International Law & National Security

Public Committee Against Torture in Israel v. Government of Israel: U.S. Military Commissions Through the Lens of the Supreme Court of Israel

*By Michael A. Newton**

The legal dimension of the struggle to defeat terrorists has at times overshadowed the armed struggle, as the nature of the conflict itself has changed and the tides of politics and public opinion have swirled. In modern conflict, the overall mission is necessarily intertwined with political, legal, and strategic imperatives that are not accomplished in a legal vacuum or by undermining the threads of legality that bind diverse components of a complex operation together.[1] The struggle against transnational terrorists confronts civilized societies and the military commanders in their service with the challenge of implementing humanitarian restraints in an environment marked by utter disregard for the bounds of international law on the part of the adversary. Recognizing the inherent difficulty of a sustained "war against rampant terrorism," the President of the Israel Supreme Court, Aharon Barak, wrote that the "armed conflict is not undertaken in a normative vacuum. It is undertaken according to the rules of international law, which establish the principles and rules for armed conflicts. The armed conflict against terrorism is an armed conflict of the law against those who seek to destroy it."[2] Despite their own obligations to comply with the "law of war during all armed conflicts, however such conflicts are characterized,"[3] professional military forces are confronted with an adversary that intentionally targets civilians and participates in armed conflict without legal authority to do so.

In the context of the massive wave of terrorist acts directed at Israeli society that began in early 2000, termed the *intifada*, thousands of crimes have been committed against innocent civilians, resulting in the deaths of more than a thousand citizens and the injury of thousands more. The Government of Israel in turn adopted a strategy to disrupt terrorist acts, euphemistically termed "the policy of targeted frustration." The governmental policy permits military forces to intentionally target those who unlawfully seek to kill and injure Israeli citizens.[4] On December 11, 2005, the Israel Supreme Court, sitting as the High Court of Justice, addressed the following issue in a sweeping opinion on this policy, frequently referred to as the *Targeted Killings* case:

> The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.

The *Targeted Killings* opinion provides an extensive analysis of the framework of humanitarian law with regard to terrorist acts as its rationale for upholding the policy. On behalf of the terrorists, the petitioners argued that "the targeted killings policy is totally illegal, and contradictory to international law, Israeli law, and basic principles of human morality. It violates the human rights recognized in Israel and international law, both of those targeted, and the rights of innocent passersby caught in the targeted killing zone."[5]

The Israeli policy, along with its judicial validation, rests on the premise that civilians illegally seeking to kill Israeli citizens have forfeited their otherwise non-derogable right to life. In its unanimous opinion, the bench concluded that "the State's struggle against terrorism is not conducted "outside" the law; it is conducted "inside" the law, with tools that the law places at the disposal of democratic states."[6] The Israeli approach to applying international law as a constraining system of principles in the fight against its enemies relies on the recognition that there is no moral or legal equivalency between terrorists and those who defend the state. The inequity between combatants operating under state authority and terrorists persists because the "state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The fight against terrorism is also law's war against those who rise up against it."[7] Thus, the court unanimously upheld the policy because the framework of existing humanitarian law warrants the conclusion

> not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" (§51(3) of *The First Protocol*)…. we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.

I. The Normative Framework of Armed Conflict

The legal regime applicable to armed conflict, termed *lex specialis* by the International Court of Justice,[8] is integral to the very notion of military professionalism, because it defines the class of persons against whom military forces can lawfully apply violence based on principles of military necessity and reciprocity.[9] States have historically sought to prescribe the conditions under which they owed particular classes of persons affirmative legal protections in the context of armed conflicts. The constant effort to be as precise as possible in describing the classes of persons entitled to those protections was an essential element of the diplomatic tussles that spawned positivist legal trends. The legal line between lawful and unlawful participants in conflict provided the intellectual impetus for the evolution of the entire field of law relevant to the conduct of hostilities.[10]

** Michael A. Newton is Acting Associate Clinical Professor of Law at Vanderbilt University Law School.*

Since 1854, there have been over sixty international conventions regulating various aspects of armed conflicts, and a recognizable body of international humanitarian law has emerged from this complex mesh of conventions and custom.[11]

The *lex specialis* law of armed conflict establishes a bright line between those persons governed by its norms and those who derive rights and benefits from other bodies of law. The two essential strands that professional military forces must reexamine and apply in this new style of conflict are: How may we properly apply lethal force? If lawful means of conducting conflict are available, against whom may we properly apply military force? These two strands are the essential foundation of the professional military ethos, even against a lawless enemy. By extension, one of the cornerstones of humanitarian law is the mandate that respect for and protection of the civilian population and civilian objects requires that state parties must always "distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[12]

In fact, the detailed proscriptions of the laws and customs of war are shaped by the distinction between civilians and lawful combatants, and the correlative rights and duties that accrue from that status. This distinction forms the basis for the petitioners' arguments in the *Targeted Killings* case, that members of terrorist organizations must be treated as criminals, subject to the applications of relevant provisions of domestic criminal law, rather than as persons who may be intentionally targeted and killed using the instruments of state power.[13] In seeking to remove terrorists from the framework of the *lex specialis* regime applicable to armed conflicts,[14] the petitioners ignore the declarative norm that "the right of belligerents to adopt means of injuring the enemy is not unlimited."[15] The modern formulation of this foundational principle is captured in Article 35 of the 1977 Protocol I to the 1949 Geneva Conventions as follows: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited."[16] The imperative that logically follows from this core organizing principle is that the right of *non-belligerents* to adopt means of injuring the enemy is *nonexistent*. In embarking on the age of positivist legal development, states attempted to clarify the line between lawful combatants and unlawful criminals when the application of the law appeared unresponsive to changing military requirements. While the law evolved as a pragmatic response to the changing tactics of war, it is clear that the legal line remained fixed; the law of armed conflict has never accorded combatant immunity to every person who conducts hostilities. For example, from 1777 to 1782, the British Parliament passed an annual act declaring that privateers operating under the license of the Continental Congress were pirates, and as such could be prosecuted for their acts against the Crown.[17] As one European scholar noted, "unlawful combatants… though they are a legitimate target for any belligerent action, are not, if captured entitled to any prisoner of war status."[18] Persons outside the established framework of law who commit warlike acts do not enjoy combatant immunity and are therefore common criminals subject to prosecution for their actions.[19]

In other words, persons who employ violence amounting to the conduct of hostilities governed by the law of war do so unlawfully unless they can find affirmative legal authority for their acts under international law; those acting with the requisite legal authority have historically been termed belligerents or combatants. Conversely, persons who have no legal right to wage war or adopt means of inflicting injury upon their enemies have been described synonymously as non-belligerents, unprivileged belligerents, unlawful combatants, or unlawful belligerents. Lawful combatants become "war criminals" only when their actions transgress the established boundaries of the laws and customs of war. Prisoners of war, for example, are within the purview of the law of armed conflict and accordingly enjoy legal protection *vis-á-vis* their captors. However, because the legal regime protects them, prisoners of war in turn have no legal right to commit "violence against life and limb."[20] Two essential implications follow from the conceptual foundation of combatant immunity as an offshoot of state sovereignty. First, although the application of international humanitarian law has steadily expanded from international to non-international armed conflicts,[21] the concept of "combatancy" as a legal term of art has been strictly confined to international armed conflicts. Even as the law expanded to grant combatant immunity for irregular forces that do not line up in military uniforms on a parade field, participants in non-international armed conflicts remain completely subject to domestic criminal prosecution for their warlike acts. Protections found in domestic law are grounded not on the status of a person but on the basis of his or her actual activities, because no one has an international law "right to participate in hostilities" in a non-international armed conflict.[22]

Secondly, terrorists who participate in hostile activities in a non-international armed conflict cannot expect any immunity derived from international law for their actions. Therefore, the law applicable to non-international armed conflicts does not provide for combatant status, nor does it define combatants or specify a series of obligations inherent in combatant status. Thus, in order to reach the merits of particular cases, numerous domestic courts have rejected claims of combatant immunity that are unwarranted under existing international law.[23] Indeed, introducing the concept of "combatant immunity" in the context of non-international armed conflicts would grant immunity for acts which would be perfectly permissible in an international armed conflict, such as attacks directed at military personnel or property. This striking silence in the law applicable to non-international armed conflicts means that any effort to describe a "combatant engaged in a non-international armed conflict" is an oxymoron.

Taken together, these principles form the backbone of the law of armed conflict.

II. The Pending *Boumediene v. Bush* Case

The analysis of the issue stated above by the court in the *Targeted Killings* case offers instructive parallels for what will certainly be one of the most closely watched cases during the coming United States Supreme Court term. After President Bush used executive power to promulgate a system of military tribunals to try alien enemies for "offenses triable by military commission,"[24] the Court rejected that system. In *Hamdan v. Rumsfeld*,[25] the Court found that the President's executive order

violated the statutory mandate found in the Uniform Code of Military Justice that requires the President to promulgate "rules and regulations" for courts-martial, military commissions and other military tribunals that are "uniform insofar as practicable."[26] The UCMJ is clear that the statutory provisions for trial by courts-martial "do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."[27] Nevertheless, the Court concluded that the Presidential order failed to comply with the legal obligation imposed by Article 3 Common to the Geneva Conventions that prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[28]

Repeating the pattern previously established following Supreme Court rejections of administration interpretations of Executive power regarding the treatment and punishment of terrorist suspects,[29] the Congress acted swiftly to ameliorate the legal lacunae identified by the Court. Enacting the Military Commissions Act of 2006,[30] Congress took heed of Justice Breyer's observation in his *Hamdan* concurrence that nothing "prevents the President from returning to Congress to seek the authority he believes necessary."[31] The Military Commissions Act specifically authorized the President to promulgate tribunals with jurisdiction over "alien unlawful enemy combatants."[32] The provisions of the 1949 Geneva Conventions form the backdrop for this new category of personal jurisdiction by requiring prisoners of war "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."[33] Hence, the normal jurisdictional provisions of courts-martial extend personal jurisdiction over persons in U.S. custody who are legally entitled to the rights accorded prisoners of war.[34] The Military Commissions Act also expanded normal courts-martial jurisdiction to cover "lawful enemy combatants" who "violate the law of war."[35]

On the other hand, creating an express category of persons subject to the jurisdiction of military commissions, Congress defined the term unlawful enemy combatant to mean

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
>
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

The Israeli Imprisonment of Unlawful Enemy combatants Law, in contrast, defines an unlawful combatant as "a person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force that commits hostilities against the State of Israel who does not fulfill the conditions granting prisoner of war status in international humanitarian law."[36] The statutory provisions of the Military Commissions Act and the attendant legal rights flowing from the conjunction of legislative and executive power in establishing jurisdiction over unlawful combatants will be foremost in one of the most anticipated cases scheduled for oral argument during the Supreme Court term beginning in October 2007. In the case *Boumediene et. al. v. Bush*, the D.C. Circuit squarely upheld the provisions of the Military Commissions Act on constitutional grounds.[37] In granting certiorari to reevaluate the scope of rights that accrue to enemy civilians who unlawfully take up arms to conduct hostilities against the United States, its citizens, and its property, the Supreme Court will of necessity address a different manifestation of the same issue confronted by the Israeli Court in the *Targeted Killings* case.

III. Terrorists are not Lawful Combatants

The Geneva Conventions incorporate the principle of lawful combatants only into international armed conflicts, and thus convey Prisoner of War status only to actors participating in an armed conflict between "two or more High Contracting Parties."[38] Because only states enjoyed the historical prerogative of conducting warfare, the principles of lawful combatancy developed from the premise that only states had the authority to sanction the lawful conduct of hostilities. Propelled by the classic view that "the contention must be between States" to give rise to the right to use military force,[39] the concept of "combatant status" developed to describe the class of persons operating under the authority of a sovereign state to wage war. Despite this clear premise of humanitarian law, the Israel Supreme Court determined that the conflict between Israel and terrorist fighters constitutes an international armed conflict because it "crosses the borders of the state."[40] This conclusion is unsupported by any example of state practice and contains no scintilla of legal support, as it represents the only example in which the legal character of a conflict has been made by reference to the geographic boundary rather than the identity of the participants.

The finding that the law of international armed conflicts applies to the *Targeted Killings* facts is unique in light of the historically incremental expansion of the concepts of combatancy. It was only the patriotic resistance of partisan fighters to the German occupations in World War II, and the horrific crimes committed by German forces against the civilian populace in response,[41] that convinced states to update the legal standards for obtaining combatant status during occupation. This is intellectually consistent because during the period of occupation, the sovereign power of the state has been displaced by the occupying power. In effect, fighters acting to repel the occupier are acting as proxies for the military of the defeated sovereign. Although a state of occupation does not "affect the legal status of the territory in question,"[42] the assumption of authority over the occupied territory implicitly means that the existing institutions of society have been swept aside. Because the foreign power has displaced the normal domestic offices, the cornerstone of the law of occupation is the broad obligation that the foreign power "take all the measures in his power to restore,

and ensure, as far as possible, public order and safety...."[43] The fact that the provisions for regulating the status of irregular fighters did not become part of the Fourth Geneva Convention[44] (designed to protect the civilian population) is itself legally significant. As one eminent commentator noted,

> The whole point about the lawful guerrilla fighter, so far as he could be identified and described was that he was not a civilian. The Civilians Convention was for protecting civilians who remained civilians and whose gestures of resistance, therefore, would be punished as crimes, just as would any acts of guerrilla warfare which lay outside whatever lawful scope could be defined.[45]

Accordingly, the 1949 Geneva Conventions restated and updated the law of combatant status within the Third Geneva Convention on Prisoners of War. In addition, the Conventions added a requirement for the detaining state to convene a "competent tribunal" to consider the facts relevant to a particular person's status, when that status is in doubt.[46] This provision was intended to "avoid arbitrary decisions by a local commander,"[47] and in the practice of the U.S. Army may be accomplished with regard to lawful combatants by three officers with expeditious thoroughness.[48] The important point is that, apart from adding language specifically referring to organized resistance movements, the 1949 modifications were taken directly from the Hague Regulations of 1907. Under the Geneva Conventions of 1949, the class of civilians entitled to prisoner of war status was described inter alia as:

> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, *including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied,* provided that such militias or volunteer corps, *including such organized resistance movements*, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war."[49]

Despite its error in considering the conflict as one bound by the laws and customs applicable to international armed conflicts, the *Targeted Killings* court correctly applied these principles to conclude that the petitioners did not enjoy the protections granted to legal combatants, and as such "are not entitled to the status of prisoners of war; they may be put on trial for their membership in terrorist organizations and for their operations against the army."[50]

IV. Terrorists are not Civilians

The State of Israel requested the *Targeted Killings* court to accept the premise that terrorists are unlawful combatants in the sense that they "take active and continuous part in an armed conflict, and therefore should be treated as combatants in the sense that they are legitimate objects of attack."[51] This argument asked the court to employ the term 'combatant' in its common sense meaning rather than as a legal term of art derived from preexisting law. In light of its previous decision to apply the full body of the Geneva and Hague Conventions, the court was forced to address the specific mandate of Protocol I, which defines the term "civilian" purely in contradistinction to the opposing status of lawful combatant. Article 50 embodies a dualist view by defining a civilian as "any person who does not belong" to one of the specified categories of combatant.[52] The International Committee of the Red Cross (ICRC) has long held the position that because there "is no intermediate status" between combatant and civilian, every person in enemy hands "must have some status under international law."[53] Though the ICRC explicitly recognized that "[m]embers of resistance movements must fulfill certain stated conditions before they can be regarded as prisoners of war," [54] its dualist preference led it to advocate that even those who fight unlawfully remain entitled to the benefits accorded to lawful combatants. Despite overturning several centuries of legal development and judicial practice,[55] the ICRC noted that this dualism would be "satisfying to the mind" in that it elevates the humanitarian point of view "above all."[56] The *Targeted Killings* court refused to accept the State's categorization of terrorists as unlawful combatants, and implicitly accepted the ICRC dualist view, because the "question before us is not one of desirable law, rather one of existing law. In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category."[57]

In theory, the ICRC dualist view enshrined in Article 50 and adopted by the court protects unlawful combatants from the effects of their misconduct. Permitting terrorists to be legally classified as civilians puts the military forces opposing terrorist activities into the quandary of either supinely permitting the planning and conduct of terrorist activities or violating the clear legal norm that the "civilian population as such, as well as individual civilians shall not be the object of attack."[58] Article 50 seems to embody a system in which there is no theoretical gap; a person is either a combatant or a civilian. This leads ineluctably to the assumption that an unlawful combatant who fails to qualify as a prisoner of war must be a civilian entitled to protection. The plaintiffs in *Targeted Killings* argued precisely with this logic in advocating a revolving door immunity that would grant terrorists immunity from harm for the entire time they plan their attacks, suspend that immunity only for a very narrow window during which the actual attack is underway, then become protected again immediately after the attack even as they return to their homes intending to plan and execute their next attack. According to the plaintiffs, the state must demonstrate a high degree of imminency to justify any attack on terrorists, who continue to wear the mantle of "civilian," thus losing protections "*only* during such time that he is taking a direct and active part in hostilities, and *only* for such time as said direct participation continues"(emphasis added).[59]

Nevertheless, Protocol I sustained the preexisting principle of unlawful combatancy by specifying that civilians enjoy the protections embodied in the Protocol "unless and for such

time as they take a direct part in hostilities."[60] By choosing to participate in hostilities, the unlawful combatant has separated himself legally from the shield afforded by international law. As Professor Yoram Dinstein has observed, "one cannot fight the enemy and remain a civilian."[61] Just as it is possible to lose combatant status (by becoming a prisoner of war, for example), and the immunity that goes with it (by failure to comply with the law of war), the unlawful belligerent cannot properly be termed a civilian in the same sense as those innocents who huddle in their homes while combat rages round them. In using this legal rationale to uphold the Israeli policy of intentionally directing attacks against terrorists, The *Targeted Killings* court correctly characterized the plaintiffs' arguments as "unacceptable."[62] Permitting terrorists to "change their hat at will, between the hat of a civilian and the hat of a combatant" would reduce the legal structure regulating conflicts to obsolescence. In his concurrence, Judge Rivlin termed this class "international law breaking civilians, whom I would call "uncivilized civilians." The *Targeted Killings* case reinforces the laws and customs of war by recognizing that granting legal protection to any civilian who takes up arms in violation of the rules specified in international law would create a perverse incentive to defy the conventions regulating conduct and deliberately conduct hostilities outside the bounds of the law all the while relying on the goodwill of the enemy to apply that same body of law.

Though it makes no reference to the underlying negotiations in 1949, the conclusion of the *Targeted Killings* court also preserves the intentions behind the Geneva Conventions. At the time, some delegates pushed for a broader interpretation of the textual provisions that would have protected illegal combatants based on the understanding that the "categories named in Article 3 [the present Article 4 of the Third Geneva Convention] cannot be regarded as exhaustive, and it should not be inferred that other persons would not also have the right to be treated as prisoners of war."[63] This position was politely but firmly rejected by the delegates in favor of the view that the text itself is the exclusive source to "define what persons are to have the protection of the Convention."[64] In fact, a number of other delegations explicitly confirmed that the textual provisions of the Geneva Conventions did not foreclose the traditional category of unlawful combatants. The Dutch delegate pointed out that a summary conclusion to the effect that combatants who did not meet the criteria for prisoner of war status "are automatically protected by other conventions is certainly untrue."[65] He further clarified that the Fourth Geneva Convention (the civilians convention) "deals only with civilians under certain circumstances; such as civilians in an occupied country or civilians who are living in a belligerent country, *but it certainly does not protect civilians who are in the battlefield, taking up arms against the adverse party*."[66] Furthermore, the United Kingdom delegate observed that "the whole conception of the Civilians Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms, who could not expect full protection under rules of war to which they did not conform."[67] Thus, the *Targeted Killings* case used a semantic distinction to reach an outcome that is consistent with the underlying fabric of the Geneva Conventions.

V. Unlawful Combatants in United States Law

In *Boumediene v. Bush*, the Supreme Court will address the legal categorization of private persons who take up arms and their correlative rights against the United States in light of the MCA provision that terms them "unlawful combatants." The MCA definition of "unlawful combatants" is substantively accurate despite the semantic imprecision that could have been avoided by using the labels "unlawful belligerents" or "unlawful participants." The United States refused to accept Protocol I in part on the basis that Article 44(3) contributed to the "essence of terrorist criminality" by its "obliteration of the distinction between combatants and non-combatants."[68] The United States rejected Protocol I on precisely the same intellectual grounds used by the *Targeted Killings* court to uphold the Israeli government policy. Protocol I appears to pave the way for any civilian to take up arms when the fancy strikes, engage in hostilities, put down his or her weapons, hide among the innocent civilian populace, strike at will, and yet claim combatant status (with an accompanying combatant immunity from prosecution for those warlike acts). This on/off combatant status would effectively erode the law of unlawful combatancy to its vanishing point. Article 44, paragraph 3 of Protocol I undermines the traditional qualifications for achieving combatant status by accepting the notion that there may be some circumstances "owing to the nature of the hostilities" in which combatants cannot distinguish themselves from the civilian population.[69] In such circumstances, the duty to distinguish may be watered down to the point that the combatant need only carry his arms openly "during each military engagement" or when "visible to the enemy."[70] In the real world of state practice, the protections ostensibly provided to terrorists under Protocol I have remained inapplicable and have by no means been universally accepted as a matter of law, nor do they obviate the other requirements for lawful combatant status set forth in the Hague Regulations and Article 4 of the Geneva Conventions of 1949. Thus, the explicit recognition of a category of "unlawful combatants" is valid under both United States and international law.

The Military Commissions Act further conforms United States practice to international law by establishing a mechanism for the prosecution of persons who take part in hostilities but are not legally entitled to prisoner of war status. The official ICRC Commentary to Protocol I specified that "anyone who participates directly in hostilities without being subordinate to an organized movement under a Party to the conflict, and enforcing compliance with these rules, *is a civilian who can be punished for the sole fact that he has taken up arms"* (emphasis added).[71] The ICRC text further restates the long-established principle that "anyone who takes up arms without being able to claim this status [of a "lawful combatant"] will be left to be dealt with by the enemy and its military tribunals in the event that he is captured."[72] Accepting the reality that such persons are unlawful belligerents who may be prosecuted for their warlike acts, Protocol I describes a minimum set of due process obligations applicable to such prosecutions. Article 45 provides that "[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit

from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol."[73] The MCA Provisions meet and exceed the relevant international standards.

Finally, international law is clear that no accused should face punishment unless convicted pursuant to a fair trial affording all of the essential guarantees embodied in widespread state practice.[74] Common Article 3 states this principle with particularity by requiring that only a "regularly constituted court" may pass judgment on an accused person.[75] Interpreting this provision in light of state practice, the ICRC concluded that a judicial forum is "regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country."[76] Accepting the ICRC benchmark of legitimacy, the MCA provisions meet the criteria derived from the law of war because they apply the general principles of criminal law drawn from the existing Manual for Courts-Martial with only slight (but important) modifications. Similarly, the MCA provisions are "established by law" in accordance with human rights principles.[77] The United Nations Human Rights Commission adopted a functional test that the tribunal should "genuinely afford the accused the full guarantees" in its procedural protections.[78] Noting that the ICCPR drafters rejected language specifying that only "pre-established" forums would provide sufficient human rights protections, the ICTY Appeals Chamber concluded:

> The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.[79]

The MCA provisions for external review of the ground for detention and jurisdiction over an unlawful combatant pending trial meet these international standards. Indeed, the Geneva Conventions specifically permit the deprivation of liberty even for innocent civilians who are fully protected by their provisions if 'the security of the Detaining Power makes it absolutely necessary.'[80] Even large-scale internment may be permissible in situations where there are 'serious and legitimate reasons' to believe that the detained persons threaten the safety and security of the occupying power.[81] The Geneva Conventions nowhere reference any right of such detained civilians to review by an external judicial body pursuant to a grant of habeas corpus. It would be unprecedented for the Supreme Court to convey greater procedural rights to unlawful combatants than those enjoyed by persons fully protected by the laws and customs of war.

CONCLUSION

September 11th reopened international discussion over the basic division between those persons and incidents within the proper purview of the law of war, as opposed to those persons and incidents within the purview of criminal conduct. In describing terrorists under the armed conflict rubric, the phrases unlawful combatants, unlawful participants, unlawful belligerents, illegal saboteurs, and unprivileged belligerents are merely semantic distinctions to describe the same legal relationship between the person taking up arms and the other persons caught up in the conflict. Despite the holding of the *Targeted Killings* case, in international law today there is no legal category that might be described as an unprotected civilian. The proper characterization of such individuals is the historically accepted determination that they are unlawful combatants (or unprivileged belligerents). Persons who take part in hostilities without meeting the legal criteria as prisoners-of war are neither protected civilians nor lawful combatants. Therefore, though the historical evolution of the law of armed conflict has steadily shrunk the range of conduct deemed to be outside the boundaries of international law, the principle of unlawful combatancy has survived intact.

In theory, the modern law of armed conflict is nothing more than a web of interlocking protections and specific legal obligations held together by the thread of respect for humankind and a reciprocal expectation that other participants in armed conflict are bound by the same normative constraints. This foundational premise is at the heart of the challenge posed by the modern manifestations of transnational terrorism. Recent history shows that the expectations of reciprocity and professionalism that make the law of armed conflict a coherent whole are increasingly challenged in practice. The European Parliament opined that the law of armed conflict must "be revised to respond to the new situations created by the development of international terrorism."[82] The *Targeted Killings* opinion postulates that legal norms "developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted international rules, to the new reality."[83] The MCA provisions as enacted by the United States Congress accomplished precisely this goal.

Endnotes

1 The United States doctrine for Counterinsurgency that was rewritten and repromulgated in response to operations in Iraq makes this principle plain by referring to legal considerations in more than 100 places throughout its text. Dep't of The Army, Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5, Counterinsurgency (DEC. 15 2006), *available at* http://usacac.army.mil/CAC/Repository/Materials/COIN-FM3-24.pdf.

2 H.C. 3451/02, *Almadani v. IDF Commander in Judea and Samaria*, 56 (3) P.D. 30, 30-35, *quoted in* Judgments of the Israel Supreme Court: Fighting Terrorism within the Law 13 (2005).

3 *See, e.g.*, DOD. Dir. 2311.01E, para. 4.1.

4 *Pub. Comm. Against Torture in Israel v. Gov't of Israel*, HCJ 769/02, para. 2, *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf . The majority opinion was written by President Emeritus A. Barak, with President D. Beinisch and Vice President E. Rivlin concurring and attaching separate comments [hereinafter *Targeted Killings Judgment*].

5 *Id.* para. 3.

6 *Id.* para. 61.

7 *Almadani, supra* note 1, at 34, *quoted in Targeted Killings Judgment, supra* note 4, para. 62.

8 *See* Michael J. Matheson, *The Opinion of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 Am. J. Int'L. L. 417, 422 (1997) ("the test of what is an arbitrary deprivation of life, however, falls to be determined

by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.").

9 *See generally* Leslie C. Green, *What is – Why is There – The Law of War, in* Essaya on the Modern Law of War 1 (2d. ed. 1999).

10 The field is frequently described as international humanitarian law. This vague rubric is increasingly used as shorthand to refer to the body of treaty norms that apply in the context of armed conflict as well as the less distinct internationally accepted customs related to the treatment of persons. The core of the international law of war includes the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371); Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3316 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021) [*hereinafter* Geneva Convention on Prisoners of War]; Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [*hereinafter* Civilians Convention].

11 M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 56 (2d ed. 1999).

12 *See* 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims Of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. art 483, 23 [*hereinafter* Protocol I].

13 *Targeted Killings Judgment, supra* note 4, para. 4.

14 For example, beginning in 1874, states accepted the principle that "the laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy." *See* The Brussels Project of an International Declaration concerning the Laws and Customs of War, Art. 12, *reprinted in* Dietrich Schindler and Jiri Toman, The Laws of Armed Conflicts 25-34 (2d ed. 1981) [*hereinafter* Brussels Declaration]. By 1907, this concept morphed into the phrase "the right of belligerents to adopt means of injuring the enemy is not unlimited."1907 Hague Regulations, *supra* note 12, art 22.

15 Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, *entered into force* Jan. 26, 1910, *reprinted in* Documentation on the Laws of War 73 (3d ed., eds. Adam Roberts & Richard Guelff 2000)[*hereinafter* 1907 Hague Regulations].

16 Protocol I, *supra* note 12, art. 48.

17 Alfred P. Rubin, The Law of Piracy, 63 Naval War Col. Int'l. L. Stud. 154 (1988), *citing* 16 Geo. III c. ix (1777).

18 Ingrid Detter de Lupis, The Law of War 148 (2000) (noting that unlawful combatants are "also personally responsible for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier").

19 In a classic treatise, Professor Julius Stone described the line between lawful participants in conflict and unprivileged or "unprotected" combatants as follows, Julius Stone, Legal Controls on International Conflict 549 (1954):

> The distinction draws the line between personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection. 'Non-combatants' who engaged in hostilities are one of the classes deprived of such protection… Such unprivileged belligerents, though not condemned by international law, are not protected by it, but are left to the discretion of the belligerents threatened by their activities.

20 Geneva Convention on Prisoners of War, *supra* note 10, art. 93.

21 *See, e.g.. Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, art. 8(2)(e).

22 Marco Sassoli & Antoine Bouvier, How Does Law Protect in War? 208 (International Committee of the Red Cross 1999).

23 In one of the most widely publicized cases in the current struggle, a*vailable at* http://www.globalspecialoperations.com/reid.html, United States District Court Judge William Young announcing a life sentence against Richard Reid, the so-called shoe bomber, with the emphatic pronouncement that

> Here in this court, where we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice, you are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist. And we do not negotiate with terrorists. We do not treat with terrorists. We do not sign documents with terrorists. We hunt them down one by one and bring them to justice. So war talk is way out of line in this court. You are a big fellow. But you are not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders."

See also The Military Prosecutor v. Omar Mahmud Kassem and Others, Israeli Military Court, Ramallah, April 13, 1969, 41 I.L.R. 470 (1971), *reprinted in* Howard Levie, Documents on Prisoners of War, 60 Naval War Col. Int. L. Stud. 771 (1979) (rejecting the claim of combatant immunity raised by a member of the "Organization of the Popular Front for the Liberation of Palestine"); House of Lords (Privy Council), Osman Bin Haji Mohamed Ali and Another Appellant and the Public Prosecutor Respondent On Appeal From the Federal Court of Malaysia, 1 Law Rep. 430 (1969), *reprinted in* Marco Sassoli & Antoine Bouvier, How Does Law Protect in War? 767 (International Committee of the Red Cross 1999) (rejecting combatant status for members of the Indonesian armed forces who failed to comply with the provisions of Article 4 of the Geneva Conventions).

24 *See* Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (Nov. 16, 2001).

25 548 U.S. ____, 126 S.Ct. 2749, 165 L.Ed. 2d 723 (2006).

26 10 U.S.C. § 836 (also permitting the President latitude implement procedural rules that "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.).

27 10 U.S.C. § 821. *See also* Michael A. Newton, *Continuum Crimes: Jurisdiction over Foreign Nationals Who Commit International Crimes,* 153 Mil. L. Rev. 1 (1996)(an early call for expansion of UCMJ authority under article 21 to expand the jurisdiction of military commissions).

28 *Hamdan*, *supra* note 25, at 2790, *quoting* Geneva Convention on Prisoners of War, *supra* note 10, art. 3(1)(d).

29 Following the decision by Justice O'Connor in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) in which a plurality of Justices required the military to hold status hearings to verify the United States does not mistakenly detain "the errant tourist, embedded journalist, or local aid worker." *Id.* at 534. The military quickly created a system of Combatant Status Review Tribunals, *See* http://www.defenselink.mil/news/Combatant_Tribunals.html Congress responded with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA), which the President signed into law on December 30, 2005.

30 P.L. 109-366, October 17, 2006 (passing the House and Senate by a combined vote of 313-204-12).

31 126 S.Ct. at 2799.

32 10 U.S.C. § 948(c).

33 Geneva Convention on Prisoners of War, *supra* note 10, art. 102.

34 10 U.S.C. § 802(a)(9).

35 *See* 10 U.S.C. § 802(a)(13)[enacted by the Military Commissions Act, P.L. 109-366, sec. 4].

36 *Targeted Killings Judgment, supra* note 4, para. 25.

37 476 F.3d 981 (D.C. Cir. 2007), *cert. granted on rehearing* 2007 LEXIS

US 8757 (June 29, 2007), consolidated with *Al Odah, et. al. v United States*, 2007 LEXIS 8810.

38 Geneva Convention on Prisoners of War, *supra* note 10, art. 102.

39 L. Oppenheim, International Law: A Treatise, § 56 at 203 (H. Lauterpacht ed., 7th ed., 1952).

40 *Targeted Killings Judgment, supra* note 4, para. 18.

41 *See, e.g.,* U.S. v. Otto Ohlendorf et al. (The Einsatzgruppen Case), (Case No. 9), 4 L. Rep. of Trials of War Criminals 411 (U.N. War Crimes Comm. 1948), *reprinted in* Howard Levie, Documents on Prisoners of War, 60 Naval War Col. Int'l. L. Stud. 408 (1979); Italy, Sansoli and Others v. Bentivegna and Others, Court of Cassation, 24 Int. L. Rep. 986 (1958), *reprinted in* Marco Sassoli & Antoine Bouvier, How Does Law Protect in War? 701 (International Committee of the Red Cross 1999) (upholding the legal status of Italian irregulars in fighting against German occupation).

42 Protocol I, *supra* note 12, art. 8. The United States policy in this regard is clear that occupation confers only the "means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty." Department of the Army, Field Manual 27-10: The Law of Land Warfare, para. 358 (1956) [*hereinafter* FM 27-10] (devoting the whole of Chapter 6 of the United States Army Field Manual related to the law of armed conflict to explicating the text of the law related to occupation as well as the United States policy related to occupation), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/27-10/.

43 1907 Hague Regulations, *supra* note 15, art. 42 (emphasis added). UK Ministry of Defence, The Manual of the Law of Armed Conflict 275, P 11.3 (2004).

44 Civilians Convention, *supra* note 10.

45 Geoffrey Best, War and Law Since 1945 127-29 (1994).

46 *Id.*, art. 5.

47 IIb Final Record of the Diplomatic Conference of Geneva of 1949, at 270.

48 FM 27-10, *supra* note 41, para. 71(c).

49 Geneva Convention on Prisoners of War , *supra* note 10, art. 4 (emphasis added). This is only a partial listing of the provisions most relevant for determining the status of terrorists and their supporters.

50 *Targeted Killings Judgment, supra* note 4, para. 25.

51 *Targeted Killings Judgment, supra* note 4, para. 27.

52 Protocol I, *supra* note 12, art. 50.

53 The Geneva Conventions of 12 August 1949: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva 51(1958).

54 *Id*. at 50 ("There are certain cases about which some hesitation may be felt. We may mention, first, the case of partisans, to which Article 4, A (2) , of the Third Convention refers. Members of resistance movements must fulfil certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who have fallen into enemy hands do not fulfil those conditions, they must be considered to be protected persons within the meaning of the present Convention. That does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions of Article 64 and the Articles which follow it").

55 *See, e.g.,* The Hostages Trial: Trial of Wilhelm List and Others (Case No. 47), 8 L. Rpts. of Trials of War Criminals 34, 58 (U.N. War Crimes Comm. 1948) ("Guerilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganised forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applied to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured.").

56 The Geneva Conventions of 12 August 1949: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva 51(1958) ("In short, all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. ' There is no ' intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution—not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view").

57 *Targeted Killings Judgment, supra* note 4, para. 27.

58 Protocol I, *supra* note 12, art. 51(2).

59 *Targeted Killings Judgment, supra* note 4, para. 6.

60 Protocol I, *supra* note 12, art. 51(3).

61 Yoram Dinstein, "*Unlawful Combatants*", 32 Isr. Y.b. on Hum. Rts. 247, 248 (2002).

62 *Targeted Killings Judgment, supra* note 4, para. 13.

63 IIb Final Record of the Diplomatic Conference of Geneva of 1949, at 268 (quoting the Dutch delegate who argued that "the cases provided for by Article 3 must be treated separately and in accordance with present-day international law").

64 *Id*.

65 *Id.* at 271.

66 *Id.* (emphasis added).

67 *Id*. at 621. Brigadier Page, the United Kingdom delegate, noted that illegal combatants "should no doubt be accorded certain standards of treatment, but should not be entitled to all the benefits of the convention." *Id.* The Swiss delegate expressed an almost identical view that "in regard to the legal status of those who violated the laws of war, the Convention could not of course cover criminals or saboteurs." *Id.*

68 A Message from the President of the United States Regarding Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, Treaty Doc. 100-2, Dec. 13. 1986, *reprinted in* Marco Sassoli & Antoine Bouvier, How Does Law Protect in War? 603, 604 (International Committee of the Red Cross 1999).

69 Protocol I, *supra* note 12, art. 44(3). The text does contain some qualifiers by which Protocol I proponents sought to legitimize this erosion of traditional principles. For example, Article 44(7) specifies that "[t]his Article is not intended to change the generally accepted practice of States with respect to the wearing of uniforms by combatants assigned to the regular, uniformed armed units of a Party to the conflict."

70 *Id.*

71 Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 at 514 (Y Sandoz, Ch.Swinarski, & B. Zimmermann eds., 1987) [*hereinafter* ICRC Commentary on Protocol I] (emphasis added).

72 *Id.*

73 Protocol I, *supra* note 12, art. 45(3).

74 For a summary of state practice and its implementation in treaty norms

and military manuals around the world, see 1 Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law 352-75 (2005) [hereinafter ICRC Study].

75 Geneva Convention on Prisoners of War, *supra* note 10, Art. 3.

76 ICRC Study, *supra* note 74, at 355.

77 International Covenant on Civil and Political Rights art. 14, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [*hereinafter* ICCPR] (describing analogous provisions derived from international human rights law).

78 *See* Human Rights Comm., General Comment on Article 14, P 4, U.N. Doc. A/43/40 (1988); Human Rights Comm., Cariboni v. Uruguay, U.N. Doc. A/39/40 (Oct. 27, 1987). The Inter-American Commission has taken a similar approach. *See, e.g.,* Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am. C.H.R., Annual Report 1973, 2-4, OEA/Ser. P, AG/doc. 409/174 (March 5, 1974).

79 Prosecutor v. Tadic Case No. IT-94-1-AR72, 1995 WL 17205280, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, P 45 (Oct. 2, 1995), *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm.

80 Civilians Convention, *supra* note 10, art 42.

81 *Prosecutor v. Delalic, Mucic, Delic, and Landzo (Celibici*), Case No. IT-96-21-T, Judgment, 20 Feb 2001.

82 European Parliament Resolution B5-0066/2002 (Feb. 7, 2002).

83 *Targeted Killings Judgment, supra* note 4, para. 28.