

Defining Terrorism: A Comparison of Several Judicial-Executive Dialogues

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Résumé de l'article

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by
Noemi Gal-Or

ABSTRACT

The events of 9/11 have forced upon the entire community of Western states a re-assessment of their respective anti-terrorism policies and laws. It released an intense discussion seeking to update and re-characterize the post-9/11 state of international relations producing a wave of renewed attempts to legally (re)define terrorism. The main challenge is to determine whether terrorism in its twenty-first century manifestation warrants recognition as a component within the doctrine of armed conflict and what would be the effects of such transformation. This article compares how the judiciary in Western liberal and pluralist democracies has been tackling this dilemma and affecting respective legislative responses. The article offers preliminary thoughts as guidelines to the design of parameters for an approach to anti-terrorism security that is common to North America (and the rest of the world). To this effect, it contextualizes the relevant North American jurisprudential developments within a sample of other Western-oriented judicial track records. The article finds that the North American dialogue (in Canada and the US) among the three branches of government is departing from two opposite ends of one and the same Western War on Terror adjudicative spectrum. This context appears to be slowly, but eventually, progressing toward conversion, effecting a common re-characterization and definition of terrorism, anti-terrorism, and their place within the doctrine of armed conflict.

INTRODUCTION

The arrival of international terrorism at America's shores on 11 September 2001 has forced upon the entire community of Western states a re-assessment of their respective anti-terrorism policies and laws. Conspicuous disagreement regarding the war in Iraq juxtaposed with a general consensus regarding Afghanistan reveal confusion as to the understanding of the nature of the armed conflict and indecisiveness regarding suggestions that a new form of interna-

tional law has been unfolding. A noteworthy outcome has been the intense discussion seeking to update and re-characterise the state of international relations since 9/11, accompanied by renewed attempts to legally (re) define terrorism.¹

In other words, does the accumulation of terrorist attacks in the West — but also elsewhere in the world — represent a state of armed conflict (“war”) with other states, in which these states sponsor or support terrorism? Or, is it a state of armed conflict with a new international actor — the non-state actor (NSA)? If so, does this represent a new type of international war? Moreover, is terrorism to be considered an act of armed conflict falling within the paradigm of international humanitarian law or simply a criminal offense?

This article compares how, in liberal pluralist democracies, the above mentioned has been tackled in adjudicative cases and legislative responses to adjudicative decisions. It is intended to offer preliminary thoughts as guidelines to the design of parameters for a North American (and international) anti-terrorism security common approach. Since this research was originally presented,² dockets related to the War on Terror have been mushrooming. The article identifies a number of selected cases as representative trailblazers indicating directions that the legal branch in North America would come to follow. The 2005 Ontario Rutherford decision of *Khawaja vs. Re*,³ relaxing the evidentiary burden of the Crown in matters of terrorism, and the Supreme Court of Canada (SCC) case *Charkaoui v. Canada (Citizenship and Immigration)*,⁴ regarding the constitutionality of the anti-terrorism law’s (subsumed in Canada’s immigration law) security certificate, paved the way to legislative amendments. Among other things, these decision have led to the recent *Canada (Justice) v. Khadr*⁵ that ordered the disclosure of the Canadian Khadr-related documents. In the US, the War on Terror sparked a fierce dialogue among, especially, the executive and the judiciary. *Hamdan v. Rumsfeld*,⁶ which held that the military commission prosecuting an alleged *al-Qaeda* member captured during the US Afghanistan invasion and kept at the Guantánamo Bay detention camp lacked power to proceed, served as a major trigger to the Military Commissions Act (MCA) 2006⁷ bypassing of this US Supreme Court decision. It serves as an important precedent in the recent *Boumediene v. Bush*⁸ judgments which found in favour of the rights of foreign Guantánamo detainees under American constitutional law. The paper contextualizes these North American developments in an overall Western-oriented judicial track record. For comparative purposes, it refers to the following prominent “off shore” cases: The Israeli High Court of justice (HCJ) decision regarding an application for a conditional order and a temporary injunction against targeted state-killings;⁹ the European Court rule on United Nations (UN) and European Union (EU) terror suspect blacklisting;¹⁰ and the German criminal complaint against Donald Rumsfeld and others.¹¹

This comparison should assist in identifying and synthesising commonalities and distinguishing differences in the approaches taken by the respective tri-

bunals and legislatures. It is hoped that such rudimentary mapping will contribute to the many endeavors¹² aimed at isolating the core issues dominating the legal conceptual lull regarding a democratic, rule-of-law-based adequate anti-terrorism policy.

Which law governs?

The main challenge to the anti-terrorism policies adopted by “Rule of Law”-minded states consists in the “pigeon-holing” of the conduct targeted by legislation and cases brought to trial. There are several competing conceptual trajectories, which lead to different “pigeon-holing” options. The challenge is to juxtapose them and explore whether there is a crossing point at which they all meet. Among the two major trajectories — level of governance and terrorism prevention — this article chooses to focus only on the former. It comments on the branches this trajectory is leading off as guided by the cases and legislation mentioned above. It concludes with a discussion of the commonalities linking the approaches at the different levels of governance and the differences separating them and offers observations concerning the import of the comparison for future international and national legislation regarding terrorism.

Level of Governance

The approach to anti-terrorism is first and foremost determined by the level of governance at which it is being addressed. This bias results in a kaleidoscopic image of terrorism whereby jurisdictional legal boundaries mistakenly deconstruct the nature of the terrorist offense. Terrorism today is almost exclusively of an international, trans-boundary nature. A principled approach to terrorism that does not distinguish between *definitions* of terrorism based on a domestic versus international dichotomy is certainly overdue. Rather, the relevant distinction applies to the *scope of jurisdiction* of domestic versus international tribunals and the supremacy of legislation (domestic parliamentary versus international) with regards to acts of terrorism. This arises clearly from the comparison between the *Khawaja* and *Charkaoui* (Canadian) with *Yusuf, Kadi*, and *Ayadi* (EU cases), the Israeli Barak Decision, *Rumsfeld and Tenet*, and *Hamdan*.

The National Level

Canada

In *Khawaja*, the applicant challenged the constitutionality of his indictment under the Terrorism Section, Part II.1 of the *Criminal Code* and according to s. 52 of the *Constitution Act*, 1982 and s. 2 of the *Charter of Rights and Freedoms*, 1982 (Charter).¹³ In its ruling, the Court explicitly placed the Anti-Terrorism Act within the international context of international terrorism and noted that “. . . there is a developing context, both domestically and internationally, in which any consid-

eration and evaluation of the legislation in question must be undertaken.”¹⁴ It identified, in the analysis of legislative intent, that according to Anne McLellan, then Minister of Justice and Attorney General of Canada, “criminal sanction may not be enough”¹⁵ to deter terrorist suicide bombing. Moreover, in its reasoning, the Court compared domestic with international law, namely criminal law, humanitarian law, and the law of crimes against humanity, when addressing the difference between motive for a crime, which is non-justiciable under all these laws, and intent (*mens rea*) which is a crucial element of crime.¹⁶ Yet, at the end of the day, the Court shied away from qualifying the legislation as a matter of protecting national security: “. . . we believe that this characterization has the potential to go too far and would have implications that far outstrip legislative intent.”¹⁷ To the contrary, it cloaked *Khawaja* in the safe context of domestic criminal law and consequently produced a judgment focusing on “the freedom-protected aspects of the lives of those on whom any shadow of suspicion may fall, with or without justification.”¹⁸ It is not a ruling on terrorism and national security, and national security concerns do not make it to a Charter s. 1 test.

Unlike in *Khawaja*, the Court in *Charkaoui* did tackle the constitutionality of the security certificate in terms of national security. The Court grappled with the question of “How Do Security Considerations Affect the [Charter] Section 7 Analysis?”¹⁹ It recognized that:

[m]ore particularly, the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual. . . . Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here.²⁰

Nevertheless, the consideration of national security did not lead the Court to a different type of reasoning. Similar to *Khawaja*, the Supreme Court of Canada implicitly recognised the international nature of terrorism, at least the conflict of law framework governing terrorism, and re-iterated the state’s duty to comply with its international agreements. Equally, as in *Khawaja*, it refrained from contemplating particular conflict of law issues, namely the interface between domestic criminal law and international criminal law and armed conflict. The only reference to the law of war²¹ is of secondary significance and indirect.²²

In *Khawaja*, the applicant was a Canadian citizen, a fact that would

exclude the application of the law of war and trigger jurisdiction under domestic law. In *Charkaoui*, however, one appellant, Adil Charkaoui, was a permanent resident, while the two co-appellants, Hassan Almrei and Mohamed Harkat, were foreign nationals at the time who had been recognized as Convention refugees.²³ The appeal, which was based on immigration law, dealt with the detention of foreign nationals and the differential treatment of citizens and non-citizens.²⁴ The Court, however, did not entertain the possibility of raising the question in the context of the law of war. Had it identified terrorism as an act of armed conflict, such an interpretation might have been required to determine whether the non-citizens in this case had been enemies of Canada and, as such, whether they had been civilian or combatant enemies. Thus, like *Khawaja*, *Charkaoui* also referred the issue back to Parliament, as a matter for legislation. This approach is re-iterated in the two relevant and significant recent cases of *Hape* and *Khadr*. In the latter, the Court reaffirmed its opinion in *R. v. Hape*²⁵: “The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada’s international human rights obligations.”²⁶

Clearly, neither the Canadian Parliament (Anti-Terrorism Act) nor the Courts are yet ready to pigeon-hole terrorism as a matter *also* pertaining to the law of armed conflict. At the other end of the spectrum are the American judicial decision in *Hamdan* and the legislation of the MCA, and the German complaint in *Rumsfeld & Tenet*, both representing an approach different from the Canadian examples.

The United States

In *Hamdan*, a Yemeni national alleged to have been an *al-Qaeda* member, who was apprehended in Afghanistan and detained at Guantánamo Bay, challenged the legality of his treatment by the US as per the law of armed conflict. Since the US was engaged in an armed conflict in Afghanistan, and in spite of the US position that persons apprehended during that activity had been “unlawful combatants”²⁷ and were therefore not entitled to the protection of the law of armed conflict, the case has clearly been pigeon-holed as pertaining to the law of armed conflict.²⁸ It accords also with the characterization of 9/11 by the UN Security Council (SC) Resolution 1368 (2001), based on the UN Charter Ch. 7, which authorized the NATO operations in Afghanistan on the grounds that Afghanistan was a state host to terrorists.²⁹ The UN has thus lent credibility to the US claim against the exclusivity of international criminal law as the legal framework to address acts of terrorism.

Applying the law of armed conflict to terrorism does not obviate human rights laws and the protection of the individual. In *Hamdan*, the US Supreme Court (USSC) found international law to be judicially cognizable in US courts by way of reference in an Act of Congress.³⁰ The Court determined that the law

of armed conflict, including the 1949 Geneva Conventions (and therefore also Common Article 3³¹ providing for the protection of the individual civil person and the corresponding duty of the armed forces) was applicable to the treatment of detainees. It found, *inter alia*, that the relevant military commission established by the President was unlawful and lacked power to proceed since it was incompatible with the standards of Common Article 3.

As in the Canadian cases, this implied that the legislation pertaining to the military commissions must be amended. Indeed, the Executive responded to the Hamdan judgment by instructing the Defence Department leadership to comply with Common Article 3 provisions.³² The administration's revision of the MCA reaffirmed the disputed characterization of the non-state combatant as unlawful combatant by expanding it, retroactively eliminated the right of *habeas corpus* for alien enemy combatants (a violation of the legal principle against *ex post facto* criminalization) and limited the ability of individuals to seek protection under the Common Article 3 in certain proceedings.³³ Practically,

[m]any of the enumerated crimes are *composites* of rules drawn from the law of international armed conflict and the law of non-international armed conflict. While these two bodies of law have converged to a degree, significant differences remain. . . . [B]ecause the US views the conflict with Al-Qaeda as a non-international armed conflict, many of the enumerated crimes would not qualify as war crimes as traditionally understood given the narrower scope of rules applicable in such conflicts under common Article 3 of the Geneva Conventions. . . . Certainly, international law provides no privilege to kill in a noninternational armed conflict; however, this simply means that the person could be held criminally responsible under ordinary domestic law, not the law of armed conflict.³⁴

At the same time, the MCA recognized the constitutional judicial power of the USSC and the US lower federal courts as extending to the treaties of the US. Moreover, the MCA criminalized certain serious violations of common Article 3, thus incorporating the Article in domestic law with regard to "an armed conflict not of an international character."³⁵ However, it omitted reference to the Hamdan judgment's requirement of "judicial guarantees which are recognized as indispensable by civilized peoples."³⁶ In retrospect, *Hamdan* led directly to *Boumediene* where the USSC found that the Guantánamo detainees' constitutional entitlement to meaningful *habeas corpus* review by federal civilian judges had been violated. It also calls on the other branches of government to produce a "workable" concept of terrorism while acknowledging that such task may in the future fall within the purview of the judiciary:

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dan-

gerous threats to us for years to come, the Court might not have this luxury. . . . The political branches, . . . can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism. . . . It bears repeating that our opinion does not address the content of law that governs petitioners' detention.³⁷

Germany

The *Rumsfeld & Tenet* complaint, filed in Germany³⁸ on behalf of nine Iraqi citizens incarcerated in Abu Ghraib, Iraq, and one Saudi national held in Guantánamo Bay, Cuba, and in the name of a long list of international interests and interestees, alleged torture and war crimes in the said prisons. It also raised questions regarding the impact of the revised (2006) MCA on Germany's duties of comity and "complementarity" in international law,³⁹ as well as the culpability of lawyers when in the service of their government.⁴⁰ The complaint, which is still pending, was filed under Germany's 2002 Code of Crimes against International Law (CCAIL) adopted consequent to Germany's adherence to the treaty establishing the International Criminal Court (ICC). The complaint brands the issue as a matter of human rights law in general, particularly international criminal law (which has a nexus to humanitarian law [*jus in bello*]). Investigation of the complaint was denied on several grounds, including the inappropriate exercise of Germany's extra-territorial jurisdiction, lack of evidence, potential encouragement of future frivolous complaints, and a vague reference to comity.⁴¹ The complainants appealed in November 2007; a decision is still pending. The complaint has largely been dealt with by the German federal prosecutor as a matter of German criminal law. It is too early to determine where the case fits on the spectrum of levels of governance regarding the selection of types of law.

Nevertheless, it is reasonable to expect that issues concerning the correspondence of domestic and international law, as well as international criminal law and the law of armed conflict pertaining to the definitions of war versus terrorism, will unfold as it proceeds.

Israel

The Barak Decision should be placed somewhere along the legal spectrum closer to the American and German extreme rather than the Canadian side. It goes farther than the American examples in an attempt to reconcile the existing tension between domestic and international law, and among the various types of international laws, and seeks to clear the cloud shrouding the politics, and legal lacuna, surrounding terrorism. Unlike the Canadian cases, the HCJ dares to address the intricacies of the new situation head on. In fact, it has no other option available.

The Barak Decision came in response to an application by two Israeli human rights organizations submitting that the Israeli policy of targeted killing was patently illegal, contrary to international law, the law of the State of Israel, and the fundamental principles of human morality.⁴² In the context of this paper, the Barak Decision stands out in its explicit two-prong approach: the Court asked itself which law applied to the case, and considered the legal applicability of a new third status of international personality (in addition to civilian and combatant). Having addressed these issues, it then interpreted and applied the extant legal provisions. For instance, it considered the test of proportionality, judicial review, justiciability, etc.

Unlike the Canadian, and more similar to the American and German, cases there was no disagreement as to the armed conflict contextual nature of this case. Mainly, the applicants maintained that the governing law was that of non-international armed conflict (to the exclusion of the law of international conflict) and the law of foreign occupation. The latter gave rise to the duty of the occupant to police and enforce the law within the territory occupied in accordance with the Fourth Geneva Convention on the protection of civilian population and its two additional protocols of 1977.⁴³ While recognizing the conduct addressed by the policy of targeted killing as terrorism, the appropriate counter-terrorism policy must fall under international criminal law and Israeli national emergency legislation. In the alternative the international law of armed conflict recognized only two international personalities — combatants and civilians.⁴⁴

The applicants' submission led the Court to question whether there existed a third category of "unlawful combatants" and within it to adopt a position with regard to the yet international legally incomplete definition of "hostile act."⁴⁵ The Court then turned to the application of this position and asked whether terror organizations and their member fighters were combatants entitled to rights under the law of armed conflict. Were they civilians who directly participated in the armed conflict or, rather, neither combatants nor civilians? "What, then, is the status of these terrorists?"⁴⁶ It determined that the status of an individual person as an "unlawful combatant"⁴⁷ was a matter pertaining not only to national criminal law but equally to the international law of international armed conflicts.

Civilians who are unlawful combatants are a legitimate object for attack, and hence are not enjoying the rights of civilians who are not unlawful combatants, provided they are participating concurrently and directly in the hostile acts. As we saw, they are also not enjoying the rights of combatants. For instance, the law of prisoners of war does not apply to them.⁴⁸

Similar to the other national courts reviewed, the H CJ refrained from rendering judgment on this question:

We will not adopt a position in the question whether it is desirable to recognise this third category. The question before us is not of nor-

mative law but of extant law. In our opinion, regarding everything in the matter of the extant law we do not have sufficient data to enable us to recognise the existence of this third category. This, according to the extant state of the international law, whether conventional or customary [ref. to Cassese]. It is difficult for us to see how it would be possible to recognise a third category in the interpretive framework of The Hague and Geneva Conventions. . . . Nevertheless, a new reality sometimes requires new interpretation. Rules developed at the backdrop of a reality that had now changed will now have to receive a dynamic interpretation which will adapt them, in the framework of agreed rules of interpretation, to the new reality [references to previous HCJ decisions]. In the spirit of this interpretation, we shall now approach the laws of international customary law dealing with the status of civilians who are also unlawful combatants.⁴⁹

The essence of the judgment in the Barak Decision boils down to the unanimous judicial conclusion that, under customary international law, as much as it was inappropriate to determine *a priori* that every targeted killing was forbidden, it was equally inappropriate to determine that every targeted killing was permitted. While the laws applying to such policy were determined by customary international law, the legality of *each single attack* in the execution of the policy must be determined according to rules on a case by case basis.⁵⁰ Although criticized for its evasiveness and for dangerously throwing out of balance the international legal distinction between combatant and civilian⁵¹ and remembered for the unfortunate impractical requirement of the state to have “founded information”⁵² prior to classifying the status of a civilian caught in hostilities,⁵³ the judgment will most likely become a reference point (to follow or distinguish) in future adjudications by both Israeli and other courts. It bravely breaks ground by tackling head-on the grey area wherein the distinction between civilian and combatant in the twenty-first century’s reality of armed conflict has become increasingly blurred. Its emphasis on, and test prescribed concerning, the independent judicial review in the *ex post facto* evaluation of any targeted killing, will most likely serve as a tentative model.

The International (European Regional) Level

Unlike the Canadian courts, yet similar to the other national court cases and the legislations reviewed above, the European Court of First Instance (CFI) *Yusuf, Kadi*, and *Ayadi* decisions appear to be “trapped” in an entanglement of international criminal law and the law of war. The decisions resulted from a petition by three EU residents who were listed on the UN Sanctions Committee list of targeted persons and its consequent incorporation within Community law. The list features as one of the tasks mandated to the Sanctions Committee established pursuant to UN Security Council Resolution 1267 (1999).⁵⁴ The petitioners sought the annulment of their blacklisting by arguing that it infringed upon their

rights to property, fair hearing, and effective judicial remedy. One applicant further argued that the EU lacked competence to adopt the listing regulation.⁵⁵ The cases thus raised the issue of the powers of the Sanctions Committee and questioned the extent to which the EU member states, as UN member states, the EU, and the EU Courts, were bound to comply by UNSC resolutions.⁵⁶ In *Yusuf, Kadi*, and *Ayadi*, the CFI found UNSC resolutions to be taking precedence over community law, including over fundamental rights as protected therein, and that the community and its courts were bound by UNSC resolutions. It rejected the argument that community law was autonomous from UNSC resolutions (i.e., UN Charter obligations). The Court equally found that the UNSC Resolution did not violate *jus cogens*.

Two significant observations concerning the convergence of levels of governance in legal matters of terrorism arise from this case. First, the Sanction Committee's procedures, which have been criticized for lack of transparency and due process safeguards,⁵⁷ were potentially frustrating certain member states' compliance (e.g., regarding constitutional incompatibility). In this regard, the Canadian courts were probably wise to refrain from digging too deeply into international criminal law. Second, the UNSC Resolution 1368 (2001), which, based on UN Charter Ch. 7 authorized NATO operations in Afghanistan on the ground that Afghanistan had been hosting terrorists, impinged on the exclusivity of international criminal law in matters of terrorism. It opened the gates to treat terrorism also in the framework of the international law of armed conflict. In combining the rationale of both UNSC resolutions (regarding the Sanction Committee and Afghanistan, respectively), a new legal situation has emerged wherein the boundaries between international criminal law and the law of war were blurred. Consequently, if the UNSC commands legislative supremacy, adjustments are warranted at the level of members' national legislations (including members of the EU). National courts will also be called on to take these matters into consideration.

Level of Governance Approach: Commonalties and Differences

All the cases reviewed here involved national security issues and concerns of defense also against external (foreign) threats. The Canadian cases purported that the reasons for the state's application of its Anti-Terrorism Act was based on the involved persons' connections with persons and organisations outside of Canada and on the extra-territorial and international context of the events. Similarly, in the American case the alien detainees were kept in detention for activities against, and outside of, the US. In the German case, the complaint was grounded in the harm foreign complainants suffered arising from US policy when in Iraq and Afghanistan. And in the Israeli case, non-Israeli citizens were subject to an extraterritorial targeted killings policy. In the EU case, the black-listing of foreign citizens was contested. Thus, all the cases involved also non-nationals in one way or another.

Obviously, the cases and legislations reviewed here are closely related to the foreign policy of the concerned states. On its face, this would suffice to justify consideration of relevant international legal provisions. As was shown, however, such consideration appears to be stretching across a continuum that ranges from merely procedural consideration, as in the Canadian and German cases, through concerted review and interpretation juxtaposing international with national legal provisions, as in the Israeli and American cases, and up to analysis according to mainly international and regional European law. The levels of governance trajectory shows that at the national level, the more the issue is “boxed in” as an international issue,⁵⁸ the greater the number of, and the clearer are, the law reform elements that arise. However, at the regional confederal and international levels of governance (Europe), where international law applies *prima facie*, inconsistency between branches of international law (criminal or war related) becomes more pronounced. It will therefore be interesting to see which approach will sway either the UNSC or the International Court of Justice (and special tribunals, e.g. war tribunals and International Criminal Court) — the two prominent sources of international law. It appears indeed that the UNSC has already embarked, albeit hesitantly, on that course.

It is important to note that in all the above cases the state or the confederation of states, appeared before the courts as defendants (or respondents). The governments were prompted by claimants and applicants to address legislative and executive provisions that lacked (and continue to lack) clarity. None of the governments voluntarily initiated any judicial review of its terrorism legislation or policy.

Moreover, in the Canadian 2007 *Charkaoui* case, the legal proceedings began, in fact, early and close to the issuance of the security certificates. All along, appellants remained in detention under this law since 2001, 2002, and 2003 respectively.⁵⁹ In the case of the 2006 Barak Decision, the application was submitted in 2002.⁶⁰ Thus, both Canadian and Israeli courts did not let themselves be pressed by time.⁶¹ In *Charkaoui*, the Court concluded its judgment as follows:

However, in order to give Parliament time to amend the law, I would suspend this declaration [that the IRPA’s procedure is inconsistent with the *Charter* and of no force and effect] for one year from the date of this judgment. If the government chooses to go forward with the proceedings to have the reasonableness of Mr. Charkaoui’s certificate determined during the one-year suspension period, the existing process under the IPRA will apply. After one year, the certificates . . . will lose the “reasonable” status that has been conferred them, and it will be open to them to apply to have the certificates quashed. . . .⁶²

In the Barak Decision, the Court halted the hearings during 2005, following a declaration by the government of Israel whereby it temporarily suspended

exercise of the policy of targeted killings. It renewed the hearings only after the government re-activated the policy and following the applicants' request for resumption of hearings. Canada's and Israel's sense of urgency in addressing the applicants' submissions suggests that the courts were awaiting more determinacy at the domestic level regarding the application of international law. While I leave the discussion of this detail for another time, it is worthwhile to take note of a transcript of military hearings (combatant status review tribunal) at Guantánamo Bay released by the Pentagon.⁶³ It suggested that regardless of whether the state targeted by terrorists considered itself to be in a state of international armed conflict, the "enemy" has been seeing itself fighting such a war.⁶⁴ If the information received is legitimate and had been offered candidly and voluntarily by the detainee Khalid Shaikh Mohammed,⁶⁵ then it would add to admissions by similar terrorists and may assist legislators — international and national — in fleshing out further legal clarifications. The said detainee referred to himself as a participant in a military campaign but also as a revolutionary: he described his role as "the 'military operational commander for all foreign operations around the world' for Al Qaeda."⁶⁶ Such a role would put him within the purview of the international law of war — not international criminal law of terrorism — including the law of the ICC. If and when Shaikh Mohammed is tried for war crimes by a military commission,⁶⁷ the proceedings may further contribute to clarifying the legal characterisation or definitions of state of war, hostilities, armed conflict, and terrorism and assist in hammering out the issue of a third status of natural international personality.

CONCLUSION

The dialogue between the judiciary and the executive and legislative levels of government reviewed here suggests that the statement that "[i]t is cold comfort that there are by now more than a dozen UN conventions against particular manifestations of terrorism . . ."⁶⁸ has been premature. It is inaccurate to suggest that the conventions "do not lead significantly closer to a shared understanding of the problem."⁶⁹ Indeed, when considered from a level of governance approach, and precisely because "the war on terror created a permanent state of exception,"⁷⁰ both hard pressed national and international courts, as well as national and international executives, are being forced to reach hard conclusions. As this article has shown, the North American dialogue among the three branches of government is departing from two opposite ends of one and the same Western War on Terror adjudicative spectrum. This context appears to be slowly, but eventually, progressing towards conversion, effecting a common re-characterization and definition of terrorism, anti-terrorism, and its place within the doctrine of armed conflict.

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Endnotes

I wish to acknowledge and thank the anonymous reader for the useful comments.

1. And each international law as “a different legal order,” (Nolte quoted in the Barak Decision, *infra*, note 4).
2. Presented at “Adapting North American Security Relations to Terrorist Threats,” Simon Fraser University Workshop, 23 March 2007.
3. *Mohammed Momin Khawaja v. Her Majesty the Queen*, Ontario Superior Court, Crt. File #: 04-G30282, 16 December 2005, released 24 October 2006 [cited hereafter as *Khawaja*].
4. *Adil Charkaoui v. Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness*, Supreme Court of Canada, 2007 SCC 9, Docket: 30762, 30929, 31178, 23 February, 2007 [cited hereafter as *Charkaoui*].
5. 2008 SCC 28 [cited hereafter as *Khadr*]. See Noemi Gal-Or, “Canada (Justice) v. Khadr: Reconciling the Charter with US and International Laws,” *The Lawyers Weekly*, 22 August 2008.
6. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) [cited hereafter as *Hamdan*]. In contradiction to the spirit of this case, the recent US Court of Appeals for the District of Columbia Circuit in *Boumediene v. Bush*, Nos. 05-5062 etc. (D.C.Cir. 20 February 2007 available through *Westlaw* at 2007 WL 506581 upheld the constitutionality of the MCA withdrawal of federal *habeas corpus* jurisdiction for Guantánamo detainees. Andrew Kent, “D.C. Circuit Upholds Constitutionality of Military Commissions Act Withdrawal of Federal Habeas Jurisdiction for Guantanamo Detainees,” *ASIL Insight* 1, no. 8 (21 March 2007).
7. Military Commissions Act 2006 (MCA), Public Law 109-366, 120 Stat. 2006 (17 October 17 2006) [cited hereafter as MCA].
8. United States Supreme Court: *Boumediene v. Bush* (Together with *Al Odah v. United States*) (12 June 2008), found at: <http://www.scotusblog.com/wp/wp-content/uploads/2008/06/06-1195.pdf> [cited hereafter as *Boumediene*].
9. The Israeli Public Committee against Torture and the Association for the Protection of the Environment and Human Rights — LAW v. The Government of Israel, the Prime Minister of Israel, the Defense Minister, the Defense Forces of Israel [IDF], the Chief of Staff, Shurat Hadin — Israel Law Center and 24 Others, H CJ 769/02, 14 December 2006, Hebrew version [cited hereafter as Barak Decision].
10. *Yusuf and Al Barakaat International Foundation v. Council of European Union and the Commission of the European Communities*, Case t-306/01 [cited hereafter as *Yusuf*]; *Kadi v. Council of the European Union and the Commission of the European Communities*, Case T-315/01 [cited hereafter as *Kadi*]; *Ayadi v. Council of the European Union*, Case T-253/02 [cited hereafter as *Ayadi*], all found at: <http://curia.europa.ca/>.
11. *Criminal Complaint v. United States Secretary of Defense Donald Rumsfeld, Former Director of Central Intelligence of the United States George Tenet, et al.*, 14 November 2006, found at: <http://www.ccrny.org/v2/GermanCase2006/Docs/> [cited hereafter as *Rumsfeld & Tenet*].
12. There is a relevant growing literature on the “new terrorism” that I will not address here for lack of space.
13. Re. “vagueness and overbreadth” and freedom of thought, belief, opinion, and expression, respectively. *Khawaja*, pp. 3-4.
14. *Ibid.*, p. 5. See also reference to international treaty commitments, p. 11.
15. *Ibid.*, p. 26.
16. *Ibid.*, p. 24.
17. *Ibid.*, p. 6.
18. *Ibid.*, p. 30.

19. *Charkaoui*, p. 26. The questions in this case were regarding provisions of the *Immigration and Refugee Protection Act (IRPA)*. S. 7 refers to freedom from arbitrary detention.
20. *Ibid.* pp. 43-45.
21. "Law of War" consists of *jus ad bellum* and *jus in bello* (humanitarian law). Often it is being referred to as the law of armed conflict so as to highlight the legal distinction between international and non-international armed conflict.
22. Regarding the limits justified under s. 1 of the Charter, in a quotation from a SCC 1995 judgment, wherein the outbreak of war is identified as such legitimate exception. *Ibid.*, p. 48.
23. *Ibid.*, p. 21.
24. *Ibid.*, pp. 8 and 10.
25. *R. v. Hape* (2007 SCC 26) [cited hereafter as *Hape*].
26. *Khadr*, paragraph 2.
27. A definition of legal status that is particular to the US and is different from the definition of non-state combatants in a non-international armed conflict. This point will be discussed below in the context of the Barak Decision. The word "unlawful" is a source to much confusion: it can be construed as breaking the law or alternatively as not being governed by the law.
28. Albeit, according to the US government, by distinction.
29. United Nations, Security Council, S/Res/1368 (2001), found at: <http://documents.un.org/mother.asp>, 12 September 2001.
30. The Uniform Code of Military Justice. For an analysis of the judgment, see John P. Cerone, "Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of *Hamadan v. Rumsfeld*", *ASIL Insight*, 10, no. 17 (14 July 2006).
31. This article is common to all four Geneva Conventions:
"Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. International Humanitarian Law — Treaties & Documents, found at: <http://www.icrc.org/ihl.nsf/FULL/365?OpenDocument>, (accessed 14 March 2007) [cited hereafter as Common Article 3].

32. Cerone, "Status of Detainees."
33. John Cerone, "The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and the US," *ASIL Insight*, 10, no. 30 (13 November 2006).
34. *Ibid.* Emphasis added. See also discussion of the Barak Decision, *infra*.
35. *Ibid.*
36. *Ibid.*
37. *Boumediene*, p. 69.
38. In 2006, the German courts were considered as a last resort to successfully litigate for those victims of abuse and torture while detained by the United States. See "German War Crimes Complaint Against Donald Rumsfeld, et al. Summary," found at: <http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al>.
39. These refer to the duty of comity in the relations between states (and possibly also international organizations) and "complementarity," which recognizes a duty by third states to establish extraterritorial international jurisdiction where another state failed to exercise its primary jurisdiction according to international law.
40. Scott Lyon, "German Criminal Complaint Against Donald Rumsfeld and Others," *ASIL Insight*, 10, no. 33 (14 December 2006).
41. The Prosecutor General at the Federal Court, *Re. Criminal Complaint Against Donald Rumsfeld et al.* Karlsruhe, 5 April 2007, 3 ARP 156/06-2, *Id.*
42. Barak Decision, p. 2.
43. ICRC website, found at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions>.
44. *Ibid.*, pp. 2-4.
45. *Ibid.*, pp. 29-36.
46. *Ibid.*, p. 20. Author's translation applies to all of this judgment's quotations. The English version of the decision is now available.
47. According to the author's reading of this judgment, the Court uses this term to argue that there is a lacuna in international law; to distinguish the fact that there exists no law protecting the rights governing civilians involved in hostilities, while rights to protection applying to non-involved civilian and to "lawful" combatants are recognized. See *Ibid.*, p. 24.
48. *Ibid.*, p. 24.
49. *Ibid.*, p. 25.
50. *Ibid.*, p. 54.
51. This with regard to the analysis of the time dimension of involvement in hostilities, i.e. the significance of duration of time, uninterrupted activity, and a consistent string of continuous activity as a variable distinguishing unlawful combatant's participation in the hostilities. I will not elaborate on this aspect of the decision for lack of space. Equally, I will not elaborate on the discussion of the laws pertaining to civilian military sub-contractors, which was mentioned in the decision nor the claim made by Orna Ben-Naftali that *de facto* the decision recognized a third status of international personality. See personal notes of author from colloquium, Department of International Relations and International Law, Hebrew University of Jerusalem, 18 December 2006 [cited hereafter as personal notes]. Also, it should be noted that the Court did not distinguish between foreign occupation versus non-foreign occupation situations.
52. Barak Decision, p. 36. This suggests a "model of suspicion." Quotation from Mordechai Kremnizer, personal notes.
53. Having definitively detached self from the activity, a civilian directly participating in a single or sporadic act of hostility is entitled to protection against being targeted. This is juxtaposed with a civilian joining a terrorist organization and "evidencing" his/her membership of such

- organization by directly participating in the carrying out of a string of hostilities, taking short breaks in-between single acts, and using the intermission to plan the next act of hostility. *Ibid.*, p. 36.
54. And an additional person — Hassan, resident of Saudi Arabia. See Chia Lenhardt, “European Court Rules on UN and EU Terrorist Suspect Blacklists,” *ASIL Insight*, 11, no. 1 (31 January 2007).
 55. Dating from 19 October 2005, imposing financial sanctions on the Taliban regime in Afghanistan, establishing the Committee, and tasking it with overseeing the implementation of the sanctions. The Sanctions Committee amended its listing guidelines so as to enable affected persons to submit petitions directly and independently of diplomatic protection via their governments, but it failed to recognize these persons right to participate in the review process, and did not establish an independent review mechanism. Another measure based on UNSC resolution 1373 (2001) and adopted by Community law was found in violation of fundamental rights and declared invalid. *Ibid.*
 56. And in the EU case, whether Community law had legislative supremacy over members’ national laws.
 57. *Supra*, note 21.
 58. *Khadr* digresses somewhat from this pattern.
 59. *Charkaoui*, p. 22.
 60. The Court addressed the trial schedule and attempted to explain its long and controversial duration. Barak Decision, pp. 10-11.
 61. Neither did the US Court in *Boumediene v. Bush*, *supra*, note 8.
 62. *Charkaoui*, p. 83.
 63. Combatant status review tribunals differ from military commissions that hear war crimes. They were created in response to a 2004 USSC (not 2006 *Hamdan*) decision to determine whether prisoners at Guantánamo were properly designated as enemy combatants and consequently subject to indefinite detention. These tribunals offer even lesser procedural protections than the military commissions and are not recognized as judicial bodies. Adam Liptak, “Suspected Leader of 9/11 Attacks Is Said to Confess,” *The New York Times*, 15 March 2007, found at: <http://www.nytimes.com/2007/03/15/gitmo.html/>.
 64. *Ibid.* For a detailed discussion of the meaning of “enemy,” see Christiane Wilke, “Laws Enemies: Enemies, Persons, and War in mid-20th Century U.S. Supreme Court Jurisprudence,” *Studies in Law, Politics, and Culture*, forthcoming (on file with author).
 65. Who is said to be the mastermind of the 9/11 attacks.
 66. *Ibid.*
 67. Charges were announced on 11 February 2008 at a press conference at the Pentagon. Jess Bravin “Capital Charges Are Filed in 9/11 Trials,” *The Wall Street Journal*, 12 February 2008, found at: http://online.wsj.com/article/SB120274624106059119.html?mod=hps_us_whats_news.
 68. Joerg Friedrichs, “Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism,” *Leiden Journal of International Law* 19 (2006), p. 71.
 69. *Ibid.*
 70. *Ibid.*