¹ There would also be potential problems in the application of various technical provisions of Geneva Convention III vis-à-vis captured terrorists *qua* POWs. *E.g.*, the requirements not to transfer POWs from the Detaining Power to another High Contracting Party (art. 12), to give advances of pay to POWs according to rank (art. 60), and to release and repatriate POWs "without delay after the cessation of active hostilities" (art. 118). Although special agreements to deal with these and other matters might be concluded in accordance with Article 6, the complications inherent in such a procedure would be likely to deter States from seeking to effect them.

terrorist organizations. If only Common Article 3 could be said to be applicable, then option (ii) effectively merges with option (iv). Even if Additional Protocol II did apply to a non-international armed conflict with terrorists, there would be a dearth of applicable law relating to methods and means of warfare. For example, what weapons may one use or not use in a non-international armed conflict with terrorists? With option (iii), the problem would lie in knowing which specific provisions, from a much greater corpus of law, to apply. Should the law of international armed conflict be applied, so as to afford the highest level of protection and standards of conduct possible? Although that sounds attractive in theory, in practice States would surely oppose it for the same reasons that they would oppose option (i).

Option (iv) sounds superficially attractive. Since there is universal agreement about the scope and application of Common Article 3, every State in the world accepts it, and there is judicial authority from the highest court in international law that it is the basis of humanitarian protection in all conflicts,¹⁶² there would seem to be minimal problems in applying it to conflicts with terrorist organizations. But again, the devil is in the detail. This option avoids hard choices based on rigorous analysis, and Common Article 3 is completely silent as to aspects of warfare other than protection of victims.¹⁶³ In this respect, one might legitimately ask: is Common Article 3 enough?

Finally, options (v) and (vi) represent British practice, the former in relation to earlier “emergencies” such as those in Malaya and Northern Ireland,¹⁶⁴ the latter in relation to current doctrine. Although imperfect, the current British perspective on legal classification of, and application of rules in, individual military operations in the “War on Terror” does at least have the benefit of flexibility and adaptability. It preserves the prerogatives and privileges of States’ forces without extending them to those who are not

¹⁶² *Military and Paramilitary Activities (Nicar. V. U.S.)*, *supra* note 150.

¹⁶³ As mentioned above, the same is true of Additional Protocol II and the customary law of non-international armed conflict. But at least since the ICTY decision in *Tadić*, *supra* note 73, there has been a developing tendency to extend the application of many customary rules regarding methods and means of warfare in international armed conflicts to cover non-international armed conflicts also. *See* Turns, *supra* note 85.

¹⁶⁴ Although, for a critical view of the “militarization phase” in Northern Ireland and its implications, *see* Colm Campbell & Ita Connolly, *A Model for the ‘War Against Terrorism’? Military Intervention in Northern Ireland and the 1970 Falls Curfew*, 30 J. L. & Soc. 341 (2003).

entitled to them, while nevertheless enabling the most humanitarian treatment possible of captured terrorists.

International humanitarian law has itself been suffering from all the uncertainty surrounding its interpretation and application since September 2001. I am of the view that there is nothing inherently wrong with the rules themselves: rewriting them is not necessary, and probably not practicable in any event. What is needed is some agreement and consistency as to what existing law to use in relation to military counter-terrorist operations. Ultimately, talk of "unlawful combatants" and even the use of the term "terrorists" serve no useful legal purpose and should be abandoned in legal discourse. These terms are legally meaningless and only contribute to decreasing the incentives for mutual respect of the law.¹⁶⁵ Such a regression to barbarism on the part of civilized nations is the last thing the law needs in an already increasingly barbaric age.

¹⁶⁵ It is at least heartening that the latest reissue of the U.S. Army *Field Manual on Human Intelligence Collector Operations* incorporates reference to Common Article 3 as the benchmark for a single humane standard of treatment for all detainees in military custody, regardless of their status. See Dep't of the Army, FM 2-22.3 (FM 34-52) (Sept. 2006); Dep't of Def. Directive 2310.01E ¶ 4.2 (Sept. 5, 2006).

