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A Paradigm of Prevention: Humpty Dumpty, the War on Terror, and the Power of Preventive Detention in the United States, Israel, and Europe†

A decade into the proclaimed “global war on terror,” states are still struggling with the phenomenon’s locus and definition under the effective laws. Remarkably, preventive detention of suspected terrorists fluctuates between various legal regimes: In Europe, criminal law is predominantly used but special security orders are occasionally issued as well; Israel applies in part the law of international armed conflicts; and in the United States, detention under a new war premise has been claimed.

This Article analyzes the response of the U.S. Supreme Court, the Israeli Supreme Court, and the European Court of Human Rights to legislative and executive policies asserting the power of preventive detention in the aftermath of September 11, 2001. The comparison exposes significant differences with regard to the application of international law, and most prominently concerning the underlying question of whether the struggle against terrorism should be considered a “war,” or, perhaps more traditionally, a fight against crime.

Despite the substantial discrepancies in these three jurisdictions, this Article argues that the similarities are actually more striking. Whereas no court has accepted any attempt to fight terrorism outside the bounds of law, the judges have not hesitated to stretch and blur the pertinent frameworks by extensive interpretation. Ultimately, it is questionable whether on account of the individual’s rights the resulting flexibilities and uncertainties are justifiable.

“I don’t know what you mean by ‘glory,’” Alice said. Humpty Dumpty smiled contemptuously. “Of course you don’t – till I tell you. I meant ‘there’s a nice knock-down argument for you!’” “But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected. “When I use a word,” Humpty Dumpty

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said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less." "The question is," said Alice, "whether you can make words mean different things." "The question is," said Humpty Dumpty, "which is to be master – that's all."

LEWIS CAROLL, THROUGH THE LOOKING-GLASS
AND WHAT ALICE FOUND THERE 118-119
(Elibron Classics Series 2006) (1904).

[I]t must always be kept in mind that detention without the establishment of criminal responsibility should only occur in unique and exceptional cases. The general rule is one of liberty. Detention is the exception.

Israeli Supreme Court sitting as High Court
of Justice 3239/02
Marab v. IDF Commander [2003] IsrSC 57(2),
349, para. 20.

I. INTRODUCTION

As the Israeli Supreme Court pointed out in *Marab v. IDF Commander*, it is one of the constituting principles of a liberal society that individuals have to be left in freedom except when they are responsible for at least highly suspected of having committed a criminal offense.¹ In *Boumediene* the U.S. Supreme Court explained why:

[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital:

To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government²

1. See HCJ 3239/02 Marab v. IDF Commander in the West Bank [2003] IsrSC 57(2) 349, para. 20.

2. *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008) (quoting THE FEDERALIST No. 5 (Alexander Hamilton) (Clinton Rossiter ed., 1961), quoting 1 W. Blackstone, Commentaries *136, 4, at *438); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting).

II. UNITED STATES

Three days after the attacks of 9/11, Congress passed the Authorization for Use of Military Force (AUMF),⁶ a document that has played—and continues to play—a crucial role in the controversy over detention of suspected terrorists. The AUMF provides:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁷

President Bush relied on the AUMF in order to detain “enemy combatants” in the global war on terror⁸ and President Obama largely continues to do so.⁹ But the debate about terrorists as enemies or criminals, about war or crime, is much older than the AUMF. Already in 1866 the US Supreme Court dealt with these issues in *Ex parte Milligan*.¹⁰

A. Milligan

During the civil war, Lambdin P. Milligan, a U.S. citizen and resident of Indiana who had never served in the U.S. or confederate army, was arrested in his home by U.S. troops and brought into military confinement. The government alleged that Milligan had joined and aided the secret society known as the “Order of American Knights” or “Sons of Liberty” for the purpose of overthrowing the government; he had “communicat[ed] with the enemy” and conspired to “seize munitions of war” and to “liberate prisoners of war.”¹¹ A military commission found Milligan guilty on all charges and sentenced him to be hanged.

The Supreme Court decided that Milligan could not be detained in military imprisonment and tried by a military commission. A five-

6. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

7. *Id.* at § 2(a).

8. Presidential Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 Nov. 2001, ILM (2001) 252, § 2(1)(1); see also Brief for the Respondents at 12-24, 39, *Hamdi* (No. 03-6696); Brief for the Petitioner at 27-49, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027); see also John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003-2004).

9. See Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo, *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) (No. 05-0763).

10. 71 U.S. 2 (1866).

11. *Id.* at 6-7.

Justices majority held that the laws of war could not serve as a source of authorization because they “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and unobstructed.”¹² The majority concluded that the right to a jury trial in civilian courts, “a right preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service,”¹³ had been violated. This right “is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.”¹⁴ The majority explained that Milligan’s detention as a prisoner of war was unlawful because he had lived in Indiana for the past twenty years, had been arrested there, and had not been a resident of any of the states in rebellion.¹⁵

The concurrence, a four-Justices minority, agreed that Congress had not authorized Milligan’s detention and trial but declined to reject in general Congress’s power to authorize military detentions and commissions in such circumstances. Citizens attempting to destroy or injure the national forces may well be subject to military trial and punishment.¹⁶ The minority found that a “powerful secret association under military organization” apparently existed in the state of Indiana.¹⁷ “In such a time of public danger,” Congress may use military commissions.¹⁸ “[Federal] courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.”¹⁹

The majority and concurrent opinions in *Milligan*, issued in 1866, already encapsulate the whole spectrum of arguments and legal constructions relevant for the detention of terrorists after 9/11. The majority defended the criminal law system, whereas the minority considered that necessity may require military detention and trial.

B. Quirin

The first opportunity for the Supreme Court to review the decision in *Milligan* came in World War II. *Ex parte Quirin*²⁰ concerned the military trial of eight Nazi saboteurs who entered the United States in order to destroy war industries and facilities. The petitioners were trained at a sabotage school in Berlin and received

12. *Id.* at 121.

13. *Id.* at 123.

14. *Id.* at 123.

15. *Id.* at 131.

16. *Id.* at 139.

17. *Id.* at 140.

18. *Id.* at 140.

19. *Id.* at 140-41.

20. 317 U.S. 1 (1942).

instructions from an officer of the German High Command. They arrived with German submarines in the United States, carrying explosives and wearing uniforms or caps of the German marine, which they promptly buried after landing.²¹ Shortly after their arrest, the saboteurs were tried by a military commission and sentenced to death. President Roosevelt later commuted the death sentences for two of the petitioners to life in prison because they confessed and informed the FBI of the sabotage plan.

In a unanimous opinion the Supreme Court upheld the military detention and trial and reasoned as follows:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.²²

The Court obviously wrestled with the decision in *Milligan* and tried to distinguish it on the facts. In contrast to the petitioners in *Quirin*, *Milligan* had not been “part of or associated with the armed forces of the enemy,”²³ the Court asserted.

C. Hamdi

On June 28, 2004, the Supreme Court decided the *Hamdi* case.²⁴ It was the first occasion for the Court to pronounce a judgment on the government’s war on terror doctrine after 9/11. During the U.S. invasion in Afghanistan, in 2001, the American citizen Yaser Esam Hamdi was captured by Northern Alliance forces and then turned over to the U.S. military. The government classified Hamdi as an “enemy combatant” for fighting alongside the Taliban.

The Court upheld Hamdi’s military detention. Justice O’Connor, writing for the plurality, confined the term “enemy combatant” to its traditional meaning.

[T]he “enemy combatant” that [the government] is seeking to detain is an individual who, it alleges, was “part of or supporting forces hostile to the United States or coalition

21. *Id.* at 21.

22. *Id.* at 30-31.

23. *Id.* at 45.

24. *Hamdi vs. Rumfield*, 542 U.S. 507 (2004).

partners” in *Afghanistan* and “who engaged in an armed conflict against the United States” *there*.²⁵

Justice O’Connor added the place of the armed conflict to the government’s definition and limited it to Afghanistan, something the government had deliberately omitted.²⁶ The plurality did not decide about the “war against al Qaeda,” either; instead, for the purposes of the case, it narrowed the conflict to a war with the Taliban, the de facto government at that time.²⁷ By injecting these two elements into the government’s fragmentary definition—first, the place of the conflict and, second, the relevant hostile force—the plurality pressed the *Hamdi* case into the traditional framework of an armed conflict between states. The plurality concluded that

detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.²⁸

Justice O’Connor went on and discussed whether indefinite or perpetual detention for the purpose of interrogation is authorized by the AUMF. She denied this and added in a decisive paragraph:

[O]ur understanding is based on long-standing law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.²⁹

The Court explicitly refused to decide on the “national security underpinnings of the war on terror,” which are, “although crucially important,” also “broad and malleable.”³⁰ John Yoo’s interpretation of

25. *Id.* at 516 (plurality opinion) (emphasis added).

26. Brief for the Respondents at 20-21, *id.* (No. 03-6696): “The President’s authority to use military force in Afghanistan *and elsewhere* in the *global* armed conflict against the al Qaeda terrorist network must include the authority to detain those enemy combatants who are captured during the conflict” (emphasis added).

27. *Id.* at 518 (plurality opinion): “There can be no doubt that individuals who fought against the United States in Afghanistan *as part of the Taliban*, an organization known to have supported the al Qaeda terrorist network responsible for the attacks, are individuals Congress sought to target in passing the AUMF” (emphasis added). The phrase is ambiguous: emphasizing the second part (“*. . . an organization known to have supported the al Qaeda terrorist network responsible for the attacks*”) may imply that al Qaeda members as such can be treated as enemy combatants.

28. *Id.* at 518 (plurality opinion); *see also id.* at 587 (Thomas, J., dissenting).

29. *Id.* at 521 (plurality opinion).

30. *Id.* at 520 (plurality opinion); *see also id.* at 521 (plurality opinion):

The United States may detain, for the duration of hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed

Hamdi as complete acceptance of the government's theory is therefore misleading.³¹

For some, however, the decision of the plurality felt like an attempt of pushing and shoving things to fit into some fixed perimeter of specified shape—whereas in reality the bulges come out all too noticeably. Justice Souter, with whom Justice Ginsburg joined, criticized that the government had not made out its claim that in detaining Hamdi incommunicado and denying him prisoner of war treatment, it could rely on the law of armed conflicts. The government had failed to show that Hamdi's confinement was in fact a conventional detention in an armed conflict between states. Accordingly, it could not be authorized by the laws of war.³²

D. Padilla

By far the best opportunity to test the war on terror doctrine was *Padilla*,³³ decided on the same date as *Hamdi*; but the Supreme Court dodged the issue once again. On May 8, 2002, José Padilla, an American citizen, flew from Pakistan to Chicago. Upon his arrival at Chicago O'Hare Airport, federal agents arrested him pursuant to a material witness warrant related to grand jury proceedings investigating the 9/11 attacks. He was brought to New York for detention in criminal custody. On June 9, 2002, two days before the district court judge was to rule on Padilla's confinement, the President designated him an "enemy combatant" and ordered his detention in military custody.

The government defended the case on the basis of the law of armed conflicts, like in *Hamdi*, but the factual differences between the two cases were striking: Padilla was apprehended on American soil and not on the battlefield in Afghanistan, and he was detained on the ground of "being closely associated with al Qaeda" and not because of taking up arms with the Taliban.³⁴ It would have been impossible for the Supreme Court to squeeze this case into the conventional framework of an inter-state armed conflict as well. The

conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore authorized by the AUMF.

31. John C. Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 574, 579, 580 (2006).

32. *Hamdi*, 542 U.S. 507, 539, 551 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2095-96 (2005) criticize Justice Souter's reasoning. They contend that unlawful treatment does not imply unlawful detention. However, the treatment of Hamdi demonstrates well that the government abandoned the traditional law-of-war framework.

33. *Rumsfeld v. Padilla* 542 U.S. 426 (2004).

34. *Id.* at 431, n.2.

government could have won only if the Court's understanding based on long-standing law-of-war principles had indeed unraveled. Ultimately, however, the Supreme Court held that the petition had been filed improperly and therefore did not decide whether the President had authority to detain Padilla in military custody.

The dissenting opinion forcefully attacked the government's position:

At stake in this case is nothing less than the essence of a free society . . . Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber . . . Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information.³⁵

Despite this strong language, it is important to recognize that the criticism was directed against executive detention that is *unchecked* by the judiciary. On the question whether there was in fact authorization to detain Padilla militarily, the dissenting opinion hinted at a much more nuanced position.³⁶

Padilla filed a new petition and the case eventually reached the Court of Appeals for the Fourth Circuit. In the meantime the government had added new information: Padilla allegedly had been "armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States."³⁷ The Fourth Circuit sanctioned the detention by relying on *Hamdi*. The judges nevertheless emphasized Padilla's association with al Qaeda, "an entity with which the United States is at war."³⁸

In order to avoid judgment by the Supreme Court, the government transferred Padilla to a jail in Miami, Florida to face criminal charges. He was found guilty, by a federal jury, of conspiring to kill

35. *Id.* at 465 (Stevens, J., dissenting); Justices Souter, Ginsberg, and Breyer joined the dissenting opinion.

36. In a footnote Justice Stevens stated that "[c]onsistent with the judgment of the Court of Appeals" there is no authorization for "protracted, incommunicado detention of American citizens arrested in the United States" (*id.* at 464, n.8 (Stevens, J., dissenting)). This formulation, however, does not exclude military detention that is not "protracted" or "incommunicado." The Court of Appeals for the Second Circuit, 352 F. 3d 695 (2003) at 43 and 48, to which Justice Stevens referred, concluded that "while it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war," there was no authorization by Congress for the "detention as an enemy combatant of an American citizen seized within the country away from a zone of combat."

37. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) at 390.

38. *Id.* at 6 and 9.

people in an overseas *jihad* and of funding and supporting overseas terrorism. In 2008 Padilla was sentenced to seventeen years and four months in prison.

E. Hamdan

In the *Hamdan* judgment the Supreme Court held that the military commission that tried the driver of Osama Bin Laden for conspiracy violated Common Article 3 of the Geneva Conventions.³⁹ The Court concluded that the term “armed conflict not of an international character” in Common Article 3 is used in contradistinction to a conflict between nations. The phrase bears its literal meaning. Thus, Common Article 3 was held applicable to the “non-international armed conflict” with al Qaeda.⁴⁰

Marko Milanovic explained that it is unclear exactly which “non-international armed conflict” the Court meant.⁴¹ One may read the judgment as a mere reference to the war in Afghanistan, which started as an international armed conflict but turned into a non-international one once the Taliban had been toppled and the new Afghan government installed. More plausible, though, is the reading that the Court had an amorphous global conflict against al Qaeda in mind, not attached to a specific territory in which protracted armed violence occurs.

The *Hamdan* case did not deal with the power to detain.⁴² Nevertheless, its holding that the conflict with al Qaeda has to be characterized as a non-international armed conflict, combined with the conclusion in *Hamdi* that military detention for the duration of an armed conflict is a “fundamental and accepted incident to war,” suggests that the executive has some kind of power to detain individuals militarily in the war against al Qaeda.

This conclusion, however, is controversial. It is also argued that the law of non-international armed conflicts does not authorize detention of enemy combatants at all.⁴³ Otherwise, due to the principle of reciprocity, states would have to accept that opposing groups have

39. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

40. *Id.* at 630.

41. Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, 866 INT'L REV. RED CROSS 373, 375-81 (2007).

42. *Hamdan*, 548 U.S. 557, 635 (2006): “It bears emphasizing that *Hamdan* does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities;” *but see id.* at 671, n.7 (Scalia, J., dissenting): “[P]etitioner . . . is already subject to indefinite detention under our decision in *Hamdi v. Rumsfeld*.”

43. *See, e.g., al-Marri v. Pucciarelli*, 534 F. 3d 213, 233 (4th Cir. 2008) (Motz, J., concurring) relying on the International Committee of the Red Cross, *Official Statement: The Relevance of IHL in the Context of Terrorism* (Feb. 21, 2005), at 1, 3; *see also* Gabor Rona, *An Appraisal of U.S. practice Relating to “Enemy Combatants,”* 10 Y. B. INT'L HUMANITARIAN L. 232, 241 (2007).

the same detention powers vis-à-vis the state in a non-international conflict.

F. *Boumediene, al-Marri, and Beyond*

The Supreme Court in *Boumediene* still left the contours of military detention powers unclear.⁴⁴ Justice Kennedy only made some vague remarks at the end of the opinion he wrote for the majority: “The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our society.”⁴⁵ He also acknowledged that “[h]abeas corpus proceedings need not resemble a criminal trial.”⁴⁶

The debate over the correct interpretation of the Supreme Court’s case law is demonstrated in the *al-Marri v. Pucciarelli* judgment of the U.S. Court of Appeals for the Fourth Circuit, decided on July 15, 2008, shortly after *Boumediene*.⁴⁷ Ali Saleh Kahlah al-Marri, a citizen of Qatar, lawfully entered the United States with his wife and children on September 10, 2001. On December 12, 2001, FBI agents arrested him at his home as a material witness in the government’s investigation of the 9/11 attacks and imprisoned him in civilian jails. He was charged with credit card fraud and other criminal offenses. Before a hearing on pre-trial motions could take place, including a motion to suppress evidence against al-Marri purportedly obtained by torture, President Bush issued a military order declaring al-Marri an “enemy combatant” and moved him to a navy brig in South Carolina, where he was largely held in solitary confinement without charge.

The Court of Appeals ruled in a fractured 5-to-4 decision that al-Marri’s detention was lawful if the government’s allegations were true. Two opinions theorized comprehensively on the military power to detain alleged terrorists and crystallized once again the two opposing legal constructions on the subject. Judge Motz argued for a traditional law-of-war understanding. She identified a common thread in all precedents: Hamdi’s detention was upheld because he bore arms with an enemy nation on the battlefield; he fought with the Taliban, Afghanistan’s de facto government at the time of the U.S. invasion. The Court of Appeals for the Fourth Circuit upheld Padilla’s detention because he was armed and present in a combat zone in Afghanistan as part of Taliban forces. Both decisions grounded their holdings on the “central teaching from *Quirin*, i.e., enemy combatant status rests on an individual’s affiliation during wartime with

44. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008): “It bears repeating that our opinion does not address the content of the law that governs petitioner’s detention. This is a matter yet to be determined.”

45. *Id.* at 2277.

46. *Id.* at 2269.

47. 534 F.3d 213 (4th Cir. 2008).

the military arm of the enemy government.”⁴⁸ And *Quirin, Hamdi*, and *Padilla v. Hanft* all emphasized *Milligan*’s premise that a civilian—highly dangerous but unaffiliated with an enemy nation—cannot be subjected to military jurisdiction. Al-Marri did not show any affiliation to an enemy nation. That is why he was not an enemy combatant but a civilian and had to be treated as such.

Judge Wilkinson, on the other hand, rebuked this traditional understanding. He described a new world to which the law has to adapt:

If the past was a time of danger for this country, it remains no more than a prologue for the threats the future holds The advance and democratization of technology proceeds apace, and our legal system must show some recognition of these changing circumstances . . . [L]aw must reflect the actual nature of modern warfare.⁴⁹

He continued:

[T]he dispersions of lethal materials, the march of advancing technologies, and the widening distribution of knowledge as to the means and implements of mass destruction . . . long predated September 11th and will long continue even as the events of that day recede in memory.⁵⁰

Enemy states and demarcated foreign battlefields, in contrast, are “quaint and outmoded notions.”⁵¹

This finding of the individual’s dangerous empowerment in today’s world is the basis for Judge Wilkinson’s legal reasoning. The war against terror has already created a new law of war—Congress’s AUMF demonstrates this and no precedent stands in the way.⁵² Affiliation to an enemy nation was not the “lynchpin” of the decisions in *Hamdi* and *Padilla v. Hanft*, Judge Wilkinson contended.⁵³ *Hamdi*, on which *Padilla v. Hanft* relied, did not set out necessary, but only sufficient, requirements for enemy combatant status.⁵⁴ *Quirin* rejected any “battlefield requirement” and *Milligan* was inapposite: “Congress *never* authorized the use of military force against the Sons of Liberty, *Milligan*’s organization, but Congress *has* authorized the use of force against al Qaeda, al-Marri’s organization.”⁵⁵

Upon request of the Obama administration, the Supreme Court vacated the Court of Appeals ruling because in the meantime al-

48. *Id.* at 230 (Motz, J., concurring) (internal quotation marks omitted).

49. *Id.* at 293 (Wilkinson, J., concurring in part, dissenting in part).

50. *Id.* at 295 (Wilkinson, J., concurring in part, dissenting in part).

51. *Id.* at 293 (Wilkinson, J., concurring in part, dissenting in part).

52. *Id.* at 321-322 (Wilkinson, J., concurring in part, dissenting in part).

53. *Id.* at 299 (Wilkinson, J., concurring in part, dissenting in part).

54. *Id.*

55. *Id.* at 301 (Wilkinson, J., concurring in part, dissenting in part) (internal citations omitted).

Marri had been released from military custody and charged by a federal grand jury in Peoria, Illinois.⁵⁶

Boumediene, by declaring that detainees at Guantánamo Bay are entitled to the constitutional privilege of habeas corpus, made way for numerous proceedings in which alleged enemy combatants challenged their confinement. Petitioners' counsels often advocated in these cases a definition linked to the traditional law of armed conflicts. They contended that an enemy combatant is a "(1) member of a State military that is engaged in an armed conflict against the United States, or (2) a civilian directly participating in hostilities as part of an organized armed force in an armed conflict against the United States."⁵⁷ In its second part this definition refers to provisions in international humanitarian law in which the "taking direct (or active) part in hostilities" phrase is used.⁵⁸ The Israeli Supreme Court has decided that civilians are not directly participating in hostilities if they "generally support the hostilities against the army," "sell food or medicine to an unlawful combatant," or "aid the unlawful combatant by general strategic analysis, and grant them logistical, general support, including monetary aid."⁵⁹

The Obama administration rejects the "direct participation"-test. Moreover, despite the choice for criminal proceedings in *al-Marri*, the government continues to assert the authority to detain militarily not only al Qaeda and Taliban forces but also "associated forces"; not only on the battlefields of Afghanistan, but everywhere.⁶⁰ Strikingly, the current government merely inserts into the enemy combatant definition mostly used by the Bush administration the word "substantially"

56. On April 30, 2009, al-Marri pleaded guilty in federal court to the count of conspiracy to provide material support or resources to a foreign terrorist organization. On October 29, 2009, he was sentenced to more than eight years in prison.

57. See, e.g., Petitioner's Memorandum Regarding the Definition of "Enemy Combatant" at 3, *Boumediene*, 583 F. Supp. 2d 133 (D.D.C. 2008); see also Brief for the Respondent at 29, n.21, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), advocating essentially the same approach.

58. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, art. 3(1) (prohibiting attacks on civilians "taking no active part in hostilities"); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, art. 51(3) ("[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities"); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, art. 13(2)-(3) (civilian population "shall not be the object of attack, . . . unless and for such time as they take a direct part in hostilities"); see also International Committee for the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities (May 2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

59. *Public Committee Against Torture in Israel v. Israel*, 46 ILM 375, 391-92 (Isr. S. Ct. 2007).

60. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 7, *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) (No. 05-0763).

ahead of “supported, Taliban or al-Qaeda forces or associated forces . . .”⁶¹ Although the government pays heed to the international law of armed conflicts, which “inform necessarily” the AUMF,⁶² it adopts an idiosyncratic reading of it. By conflating bits and pieces of *ius in bello* and *ius ad bellum*, the Obama administration contends that the traditional law of conflicts between the armed forces of opposing states merely inspires the framework that governs this new conflict.⁶³

Whether the government’s concept reflects the state of the law is yet to be seen. The Guantánamo litigation has produced a considerable amount of decisions—which pose a myriad of new questions. The judges disagree on whether the “(substantial) support”-limb of the definition is a valid ground for detention;⁶⁴ whether integration into a command-and-control structure is required;⁶⁵ whether actual dangerousness or the duration of the conflict determines the length of confinement;⁶⁶ and whether the relationship to al Qaeda can be vitiated over time or by mitigating circumstances.⁶⁷

Equally unclear is the role international law plays in finding an answer to these questions. In *Gherebi v. Obama*⁶⁸ Judge Walton held that there is no power of detention in the law of international armed conflicts; in fact, the Geneva Conventions do not authorize detention at all but act only as “restraints on the inherent authority of the state to exercise military force in whatever manner it deems appropri-

61. *Id.* at 2.

62. *Id.* at 1; see also Response of the Respondents-Appellees to petition for rehearing and rehearing en banc, *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. Jan. 5, 2010), at 1-2, available at <http://www.scotusblog.com/wp-content/uploads/2010/05/US-response-re-rehear-Al-Bihani-5-13-10.pdf>.

63. See, e.g., *id.* at 7: “[T]he United States has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.”

64. See, e.g., on the one hand: *Hamilily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *Anam v. Obama*, 653 F. Supp. 2d 62 (D.D.C. Sept. 14, 2009); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009); *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 85 (D.D.C. 2009); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) and on the other hand: *Gherebi v. Obama*, 609 F. Supp. 2d 43, 70-71 (D.D.C. 2009); *Al-Bihani v. Obama*, 590 F.3d 866, at 872-73 (D.C. Cir. Jan. 5, 2010); *Hatim v. Gates*, 632 F.3d 720, 721 (D.C. Cir. Feb. 15, 2011); *Uthman v. Obama*, No. 10-5235 (D.C. Cir. Mar. 29, 2011).

65. See, e.g., *Hamilily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *Salahi v. Obama*, Memorandum Order, Apr. 9, 2010, 2010 U.S. Dist. LEXIS 35360.

66. See, e.g., on one side: *Basardh v. Obama*, 612 F. Supp. 2d 30, 35 (D.D.C. 2009) and on the other: *Awad v. Obama*, 646 F. Supp. 2d 20, 26 (D.D.C. 2009); *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. Jan. 5, 2010).

67. See, e.g., *Al Ginco v. Obama*, 626 F. Supp. 2d 123, 130 (D.D.C. 2009); *Al Adahi*, No. 05-0280, slip op. at 40-42 (D.D.C. Aug. 17, 2009); *Hatim v. Obama*, No. 05-1429, slip op. at 18 (D.D.C. Dec. 15, 2009); *Basardh v. Obama*, 612 F. Supp. 2d 30, 35 (D.D.C. 2009).

68. 609 F. Supp. 2d 43, 70-71 (D.D.C. 2009).

ate.”⁶⁹ Still, Judge Walton borrowed parts of the established distinction in the law of armed conflicts between enemy armed forces and civilians. Likewise in *Hamily v. Obama*,⁷⁰ district court Judge Bates essentially accepted the executive’s basic premise that the traditional rules for the inter-state war only provide the foundation on which the new law for the new conflict has to be built. In the *al-Bihani* judgment,⁷¹ the Court of Appeals for the District of Columbia Circuit went even further and rejected any relevance of international laws. “Their dictates and application to actual events are by nature contestable and fluid,” the majority opined. They found “no occasion” to “quibble over the intricate application of vague treaty provisions and amorphous customary principles.”⁷²

G. Assessment

In the United States, the outer bounds of the power to detain alleged terrorists on the basis of a war premise are still not fully determined, even after six Supreme Court judgments and many lower court decisions. It is still not settled which framework will apply to which cases and what the necessary and sufficient elements of the definition of an “enemy combatant” are.

However, the overall picture that is about to emerge resembles less and less the traditional understanding of the law of armed conflicts. The judiciary accepts to a certain extent novel and fuzzy concepts of “battlefield” and “enemy forces” by characterizing the war against al Qaeda as a non-international armed conflict (*Hamdan*). The broad rationale, enunciated in *Hamdi*, of “prevent[ing] captured individuals from returning to the battlefield and taking up arms again,”⁷³ seems to have been morphed in order to contain abstract danger stemming from individuals with unprecedented power in a hyper-technologized world (Judge Wilkinson in *al-Marri*). The Guantánamo litigation has shown that, on the whole, the judges are willing to accept the shift to the paradigm of prevention. Membership in al Qaeda seems to be sufficient for detention until the conflict with al Qaeda ends.⁷⁴ But while membership in an enemy force was easy to identify in a traditional inter-state conflict, it is much less so in a war against a clandestine and diffuse terrorist organization. In this new scenario, the regime of international armed conflicts functions

69. *Id.* at 32-33.

70. 616 F. Supp.2d 63 (D.D.C. 2009).

71. 590 F.3d 866 (D.C. Cir. Jan. 5, 2010).

72. *Id.* at 871-72. The majority of active circuit judges declared that the rejection of international law was mere *dicta*, see *al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010), cert. denied, No. 10-7814, 2011 WL 1225807 (U.S. Apr. 4, 2011).

73. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

74. See, e.g., *Salahi, v. Obama* 625 F.3d at 748, 753; *Gherebi v. Obama*, 609 F. Supp. 2d at 66-67; *Hatim v. Obama*, 677 F. Supp. 2d 1, 12-13 (D.D.C. 2009).

merely as an “inspiration” that “informs” the rules for this new conflict. More recent judgments point in the direction that international law is not applied directly but with a high degree of flexibility, or by analogy—if at all.

Hence, the new framework becomes a second, more forceful alternative to criminal proceedings without distinguishing itself conceptually: the cases of *Padilla* and *al-Marri*, constantly oscillating between the two legal worlds, exemplify that both systems are not mutually exclusive anymore. Alleged terrorists can be held as “enemy combatants” or as criminal suspects. The application of one system or the other has become a matter of political choice rather than one of legal principle. As the understanding of “battlefield” and “enemy forces” has evolved, the new framework invades spheres that were once reserved to criminal law. In sum, there are several indications that a new law of war is materializing.

III. ISRAEL

In contrast to the United States, Israel has found itself in an almost permanent struggle to ensure its citizens’ safety. As a result of more or less hostile relations with the surrounding Arab countries, Israel has been in a formal state of emergency ever since 1948.⁷⁵ In fact, the state of emergency was declared at the same time as the state’s establishment.⁷⁶

A. *Administrative Detention in Israel Proper*

From the beginning, one of the principal instruments of Israel’s security architecture has been the detention of individuals who pose a potential threat.⁷⁷ In 1979, Israel introduced a legal regime of administrative detention, the “Emergency Powers (Detention) Law.”⁷⁸

75. Under international human rights law, the declaration of a state of emergency requires a “public emergency which threatens the life of the nation,” Art. 4 ICCPR; see David Kretzmer, *Emergency, State of*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2008), online edition (www.mpepil.com), para. 6 *et seq.* Israel ratified the ICCPR in 1991.

76. SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL para. 899, *et seq.* (2007); see also Baruch Bracha, *Checks and Balances in a Protracted State of Emergency – The Case of Israel*, 33 ISRAEL Y. B. HUMAN RTS., 123 (2003); initially, the state of emergency was not limited in its duration. Since 1992, Basic Law: The Government, section 38 (b), provides that such a declaration may not exceed one year. The Knesset routinely renews the declaration, an option that is explicitly mentioned in the law; cf. Navot, para. 904. From a theoretical point of view, it is highly questionable if a state of emergency can be “limitless” as the exceptional character is inherent in the concept itself.

77. For a general account on administrative detention in times of emergency, see Marco Sassòli, *Internment*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 75, online edition (www.mpepil.com), para. 26 *et seq.*

78. Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1920 (2004).

This law governs detention during the time of emergency and remains in force to date. It empowers the Minister of Defense to detain a person for a period of up to six months whenever there is reason to believe that national security requires such detention. Once being placed in administrative detention, a person must be brought before the district court within forty-eight hours. The court has the power to annul the order, thereby granting the right to habeas corpus. Since the law only applies to citizens and residents of Israel proper,⁷⁹ resort to the means of administrative detention has been only sporadic.⁸⁰

B. *The West Bank: Marab v. IDF Commander*

In contrast, detention of alleged terrorists has become a common security measure of the Israel Defense Forces (IDF) in the West Bank.⁸¹ The territory east of the “Green Line” is subject to a protracted belligerent occupation, as both the International Court of Justice⁸² and the Israeli Supreme Court have affirmed.⁸³ For that reason, detention does not require formal legislation; mere military orders constitute sufficient legal grounds.⁸⁴

In March 2002, after a significant increase of terrorist attacks in Israel, the IDF launched “Operation Defensive Shield” in the West Bank. Extensive military activities led to several thousand detentions. As previous orders were soon considered insufficient for the screening of thousands of detainees within a number of days, the IDF commander for the West Bank promulgated Special Order 1500.⁸⁵ The order defined the term “detainee” as someone “who has been detained, since March 29, 2002, in the context of military operations in the area, and the circumstances of his detention raise the suspicion that he endangers or may be a danger to the security of the area, the IDF, or the public.” Immediately, Israeli human rights organizations challenged the detentions in *Marab v. IDF Commander*.⁸⁶ The peti-

79. See CrimA 6659/06 A. v. State of Israel [2008] (unpublished), at 35, reproduced in 38 ISRAEL Y. B. HUMAN RTS. 295 (2008).

80. NAVOT, *supra* note 76, para. 915.

81. See Lila Margalit, *Administrative Detention in Israel and the Occupied Territories*, Lecture at the Yale Law School (April 2008), available at <http://www.acri.org.il/pdf/AdminDetention.pdf>.

82. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 2004), para. 78.

83. See recently in *A. v. Israel*, at 36; note that the Supreme Court has refrained from determining the formal applicability of the Fourth Geneva Convention to the occupation of the West Bank; see David Kretzmer, *The Supreme Court of Israel: Judicial Review during Armed Conflict*, 47 G. Y. I. L., 392, 397 *et seq.* (2004); about the problematic situation of a prolonged belligerent occupation in general see Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990).

84. Schulhofer, *supra* note 78, at 1921 *et seq.*

85. Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (Number 1500)-2002.

86. *Marab v. IDF Commander in the West Bank*, *supra* note 1.

tioners contended that international law recognizes only two types of detention, regular "criminal" detention and preventive detention based on an individual examination of each case. The new order allegedly created a third type, in essence "prolonged mass detention for the purpose of screening the detainees," without scrutinizing individual reasons related to a specific person.⁸⁷

In its judgment of February 5, 2003, the Israeli Supreme Court relied on norms of international humanitarian and human rights law. In particular, the judgment referred to Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), which states that "no one shall be subjected to arbitrary arrest or detention."⁸⁸ The Court took the view that international humanitarian law decides whether detentions are contrary to Article 9(1) ICCPR. Article 43 of the Hague Regulations⁸⁹ and Article 27 of the Fourth Geneva Convention⁹⁰ were cited to show that the occupying power "may take such measures of control and security in regard to protected persons as may be necessary" to preserve public peace and safety. Additionally, Article 64 of the Fourth Geneva Convention empowers the military commander to promulgate security legislation that is necessary to secure public order and the security of the occupying forces.⁹¹ And the authority to detain a person for criminal investigation is inherent in the wording of Article 78 of the Fourth Geneva Convention. Thus, according to the Israeli Supreme Court, detention for the reason of criminal investigation is lawful and not arbitrary within the meaning of Article 9(1) ICCPR.⁹²

Consequently, Order 1500 had not created a third type of detention but merely adapted the former model of criminal detention or "detention for investigative purposes" to the new circumstances in the West Bank that resulted from the outbreak of the Second Intifada. In the Court's own words, Order 1500 was "intended to prevent the disruption of investigative proceedings due to the flight of a detainee whose circumstances of detention raise the suspicion that he is a danger to security."⁹³ While the Court concluded that mass detentions were normally unjustified because international humanitarian law requires a present danger originating from a particular individual, the Court backpedaled immediately: the deten-

87. *Id.*, para. 9.

88. International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

89. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex arts. 1, 3, 36 Stat. 2277, 2295-96, 1 Bevans 631, 643-44.

90. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *opened for signature* Aug. 12, 1949, art. 42, 6 U.S.T. 3517, 3544, 75 U.N.T.S. 287, 314 [hereinafter Fourth Geneva Convention].

91. *Marab v. IDF Commander in the West Bank*, *supra* note 1, para. 21.

92. *Id.*

93. *Id.*, para. 24.

tions in the West Bank were legal if the suspect had been arrested during an operation against armed groups because it was not entirely unlikely that the suspect had been involved in the strife.⁹⁴ Also, suspicion of membership in terrorist groups was, under certain circumstances, sufficient to render confinement lawful.⁹⁵ The Court did not object to the order's blurry wording of "circumstances of detention" to ascertain the degree of danger posed by an individual.

David Kretzmer argued that "there is a certain element of artificiality in regarding detention during hostilities as a form of criminal detention."⁹⁶ In fact, the Fourth Geneva Convention only allows preventive detention as a measure of last resort.⁹⁷ It therefore remains doubtful whether Order 1500 indeed fulfills the requirements of international humanitarian law.

C. *Beyond the OPT and Israel's Borders: A. v. Israel*

When the widespread violence during the Second Intifada in the West Bank and Israel proper reached its peak in 2002, the Knesset enacted a law with the purpose of regulating the detention of so-called "unlawful" or "enemy combatants," the exact term that has become prominent following the terrorist attacks in the United States on September 11, 2001.⁹⁸

In 2002 and 2003, two Gaza residents, allegedly members of the Lebanese Hezbollah organization, were detained on the basis of the new law. Their case came before the Supreme Court, which delivered its judgment on June 11, 2008.⁹⁹ The appellants regarded the Unlawful Combatants Law as a violation of international humanitarian law.¹⁰⁰ Moreover, they argued that the law could not apply to their detention, as the Knesset had already enacted a less severe and thus more appropriate law (the above-mentioned Emergency Powers (De-

94. *Id.*, para. 23.

95. *Id.*, para. 23; *cf.* Kretzmer, *supra* note 83, 437.

96. Kretzmer, *supra* note 83, 441.

97. JEAN S. PICTET, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 258-59 (1958).

98. The Internment of Unlawful Combatants Law, 5762-2002, reproduced in 32 ISRAEL Y. B. HUMAN RTS. 389 (2002) [hereinafter Unlawful Combatants Law]; on the development in the U.S. see *supra*, Part II; for a summary of the legislative history of the Unlawful Combatants Law *cf.* Hilly Moodrick-Even Khen, *Unlawful Combatants or Unlawful Legislation? An Analysis of the Imprisonment of Unlawful Combatants Law*, Israel Democracy Institute 1, 4 *et seq.* (2005), available at <http://ssrn.com/abstract=902934>.

99. CrimA 6659/06 A. v. State of Israel [2008] (unpublished), reproduced in 38 ISRAEL Y. B. HUMAN RTS. 295 (2008); for a more detailed analysis of the decision *A. v. Israel*, see also Henning Lahmann, *The Israeli Approach to Detain Terrorist Suspects and International Humanitarian Law: The Decision Anonymous v. Israel*, 69 HEIDELBERG J. INT'L L. 347-64 (2009).

100. *A. v. Israel*, para. 4.

tention) Law of 1979).¹⁰¹ The Court rejected this argument by holding that

the Emergency Powers (Detention) Law applies in a time of emergency and as a rule its purpose is to prevent threats to state security arising from *local* individuals (i.e., citizens and residents of the state), . . . [while] the Internment of Unlawful Combatants Law is intended to apply to *foreign* individuals who operate within the framework of terrorist organizations against the security of the state.¹⁰²

The Emergency Powers (Detention) Law therefore does not apply to Gaza's residents.

The Supreme Court analyzed the appellants' argument on the Unlawful Combatants Law's incompatibility with international humanitarian law in more detail. The law states in its purpose section that the act intends to conform to "the obligations of the State of Israel under the provisions of international humanitarian law." Apparently, the law assumes that international humanitarian law applies and that there exists an armed conflict within the meaning of the Geneva Conventions and the Additional Protocols. The Supreme Court not only accepted this assumption, but in addition qualified the armed conflict as an international one by referring to its own reasoning in the 2006 decision regarding Israel's policy of "targeted killings."¹⁰³ The rules of international armed conflicts apply to all cases of armed violence that crosses the borders of the state; hence, they also apply to the conflict between Israel and the terrorist organizations that operate outside its territory.¹⁰⁴

Even assuming there existed an *armed* conflict in Gaza or the West Bank, which is not as self-evident as asserted,¹⁰⁵ the Court's argument for the *international* character of the conflict is ultimately unpersuasive. The judgment relies explicitly on Antonio Cassese who asserts that an armed conflict between an occupying power and in-

101. *Id.*, para. 33.

102. *Id.*, para. 35 (emphasis in the original).

103. HCJ 769/02 Public Committee Against Torture in Israel v. The Government of Israel [2006] (unpublished) [hereinafter *Targeted Killings*], available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf; for an analysis of the decision see, e.g., Antonio Cassese, *On Some Merits of the Israeli Judgment on Targeted Killings*, 5 JICJ 339-45 (2007); William J. Fenrick, *The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities*, 5 JICJ 332-38 (2007); Roy S. Schondorf, *The Targeted Killings Judgment*, 5 JICJ 301-09 (2007); Milanovic, *supra* note 41.

104. *Targeted Killings*, para. 18; *A. v. Israel*, para. 9.

105. On this issue see, e.g., Milanovic, *supra* note 41, at 382 *et seq.*, who criticizes the presumption in *Targeted Killings* that there has been an ongoing armed conflict since the first *Intifada*. Milanovic argues that the intensity of violence during most of the time might not have reached the necessary threshold to qualify as an armed conflict.

surgent groups in an occupied territory is of an international nature because it is governed by the Fourth Geneva Convention, which is part of the law of international armed conflicts.¹⁰⁶ But Gaza is not under belligerent occupation since Israel's withdrawal in 2005.¹⁰⁷ Cassese's argument therefore does not support the Supreme Court's conclusion with regard to the Gaza strip.¹⁰⁸

Despite this inconsistency, the Court examined the Unlawful Combatants Law's compliance with the Geneva Conventions. The judges had to resolve the question whether the law aimed at establishing a "third category" in international humanitarian law, thus denying the non-state fighters falling within the scope of the law both the protection of the Third and of the Fourth Geneva Convention.¹⁰⁹ On this issue, the Supreme Court did not entertain the putative considerations of the Israeli legislator but endorsed its own holding in *Targeted Killings*.¹¹⁰ It decided that "the term 'unlawful combatant' does not constitute a separate category but is a sub-category of 'civilians' recognized by international law. This conclusion is based on customary international law, according to which the category of 'civilians' includes everyone who is not a 'combatant'."¹¹¹

The judges declared the Unlawful Combatants Law also compatible with the substantial rules of the Fourth Geneva Convention. Article 27(4) in combination with Article 42(1) permits preventive detention of suspected enemy fighters as a "measure of control and security."¹¹² Additionally, in accordance with Jean Pictet's understanding of detention as a means of *ultima ratio*,¹¹³ the Supreme Court held that the state itself is liable to prove that the detainee "took part or belonged to a force that is carrying out hostilities against Israel."¹¹⁴ Still, "remote, negligible or marginal contribution to the hostilities" is sufficient to render detention lawful.¹¹⁵ Although it would not suffice to show just "any tenuous connection with a ter-

106. ANTONIO CASSESE, *INTERNATIONAL LAW* 420 (2d ed. 2005).

107. See H CJ 9132/07 Bassiouni v. Prime Minister [2008] (unpublished), at 12; see also Yuval Shani, *The Law Applicable to Non-Occupied Gaza: A Comment On Bassiouni v. Prime Minister of Israel*, *International Law Forum of the Hebrew University of Jerusalem Law Faculty*, Research Paper No. 13-09. 1, 6 *et seq.* (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350307.

108. Cf. Lahmann, *supra* note 99, at 350 *et seq.*

109. *A. v. Israel*, para. 12.

110. *Targeted Killings*, para. 26.

111. *A. v. Israel*, para. 12; see also Prosecutor v. Zdravko Mucic et al., Trial Judgment, ICTY-96-21 (Nov. 16, 1998), at 271: "There is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (. . .), he or she necessarily falls within the ambit of Convention IV."

112. *A. v. Israel*, para. 16 *et seq.*

113. Pictet, *supra* note 97, 258-9.

114. *A. v. Israel*, para. 20.

115. *Id.*, para. 21.

rorist organization,"¹¹⁶ the so-called "membership criterion" in section 2 of the law may support the allegation that a particular individual took part "in the cycle of hostilities in the broad sense."¹¹⁷

The Court thus accepted the legislature's attempt to create an analogy to the terrorist organizations that fight the State of Israel with regular armed forces. Detention of enemy soldiers is lawful during armed conflicts because the threat to the detaining state's security can be derived from their sheer status.¹¹⁸ Human rights groups and affiliated scholars insistently criticized the transposition of this reasoning to the phenomenon of non-state terrorism, accusing the Israeli authorities of imposing collective punishment on the Palestinian population.¹¹⁹ Indeed, it is questionable whether organizations like Hamas or Hezbollah can legitimately be compared to regular armed forces.¹²⁰ Finally, the Court's judgment is controversial because it construes exceptions to the principle of liberty broadly, contrary to the general rule that such exceptions ought to be interpreted narrowly.

All in all, *A. v. Israel* is an emphatic reaffirmation of *Targeted Killings'* holding that in the fight against terrorism no one stands outside the bounds of law. Yet to achieve this result without quashing the new legislative policies, the Court had to exhaust all possibilities of interpreting international humanitarian law in favor of the state.

D. Assessment

The analyzed decisions have shown that, in contrast to its U.S. counterpart, the highest Israeli court has not pursued a strategy of avoidance with regard to the application and interpretation of norms of international humanitarian law. While U.S. courts have often used the traditional legal framework of armed conflict as a "toolbox" merely to provide some kind of distant benchmark for shaping an unprecedented body of law for the war against terror, the Israeli Supreme Court has constantly shown its willingness to take the effective law of armed conflicts for granted, sometimes against the executive and legislative branches' intentions. But it is also evident that the Israeli judges are willing to bend and sometimes overstretch the bounds of international law in order to rationalize detention policies. With regard to non-residents of Israel proper, the struggle against terrorism is classified as an armed conflict, not a fight against crime—an approach that reflects the developments in the United States.

116. *Id.*

117. *Id.*

118. *Cf.* Sassòli, *supra* note 77, para. 4.

119. *Cf.*, *e.g.*, Moodrick-Even Khen, *supra* note 98.

120. *Cf.* Lahmann, *supra* note 99, at 358 *et seq.*

The Israeli Supreme Court contends that the armed conflict is an international one, thus differing from the U.S. Supreme Court decision in *Hamdan*. The main reason for this holding is presumably the lower standard of protection of the individual in international humanitarian law than under human rights regimes.¹²¹ As long as the West Bank is under belligerent occupation by Israel, this approach appears inevitable. Concerning the situation beyond the borders of Israel, however, where the state does not act as occupier, the application of international humanitarian law to the fight against terrorism is unconvincing.

IV. EUROPE

The European Court of Human Rights has tried to respond to the challenges of counter-terrorism detention solely within the framework of human rights law. Whereas the U.S. Supreme Court has characterized the fight against al Qaeda as a non-international armed conflict¹²² and the Israeli Supreme Court has argued for an international armed conflict between Israel and terrorist groups outside the state territory,¹²³ the European Court has measured detention schemes against the yardstick of the European Convention of Human Rights (ECHR).

A. *The Right to Liberty and its Exception under Article 5(1)(c) ECHR*

Already in 1961, in *Lawless v. Ireland*,¹²⁴ the European Court of Human Rights had to examine whether preventive detention violates the right to liberty guaranteed in Article 5. The case was about G.R. Lawless, a suspected IRA member who was arrested by the police. Shortly before the forty-eight hours period for detention without judicial review expired, he was removed from the police station and transferred to a military prison. Lawless remained in military custody without charge or trial for nearly five months. The legal basis for his detention was an order issued by the Minister of Justice according to Irish law that provides that

whenever a Minister of State is of the opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of peace and order or to

121. Cf., e.g., ICRC, *Application of international humanitarian law and international human rights law to UN-mandated forces*, Report on the Expert meeting on multinational peace operations (2003), available at <http://www.icrc.org/eng/resources/documents/publication/p0912.htm>.

122. See *supra* Part II.E.

123. See *supra* Part III.C.

124. *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) (1961).

the security of the State, such Minister may . . . order the arrest and detention of such person.¹²⁵

Lawless brought the case to the European Court of Human Rights and alleged a violation of Article 5(1) of the Convention. The Irish Government relied on the exception listed in sub-paragraph (c) to justify Lawless's deprivation of liberty. The provision stipulates:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

. . . .

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

The Court rejected Ireland's argument that the internment of Lawless was justified as being "necessary to prevent his committing an offence."¹²⁶ Since no independent judicial review with regard to Lawless's internment had taken place, the government could not rely on Article 5(1)(c). The Court warned that otherwise,

anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive detention without it being possible to regard this arrest or detention as a breach of the Convention; whereas such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention;¹²⁷

In *Guzzardi v. Italy*,¹²⁸ a case involving a suspected *mafioso* who was banished to a small Italian island, the Court specified that Article 5(1)(c) does not allow for

a policy of general prevention directed against an individual or a category of individuals who, like mafiosi, present a danger on account of their continuing propensity to crime; it does no more than afford the Contracting States a means of preventing a concrete and specific offence.¹²⁹

125. Cited according to *Lawless v. Ireland*, para. 12.

126. *Lawless v. Ireland*, para. 15.

127. *Id.*, para. 14.

128. *Guzzardi v. Italy*, 39 Eur. Ct. H.R. (ser. A) (1980).

129. *Id.*, para. 102.

Ciulla v. Italy made clear that sub-paragraph (c) “permits deprivation of liberty only in connection with criminal proceedings.”¹³⁰ But what does the Court mean by “a concrete and specific offense” and “criminal proceedings”? The question is crucial as states might dress up preventive measures as criminal investigations, thereby using sub-paragraph (c) as a smokescreen to circumvent the right to liberty.

In *Ireland v. United Kingdom*,¹³¹ the Court examined whether various laws permitting detention required the suspicion of an “offense” in the sense of Article 5(1)(c). “Regulation 10” allowed incarceration if necessary “for the preservation of the peace and maintenance of order.” It was also sometimes used to interrogate persons about the activities of others.¹³² For these reasons, the Court was unwilling to justify the regulation under Article 5(1)(c). In contrast, other legal provisions, the

Terrorist Order . . . and the Emergency Provisions Act . . . , were applicable only to individuals suspected of having been concerned in the commission or attempted commission of any act of terrorism, that is the use of violence for political ends, or in the organisation of persons for the purpose of terrorism; these criteria were well in keeping with the idea of an offence . . .¹³³

In *Brogan v. United Kingdom*, the majority of judges reiterated the wording in *Ireland v. United Kingdom* that the definition of terrorism in UK law is “well in keeping with the idea of an offence.”¹³⁴ Judges Walsh and Carrillo Salcedo were unconvinced. They maintained in their dissenting opinion:

[I]n fact there is no such offence as “terrorism” . . . , the law does not require the detained person to be informed of any specific criminal offence of which he may be suspected, nor does the law require that his interrogation should be in respect of offences of which he may be suspected . . . In our opinion, Article 5 . . . does not permit the arrest and detention of persons for interrogation in the hope that something will turn up in the course of the interrogation which would justify the bringing of a charge.¹³⁵

Ireland v. United Kingdom and *Brogan* demonstrate that the majority of the Court is fairly lenient on its understanding of “of-

130. *Ciulla v. Italy*, 148 Eur. Ct. H.R. (ser. A) (1989), para. 38.

131. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

132. *Id.*, para. 196.

133. *Id.*

134. *Id.*, paras. 51-52.

135. *Id.*, dissenting opinion of Judges Walsh and Carrillo Salcedo in respect of Article 5 para. 1(c) (art. 5-1-c).

fense” and “criminal proceedings.”¹³⁶ But the precise elements of the Court’s definition remain arcane.

One may try to shed light on this issue by making an analogy to the case law under Article 6 of the Convention, which protects, in paragraphs 2 and 3, procedural rights specific to criminal proceedings. In the context of Article 6 the Court is also faced with the question of what a “criminal offense” is. *Engel v. Netherlands*¹³⁷ mentions three criteria: the classification under national law, the nature of the proscribed act, and the measure’s severity.¹³⁸ While the classification under national law has only a “relative value” because Convention terms must be understood “within the meaning of the Convention,”¹³⁹ the nature of the act is a “factor of greater import.”¹⁴⁰ The House of Lords summarized the case law of the European Court of Human Rights in *AF and MB v. Secretary of State for the Home Department* as follows:¹⁴¹ treated as non-criminal are measures that are preventive in purpose, treated as criminal are those which have a more punitive, retributive, or deterrent object.¹⁴² Lord Bingham acknowledged that

[e]ven this distinction, however, is not watertight, since prevention is one of the recognised aims and consequences of punishment . . . and the effect of a preventative measure may be so adverse as to be penal in its effects if not in its intention.¹⁴³

In fact, *Ireland v. United Kingdom* and *Brogan* have determined laws to be still criminal in nature that allowed detention on a general suspicion of terrorist activities and on suspicion that the person concerned was “involved in the organisation of persons for the purpose of terrorism.” Where a retributive and punitive element might lie in such laws is difficult to fathom, but the European Court did not delve into the issue and left a large margin of discretion to the state. In *Jussila v. Finland* the Court acknowledged that the *Engel* criteria “have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the crimi-

136. The majority confirmed in *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993) the holding in *Brogan*; Judge Walsh repeated his criticism.

137. *Engel v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) (1976).

138. *Id.*, para. 82.

139. *Id.*, paras. 81-82.

140. *Campbell and Fell v. United Kingdom*, 233 Eur. Ct. H.R. (ser. A) (1984), para. 71.

141. *Secretary of State for the Home Department v. AF and Secretary for the Home Department v. MB* [2007] UKHL 46.

142. *Id.*, para. 23.

143. *Id.*

nal law.”¹⁴⁴ Thus, Article 5(1)(c) imposes little *substantive* constraints on states that pass ever more preventive and vaguely defined criminal laws.¹⁴⁵

B. The Exceptions to the Right to Liberty under Article 5(1)(a), (b), (d), (e), and (f)

Various governments have also tried to justify preventive detention under the remaining exceptions to the right to liberty. Article 5(1)(a) allows the “lawful detention of a person after conviction by a competent court.” In *Guzzardi*, the Court made clear that there cannot be a “conviction” within the meaning of Article 5(1)(a) if there is no offense, either criminal or disciplinary.¹⁴⁶

Article 5(1)(b) permits “the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.” Although the Court’s interpretation of this provision is opaque, no state could ever rely successfully on Article 5(1)(b) to justify preventive detention.¹⁴⁷

Whereas Article 5(1)(d), concerning the detention of minors, has no relevance here, governments have attempted to base preventive detention also on sub-paragraphs (e) and (f). In *Guzzardi*, Italy reasoned *a fortiori* to the provision in sub-paragraph (e), which allows the “lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.” The *mafioso* Guzzardi was much more dangerous than a vagrant, he was “a vagrant in the wide sense of the term,” “a monied vagrant,” Italy contended.¹⁴⁸ But the Court rejected categorically this understanding and stressed the importance of a narrow interpretation.¹⁴⁹

*Chahal v. United Kingdom*¹⁵⁰ dealt with sub-paragraph (f). The provision sanctions the “lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” In *Chahal*, UK immigration authorities held an Indian national allegedly involved in terrorist activities in custody for over six years. The Court’s majority did not object to that policy provided that the deportation proceedings were diligently pursued.

144. *Jussila v. Finland*, judgment of Nov. 23, 2006, para. 43, available at <http://www.echr.coe.int/eng>.

145. See also the criticism of Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 40 *CASE W. RES. J. INT’L L.*, 593, 617 (2009).

146. *Guzzardi v. Italy*, 39 *Eur. Ct. H.R.* (ser. A) (1980), para. 120.

147. See, e.g., *Engel v. Netherlands*, para. 69.

148. *Guzzardi v. Italy*, para. 98.

149. *Id.*

150. *Chahal v. United Kingdom*, 23 *Eur. Ct. H.R.* (ser. A) (1996).

Although Chahal contested the finding that he posed a threat to national security and demanded to be freed, the majority of the Court did not examine the claim and was satisfied that national procedures made sure that there was a “*prima facie*” case against Chahal.¹⁵¹ The judgment has drawn criticism, not only from the dissenting opinions. Monica Hakimi, for example, opined that the Court upheld security detention without making any independent determination whether the detention was necessary for security purposes.¹⁵²

C. *Derogation from the Right to Liberty*

In *Lawless*, after finding no justification in the exceptions listed in Article 5, the Court examined whether Lawless’s detention for nearly five months without judicial review was compatible with the Convention by virtue of Ireland’s derogation under Article 15(1). This provision reads:

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

The Court defined “[p]ublic emergency threatening the life of the nation” in *Lawless* as an “exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”¹⁵³ The situation in *Lawless* amounted to a public emergency because of increased terrorist activities and the existence of a secret and violent army operating inside and outside of Ireland.¹⁵⁴

The Court continued to analyze whether the measures taken were strictly required by the exigencies of the situation. Ordinary law, criminal courts, and even military courts were unable to “check the growing danger” and “restore peace and order,” the Court held.¹⁵⁵ The circumstances therefore appeared to require administrative detention. The safeguards put in place were sufficient to prevent abuses: parliamentary supervision of the security act; an administrative “detention commission” consisting of a military officer and two judges who could release detainees; ordinary courts able to compel the detention commission to carry out its functions; and the possibil-

151. *Id.*, para. 122.

152. Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, CASE W. RES. J. INT’L L. 593, 619 (2009).

153. *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) (1961), para. 28.

154. *Id.*

155. *Id.*, para. 36.

ity of release from custody if the detainee undertook to abide by the law.¹⁵⁶

The case *Ireland v. United Kingdom* was again about a derogation under Article 15 that had been issued against the backdrop of the Northern Ireland conflict. The Court pointed out that national authorities are in principle better placed than the international judge to decide on the existence of a public emergency and the proportionality of the measures taken. They enjoy therefore a wide margin of appreciation. Still, the Court backtracked a step and affirmed that the margin of appreciation is not unlimited but “accompanied by a European supervision.”¹⁵⁷

In light of the facts (“over 1,100 people had been killed, over 11,500 injured and more than £ 140,000,000 worth of property destroyed during the recent troubles”¹⁵⁸) the judges had no doubts at all as to the existence of a public emergency threatening the life of the nation.¹⁵⁹ They also accepted the British government’s view that normal legislation was insufficient for the campaign against terrorism, which called for extrajudicial restrictions of liberty.¹⁶⁰ The Court took issue with “Regulation 10,” which did not require the suspicion of an offense for detention, but eventually held that the exceptional circumstances and the limited detention period permitted under that law rendered Regulation 10 lawful.¹⁶¹

Another fundamental case on Article 15 is *Brannigan and McBride v. United Kingdom*.¹⁶² The majority upheld the detention of up to seven days without judicial review as being proportionate under Article 15. They stressed the availability of *ex post* habeas corpus proceedings, although, according to national case law, no specific crime had to be suspected to support a proper detention.¹⁶³ Judge Walsh leveled poignant criticism at the majority. He lambasted that the government was allowed to detain individuals without suspicion of specific crimes and without being disturbed by judicial control: “What is sought in the present case is to remove from scrutiny by the Convention organs cases where no charge is preferred.”¹⁶⁴

In *Aksoy v. Turkey*¹⁶⁵ the Court finally rejected the detention of a suspected terrorist for fourteen days without judicial supervision. The line of case law from *Lawless* to *Aksoy* therefore demonstrates quite clearly how the Court has tightened procedural guarantees in

156. *Id.*, para. 37.

157. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), para. 207.

158. *Id.*, para. 12.

159. *Id.*, para. 205.

160. *Id.*, para. 212.

161. *Id.*

162. *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993).

163. *Id.*, para. 63.

164. *Id.*, dissenting opinion of Judge Walsh, para. 11.

165. *Aksoy v. Turkey* 1996-IV Eur. Ct. H.R. (1996).

its interpretation of Article 15. While the judges in *Lawless* deemed five months detention without independent judicial review to be justified, they were unwilling to accept fourteen days in *Aksoy*.

*A and Others v. United Kingdom*¹⁶⁶ is the most recent case on detention and Article 15. Two months after 9/11, the British government derogated from Article 5 and Parliament passed a law that gave the Secretary of State the power to detain preventively foreign nationals suspected to be international terrorists who would or could not be deported.

The Court recalled the definition of “public emergency” from the *Lawless* judgment and referred to the holding in the *Greek case* that the emergency should be “actual or imminent.”¹⁶⁷ Although when the derogation was made no al Qaeda attack had taken place in the United Kingdom, the Court held that the government rightly feared that such an attack had been imminent.¹⁶⁸ A threat to the institutions of government or to “the existence as a civil community” was not necessary under Article 15.¹⁶⁹

The Court then rejected the requirement that the emergency be temporary. The case law on Northern Ireland demonstrated that a public emergency may continue for many years, the Court said, but conceded that the duration of the emergency may have an impact on the question of proportionality. Lastly, the Court declared that the UK law was essentially a security and not an immigration measure, which imposed “a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists.”¹⁷⁰

In sum, the case law from *Lawless* in 1961 to *A and Others v. United Kingdom* in 2009 has developed in two ways. First, the Court has loosened the definition of a public emergency over time by rejecting a narrow reading and a temporary duration requirement, and by granting considerable leeway to the national authorities in their understanding of the situation. There exists a difference between, on the one hand, the war-like situation that broke out in Northern Ireland with which the Court was confronted in *Ireland v. United Kingdom*, and the situation in *A and Others v. United Kingdom* on the other hand, which was marked by a diffuse and indefinite fear of a terrorist attack in the post 9/11 world. Second, the Court scrutinizes the proportionality of the measures taken more and more closely. Detention of suspected terrorists without judicial review is not permissible anymore, not even in times of public emergency.

166. Judgment of Feb. 19, 2009, available at <http://www.echr.coe.int/eng>.

167. Greek Case YB 1, § 153 (1969).

168. *A and Others v. United Kingdom*, *supra* note 166, para. 177.

169. *Id.*, para. 179.

170. *Id.*, para. 186.

However, the Court developed mainly procedural rather than substantive limits. In *A and Others v. United Kingdom* the Court held that the law was discriminatory but it did not address the issue of measures less restrictive than detention.¹⁷¹ Objecting to discrimination alone would suggest that the law could have been brought in line with the Convention by subjecting *British* terrorist suspects to indefinite detention as well. In *Ireland v. United Kingdom*, the Court accepted “Regulation 10,” which allowed purely preventive detention.

Thus, the European Court of Human Rights does not oppose preventive confinement of alleged terrorists as such in times of public emergencies. Provided that procedural safeguards are in place and that the judiciary and the parliament are involved, the detention will presumably be lawful under Article 15. Without belittling procedural requirements: this effectively means that the substantive limits imposed in the exhaustive catalog of Article 5(1) vanish under Article 15.

D. Human Rights Superseded by the Law of Armed Conflicts?

Not only derogation may qualify the guarantees enshrined in Article 5. The theory of international humanitarian law as *lex specialis* to human rights law has the potential of supplanting the right to liberty as well. Detention of enemy combatants for the duration of the armed conflict is held to be a “fundamental and accepted . . . incident to war.”¹⁷² Article 5(1)(a) – (f), by contrast, does not list the internment of combatants until the cessation of hostilities in its exhaustive list of permissible grounds of detention. If humanitarian law operated as the special law, the limits imposed by Article 5(1) would effectively be disabled.¹⁷³

The International Court of Justice (ICJ) first mentioned the *lex specialis* theory in the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.¹⁷⁴ The protection of human rights does not cease in times of war, except by way of derogation, the ICJ observed. The Court gave the example of the human right not to be

171. In contrast, the House of Lords had already decided in 2004 that restrictions on liberty short of detention, such as surveillance measures should have been sufficient, *A and Others v. Secretary of State for the Home Department*, judgment of Dec. 16, 2004, [2004] UKHL 56, Lord Bingham of Cornhill, para. 35.

172. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), at 518; see also Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, art. 4.

173. For a discussion of the doctrine see, e.g., Milanovic, *supra* note 41, at 389-92; Marco Sassòli & Laura M. Olson, *The Relationship between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 871 INT’L REV. RED CROSS, 599 (2008); Cordula Droegge, *Elective Affinities? Human Rights and Humanitarian Law*, 871 INT’L REV. RED CROSS 501 (2008).

174. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 95 (July 8), para. 25.

deprived arbitrarily of one's life, which applies in principle also during hostilities. But the judges qualified this statement by saying that as *lex specialis*, it is humanitarian law that defines what "arbitrary" means in a situation of armed conflict.¹⁷⁵

In the *Wall Opinion* the ICJ expanded this theory:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.¹⁷⁶

It is debatable, however, when exactly which of the three situations is pertinent and how both regimes can interplay with regard to the same right at the same time.

Concerning the right to liberty, the UN Human Rights Committee said in its report on the situation of Guantánamo detainees:

Any person having committed a belligerent act in the context of an international armed conflict and having fallen into the hands of one of the parties to the conflict (in this case, the United States) can be held for the duration of hostilities, as long as the detention serves the purpose of preventing combatants from continuing to take up arms against the United States In the context of armed conflicts covered by international humanitarian law, this rule constitutes the *lex specialis* justifying deprivation of liberty which would otherwise, under human rights law . . . constitute a violation of the right to personal liberty.¹⁷⁷

In the situation of an international armed conflict, the Committee therefore considered the human right to liberty inapplicable and entirely superseded by humanitarian law.

As discussed above, the Israeli Supreme Court dealt in *Marab* with the right to liberty under Article 9(1) ICCPR, which prohibits arbitrary arrest or detention.¹⁷⁸ Confronted with the question what

175. *Id.*

176. *Wall Opinion*, para. 106; see also Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda), 2005 I.C.J. (Dec. 19), para. 216.

177. UN Commission on Human Rights, *Situation of Detainees at Guantánamo Bay*, Feb. 27, 2006, E/CN.4/2006/120, para. 19, available at: <http://www.unhcr.org/refworld/docid/45377b0b0.html>.

178. See *supra* Part III.B.

constitutes an “arbitrary detention,” the judges looked at the provisions of the law of international armed conflicts. This body of law was also the yardstick against which the Israeli court measured detention under the Unlawful Combatants Law in *A. v. Israel*.¹⁷⁹ At least in the scenario of an international armed conflict human rights therefore seem to give way to humanitarian law.

The European Court of Human Rights has so far been unwilling to displace the obligations under Article 5. In the *Chechen* cases the Court used unequivocal language to condemn detentions which were not logged in any custody records and which left no official trace of the detainee’s whereabouts and fate.¹⁸⁰ In *Al-Jedda v. United Kingdom*¹⁸¹ the internment for more than three years of a terrorist suspect in Iraq by British forces was held to violate the right to liberty. “[E]ven assuming” that humanitarian law applied, the Court did “not find it established” that this body of law “places an obligation on an Occupying Power to use indefinite internment without trial.”¹⁸² In sum, Article 5 seems to apply even in a theater of war, if not derogated under Article 15.¹⁸³ But the question is still open whether Article 5 remains valid in an *international* armed conflict.¹⁸⁴

E. Assessment

The jurisprudence of the European Court of Human Rights can be summarized as follows: Sub-paragraphs (c) and (f) of Article 5(1) leave considerable scope to plead the exceptions of criminal or immigration proceedings for detentions that are essentially preventive in

179. See *supra* Part III.C.

180. *Kaplanova v. Russia*, judgment of Apr. 29, 2008, para. 122, available at <http://www.echr.coe.int/eng>; see also *Isayeva v. Russia*, E.H.R.R. 38 (2005); Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, 6 E.H.R.L.R., 733, 734 (2008).

181. Judgment of July 7, 2011, available at <http://www.echr.coe.int/eng>.

182. *Id.*, para. 107.

183. UN Commission on Human Rights, *supra* note 177, para. 24 applied the right to liberty with respect to detainees arrested in a non-international conflict. The report also held in para. 21 that detainees in the “war on terrorism” were neither caught in an international nor in a non-international conflict; they could rely fully on human rights.

184. According to the UK government, the conflict in Iraq has been a *non-international* conflict since June 2004, see Kate Smyth, *R. (on the application of Al-Jedda) v Secretary of State for Defence: Human Rights and Accountability in International Military Operations*, 5 EUR. HUMAN RTS. L. REV., 606, 619, n. 57 (2008). The guarantees in Article 5 may not only be limited by derogation under Article 15 and by international humanitarian law as *lex specialis* but also by the jurisdictional scope of the Convention. Although someone detained by forces of a Contracting State in a third country can in principle claim protection under Article 5 (see *Ocalan v. Turkey*, 41 Eur. Ct. H.R. 45 (2005), para. 93 and *Issa v. Turkey*, 41 Eur. Ct. H.R. 27 (2004), para. 71; see also *Al-Skeini v. United Kingdom*, judgment of July 7, 2011, available at <http://www.echr.coe.int/eng>), this may be different when the detention is attributable to or authorized by the United Nations (see *Behrami v. France* and *Saramati v. France*, 45 Eur. Ct. H.R. 10 (2007) and *Al-Jedda v. United Kingdom*, *supra* note 181).

nature. Cases like *Ireland v. United Kingdom*, *Brogan*, and *Chahal*, which allow broad concepts of “offense,” “criminal procedures,” and “deportation,” demonstrate this. Derogation under Article 15 renders the substantial limits of Article 5 virtually ineffective; the Court has only tightened procedural safeguards. Since *A and Others v. United Kingdom* it is also clear that abstract, permanent fear of terrorist attacks may constitute a “public emergency.” Finally, the right to liberty, if not derogated, apparently applies even in a theater of war although it is still unresolved whether the law of international armed conflicts may override Article 5.

At first glance, the European Convention seems to prohibit pure preventive detention. But upon a closer look the Convention reveals flexibilities and limits that accommodate certain internment schemes. It turns out that, in the end, human rights do not categorically bar the preventive detention of alleged terrorists.

V. CONCLUSION

The differences in legal constructions prevailing in the United States, Israel, and Europe are all too noticeable. Yet, in the era of transnational terrorism it appears more fruitful to point out what these legal frameworks have in common.

To begin with, the judiciary in all three regions refutes theories of legal black holes and anomic spaces. In the aftermath of 9/11, such theories gained momentum. Most prominently, John Yoo argued that in the global war against terror, the executive must be unconstrained by the judicial branch.¹⁸⁵ Likewise, U.S. Supreme Court Justice Thomas advocated in his dissenting opinions that the government’s power to protect the nation ought to exist without limitation because the circumstances that endanger the safety of nations are unforeseeable and infinite. No constitutional shackles could wisely be imposed.¹⁸⁶ Interpretation of legal terms in the national security and foreign affairs context should give utmost deference to the government’s understanding¹⁸⁷—to the point that in a state of exception the law may lose its binding force, its *vis obligandi: necessitas legem non habet*.¹⁸⁸

The majority of judges in the United States, Israel, and Europe disagree. The U.S. Supreme Court held in *Boumediene* that “[l]iberty and security can be reconciled; and in our system they are reconciled

185. John C. Yoo, *Courts at War*, 91 CORNELL L. REV. 573 (2006).

186. *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting, citing THE FEDERALIST No. 23 (Alexander Hamilton)).

187. *Hamdan v. Rumsfeld* 548 U.S. 557, 718-19 (2006) (Thomas, J., dissenting).

188. For an analysis of the state of exception, see GIORGIO AGAMBEN, THE STATE OF EXCEPTION (2005).

within the framework of the law.”¹⁸⁹ Although working under a formal state of emergency since 1948, Israel’s interventionist courts apply national and international law to the terrorist phenomenon. The European Court of Human Rights, for its part, has increasingly refined its assessment of security measures in times of public emergency. Thus, ultimately, these judiciaries keep the fight against the terrorist threat inside the bounds of the law, rejecting any attempt formally to introduce extra-judicial regimes. To quote again Lord Atkin’s famous dissenting opinion in *Liversidge v. Anderson* in 1942, “amidst the clash of arms, the laws are not silent.” The state of exception is not an anomic sphere.

However, this comes with a price. The analysis of the case law has demonstrated that the courts are often already satisfied if preventive detention is regulated by the legislature and checked by judges. The European Court of Human Rights has emphasized the importance of procedural guarantees and judicial review and so have the U.S. Supreme Court in *Hamdi* and *Boumediene* and the Israeli Supreme Court in *Marab* and *A. v. Israel*. Strikingly, the judges are reluctant to circumscribe *substantive* powers of detention. The European Court has accepted preventive schemes that were merely dressed up as criminal or immigration proceedings. Under Article 15 ECHR it discarded substantive limits altogether. The U.S. Supreme Court judgments are masterpieces of avoiding the substantive question. And the Israeli Supreme Court gives great leeway to the government’s power to detain alleged terrorists as well.

When the courts eventually touched upon the substantive issues, a disturbing development unfolded: the virulent tendency to stretch and blur the pertinent frameworks, provisions, and terms. U.S. judges have been willing to give new meaning to old concepts of international humanitarian law such as “armed conflict” and “enemy forces” in order to adapt them to the new kind of security threat. The law of non-international conflicts was never designed to apply to transnational terrorism,¹⁹⁰ but the U.S. Supreme Court in *Hamdan* decided otherwise. The Israeli Supreme Court has also accommodated preventive detention to a large extent in its very own

189. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008). See also *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866):

The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man that that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy and despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence.

190. See *Milanovic*, *supra* note 41, at 379.

understanding of international law. In *A. v. Israel* the judges exploited vague and open-textured provisions of the law of international armed conflicts to justify mass detentions of alleged terrorists. Finally, the European Court of Human Rights endorses flexible interpretations of terms like “offense” and “public emergency.”

All this creates ambiguities and legal uncertainties that call for a revision of international law with respect to security detentions of terrorist suspects.¹⁹¹ However, such revision would entail the danger of institutionalizing severe restrictions of liberties. Marco Sassòli rightly pointed out that

[i]f international humanitarian law is to be revised to cover transnational armed groups—at all, or more adequately—the purpose of such an exercise ought to be neither rhetorical nor meant to deprive those suspected of membership in (or aiding) such groups of the guarantees provided by human rights law and domestic law. As in the case of any development of [international humanitarian law], the aim, rather, should be to improve the protection of the actual and potential victims of the situations.¹⁹²

Furthermore, it is questionable whether transnational terrorism is indeed so revolutionary that it warrants the design of a new body of international law that might be subject to extensive application, if not abuse. Cases like *Milligan* or *Lawless* exemplify that the problems are not as novel as often described. Whether a new set of rules would lead to satisfactory solutions is therefore doubtful.

In any case, the judgments reviewed here chose the other horn of the dilemma. They refused to force the respective legislators to act by annulling detention schemes but instead pressed the new policies into the pre-existing legal frameworks. The outcome conflicts with Lord Atkins’ assertion that the laws “may be changed, but they speak the same language in war as in peace.”¹⁹³ The emergency, the crisis, or the state of necessity—transitory or not—has a decisive impact on the interpretation of legal terms. As soon as alleged terrorists are involved, the general rule does not appear to be one of liberty anymore. And so the judges in the United States, Israel, and Europe resemble

191. See, e.g., Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities. The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSN'L L., 295-355 (2006/07); Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law, Program on Humanitarian Policy and Conflict Research*, Harvard University, Occasional Paper Series No. 6, Winter 2006, available at <http://www.hpcr.org/pdfs/OccasionalPaper6.pdf>.

192. Sassòli, *supra* note 191, at 42.

193. *Liversidge v. Anderson*, 3 All. E. R. 338, 361 (1941).

Humpty Dumpty with his contempt for an objective meaning of words and his preference for flexible interpretation:

“When *I* use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean different things.”

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”