

Michigan Journal of International Law

Volume 39 | Issue 2

2018

Targeting the *Targeted Killings* Case - International Lawmaking in Domestic Contexts

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Recommended Citation

Yahli Shereshevsky, *Targeting the Targeted Killings Case - International Lawmaking in Domestic Contexts*, 39 MICH. J. INT'L L. 241 (2018).

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**TARGETING THE *TARGETED KILLINGS* CASE –
INTERNATIONAL LAWMAKING
IN DOMESTIC CONTEXTS**

*Yahli Shereshevsky**

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* Michigan Grotius Research Scholar, The University of Michigan Law School, and the Hebrew University of Jerusalem, Faculty of Law. I am very grateful to Yuval Shany and Steven Ratner for their guidance and support, and to Monica Hakimi and Rebecca Ingber for their challenging and insightful comments. I also wish to thank Gal Cohen, Erin Collins, Olga Frishman, Tamar Groswald Ozery, David Hughes, Rebecca Mignot-Mahdavi, Tal Mimran, Nadiv Mordechay, Julian Davis Mortenson, Lauren Nishimura, Deborah Pearlstein, Sandesh Sivakumaran, the participants of the 11th Annual Minerva-ICRC International Conference on Contemporary Challenges in International Humanitarian Law, and the participants of the 2nd Annual Revisiting the Role of International Law in National Security Workshop at Cardozo Law School for their useful suggestions and comments.

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INTRODUCTION

The targeting of members of non-state armed groups is perhaps the most debated legal issue in the law of contemporary asymmetric conflicts between states and non-state actors under International Humanitarian Law (IHL). The 2006 *Targeted Killings* case¹ of the Israeli Supreme Court (ISC) is a key reference point in this debate. Recently, without much scholarly or public attention, the government of Israel, in its report on the summer 2014 conflict in Gaza (the 2014 Gaza Conflict Report), dramatically diverged from the *Targeted Killings* case's definition of legitimate targets in asymmetric conflicts.² The *Targeted Killings* case held a conduct- or functional membership-based approach to targeting. This approach allows only the targeting of those individuals who directly participate in the hostilities. The 2014 Gaza Conflict Report, on the other hand, holds a formal membership approach. This approach allows the targeting of all members of the relevant armed group, regardless of their role in the organization or their actual participation in the hostilities. This change widens the scope of legitimate targets in asymmetric conflicts, such as the conflict between the United States and ISIL or between Israel and Hamas, and could significantly influence the continuous debate between the competing approaches, in which the *Targeted Killings* case plays a major role. It signals an increasing support for the formal membership approach, which has thus far been explicitly endorsed only by the United States.

This Article offers three complementary explanations for the decision of the Israeli administration to deviate from the ruling in the *Targeted Killings* case. The first explanation relates to the ISC's willingness to apply judicial review in military operations cases. In addition to its significance

1. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) PD 62(1) 507 (2006) (Isr.).

2. STATE OF ISRAEL, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS (2015) [hereinafter 2014 GAZA CONFLICT REPORT].

for the debate over the substantive rules of asymmetric warfare, the *Targeted Killings* case serves as a symbol of the willingness to engage in extensive judicial review of a state's conduct of hostilities policy. The activist role of the ISC in such cases from the late 1990s to 2008 was widely recognized, celebrated, and discussed in the international law literature. This Article suggests that the international law literature has ignored a countertrend in which, since 2009, the ISC has appeared to defer to the executive's positions in conduct of hostilities cases. The court's deference enabled the Israeli administration to deviate from the *Targeted Killings* case without fear of judicial intervention. In addition to the explanatory force of the ISC's deference to the administration's decision to adopt a formal membership approach, the analysis of the ISC's cases offers a new theoretical insight on the complex identity of domestic courts as both national and international actors. When facing significant international pressure, domestic courts' national identity might be enhanced, resulting in greater deference to the government's position.

Second, in recent years, the formal membership approach was openly endorsed by international military lawyers and the U.S. administration. This Article suggests that such endorsement of the formal membership approach has strengthened the ability of the Israeli administration to explicitly support it, in what I call the "Americanization" of the Israeli targeting position. This analysis offers a novel account of the relevance of interpretive communities to the internalization and development of international law. It suggests that transnational actors play a complex role that can push towards both limiting and legitimizing versions of international law. The analysis opens the "black box" of the state to show the struggle between different branches of government over the role of IHL in the regulation of asymmetric conflicts. This is part of a broader, universal debate regarding IHL and the role of international law's interpretive communities in this struggle.

Finally, the adoption of the formal membership approach serves the state interest of widening the scope of legitimate targets. While such interest is not unique to the Gaza 2014 conflict, and can generally explain the support for this approach, this Article suggests that the significant rise in the conflict's death toll provides a stronger incentive for the explicit adoption of a broader definition of legitimate targets.

This Article then criticizes the justification for the adoption of the formal membership approach to targeting. Proponents of the formal membership approach suggest that the application of this approach to armed group members is justified since soldiers can be targeted regardless of their role in the military. Thus, in order to adhere to the normative symmetry principle, namely, the equal application of IHL to all parties of the conflict, all members of armed groups should be targetable regardless of their role. This Article first demonstrates that states try to argue for normative symmetry in the context of targeting while also diverging significantly from the normative symmetry principle in their application of other IHL norms in asymmetric conflicts. To put it bluntly, states want to have

their cake and eat it too. It then calls for the application of the normative symmetry principle to the full range of IHL norms in asymmetric conflicts. In addition, it offers a universal application of the functional membership approach to state soldiers and armed group members as an alternative to the formal membership approach, which does not conflict with the normative symmetry principle.

The Article proceeds as follows: Part I of the Article describes the main questions regarding targeted killings under international humanitarian law. It then describes the differences between the *Targeted Killings* case and the 2014 Gaza Conflict Report. Part II offers three complementary explanations for this change. Part III criticizes the report's approach. Part IV concludes.

I. THE DEBATE OVER TARGETED KILLINGS

The debate over the practice of targeted killings is wider than the narrow discussion of the legality of this practice under IHL. It also involves, for example, the disagreement over which legal regime should govern the so called "war on terror."³ This Article focuses only on the relevant IHL norms in situations of an armed conflict between a state and a non-state armed group, which provides the basis for the legal analysis contained in both the *Targeted Killings* case and the 2014 Gaza Conflict Report.⁴

A. Three Main Controversies in the International Law Debate over Targeted Killings

The contemporary debate over targeted killings started in response to the post-9/11 U.S. targeted killings policy and the Israeli policy in the Second Intifada.⁵ The main approaches in this debate have been presented in different ways.⁶ This Article examines the debate through three main controversies that have occupied the literature: who can be targeted, when

3. Some argue, for example, that the U.S. targeting operations located outside the zone of combat should be governed by international human rights law instead of IHL. See, e.g., EMILY CRAWFORD, *IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT* 108-10 (2015) (describing the debate over the relevant legal regime); Michael Ramsden, *Targeted Killings and International Human Rights Law*, 16 J. CONFLICT & SEC. L. 385, 386 (2011); Marry Ellen O'Connell, *Remarks: The Resort to Drones under International Law*, 39 DENV. J. INT'L L. & POL'Y 585, 595 (2011). For the difficulty of classifying transnational armed conflicts and an argument for a unified doctrine of targeting under both legal regimes, see Monica Hakimi, *A Functional Approach to Targeting and Distinction*, 110 MICH. L. REV. 1365, 1420 (2012).

4. *Targeted Killings*, ¶ 21; 2014 GAZA CONFLICT REPORT, *supra* note 2, ¶ 233.

5. See, e.g., MARCUS GUNNEFLO, *TARGETED KILLING: A LEGAL AND POLITICAL HISTORY* 2 (2016); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 188 (2005).

6. See, e.g., Jens David Ohlin, *Targeting Co-belligerents*, in *TARGETED KILLINGS* 60 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012).

can such a person be targeted, and whether there is an obligation to use the least harmful means available in targeted killings operations.⁷

As for the first controversy, regarding persons who can be legitimate targets, the international law community is divided between two approaches—the formal membership, or status-based, approach and the conduct-based, or functional membership, approach. According to the formal membership approach, all members of an armed group that is a party to the conflict can be targeted, regardless of their role in the organization.⁸ Thus, for example, the cook, driver, or lawyer of the armed group are targetable as long as they are formally part of the armed group. This approach follows the status-based character of IHL's principle of distinction and reflects the traditional understanding of legitimate targets in interstate conflicts. According to the functional membership, or the conduct-based, approach, only those armed group members who have a sufficient link to the hostilities can be targeted. Among those who support the functional membership approach, it is possible to find different positions regarding which specific acts make an armed group member targetable.⁹

The second controversy, regarding the time in which a person can be targeted, is less relevant to armed group members. There is a general agreement that those who belong to an armed group can be targeted at all times.¹⁰ The timing question is mainly relevant to individuals who participate sporadically in the hostilities. Regarding this latter category of persons, once again there are two main approaches. One approach supports the possibility of targeting at any time, while the other limits targeting to the time in which the person is taking a direct part in the hostilities. This

7. The question of where a person can be targeted, or the geographical scope of targeting, is not discussed separately here. To some extent, this question is related to the debate over the legal regime which governs the targeting of non-state armed group members. See CRAWFORD, *supra* note 3, at 116-18. When the relevant legal regime is IHL, in most cases the geographical question correlates with the least harmful means question.

8. See, e.g., Rachel E. VanLandingham, *Meaningful Membership: Making War a Bit More Criminal*, 35 CARDOZO L. REV. 79, 135-36 (2013); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 690-93 (2010).

9. See, e.g., NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter INTERPRETIVE GUIDANCE]; H CJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) PD 62(1) 507, ¶¶ 34-37 (2006) (Isr.).

10. Both the *Targeted Killings* case and the INTERPRETIVE GUIDANCE allow the targeting of armed group members at all times. See, *Targeted Killings*, ¶ 40; INTERPRETIVE GUIDANCE, *supra* note 9, at 71-72. The only possible criticism of such approach can be found in Philip Alston's 2010 report on targeted killings, and even the report does not explicitly suggest that these persons cannot be targeted at all times. See, Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, ¶ 65, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) ("Nevertheless, the ICRC's Guidance raises concern from a human rights perspective because of the "continuous combat function" [CCF] category of armed group members who may be targeted anywhere, at any time.").

latter approach is comprised of different positions on what constitutes the time in which the person is directly taking part in the hostilities.¹¹

Finally, regarding the obligation to use the least harmful means, two main approaches exist as well. On one side are those who endorse the traditional approach used for state armed forces, allowing the use of deadly force even if less harmful means are available, and on the other are those who hold to the position that, in the targeting of armed group fighters, there is an obligation to use the least harmful means feasible.¹²

In asymmetric warfare, distinction between the involved and uninvolved is very challenging, and every choice between different normative positions bears considerable costs. The different approaches to these questions are an example of the constant tension in IHL between its limiting and legitimizing roles, between the necessities of war and the need to limit its horrible consequences as much as possible. A common division of the community of international lawyers who are involved in the regulation of warfare is between “military lawyers” and “humanitarian lawyers”—the former hold to rather conservative positions on the regulation of warfare, emphasizing the military needs of the parties to the conflict, while the latter hold to more progressive positions, emphasizing the limiting role of IHL.¹³ Those who hold to the formal membership approach and allow the targeting of individuals, even when less harmful means are available, are often associated with the “military lawyers” side, while those who hold to the functional membership approach and endorse the least harmful means obligation are often associated with the “humanitarian lawyers” side.¹⁴

Before moving to the discussion of Israel’s approach to these questions, a clarification for those familiar with the debate over the U.S. targeting and detention policy is required. This article refers throughout the text to the *formal* membership approach as an approach that widens the scope of legitimate targets and to *functional* membership as a more limiting approach. This distinction between functional and formal membership does not cover the entire scope of controversy in the debate over the U.S.

11. See, e.g., Bill Boothby, “*And for such time as*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 831, 879-92 (2010).

12. See, e.g., Geoffrey S. Corn, Laurie R. Blank, Chris Jenks & Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of the Least Harmful Means Rule*, 89 INT’L L. STUD. 536 (2013); Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268 (2013); INTERPRETIVE GUIDANCE, *supra* note 9, at 77-82.

13. See, e.g., David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT’L L. 315, 316 (2013); DAVID KENNEDY, *OF WAR AND LAW* 41 (2006).

14. I have suggested that this latter group of international lawyers should be further divided to “IHL humanitarian lawyers” and “international human rights law (IHRL) humanitarian lawyers.” See Yahli Shereshevsky, *Politics by Other Means: The Battle Over the Classification of Asymmetrical Conflicts*, 49 VAND. J. TRANSNAT’L L. 455 (2016). This further division is relevant to the broader debate over targeted killings and less relevant to this article, which focuses on the IHL part of the debate.

targeting policy. A significant part of this controversy focuses on the United States' broad definition of *functional* membership in an armed group.¹⁵ Indeed, the U.S. administration and the U.S. courts recognize that a wide range of conduct, not only combat-related activities, constitutes functional membership in an armed group.¹⁶

In any case, this is mostly a definitional issue. The official U.S. position usually refers to both functional and formal membership without clearly distinguishing between the two.¹⁷ The essence of the distinction between what I call the formal membership approach and the functional membership approach is whether any member of an armed group can be targeted, in an analogy to the targeting of states' armed forces, or only those who directly participate in hostilities.¹⁸ Proponents of the formal membership approach (such as the U.S. and Israel) broaden the scope of legitimate targets, relying on both formal and functional criteria to determine membership in armed groups, while proponents of the functional membership approach reject the ability to target individuals based on formal membership or on activities that do not constitute direct participation in the hostilities.

B. *Targeted Killings in Israel: From the Targeted Killings Case to the 2014 Gaza Conflict*

1. *The Targeted Killings Case*

Following the adoption of a targeted killings policy by the Israeli administration, a petition challenging the legality of the policy was filed to the ISC in late 2001. In a very short judgment, the ISC dismissed the case while stressing its limited role in reviewing conduct of hostilities cases.¹⁹ A second petition, which became the *Targeted Killings* case, was filed in 2002 and decided in 2006.

In the *Targeted Killings* judgment, before delving into the main questions in the targeted killings debate, the Court decided that the conflict between Israel and Palestinian armed groups is an international armed

15. See, e.g., Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. Pa. L. Rev. 1165, 1210 (2013) ("[T]he broad definition of 'functional membership' put forth by the Executive and endorsed by the courts serves as a poor proxy for assessing threat in a conflict with a non-state actor. . .").

16. *Id.* at 1178-79.

17. See, e.g., THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 20 (2016) ("[A]n individual who is formally or functionally a member of an armed group against which the United States is engaged in an armed conflict is generally targetable.").

18. See, Kevin Jon Heller, *The Use and Abuse of Analogy in IHL*, in THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 232, 263 (Jens David Ohlin ed., 2016).

19. HCJ 5872/01 Barakeh v. Prime Minister 56(3) PD 1 (2002) (Isr.).

conflict, since it “crosses the borders of a state.”²⁰ This finding was the subject of much criticism in the international legal community, which tends to classify conflicts between a state and non-state armed group, including cross-border conflicts, as non-international armed conflicts.²¹ The Court then decided the main questions on targeted killings. The Court adopted a conduct-based, functional approach to the targeting of armed group members. It characterized armed group members as civilians who are targetable when they take a direct part in hostilities.²² When addressing the other main controversies, the court decided that armed group members who regularly take part in hostilities can be targeted at any time,²³ and that the least harmful means should be adopted when possible. Accordingly, if it is possible to arrest an armed group member, then targeting is no longer a legitimate course of action.²⁴

Subsequent decisions followed this logic. In 2008, in the *Unlawful Combatants* case, a criminal appeal concerning the detention of members of armed groups, the ISC repeated its position regarding both the classification of transnational armed conflicts and the functional membership approach to the definition of members of armed groups.²⁵ Indeed, the definition of people who can be detained and those who can be targeted can differ, and the *Unlawful Combatants* case adopts a definition of functional membership for detention that is broader than the one that was adopted for targeting purposes in the *Targeted Killings* case.²⁶ Nonetheless, detention is a less harmful act than targeting. The decision of the ISC to apply the narrower definition of functional membership to detention provides a strong indication that the court still supports this approach in the context of the more harmful measure of targeting. Later cases that

20. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) PD 62(1) 507, ¶ 18 (2006) (Isr.).

21. See, e.g., Shereshevsky, *supra* note 14; Noam Lubell, *The War (?) Against Al-Qaeda*, in INT'L L. AND THE CLASSIFICATION OF CONFLICTS 421, 431–36 (Elizabeth Wilmshurst ed., 2012); Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in RESEARCH HANDBOOK ON INT'L CONFLICT AND SEC. L. 256, 305 (Nigel D. White & Christian Henderson eds., 2013); Sean D. Murphy, *Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants”*, 75 GEO. WASH. L. REV. 1105, 1136–40 (2007); Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INT'L REV. RED CROSS 95, 111–12 (2009); Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism”*, 22 LAW & INEQ. 195, 200–01 (2004); But see Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 57–67 (Elizabeth Wilmshurst ed., 2012).

22. *Targeted Killings*, ¶ 31.

23. *Id.* at ¶ 40.

24. *Id.*

25. CrimA 6659/06 A v. State of Israel (*Unlawful Combatants*) 62(4) PD 329 (2008) (Isr.).

26. The *Unlawful Combatants* case accepts the detention of those who participate indirectly in the hostilities in addition to those who participate directly in the hostilities. *Id.* at ¶ 21.

referenced the *Targeted Killings* case in the ISC did so without reservation from the initial judgment.²⁷

Another notable development after the *Targeted Killings* case was the adoption of the International Committee of the Red Cross (ICRC) Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.²⁸ The Guidance adopted a functional membership approach to the targeting of members of organized armed groups. It defines members of organized armed groups as those individuals who hold a Continuous Combat Function (CCF), namely those individuals who continuously and directly participate in the hostilities as part of the organized armed group.²⁹ Although the Court's definition of actions that constitute direct participation in hostilities in the *Targeted Killings* case is wider than the approach taken in the ICRC Interpretive Guidance, in essence, as will be further discussed in the next section, they present a similar position: only those persons who maintain strong links to the actual conduct of hostilities can be regarded as legitimate targets under IHL.

2. The 2014 Gaza Conflict Report

In May 2015, Israel published its report on the 2014 Gaza Conflict. The report was published to present the Israeli legal position on the conflict in anticipation of the (then) forthcoming United Nations Human Rights Council's commission of inquiry report on the conflict (the McGowan Report) that was published in June 2015.³⁰ In spite of the seemingly coherent approach by the ISC, the 2014 Gaza Conflict Report adopted a formal membership approach to the targeting of armed group fighters. The report explicitly stipulates that it is legitimate to attack members of organized armed groups "by the sole virtue of their membership."³¹ The report does not refer to the Hamas movement as a whole as an organized armed group but only to its military wing, the Izz al-Din al-Qassam Brigades, and other organized armed groups such as Hamas's Naval Police.³² Still, all members of these armed groups can be targeted

27. See, HCJ 474/02 Thabit v. Attorney General (2011) (Isr.); HCJ 8707/10 Hess v. Minister of Defense (2011) (Isr.); HCJ 8794/03 Hess v. Attorney General (2008) (Isr.).

28. INTERPRETIVE GUIDANCE, *supra* note 9.

29. *Id.* at 33.

30. U.N. Human Rights Council, Report of the Indep. Comm'n of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, U.N. Doc. A/HRC/29/52 (2015), [hereinafter McGowan Report].

31. 2014 GAZA CONFLICT REPORT, *supra* note 2, ¶ 264.

32. *Id.* at ¶ 265. The separation between the military and political wings addresses some of the concerns in relation to the formal membership approach. See, e.g., Kretzmer, *supra* note 5, at 200 ("Defining combatants as members of terrorist groups who take an active part in hostilities forces us to distinguish between organized armed groups whose members are all actively involved in the hostilities, whether by planning, directing or executing attacks, and organizations that have both military and political branches."). Still, it leaves the concerns that were raised regarding those who do not take part in the hostilities but are members of the military branch, such as drivers, cooks, lawyers etc.

based on their formal status, regardless of their role in the organization and “even when they are not in the act of preparing or conducting military activities.”³³ It further elaborates that, in contrast to the ICRC Interpretive Guidance, “state practice and *opinio juris* make clear that a member in an organized armed group need not have “‘a continuous combat function’ in order to be targetable under customary international law.”³⁴ The report’s position was one of the clearest points of legal controversy with and divergence from The McGowan Report. The latter did not accept the Israeli position and adopted a functional membership approach to targeting in the 2014 Gaza Conflict.³⁵

Surprisingly, the 2014 Gaza Conflict report does not refer to the *Targeted Killings* case on this issue, although it refers to the case in other contexts throughout the text.³⁶ The report does not provide any explanation for this omission or a substantive justification for the adoption of the status-based approach to targeting, except for its reference to customary international law.³⁷ However, the report fails to point to any specific country that has adopted the same approach.

While the report lacks any engagement with the *Targeted Killings* case’s functional membership approach, it is possible to find a more elaborate description (and defense) of the new approach of the Israeli administration in an article by Michael N. Schmitt and John J. Merriam following a visit to Israel in 2014, which included interviews with senior Israel Defense Forces (IDF) commanders and legal advisors.³⁸ The article was published online one month before the publication of the report³⁹ and aims to present the current legal position of the Israeli Military Advocate General Corps (MAG) on the main conduct of hostilities issues of contemporary asymmetric conflicts. The authors specifically address the *Targeted Killings* case and argue that the MAG did not intend to deviate from the case position, but merely to interpret and apply it in light of the new reality of 2015.⁴⁰ They offer three explanations for the MAG’s decision to deviate from the plain interpretation of the *Targeted Killings* case.

33. 2014 GAZA CONFLICT REPORT, *supra* note 2, ¶ 265.

34. *Id.* at 156 n.422.

35. McGowan Report, *supra* note 30, ¶ 39.

36. The 2014 Gaza Conflict Report cites the *Targeted Killings* case 5 times. 2014 GAZA CONFLICT REPORT, *supra* note 2, at 66 n.198 (regarding the violation of international law by terrorist organizations); *Id.* at 137 n.394 (regarding the classification of the conflict as an international armed conflict); *Id.* at 141 n.408, 230 n.543 (regarding the HCJ tendency to review IDF conduct of hostilities policy); *Id.* at 157 n.425 (regarding the judgment guidelines as to the actions that can be considered direct participation in hostilities).

37. *Id.* ¶ 265.

38. Michal N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT’L L. 53 (2015).

39. The article was first uploaded to SSRN on April 13, 2015 while the report was published on May 2015. *Id.*

40. Schmitt & Merriam, *supra* note 38, at 112.

The first explanation suggests that the non-state party to the current conflict is different from non-state parties to past conflicts in the sense that it is “highly organized and combat effective.”⁴¹ According to the second explanation, the notion of organized armed groups became widely accepted only after the ICRC Interpretive Guidance, whereas the *Targeted Killings* case preceded it. Therefore, while the report has accepted the notion of organized armed groups, the ISC in the *Targeted Killings* case did not take this approach into account and classified armed groups fighters as civilians who take direct part in hostilities rather than members in an armed group.⁴² Last, Schmitt and Merriam emphasize the potential inequality of accepting a conduct-based targeting approach to armed group members while maintaining a formal membership approach to the targeting of states’ armed forces.⁴³ They acknowledge that the new approach has yet to be tested by the ISC but claim that it “has been vetted through the inter-agency process and approved by senior levels in the Ministry of Justice.”⁴⁴

While some of the above reasons may serve as valid arguments in the formal/functional membership debate, they are less convincing as an explanation of why the new approach does not stand in clear contrast to the *Targeted Killings* case. As for the first argument regarding the level of organization, indeed contemporary Hamas forces in Gaza are more organized than the Hamas forces of 2000–2006. Nonetheless, it is important to note that the *Targeted Killings* case was decided in December 2006, a few months after the Second Lebanon War. That war also involved a highly organized armed group, Hezbollah, but it did not lead the Court to qualify its functional membership approach in any way.⁴⁵ Moreover, the *Unlawful Combatants* case discussed a statute that was originally created to enable the detention of members of Hezbollah and the Amal movement in a detention regime that parallels prisoner of war (POW) status on a formal membership basis.⁴⁶ The rejection of the formal membership approach by the Court in that case provides more evidence that there is no indication of a willingness of the Court to change its approach in cases of highly organized armed groups.

The second argument, regarding the importance of the notion of organized armed groups in the ICRC Interpretive Guidance, is unconvincing on two grounds. First, although the notion of organized armed groups was less developed at the time of the *Targeted Killings* case, the essence of this

41. *Id.*

42. *Id.* at 113.

43. *Id.*

44. *Id.*

45. Although the court in the *Targeted Killings* case also relied on occupation law, which does not apply to Hezbollah, in the parts that are relevant to this Article it based its position on IHL norms on conduct of hostilities and not on occupation law. CrimA 6659/06 A v. State of Israel (*Unlawful Combatants*) 62(4) PD 329, ¶¶ 24–40 (2008) (Isr.).

46. *Unlawful Combatants*, ¶ 6; Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?*, 38 ISR. L. REV. 379, 399–401 (2005).

approach, namely the recognition of the importance of the fact that the non-state actor is an organized armed group, was clearly present in 2006. For instance, the ISC refers several times to Orna Ben-Naftali and Keren Michaeli's article on the Israeli targeted killings policy, which discusses the formal membership approach to the targeting of organized armed groups,⁴⁷ and to David Kretzmer's article defending the rationale of a functional membership approach over a formal membership approach.⁴⁸

Second, the MAG, according to Schmitt and Merriam, separates between two parts of the ICRC Interpretive Guidance position—they argue that while the notion of organized armed groups has been widely accepted since 2009, including by the Israeli government, the notion of CCF was not.⁴⁹ However, this separation is problematic since it mixes two of the three discrete questions of targeted killings: who can be targeted and when such a person can be targeted.

When closely analyzed, it is easy to see that, regardless of terminology, the *Targeted Killings* case and the Interpretive Guidance hold to the same substantive positions, although they differ on their application. Both the ISC's judgment and the Interpretive Guidance hold to a functional membership approach, which examines whether the specific person is sufficiently involved in the conflict to be targeted. In both cases, this functional membership approach is built on the interpretation of the actions that can be considered direct participation in hostilities (although the Interpretive Guidance uses direct participation to determine what constitutes CCF, and thus membership in an armed group, and the *Targeted Killings* case uses direct participation as the legal basis for its targeting analysis).⁵⁰ As for the second question of when such a person can be targeted, in both cases it is accepted that persons who continuously directly participate in hostilities can be targeted at all times.⁵¹ Admittedly, the Interpretive Guidance has developed the notion of CCF, which did not exist in the *Targeted Killings* case. However, the *Targeted Killings* case accepts a similar position that allows for the targeting of armed group members at all times if they have a continuous function:

[A] civilian who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he

47. Orna Ben-Naftali and Keren Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killing, 36 CORNELL INT'L L. J. 233, 271-72, 287 (2003).

48. Kretzmer, *supra* note 5, at 199 ("[T]heir actual participation is what makes them combatants, and not their membership in a certain organization.").

49. Schmitt & Merriam, *supra* note 38, at 112-13.

50. The Interpretive Guidance offers a narrower approach to the actions which constitute direct participation in hostilities than the *Targeted Killings* case. INTERPRETIVE GUIDANCE, *supra* note 9; H.C.J. 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) PD 62(1) 507 (2006) (Isr.).

51. *Targeted Killings*, ¶ 40; INTERPRETIVE GUIDANCE, *supra* note 9, at 32-36.

*is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.*⁵²

To put it differently, the mere fact that the Interpretive Guidance introduced the notion of organized armed groups cannot be evaluated independently of its CCF notion in the formal/functional membership debate. The organized armed group notion was developed to solve the timing issue and not to broaden or change the scope of targetable persons. Thus, members of such organizations can be targeted at all times, while persons who sporadically participate in hostilities can be targeted only during such activity. This conceptualization does not allow a wider scope of individuals to be targeted—namely, the conduct that forms the basis for targeting is similar according to the Interpretive Guidance for civilians and for armed groups members; it is based on activities that constitute direct participation in hostilities. The Interpretive Guidance refers to the lack of the so-called “revolving door” problem associated with civilians who participate in hostilities as the main consequence, and perhaps rationale, of the notion of organized armed groups.⁵³ In this sense, as described above, the *Targeted Killings* case makes a similar distinction—the scope of legitimate targets is the same for all, while a member of a “terrorist organization” can be targeted at any time and not only when directly engaged in the hostilities.⁵⁴

The third argument of the MAG, as described by Schmitt and Meriam, addresses the inequality of the targeting regime’s governing attacks against soldiers and armed group members.⁵⁵ Here, again, there is nothing new about the comparison between state armed forces and armed group members, and thus it does not offer new insight that can explain the different approach. While this is sufficient for demonstrating that the report deviates from the *Targeted Killings* case, I use this opportunity to engage with the use of the argument on the equal application of IHL norms by states in Part III of this Article. It is an argument that is often used to explain states’ targeting positions and has not received enough attention in the literature. The crux of the criticism of its use is that the argument for normative equality appears to be advanced by military lawyers only with respect to some core norms when it promotes state interests, while states refuse to apply other core norms to members of non-state armed groups. The position of states regarding the lack of combatant immunity in non-international armed conflicts, and the interpretation of POW status in international armed conflicts in Israeli case law as excluding members of non-state armed groups, makes it far more challenging to criticize the functional membership approach as creating an unequal regime.

52. *Targeted Killings*, ¶ 39.

53. INTERPRETIVE GUIDANCE, *supra* note 9, at 72-73.

54. *Targeted Killings*, ¶ 39.

55. Schmitt & Merriam, *supra* note 38, at 113.

Thus, in contrast to the argument of the MAG, the decision of the Israeli government to openly and explicitly reject the functional membership approach to the targeting of organized armed group members contradicts the *Targeted Killings* case. The change in the Israeli position is significant. It is the second open endorsement of the formal membership approach by a state, after the United States' adoption of the approach in a series of official statements and documents,⁵⁶ and might represent a shift in the international community towards the formal membership approach. As discussed below in part IIB, Israel's explicit adoption of the formal membership approach might incentivize the United States to apply the formal membership in actual targeting operations, whereas it currently emphasizes the gap between its formal legal position and the more limited scope of its targeting policy.

In addition to its importance to the formal/functional membership debate, the decision of the Israeli administration to adopt a position that contradicts an explicit ISC judgment is unique and requires an alternative explanation. The next part provides three complementary explanations for the change, with broad theoretical implications.

II. THREE COMPLEMENTARY EXPLANATIONS FOR THE ADOPTION OF THE FORMAL MEMBERSHIP APPROACH: JUDICIAL DEFERENCE, THE U.S. LEGAL POSITION AND THE INTERPRETIVE COMMUNITY OF MILITARY LAWYERS, AND A PRESSING NEED

The following part offers three complementary explanations for the decision of the Israeli government to explicitly include in its report the formal membership approach to targeting. These explanations do not suggest that the substantive position of the administration on targeting has changed. It is possible to argue that even in the 2008–2009 conflict in Gaza, the formal membership approach was applied by Israel in its targeting decisions—for example in the targeting of the members of the Hamas' police.⁵⁷ Nonetheless, the 2014 Gaza Conflict Report is unique in its explicit endorsement of the formal membership approach. The decision to adopt this open endorsement of the formal membership approach in contrast to the plain reading of the *Targeted Killings* case is the subject of the following analysis.

56. See *infra* note 132 and accompanying text.

57. STATE OF ISRAEL, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶¶ 239-48 (2009) [hereinafter 2009 GAZA CONFLICT REPORT]. The report offers a vague mixture of formal membership and functional membership justifications for the targeting of the members of the Hamas' police. It refers to the role of the police in general in the fighting but emphasizes the direct individual involvement of members of the police in the fighting. Thus, it suggests that "more than nine out of every alleged 'civilian police' were found to be armed terrorist activists and combatants directly engaged in hostilities against Israel." *Id.*, at ¶ 247. See also, Gabriella Blum & Philip B. Heymann, *Law of Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 159 n.16 (2010) (suggesting the IDF applied a wider approach in the 2008-2009 conflict and justifying this position similarly to Schmitt and Merriam by restricting the *targeted killings* case position to conflicts that do not resemble conventional war).

A. *The ISC's Deference in Conduct of Hostilities Cases*

A basic assumption of institutional analysis is that the more a court defers to the executive, the more the executive will attempt to interpret norms aggressively.⁵⁸ This Article seeks to establish that, since 2009, with respect to conduct of hostilities cases, the ISC appears to defer to executive positions. This is in contrast to an activist trend with regard to conduct of hostilities issues which was widely recognized in the literature from the late 1990s to 2008. It is challenging to prove this argument empirically due to the scarcity of conduct of hostilities cases in the relevant years, and such an empirical endeavor would probably have to address all national security cases, rather than exclusively conduct of hostilities cases. Instead, the analysis relies on a method that was used in several papers on the activist role of the court and analyzes the main conduct of hostilities case law of the ISC since 2009 in light of the earlier case law of the ISC and the literature on its role in conduct of hostilities cases.

1. The Move from Activism to Deference in Conduct of Hostilities Cases

The ISC has a long history of interpreting and applying international humanitarian law, especially the law of belligerent occupation. This Article does not discuss the jurisprudence of the court in its first few decades,⁵⁹ focusing instead on the jurisprudence of the court in the twenty-first century. Several authors have argued that, since the mid-1990s, and especially since 2000, the court has held a relatively active position in national security cases and specifically in relation to conduct of hostilities cases.⁶⁰ In empirical research on the ISC's decisions during the years

58. Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 533 (2006) ("Doctrines that elevate the importance of agencies' ability to advance their agendas, and consequently instruct courts to place less emphasis on how well an agency's interpretation squares with the court's reading of the statute, encourage agencies to interpret statutes more aggressively. This effect is straightforward and unsurprising.").

59. This period was analyzed by several authors: DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* (2002); Yoav Dotan, *Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, 33 L. & SOC'Y REV. 319 (1999); Ronen Shamir, *Landmark Cases and the Reproduction of Legitimacy*, 24 L. & SOC'Y REV. 781 (1990).

60. See, e.g., DAVID SCHARIA, *JUDICIAL REVIEW OF NATIONAL SECURITY* (2015); Amichai Cohen, *Guardians and Guards: The Israeli Supreme Court's Political Role in Matters of National Security*, in *CIVIL MILITARY RELATIONS IN ISRAEL* 166 (Elisheva Rosman-Stollman & Ahrin Kampinsky eds., 2014); Aharon Barak, *International Humanitarian Law and the Israeli Supreme Court*, 47 ISR. L. REV. 181 (2014); Guy Harpaz, *Being Unfaithful to One's Own Principles: The Israeli Supreme Court and House Demolitions in the Occupied Palestinian Territories*, 47 ISR. L. REV. 401 (2014); Amnon Reichman, *Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel*, 2011 UTAH L. REV. 63, 84-87 (2011); Amichai Cohen & Stuart A. Cohen, *Israel and International Humanitarian Law: Between the Neo-Realism of State Security and the "Soft Power" of Legal Acceptability*, 16 ISR. STUD. 1 (2011); Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 LAW &

2000–2008, Menachem Hofnung and Keren Weinshall Margel demonstrate that the court played an active role, overtly and implicitly, in restraining the executive in national security cases. Specifically, they show that cases relating to military operations were one of the two categories in which total rejection of the petition occurred in less than 50 percent of the cases; this was second only to separation wall cases in overt success of the petition (full or partial). Several other articles raise similar arguments based on analysis of seminal cases of the ISC. For example, Amichai Cohen and Stuart A. Cohen argue that, since 2000, the ISC has applied extensive judicial review to military operations and their compatibility with IHL norms.⁶¹ Even more critical accounts of ISC jurisprudence accept the uniqueness of the Court's willingness to apply judicial review and, in some cases, to limit the government's conduct of hostilities practices.⁶²

There are several seminal cases that evidence the tendency of the ISC to review government policy relating to armed conflicts. In the *Bargaining Chips* case, the court ruled, in a re-hearing of the case, that the detention of several Lebanese detainees was unlawful in the absence of a showing of individual dangerousness, although some of these detainees belonged to an armed group which was a party to a conflict with Israel.⁶³ In the *Rafah* case, the ISC examined, during active hostilities, the compliance of the IDF with IHL with respect to various obligations, including the supply of basic humanitarian needs, the evacuation of the wounded, and the burial of the dead.⁶⁴ The court mediated between the parties, and most issues were resolved during the hearings. In the *Human Shields* case, the ISC accepted the petition and ordered the IDF to cease its practice of using civilians to give "early warnings" during arrest operations of armed groups' members.⁶⁵ Another example is the *Unlawful Combatants* case discussed above in which the court interpreted the statute as permitting detention of members of armed groups based on dangerousness rather

SOC. INQUIRY 919 (2010) (suggesting that the court became less deferential over time to the military commander decisions, specifically by comparing between decisions from 1990-1999 and decisions between 2000-2005); Menachem Hofnung & Keren Weinshall Margel, *Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice*, 7 J. OF EMPIRICAL LEGAL STUDIES 664 (2010); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Use of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241 (2008) (describing the international judicial tendency to review counter terrorism policies including the Israeli Supreme Court).

61. Cohen & Cohen, *supra* note 60, at 11.

62. SHARON WEILL, *THE ROLE OF NATIONAL COURTS IN APPLYING INTERNATIONAL HUMANITARIAN LAW* 154 (2014) ("It is hoped that this trend will be extended in the future to include other kinds of IHL violations, as contraventions relating to conduct of hostilities. This is a direction that has, remarkably, been led by the Israeli HCJ.").

63. CrimA 7048/97 Anonymous Persons v. Minister of Def. 54(1) PD 721 (2002) (Isr.).

64. HCJ 4764/04 Physicians for Human Rights v. Israeli Defense Force Commander in the Gaza Strip 58(5) PD 385 (2004) (Isr.).

65. HCJ 3799/02 Adalah – Legal Center for Arab Minority Rights in Israel v. General Officer Commanding Central Command 60(3) PD 67 (2005) (Isr.).

than status, in contrast to the statute's plain meaning.⁶⁶ Last, the *Targeted Killings* case serves as a significant symbol of this period despite the controversy over its substance and effect.⁶⁷

Yet, despite extensive writing on the role of the ISC in security cases, analysis has largely ignored a possible change in the attitude of the Court around 2009.⁶⁸ A review of ISC cases indicates that the extensive judicial review of military operations has decreased dramatically since 2009 both in the number of petitions and in the willingness of the Court to intervene. Indeed, since the last important case of the ISC, the late 2008 *Unlawful Combatant* case, it is impossible to find any significant cases in which the Court actively interfered with Israeli conduct of hostilities policy. A few notable examples of this tendency can be found in the Court's refusal to examine the safety range of the IDF use of artillery;⁶⁹ the rejection of the petition against the use of white phosphorus munitions;⁷⁰ the rejection of petitions concerning the humanitarian situation in Gaza during the "Cast Led" operation;⁷¹ and the rejection of several petitions which asked for the opening of criminal investigations following casualties during military operations.⁷²

In the vast majority of these cases, the ISC has rejected the petition without any sign of what Hofnung and Weinshal Mergal have called "latent intervention" by the Court, i.e. rejection of a petition only following a change in the initial state policy under the shadow of possible court intervention.⁷³ A careful analysis of one of the main cases decided by the ISC during this period can shed more light on the current trend of the Court and explain why even one of the only cases in which the government changed its initial policy might in fact be an expression of the ISC's deference to the government's policy.

66. CrimA 6659/06 A v. State of Israel (*Unlawful Combatants*) 62(4) PD 329 (2008) (Isr.).

67. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) PD 62(1) 507 (2006) (Isr.). Much literature has discussed the case. For criticism of the decision as an apologetic legitimization of state policy see, e.g., WEILL, *supra* note 62, at 142-44. For a more favorable account of the case, although still critical, see, e.g., Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT'L CRIM. JUST. 310 (2007).

68. One exception is a recent article by Weiler and Lustig who very briefly mention a possible recent change in the position of the Court. See J.H.H Weiler & Doreen Lustig, *Foreword: A Good Place in the Middle: The Israeli Constitutional Revolution from a Global and Comparative Perspective*, 38 TEL AVIV U. L. REV. 419, 486-87 (2016) (written in Hebrew).

69. HCJ 3261/06 Physicians for Human Rights v. Minister of Def. (*Artillery Safety Range*) (2011) (Isr.).

70. HCJ 4146/11 Hess v. Chief of General Staff (2013) (Isr.).

71. HCJ 201/09 Physicians for Human Rights v. Prime Minister (2009) (Isr.).

72. HCJ 1901/08 Debabseh v. Military Advocate Gen. (2012); HCJ 3292/07 Adalah v. Attorney Gen. (*Rafah Investigations*) (2011) (Isr.); HCJ 474/02 Thabet v. Attorney Gen. (2011) (Isr.).

73. Hofnung & Weinshall Margel, *supra* note 60, at 680.

In 2003, B'Tselem, the Israeli Information Center for Human Rights in the Occupied Territories, and the Association for Civil Rights in Israel (ACRI) filed a petition requesting investigation by the Military Police of any case of civilian deaths during IDF activity (the *Investigations* case).⁷⁴ Ostensibly, although the court rejected the petition, the end result of the process was in line with the petitioners' position: while in 2003 the MAG's policy did not demand more than an operational debriefing following civilian deaths during IDF activity, the Court rejected the petition only after a change in the MAG's policy in 2011. According to the new policy, an investigation shall be opened in any case of civilian death in the West Bank which is not caused by acts clearly committed in a conduct of hostilities context.⁷⁵ Gaza was excluded since, according to the MAG, this area involves a fight against a governmental entity with armed forces and not against civilians or partially civilian forces.⁷⁶

However, there are two main indications that suggest that the ruling of the Court reveals deference to the government policy. First, it seems that the Court played only a minor role, if any, in the decision to change the investigation policy. The notification by the MAG of the decision to change the policy in 2011 occurred only a few days before the Military Advocate General's testimony in the Turkel Commission, which examined Israel's investigation mechanisms for claims of violations of the laws of armed conflict.⁷⁷ The proximity in time to the testimony compared to the lack of any proceedings in the petition since 2008 suggest that the Commission report, and not the ISC, was the main incentive for the change of policy. In addition, the Court accepted the new policy in full without reservations, although the petitioners had raised serious concerns regarding cases in which the new policy did not require the opening of an independent investigation. This deference of the Court to the government position is further evidenced by the Turkel Commission's final report, which raised concerns about the same issues and recommended a change in the investigation policy to strengthen the independence of the investigation mechanism in any case of civilian deaths, including any deaths during active hostilities.⁷⁸

The second indication of deference by the Court is its implicit deviation from the *Targeted Killings* case position regarding investigations. In

74. HCJ 9594/03 B'Tselem v. Judge Advocate Gen. (*Investigations*) (Aug. 21, 2011) (Isr.).

75. *Id.* at ¶ 7.

76. *Id.*

77. PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, ISRAEL'S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW (2013) [hereinafter SECOND TURKEL REPORT]. The Military Advocate General testimony before the commission took place on April 11, 2011, while the update on the new policy was issued on April 4, 2011.

78. *Id.* at 425-26 (recommending establishing a fact-finding assessment mechanism which is separated from an operational debrief).

the *Targeted Killings* case, the court ruled that any deprivation of life in the course of a targeted killing operation should be followed by an independent examination.⁷⁹ In a Request for a Judgment that was filed in 2008, the petitioners in the *Investigations* case explicitly referred to the *Targeted Killings* case as a source of the obligation to conduct an investigation of any civilian death, even in cases where the deaths occurred during military operation in an armed conflict.⁸⁰ However, the Court did not mention the *Targeted Killings* case in its 2011 judgment, and by accepting the government position that differentiates between deaths inside and outside the context of actual fighting, it implicitly diverged from the *Targeted Killings* case position on this issue. In a later case involving the death of a suspect during an arrest operation, the court explicitly rejected the petitioners' argument that the *Targeted Killings* case should be the reference point and ruled that the case should be decided according to the guidelines of the judgment in the *Investigations* case.⁸¹ The outcome of these judgments is that a distinction is made between law enforcement operations that result in civilian deaths and conduct of hostilities cases with similar results. This separation further strengthens the reluctance of the court to intervene in government policy in conduct of hostilities cases.

Thus, a look at the jurisprudence of the Court since 2009, which does not include even a single significant conduct of hostilities case, seems to indicate that the Court now takes a much more minor role in conduct of hostilities cases than it did during most of the first decade of the twenty-first century.

2. Explaining the Change in the ISC's Attitude

The mere deference of the court is itself sufficient to provide a possible explanation for the aggressive interpretation of the *Targeted Killings* case in the report. The next section attempts to go beyond this explanation of the change in the report. It provides possible explanations for the change in the ISC behavior, suggesting that the increased involvement of the international community since the 2009 Gaza conflict, and especially the threat of international criminal adjudication, has resulted in a more deferential court. It also points to the role of NGOs in the change. These explanations contribute to the theoretical understanding of the role of domestic courts as both national and international actors and the important role of NGOs in the international law adjudication of national courts.

a. Explanations of the Court's Role in the First Period

The literature has offered several explanations for the relatively active role of the ISC in national security cases. One explanation of the Court's

79. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) PD 62(1) 507, ¶ 40 (2006) (Isr.).

80. HCJ 9594/03 B'Tselem v. Judge Advocate Gen. (*Investigations*), 3–4 (Aug. 21, 2011) (Isr.).

81. HCJ 1901/08 Debabsch v. Military Advocate Gen., ¶13 (2012).

attitude is that it sees its decisions as part of its increasing role in the global judicial dialogue.⁸² A similar explanation focuses on the participation of the Court in a global judicial cooperation against the democratic deficiencies of global counterterrorism efforts.⁸³

More critical explanations point to the legitimization of the Israeli administration policy as the basis for intervention by the court. Under this explanation, at least some intervention by the Court helps to legitimize unlawful or controversial policies of the Israeli government. This explanation has been offered for past as well as more recent practices of the ISC.⁸⁴ The rise of international criminal law has been suggested as another cause for increased intervention, both as a form of legitimation of conduct and protection against an international judicial intervention.⁸⁵

Davidov and Reichman's empirical finding of less deference between the years 2000 and 2005, as compared to previous years, suggests that the Court became less deferential the longer the conflict continued.⁸⁶ Finally, the extensive litigation by human rights NGOs has been singled out as playing an important role in the ability of the Court to intervene in national security issues.⁸⁷

b. Possible Explanations for the Change in the Courts' Behavior

Much of the above analysis seems to suggest that we should have expected the tendency of the Court to intervene in national security issues to continue: the International Criminal Court (ICC) is much more relevant

82. See Reichman, *supra* note 60, at 87.

83. Eyal Benvenisti & George Downs, *Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance*, 46 N.Y.U J. INT'L L. & POL. 741, 762-67 (2013); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241 (2008). See also Cohen & Cohen, *supra* note 60, at 11-13 (arguing that being part of a transnational epistemic community of judges has contributed to the approach of the Israeli Supreme Court).

84. See Shamir, *supra* note 59; Nimer Sultany, *Activism and Legitimation in Israel's Jurisprudence of Occupation*, 23 SOC. & LEGAL STUD. 315 (2014).

85. Eyal Benvenisti, *Scrutiny: Ajuri et. al. – Israel High Court of Justice, 3 September 2002*, 9 EUR. PUB. L 481, 491 (2003) (“One explanation for the decisive change may be the growing demand from Israeli officials for a more assertive judiciary, one that both legitimizes Israeli policies in the face of the widespread foreign criticism and protects those same officials from being subject to international criminal liability. The evolving possibilities of international criminal adjudication [highlighted by, amongst other things, the criminal charges brought against Prime Minister Sharon in Belgium and the entry into force of the ICC Statute] have increased public awareness in Israel regarding the potential consequences of violating international law. The Court's recent interventionist decisions have offered Israeli officials legal backing for their policies, and if they have been denied such backing, an explanation to the Israeli public as to why harsher measures cannot be adopted.”); Amichai Cohen, *Guardians and Guards: The Israeli Supreme Court's Political Role in Matters of National Security*, in CIVIL-MILITARY RELATIONS IN ISRAEL: ESSAYS IN HONOR OF STUART A. COHEN 171, 182-83 (Elisheva Rosman-Stollman & Aharon Kampinsky eds., 2014) (arguing that international criminal law is a reason from a principle agent theory perspective for more intervention by the ISC in national security cases).

86. Davidov & Reichman, *supra* note 60, at 949.

87. Cohen & Cohen, *supra* note 60, at 14-15.

to the Israeli-Palestinian conflict than it was before 2009,⁸⁸ the need for legitimacy is here to stay in the foreseeable future, and the conflict has only grown longer since 2009. The following section offers two possible explanations for the change that can contribute to a more complete understanding of a domestic court's role in national security cases.

One possible explanation relates to the role of human rights NGOs in national security litigation. In a 2007 meeting, Israeli human rights NGOs, which focus on the Israeli-Palestinian conflict, met to reflect on their agenda in the 40th year of occupation. In the meeting, some of the participants argued that the NGOs' continuous petitions to the ISC were detrimental to their cause, since they help the administration to maintain its legitimacy through the appearance of a functioning legal system, while their successes in the court are rather limited.⁸⁹ They suggested refraining from filing petitions to the court. This suggestion was rejected at the end of the day and no official policy or statement was published following the meeting. Nonetheless, there is some evidence that the approach of the NGOs towards the ISC has changed, as the number of petitions that were filed by human rights NGOs decreased. During the 2014 Gaza conflict, no petitions related to the military operations were filed to the ISC, although it was the most intense conflict over the last decades. In an op-ed a few days after the hostilities ended, Avigdor Feldman, a leading human rights lawyer, referred to the lack of petitions as an intentional decision by human rights NGOs.⁹⁰ In addition, it is possible to see parallel trends regarding other official institutions, most notably B'Tselem's decision to stop its cooperation with the IDF in relation to investigations of alleged war crimes.⁹¹ These developments can explain at least part of the decrease in the judicial review of military operations.

Another explanation is related to a possible change in the Court's perception of its role. It is suggested that in reaction to "the internationalization of the conflict," the Court has adopted a more protective position

88. Since 2009, the ICC has been directly involved in the Israeli-Palestinian conflict several times. In relation to the Palestinian Article 12(3) Declaration, see ALI KHASHAN, PALESTINIAN NAT'L AUTH. MINISTER OF JUSTICE, DECLARATION RECOGNIZING THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2009) [hereinafter PALESTINIAN 12(3) DECLARATION]; UNION OF THE COMOROS, REFERRAL OF THE UNION OF COMOROS WITH RESPECT TO THE 31 MAY 2010 ISRAELI RAID ON THE HUMANITARIAN AID FLOTILLA BOUND FOR GAZA (2013) (Comoros Islands request to investigate the Mavi Marmara incident); STATE OF PALESTINE, DECLARATION ACCEPTING THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2014) (Palestinian Accession to the ICC and its second 12(3) declaration).

89. The description of the meeting is based on an interview with Limor Yehuda, the director of the department for human rights in the occupied territories in ACRI at the time the meeting took place.

90. See Avigdor Feldman, *A War Without the Supreme Court*, HAARETZ (Sept. 3, 2014), <http://www.haaretz.co.il/opinions/.premium-1.2422801>.

91. Gili Cohen, *Citing IDF Failure to Bringing Soldiers to Justice, B'Tselem Stops Filing Complaints on Abuse of Palestinians*, HAARETZ (May 25, 2016), <http://www.haaretz.com/israel-news/.premium-1.721332>.

towards state conduct. Courts are both national and transnational actors.⁹² While some of the explanations of the ISC's tendency to intervene in state conduct focus on the international identity of the Court as part of a transnational network of courts,⁹³ this Article raises the possibility that around 2009, the national identity of the court was strengthened at the expense of its international identity following growing international criticism of Israel's conduct. The 2009 Gaza conflict was an unprecedented conflict at the time in terms of the number of casualties and scope of destruction. The operation attracted the world's attention much more significantly than previous events and was followed by extensive criticism of Israel's conduct. In addition, two important international law developments with respect to the conflict have occurred. First, The Palestinian Authority has issued a declaration under article 12(3) to the Rome Statute, requesting that the ICC open an investigation into alleged Israeli crimes in the occupied territories.⁹⁴ The declaration was the first sign of more significant involvement by the ICC in the Israeli-Palestinian conflict.⁹⁵ Second, the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (the Goldstone Report) was published.⁹⁶ These developments have made the prospect of external legal intervention in the conflict seem more realistic than ever. In addition, the Israeli internal discussion has begun to include frequent references to attempts to "delegitimize Israel." With a significant threat of external intervention, it is possible that the domestic identity of the Court, as a part of Israeli society, has strengthened, making it more protective and thus more deferential to the government position in national security issues.

Looking closely at two of the ISC's cases, one before and one after 2009, can illustrate this possible change in the identity of the Court. In the 2005 *Mara'abe* case, the ISC was asked to declare that parts of the separation fence which Israel has built in the west bank are illegal.⁹⁷ The Court had to address in its judgment the advisory opinion of the International Court of Justice (ICJ) in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁹⁸ that was issued a few months earlier and dealt with a similar question. The ISC judgement in the *Mara'abe*

92. See, e.g., Olga Frishman & Eyal Benvenisti, *National Courts and Interpretive Approaches to International Law*, in *THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS* 317 (Helmut Philipp Aust & George Nolte eds., 2016); Reichman, *supra* note 60; Melissa A. Watters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 *GEO. L.J.* 487, 555 (2004).

93. See *supra* note 83.

94. PALESTINIAN 12(3) DECLARATION, *supra* note 88.

95. *Id.*

96. U.N. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (2009) [hereinafter the Goldstone Report].

97. HCJ 7957/04 *Mara'abe v. Prime Minister* 60(2) PD 477, ¶ 30 (2005) (Isr.).

98. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

case was described by several authors as an attempt to walk a thin line between its domestic and international roles.⁹⁹ The Court based its decision on alleged differences between the facts it addressed and the facts that the ICJ considered, while expressing a general agreement with the legal analysis of the ICJ.¹⁰⁰ This line of reasoning enabled the Court to reach a decision that was relatively acceptable for the Israeli administration while at the same time maintaining its role as a transnational actor which engages with the international law community on international law issues.

In the 2011 *Rafah Investigations* case, the petitioners asked the court to order that a criminal investigation be opened following a military operation in Rafah.¹⁰¹ The petitioners dedicated nine and a half pages of their petition to the possibility of international criminal proceedings under universal jurisdiction in the absence of a sufficient remedy in the Israeli legal system.¹⁰² When confronted with the threat of external criminal intervention, the Court took a different path than its previous approach in the *Mara'abe* case. Although the cases are not similar, since the *Rafah Investigations* case involves only the threat of international proceedings and not an actual international decision, the rhetoric of the Court is telling. Chief Justice Beinisch chose to directly address the threat of universal jurisdiction in her judgment—in a section entitled “before concluding”—expressing very clearly her discontent with it: Claims of that type, in accordance with the manner of their formulation, are in the nature of a veiled “threat” against the respondents and even the Court, and it would have been better had the petitioner not chosen to bring that argument before us.¹⁰³

In his concurring opinion, Justice Rubinstein used even stronger words to refer to both the delegitimization of Israel and the role of a court that operates “amongst its people”.¹⁰⁴ Thus, the rejection of the petition

99. Yael Ronen, *The Use of International Jurisprudence in Domestic Courts: The Israeli Experience*, in *INTERNATIONAL LAW AND DOMESTIC POLITICS* (Marlene Wind ed., forthcoming); Daphne Barak-Erez, *Israel: The Security Barrier – Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 *INT'L J. CON. L.* 540 (2006).

100. *Mara'abe v. Prime Minister* 60(2) PD 477, ¶¶ 57-58.

101. HCJ 3292/07 *Adalah v. Attorney Gen. (Rafah Investigations)* (2011) (Isr.).

102. Petition, *Rafah Investigations* (available at <https://www.adalah.org/uploads/oldfiles/features/rafah/petition.pdf> in Hebrew).

103. *Rafah Investigations*, ¶ 18.

104. *Rafah Investigations*, ¶ 2 (Rubinstein, J., concurring) (“What hides behind the learned legal cover with innumerable citations? And the question is whether its true purpose is not the delegitimization of the State of Israel, with the “threat” to which my colleague referred about the exercise of ‘universal jurisdiction.’ The truth is that we are not in a bubble surrounding only one party at which are aimed the arrows of the petition – the State of Israel and its soldiers – and no other party or parties whose hands are covered in blood, who do not act according the humanitarian laws and according to the rules of humanity in general. The sophisticated legal language cannot cover this up. This Court is not oblivious to the harm caused to civilians, as shown by its rulings over many years – and neither are the IDF and the defense establishment in general. This Court deals with this constantly, on an almost daily basis, including judicial review of decisions made by military entities in various contexts that are threaded throughout the judgments. The Court’s decisions have also attracted internal

together with the harsh rhetoric of the Court indicate more identification of the Court with the state and specifically with the Israeli administration, in contrast to its attempt to walk a thin line between its national and international roles in previous cases such as the *Mara'abe* case.

Moreover, if indeed human rights NGOs decreased their engagement and expressed more openly their criticism of the Court, then perhaps it caused some of the judges to rethink their self-identification as part of the same epistemic interpretive community as the NGOs. The implicit or explicit characterization of the Court as part of the legitimization of human rights abuses and other violations of international law, as well as the threat of resorting to outside tribunals, is an insult to the integrity of the Court as a rule of law institution and could distance the court from those who express such positions. The Court's above quoted rhetoric towards the petitioners in the *Rafah Investigations* case, Adalah, The Legal Center for Arab Minority rights in Israel, can be an indication of such a change. It should be noted that Adalah was the first NGO to openly debate the desirability of petitioning the Court.¹⁰⁵

Another indication of the change of the balance between the national and international roles of the ISC can be found in the outreach efforts of the Court. Translations of domestic courts' judgments into English has been acknowledged as an important factor in the transnational global judicial dialogue.¹⁰⁶ The ISC created during the first decade of the twenty-first century a database entitled Judgments of the Israel Supreme Court: Fighting Terrorism Within the Law. The link to the database appears in the English version of the ISC official website, while no such link appears in the Hebrew version.¹⁰⁷ It is the only legal area with a unique official database. The title of the database and its absence from the Hebrew version indicate the importance of the national security case law of the ISC for the promotion of the image of the court as an important transnational actor. The creation of the database was described as an attempt by the ISC to become more influential in the global judicial dialogue.¹⁰⁸ Nonetheless,

criticism from various circles in Israel; but it will not alter its path, which takes into consideration domestic and international law, but which also recalls that the Court operates amongst its people.”).

105. In 2008, an online debate on the benefit of petitioning the ISC appeared on the Adalah website and its newsletter. Gad Barzilai et al., *Virtual Roundtable*, ADALAH (Feb. 2008), <https://www.adalah.org/uploads/oldfiles/newsletter/eng/feb08/roundtable/roundtable.html>.

106. See Udi Sommer & Olga Frishman, *Translating Justice: The International Organization of Constitutional Courts*, 38 LAW & POL'Y 124 (2016).

107. Compare SUPREME COURT OF ISRAEL, *Advanced Search of Decisions and Judgments Handed Down by the Supreme Court*, <http://elyon1.court.gov.il/VerdictsSearch/EnglishVerdictsSearch.aspx> (last visited Feb. 14, 2018) (contains the English version), and SUPREME COURT OF ISRAEL, *Advanced Search of Decisions and Judgments Handed Down by the Supreme Court*, <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx> (last visited Feb. 14, 2018) (contains the Hebrew version).

108. Adam Shinar, *Idealism and Realism in Israeli Constitutional Law*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM (Ernst Hirsch Ballin, Maurice Adams & Anne Meuwese eds., forthcoming) (“In its quest to become influential,

the database has not been updated since 2009 and the last judgment in the database is the above mentioned *Unlawful Combatants* case.¹⁰⁹ This could suggest that, for the ISC, the importance of its global role has decreased since 2009—if the translation and publication of national security cases is an important strategy in the international image efforts of the court, then the suspension of this project is a strong indication of the change in the direction of the ISC.

The two explanations in this section, the decrease in the NGOs' petitions and the more significant role of the national identity of the Court, are not the only possible explanations for the change. One alternative explanation could be that the ISC has become less activist overall since the retirement of Chief Justice Barak, the symbol of the extensive judicial review of the ISC,¹¹⁰ and his successor, Chief Justice Beinisch, who was perceived as part of the Barak camp in the Court.¹¹¹ Chief Justice Grunis, her successor, is perceived as a conservative judge who is reluctant to apply extensive judicial review.¹¹² Nonetheless, the change in the composition of the Court can only provide a partial explanation since, if this Article is correct in identifying 2009 as the turning point, the change would not be fully explained by the retirement of Chief Justice Barak in 2006 or of Chief Justice Beinisch in 2012. Moreover, Chief Justice Beinisch was involved in pre-2009 cases that included extensive judicial review as well as post-2009 cases that represent the deference of the Court.¹¹³

the Israeli Supreme Court itself has translated its major decisions into English so that they can be studied and used by other courts. In particular, the Court has embarked on a project of translating especially those decisions having to do with combating terrorism.”). Shinar demonstrates that the database presents an inaccurate image of the court as more progressive than it really is. This is an important observation that should be taken into account when assessing the alleged activism of the court between 2000-2008. For the purposes of the argument in this section, regardless of the representativeness of the database with regard to the pre-2009 case law, the decision of the court to suspend the updating of the database is a strong indication for the change in the outreach efforts of the court.

109. CrimA 6659/06 A v. State of Israel (*Unlawful Combatants*) 62(4) PD 329 (2008) (Isr.); SUPREME COURT OF ISRAEL (English version), *supra* note 107.

110. See, e.g., Stephen Goldstein, *The Rule of Law vs. the Rule of Judges: A Brandeisian Solution*, in THE CULTURE OF JUDICIAL INDEPENDENCE 121, 126-27 (Shimon Shetreet & Christopher Forsyth eds., 2011); Ran Hirschl, *The Socio-Political Origins of Israel's Jurisprudence*, 16 CONSTELLATIONS 476, 479-80 (2009); Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51 (2005).

111. See, e.g., Abraham Diskin & Efraim Podoksik, *Israel*, 52 EUR. J. POL. RES. POL. DATA YEARBOOK 111, 114 (2013); Goldstein, *supra* note 110, at 121, 126-27.

112. Diskin & Podoksik, *supra* note 111, at 114.

113. For example, Chief Justice Beinisch was involved in the pre-2009 *Targeted Killings* case, writing a concurring opinion, HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) PD 62(1) 507 (2006) (Isr.) (Beinisch, C.J., concurring), and in the *Unlawful Combatant* case as presiding judge, CrimA 6659/06 A v. State of Israel (*Unlawful Combatants*) 62(4) PD 329 (2008) (Isr.), as well as the post-2009 *Rafah Investigations* case as presiding judge, HCJ 3292/07 Adalah v. Attorney Gen. (*Rafah Investigations*) (2011) (Isr.), the *Investigations* case as presiding judge, HCJ 9594/03 B'Tselem v. Judge Advocate

A second possible explanation is the 2009 Israeli elections. These resulted in a right-wing government that was outwardly hostile towards the Court.¹¹⁴ This change might explain part of the attitude of the Court but should also be treated with caution since governmental criticism of the Court pre-dates the 2009 government. For example, the government that preceded this change included one of the greatest critics of the Court's activism, Professor Daniel Friedmann, as its Minister of Justice. His term involved a much-publicized controversy between him and Chief Justice Beinish.¹¹⁵

Moreover, in the context of the law of contemporary conflicts, it is difficult to analyze the relationship between the new government and the ISC without taking into account the effect of similar external factors on the government that are not related to the more general conflict between the two branches. The new government faced the aftermath of the 2009 Gaza conflict and the Goldstone Report as well as other non-state actor accounts of IHL. It became much more active in its IHL-making efforts.¹¹⁶ While the government's active engagement with IHL might contribute to the Court's deference to its position in conduct of hostilities cases, it seems that both trends represent different aspects of increasing efforts to justify the Israeli position in reaction to external legal criticism of Israel's actions.

To sum up, the reaction of domestic courts to international pressure and the likelihood of international criminal proceedings against the domestic state may lead the judges to more intervention as a legitimizing tool, as some of the literature suggests.¹¹⁷ It is possible that, in the Israeli context, some of the ISC's current judges indeed follow a more activist path in recent cases. This is most notable in cases involving the question of home demolitions.¹¹⁸ Nonetheless, this Article suggests that, since 2009, the Court has generally reacted to these developments and to a change in the position of NGOs towards the Court in the opposite way, by increasing its national identity at the expense of its role as a transnational actor and by increased deference to the executive.

Gen. (*Investigations*), and the *Artillery Safety Range* case as presiding judge, H CJ 3261/06 *Physicians for Human Rights v. Minister of Def. (Artillery Safety Range)* (2011) (Isr.).

114. See, e.g., Adam S. Chilton & Mila Versteeg, *Constitutional Courts' Limited Impact on the Protection of Constitutional Rights*, U. CHI. L. REV. (forthcoming) (referring to proposals by the Likud government to restrict the powers of the ISC).

115. See, e.g., Or Bassok, *The Israeli Supreme Court's Mythical Image – A Death of a Thousand Sound Bites*, 23 MICH. S. L. REV. 39, 100 (2014).

116. These include, *inter alia*, 2014 GAZA CONFLICT REPORT, *supra* note 2; the 2009 GAZA CONFLICT REPORT, *supra* note 57; and the SECOND TURKEL REPORT, *supra* note 77.

117. See *supra* note 85.

118. See H CJ 722/15 *Alewa v. IDF Commander in the West Bank*, ¶¶ 4-10 (2015) (Isr.) (Mazuz, J., dissenting).

3. The ISC's Deference and the 2014 Gaza Conflict Report

Regardless of the reasons for the ISC's deference, the result is the same—a deferential court in national security issues reduces the chances of judicial intervention in cases where the government diverges from previous judgments. This could serve as an explanation of the decision of the government to endorse a policy which explicitly contradicts the *Targeted Killings* case position. The next section describes another development that enabled the adoption of a formal membership approach to targeting.

B. *Foreign Military Lawyers and the U.S. Administration Engagement in the Targeting Debate: The "Americanization" of the Israeli Approach*

1. The Double-edged Sword of Epistemic Communities and the Role of Transnational Actors in the Internalization of International Law

International legal scholarship has dealt extensively with the role of transnational actors in the process of the internalization of international law.¹¹⁹ The role of the transnational judicial dialogue in the process is widely recognized in this regard,¹²⁰ as well as the role of other actors, including NGOs.¹²¹

In most cases, interactions between transnational actors are presented as bringing more compliance with international law and are usually mentioned as a process that leads to more obligations on states.¹²² In the same way, Amichai Cohen has described the role of the MAG as an agent of international law internalization, as part of an epistemic community of human rights and humanitarian lawyers that serve as a limiting factor on governmental conduct.¹²³

119. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997).

120. See Anne-Marie Slaughter, *Judicial Globalization*, 40 *VA. J. INT'L L.* 1103, 1103-04 (2000).

121. See, e.g., Cohen & Cohen, *supra* note 60, at 14-15.

122. Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in *THE HANDBOOK OF INTERNATIONAL RELATIONS* 538, 547 (Carlaens et al. eds., 2002); Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397, 1406, 1410 (1998).

123. Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 *CONN. J. INT'L L.* 367, 405-06 (2011) [hereinafter Cohen, DABLA]; Cohen & Cohen, *supra* note 60, at 10 ("DABLA personnel enjoy a second advantage—they are able to enlist pressure groups to support their positions. They form part of an 'epistemic community' of human rights and humanitarian lawyers. They participate in conferences on international law, they write law review articles on the subject, they study with professors, and sometimes they even teach courses in one or more aspects of this discipline at universities. One consequence of this situation is a heightened awareness on their part of the price that they will have to pay if they give their approval to military policies of dubious legality. They will be criticized—perhaps even ostracized—by other members of the legal fraternity. By the same token, however, they are secure in the knowledge that—should they decide to challenge military decisions on

Nonetheless, transnational actors are not composed of one unified community of experts but many different epistemic communities. In the reality of diverse epistemic communities,¹²⁴ transnational actors might have different roles in the process of interpretation and implementation of international law by states. They do not only act as norm-internalizing actors but also take part in the battle over the ideological version of international law to be adopted.¹²⁵ In this regard, they might advance the legitimizing aspects of international law over its limiting aspects. This role is clearly visible in the battle over the regulation of contemporary asymmetric conflicts. The 2014 Gaza Conflict Report serves as an illustrative example of this battle between conflicting interpretive communities. In this case, it is more accurate to identify the MAG with the epistemic community of military lawyers than with the one of which human rights or humanitarian actors are part. As David Luban pointed out, there are two distinctive cultures in the IHL community—military lawyers and humanitarian lawyers.¹²⁶ While military lawyers emphasize the legitimizing aspects of the laws of armed conflict, humanitarian lawyers emphasize the limiting role of IHL.¹²⁷ As mentioned, these distinct communities usually hold to different positions in the targeted killings debate.¹²⁸

Thus, a possible explanation of the explicit divergence from the *Targeted Killings* case position is the increasing public support for the formal membership approach from the epistemic community of the International Law Department of the MAG (DABLA) personnel, the military lawyers community, and the open endorsement of the formal membership approach by the U.S. administration. Even if DABLA and the Israeli administration always leaned towards the formal membership approach, the *Targeted Killings* case crystallized the functional membership approach as the Israeli position and made it difficult to endorse a different approach. The Article suggests that the ability of DABLA and the Israeli administration in general to explicitly adopt the formal membership approach might have been strengthened through the explicit support of their approach by foreign military lawyers and direct interaction with these lawyers, as well as the endorsement of the approach by the U.S. administration. While the *Targeted Killings* case represents the humanitarian lawyers' interpretation of targeted killings, which was further strengthened in the Interpretive

legal grounds—they can depend upon an extensive network of legal professionals to support their point of view.”).

124. See, e.g., Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331, 349-53 (2009); Peter Haas, *Introduction: Epistemic Communities and International Policy*, 46 INT'L ORG. 1 (1992).

125. For the potential effect of epistemic communities on interpretation see, e.g., Michael Waibel, *Interpretive Communities in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 147 (Andrea Bianchi, Daniel Peat, & Matthew Windsor eds., 2015).

126. David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT'L L. 315, 315-16 (2013).

127. *Id.* at 316.

128. See *supra* Section II.A.

Guidance and the McGowan Report, the 2014 Gaza Conflict Report represents the epistemic community of military lawyers' account of targeted killings. It is part of a continuous battle between the communities on the nature of contemporary IHL.

When the *Targeted Killings* case was decided, targeted killings were much less significant in the United States. Following the adoption of the Interpretive Guidance and the increased use of targeted killings by the Obama administration,¹²⁹ U.S. involvement in the debate over the targeting of non-state actors became much more apparent. It included, *inter alia*, a greater engagement with the issue in academic literature by military lawyers and in official government statements.¹³⁰ The U.S. targeting policy is complicated and nuanced and the subject of much debate.¹³¹ Nonetheless, in several key official statements and documents, from Harold Koh's speech at the American Society of International Law Annual Meeting in 2010 to former President Obama's report on the legal and policy frameworks guiding the United States in its use of military force, the United States has asserted its ability to target based on formal (and functional) membership in a non-state armed group, although it often applies a stricter approach due to policy considerations while maintaining the broad legal position.¹³²

129. Blum & Heymann, *supra* note 57, at 151; Jack Goldsmith, *The Cheney Fallacy: Why Barack Obama is Waging a More Effective War on Terror than George W. Bush*, THE NEW REPUBLIC (May 18, 2009), <http://www.tnr.com/article/politics/the-cheney-fallacy>.

130. The most representative example of the military lawyers' engagement in the debate is the 2010 symposium in the NYU Journal of International Law and Politics on the Interpretive Guidance. See Watkin, *supra* note 8; Michael Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010); Boothby, *supra* note 11; Hays W. Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010).

131. There are numerous examples in the international law blogosphere of the debate over the content and legality of the U.S. targeting position. Recent examples include, *inter alia*, Monica Hakimi, *Taking Stock on the Law of Targeting I*, EJIL TALK (Dec. 12, 2016), <http://www.ejiltalk.org/taking-stock-of-the-law-on-targeting-part-i/>; Rahma A. Hussein & Alex Moorehead, *What's Actually New in the New Drone Strike & Military Force Disclosures?*, JUST SECURITY (Dec. 6, 2016), <https://www.justsecurity.org/35330/whats-drone-strike-military-force-disclosures/>; Marty Lederman, *President Obama's Report on the Legal and Policy Frameworks Guiding and Limiting the Use of Military Force [UPDATED]*, JUST SECURITY (Dec. 5, 2016), <https://www.justsecurity.org/35239/president-obamas-report-legal-policy-frameworks-guiding-united-states-military-force-related-national-security-operations/>. See also KENNETH ANDERSON & BENJAMIN WITTES, SPEAKING THE LAW: THE OBAMA ADMINISTRATION'S ADDRESSES ON NATIONAL SECURITY LAW (2015); Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L. J. 681 (2014) (offering a qualitative empirical study of the U.S. targeting law and procedure); Blum & Heymann, *supra* note 57.

132. See, e.g., THE WHITE HOUSE, *supra* note 17 ("For example, an individual who is formally or functionally a member of an armed group against which the United States is engaged in an armed conflict is generally targetable."); Brian Egan, *International Law, Legal Diplomacy and the Counter-ISIL Campaign: Some Observations*, 92 INT'L L. STUD. 235, 243 (2016) ("Among other things, the United States may consider certain operational activities, characteristics, and identifiers when determining whether an individual is taking a direct part in hostilities or whether the individual may formally or functionally be considered a member

The clearest symbol of the foreign military lawyers' support for the explicit adoption of the formal membership approach by Israel is the Schmitt and Merriam article discussed earlier, which was published before the 2014 Gaza Conflict Report and the McGowan report.¹³³ This article is of great significance to the Israeli position in the 2014 Gaza Conflict Report, since it provides external justification for its positions. Interestingly, the substance of the Israeli report is very close to the article in several issues. There is of course no surprise that, in places where the article merely describes the Israeli conduct of hostilities policy, there are similarities between the two documents. However, the similarities also involve sections of the independent analysis of the authors, especially regarding the formal membership approach. Thus, the authors state that "[t]he IDF is on very firm ground in rejecting the CCF notion."¹³⁴ In addition, as mentioned, the authors directly try to demonstrate that the report does not contradict the *Targeted Killings* case.

The explicit support of the formal membership approach from members of their interpretive community and the U.S. government strengthened the ability of Israeli military lawyers to explicitly endorse the formal membership approach in the 2014 Gaza Conflict report. It seems to enable them to be part of a camp that supports this position rather than fighting the battle alone; to present their case as a widely accepted legal position rather than a mere Israeli legal interpretation.

Another factor which might have increased the influence of the military lawyers' position is the growing sense of isolation of Israel in the in-

of an organized armed group with which we are engaged in an armed conflict."); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) ("This includes, but is not limited to, whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces."); McNeal, *supra* note 131, at 706-07.

Nonetheless, the administration has emphasized several times its decision to limit the scope of targeting due to policy reasons especially in operations outside the zone of active hostilities. See, e.g., THE WHITE HOUSE, PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (THE PRESIDENTIAL POLICY GUIDELINES) (2013) [hereinafter PPG]; John Brennan, Speech Delivered at the Woodrow Wilson Center: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012) ("Of course, the law only establishes the outer limits of the authority in which counterterrorism professionals can operate. Even if we determine that it is lawful to pursue the terrorist in question with lethal force, it doesn't necessarily mean we should. There are, after all, literally thousands of individuals who are part of al-Qaida, the Taliban, or associated forces, thousands upon thousands. Even if it were possible, going after every single one of these individuals with lethal force would neither be wise nor an effective use of our intelligence and counterterrorism resources. As a result, we have to be strategic. Even if it is lawful to pursue a specific member of al-Qaida, we ask ourselves whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security."); Hakimi, *supra* note 3, at 1403-04.

133. Schmitt & Merriam, *supra* note 38.

134. *Id.* at 113.

ternational community. Facing harsh criticism by humanitarian actors, and taking into account the lack of willingness to hold to a more restrictive approach on targeting, it is somewhat more comfortable to hold to a legal position which is not isolated but shared by other international actors. Thus, the legal isolation of the Israeli position in the international legal community might have incentivized the Israeli administration towards a greater convergence between its position and the positions of the military lawyers community and the United States. It led to the “Americanization” of the Israeli approach to targeting. In the next part, this Article briefly contrasts the increasing willingness of the Israeli administration to cooperate with foreign experts, mainly international military lawyers, in relation to the Israeli legal reaction to military operations with Israel’s refusal to cooperate with the Human Rights Council’s Commission of Inquiry.¹³⁵ It further demonstrates the importance of cooperation within the distinct interpretive community as a tool in the battle over the law of contemporary conflicts.

2. Foreign Military Lawyers’ Involvement in the Israeli Conduct of Hostilities Policy—From the Gaza flotilla to the 2014 Gaza Conflict

The involvement of foreign military lawyers in the Israeli conduct of hostilities policy has increased in recent years. In addition to the ongoing relations between the MAG and foreign military lawyers,¹³⁶ the latter have become more involved in Israeli-initiated reports about military conflicts. A first notable example is the Turkel commission, which was established following the takeover of the flotilla to Gaza and the deaths of nine people on board the Mavi Marmara on June 1, 2010.¹³⁷ In the aftermath of the Goldstone report¹³⁸ and in light of the decision by the Human Rights Council to establish a fact-finding mission regarding the takeover of the Mavi Marmara (The Hudson-Phillips Report),¹³⁹ Israeli officials realized that, in addition to Israel’s refusal to cooperate with the Human Rights Council’s fact-finding mission,¹⁴⁰ it must produce a counter-account of the events with (at least some) international legitimacy. The Turkel commission was comprised of Israeli members, but it also included two foreign observers, Lord David Trimble and Brigadier General Kenneth Watkin,

135. See McGowan Report, *supra* note 30, ¶ 3.

136. Cohen, DABLA, *supra* note 123, at 378-79.

137. THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 (2010) [hereinafter THE FIRST TURKEL REPORT].

138. The Goldstone Report, *supra* note 96.

139. U.N. Human Rights Council, Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, U.N. Doc. A/HRC/15/21 (2010).

140. Israel has consistently refused to cooperate with international investigations of its conduct with the exception of the Secretary-General’s Panel of Inquiry of the Flotilla Incident (the Palmer Report).

the former Judge Advocate General of the Canadian Forces. The commission had, in addition, two foreign special advisors, Professor Wolff Heintschel von Heinegg, an expert on military law and the laws of war who published the German Navy Commander's Handbook on the Law of Naval Operations, and Professor Michael Schmitt, one of the most prominent contemporary military lawyers.

The 2014 Gaza conflict stood at the center of the international community's attention and involved strong criticism over the Israeli conduct of hostilities policy, including an open letter by international legal experts who harshly condemned Israeli actions and suggested that their conduct amounted to war crimes.¹⁴¹ The letter refers to the Human Rights Council's commission of inquiry and possible ICC jurisdiction over the events as desirable steps. Therefore, it is not surprising that Israel had a significant interest in presenting an alternative, positive, international law experts' position on its conduct in the 2014 conflict. Israel has since chosen a different strategy than the Flotilla case. Instead of incorporating foreign experts in its own reports, it cooperates with outside experts while issuing its own report. There are at least three independent reports and studies which were written with the cooperation of the Israeli authorities. These initiatives have issued the outcome of their studies, or at least an initial report, prior to the Human Rights Council's Commission of Inquiry report. The first such study is the High Level Military Group (HLMG) assessment of the 2014 Gaza conflict. The HLMG, which was founded by the Friends of Israel Initiative, was composed of high level military personnel from different countries.¹⁴² On May 31, 2015, it sent a letter with its key preliminary findings to the Human Rights Council's Commission of Inquiry, and it published its final report in October 2015.¹⁴³ The HLMG findings support the Israeli position. HLMG members received, as the report states, "unprecedented access" to Israeli officials including the Prime Minister, Defense Minister, and the Chief of Staff of the IDF at the time of the 2014 Gaza conflict.¹⁴⁴

The second report is the 2014 Gaza war Assessment by the Jewish Institute for National Security Affairs (JINSA)-commissioned Gaza Conflict Task Force.¹⁴⁵ This is also a report by military experts, this time American military experts, written with the assistance of Professor Geoffrey Corn as legal advisor.¹⁴⁶ The report was published in March 2015 and supports the Israeli position on the legality of its conduct in the conflict.¹⁴⁷

141. JOINT DECLARATION BY INTERNATIONAL LAW EXPERTS ON ISRAEL'S GAZA OFFENSIVE (2014).

142. HIGH LEVEL MILITARY GROUP, AN ASSESSMENT OF THE 2014 GAZA CONFLICT 4 (2015).

143. *Id.*

144. *Id.* at 7.

145. JINSA-COMMISSIONED GAZA CONFLICT TASK FORCE, 2014 GAZA WAR ASSESSMENT: THE NEW FACE OF CONFLICT (2015).

146. *Id.*

147. *Id.*

The report was written following “discussions with senior Israeli, Palestinian, and United Nations (U.N.) officials.”¹⁴⁸

While the first two reports are more anecdotal and serve only to demonstrate the administration’s willingness to engage with foreign experts, the third—the Schmitt and Merriam article discussed earlier—is more significant. In contrast to the two other reports, which were formed by pro-Israeli initiatives, it is an independent scholarly project. The authors of the study referred to the issue of their independence and emphasized that their project is not a pro-Israeli document.¹⁴⁹ Thus, Schmitt and Merriam provide external academic support for the administration position that could assist with the promotion of the formal membership approach, both internally and externally. According to the authors, they received unprecedented access to Israeli officials:

The IDF granted them unprecedented access that included a ‘staff ride’ of the Gaza area, inspection of an Israeli operations center responsible for overseeing combat operations, a visit to a Hamas infiltration tunnel, review of IDF doctrine and other targeting guidance, and briefings by IDF operators and legal personnel who have participated in targeting. The Authors also conducted extensive interviews of senior IDF commanders and key IDF legal advisers.¹⁵⁰

It is important to note that such wide access was previously denied to Israeli scholars, which further strengthens the notion that Israel had a significant interest in the positive international review of its actions.¹⁵¹ Another indication of the increasing reliance of Israel on foreign military lawyers and military experts is the reference to their reports in the initial response of the Israel Ministry of Foreign Affairs to the McGowan Report.¹⁵²

148. *Id.* at 7.

149. Schmitt & Merriam, *supra* note 38, at 56-57 (“Although the approach might be perceived as leading to a pro-Israeli bias, the sole purpose of the project was to examine Israeli targeting systems, processes, and norms in the abstract; no attempt was made to assess targeting during any particular conflict or the legality of individual attacks. With respect to the resulting observations and conclusions, note that the Authors combine extensive academic and operational experience vis-à-vis targeting and therefore were in a unique position to assess the credibility and viability of Israeli assertions. The result was a highly granular and exceptionally frank dialogue.”).

150. *Id.* at 56.

151. See Cohen, DABLA, *supra* note 123, at 370 (“One comment is required with respect to the methodology of this article. Like other academics who have sought to study the function of operational advisers in the IDF, I have been consistently denied access to official documents. My requests to conduct formal and structured interviews were denied. In view of the public attacks voiced against the ILD, this attitude is perhaps understandable. Nevertheless, it affected the methodology of this study.”).

152. ISRAELI MINISTRY OF FOREIGN AFFAIRS, *Israeli Response to the UNHRC Commission of Inquiry* (2015) (“In defending itself against attacks, Israel’s military acted according to the highest international standards. This was confirmed by a comprehensive examination by Israeli military and legal experts, as well as reports produced by internationally renowned military professionals.”).

3. Summary

In light of the above, it is suggested that the explicit divergence from the *Targeted Killings* case's functional membership approach could be explained by the interpretive community of military lawyers and the United States' open support for the formal membership approach in recent years. If the Israeli administration is trying to legitimize its actions by resorting to outside military experts, then it is possible that the result of this interaction will be an increased convergence in the legal assessment of the conduct of hostilities by the Israeli administration—especially the MAG—and the positions of such external experts. When it comes to targeted killings, it is not surprising to find that two of the main criticisms of the Interpretive Guidance functional approach, and specifically the notion of CCF, come from Schmitt and Watkin.¹⁵³ The adoption of the formal membership approach in the report is an interesting illustration of the complicated effect of transnational actors on the way in which international law is internalized, especially when relevant norms have been previously internalized by a competing transnational actor, in this case the ISC.

Interestingly, the reliance on foreign military lawyers and the U.S. administration might represent a flip in the direction of influence of the United States and Israeli interpretations of international law. Lisa Hajjar has described the U.S. legal position on asymmetric warfare of the first Bush administration as the “Israelization” of international law. She argued that the U.S. position is building on an Israeli model in its new interpretations of IHL.¹⁵⁴ Now, as this Article demonstrates, the Israeli formal membership approach is based to a large extent on the U.S. endorsement of such an approach. I would like to suggest that another twist of the story is possible. As mentioned, while the U.S. position has supported the formal membership approach as a legal position, it has emphasized the policy considerations which limit targeting to a much narrower scope of potential targets.¹⁵⁵ It is now possible that, once again, the Israeli position will influence the U.S. one. The endorsement of the formal membership approach in the report without reservation and recent changes in the U.S. administration might result in a greater reliance on the formal membership approach in the actual practice of the U.S. targeting policy, bringing the targeting policy closer to its formal legal position. Indeed, in recent

153. Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 21 (2010); Watkin, *supra* note 8.

154. Lisa Hajjar, *From Nuremberg to Guantanamo: International Law and American Power Politics*, 33 MIDDLE EAST REP. 8, 14-15 (2003).

155. See *supra* note 132 and accompanying text. The official statement on the narrower scope of potential targets came in light of the criticism of the use of “signature strikes” by the United States. See, e.g., Kevin Jon Heller, ‘One Hell of a Killing Machine’: Signature Strikes and International Law, 11 J. INT'L CRIM. JUST. 89 (2013); INT'L HUM. RTS. AND CONFLICT RESOL. CLINIC AT STAN. LAW SCH. AND GLOBAL JUST. CLINIC AT N.Y.U. SCH. OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN 12-13 (2012).

months, increasing reports have referenced the Trump administration's decision to replace the Obama administration's Presidential Policy Guidance (PPG)¹⁵⁶ with an approach that decreases the policy limitations on targeting (the document has not yet been made public).¹⁵⁷

C. Increasing Death Toll

The previous sections mainly explained the government's ability to diverge from the ruling in the *Targeted Killings* case. This section points to the potential incentives for the adoption of a formal membership approach in the 2014 Gaza conflict. First, states have an interest in the legitimizing aspect of IHL, especially when they are engaged in armed conflict with weaker parties. It is easier for states, usually the stronger side in the conflict, to achieve their goals with less limitations on their use of force.¹⁵⁸ Moreover, in urban asymmetric conflicts with non-state armed groups, in which armed group members operate from within the civilian population, states have a clear interest in broadening the scope of legitimate targets.¹⁵⁹ Thus, in asymmetric conflicts, it seems that states have an interest in adopting a formal membership approach that widens the scope of legitimate targets.

In addition to the above-mentioned general incentives for states in asymmetric conflict, the 2014 conflict has resulted in a stronger interest in broadening the scope of legitimate targets. The death toll in the operation was unprecedented. The casualties in the 2014 Gaza conflict were much higher than previous conflicts such as the 2009 Gaza conflict and the 2012 Gaza conflict.¹⁶⁰ Although the mere fact that many people lost their lives

156. *Supra* note 132.

157. See, e.g., Ryan Goodman, *Why the Laws of War Apply to Drone Strikes Outside "Areas of Active Hostilities"* (A Memo to the Human Rights Community), JUST SECURITY (Oct. 4, 2017), <https://www.justsecurity.org/45613/laws-war-apply-drone-strikes-areas-active-hostilities-a-memo-human-rights-community/>; Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>; Adil Ahmed Haque, *Targeted Killing Under Trump: Law, Policy, and Legal Risk*, JUST SECURITY (Feb. 10, 2017), <https://www.justsecurity.org/37636/targeted-killing-trump-law-policy-legal-risk/>.

158. See Shereshevsky, *supra* note 14, at 459.

159. See Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 343-44 (2010).

160. The actual number of casualties is disputed, but according to all sources, the numbers of the 2014 Gaza conflict are much higher. For example, the McGowan Report states that the 2,251 Palestinian casualties, including 1,462 Palestinian civilians, were unprecedented. McGowan Report, *supra* note 30, ¶ 20. According to the Israeli government's interim findings, 2,125 Palestinians were killed in the 2014 Gaza conflict, including 936 militants, 761 civilians and 428 "males between the ages of 16-50" with no clear determination by the Israeli government. THE 2014 GAZA CONFLICT REPORT, *supra* note 2, at A10-A11. According to B'Tselem, a total of 1,398 Palestinians were killed in the 2009 Gaza conflict, 167 Palestinians were killed in the 2012 Gaza Operation, and 2,202 Palestinians were killed in the 2014 Gaza conflict. *Statistics*, THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES (last visited Feb. 15, 2018), <http://www.btselem.org/statistics>.

in the conflict does not mean that IHL norms were violated, the outcome of the operation has attracted much criticism and provided a strong incentive to increase as much as possible the percentage of legitimate targets out of the total number of casualties.¹⁶¹ The broad membership approach adopted in the report seems to be a potential instrument for doing so. This is not to suggest that the MAG does not genuinely believe that the formal membership approach is the correct legal position, but to explain the incentive for the explicit endorsement of the position in the report despite the potential costs of deviating from an ISC judgment.

III. CRITICAL ANALYSIS OF THE CASE FOR THE FORMAL MEMBERSHIP APPROACH

The previous part of the Article explains the adoption of the formal membership approach in the report. The following section engages with the main normative argument for the adoption of the formal membership approach that was raised by both American and Israeli military lawyers—the need for normative symmetry between state soldiers and armed group fighters. Two main arguments are presented in this section: the first argument stresses the importance of the application of normative symmetry to the full range of IHL norms and not only to the norms that enable states to broaden the scope of their legitimate use of force. The second argument offers an alternative to the formal membership approach under the normative symmetry paradigm.

A. *You Cannot Have the Normative Symmetry Cake and Eat it Too*

As mentioned, the main substantive criticism of the *Targeted Killings* case's functional membership approach relates to the unequal application of targeting norms to state armed forces and non-state armed groups: while state soldiers can be targeted based solely on their membership in the armed forces, armed group members can be targeted only based on their specific conduct.¹⁶² Ostensibly, this is a valid criticism—the equal application of the rules that govern the conflict is one of the core principles of IHL and is believed to have an important impact on the willingness of parties to the conflict to comply with IHL norms.¹⁶³

Nonetheless, in a case involving a conflict between a state and a non-state armed group, the equality of belligerents principle and other core IHL principles have a much weaker role in the regulation of the conflict. States have long been reluctant to introduce the full protection of IHL in

161. Similar, though much more controversial, to the phenomenon of widening the scope of legitimate targets in cases of significant expected collateral damage is the alleged use of signature strikes by the United States, in which all males between certain ages are classified as legitimate targets. *See supra* note 155.

162. Schmitt & Merriam, *supra* note 38, at 113. *See also* McNeal, *supra* note 131, at 706-07 (presenting the normative symmetry argument as the U.S. justification for the adoption of the formal membership approach).

163. *See, e.g.*, Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT'L REV. RED CROSS 931, 961 (2008).

asymmetric conflicts between states and non-state actors.¹⁶⁴ Most notably, states have refused to apply POW status to non-international armed conflicts.¹⁶⁵ Although the lack of equality is not an explicit part of the non-international armed conflict rules, which formally apply to both sides, the lack of normative symmetry under domestic law creates an inequity between state and non-state armed forces. While soldiers are practically immune from prosecution when they attack legitimate targets, armed group members are exposed to prosecution under domestic law.¹⁶⁶

The above-mentioned difficulty becomes even more striking when taking into consideration the 2014 Gaza Conflict Report's partial divergence from the classification of the conflict as an international armed conflict in the *Targeted Killings* case. This classification, though subject to much criticism in the international law community,¹⁶⁷ has been approved in subsequent case law and in the Turkel reports. The 2014 Gaza Conflict Report described the *targeted killings* case classification position and the criticism that it faced and then did not classify the conflict one way or the other. It stated that Israel conducted its operations according to the norms of both international and non-international armed conflicts.¹⁶⁸ The report did not take into account the lack of POW status under the law of non-international armed conflicts. Perhaps the lack of acknowledgment of the relevance of POW status is due to the reluctance of the ISC to grant POW status to members of non-state armed groups, even under the rules of international armed conflict.¹⁶⁹ Nonetheless, under the international armed conflict framework, the potential to grant POW status to non-state armed groups exists, while it is completely absent from the norms of non-international armed conflicts.

In a previous Article, I argued that the classification of transnational armed conflicts between states and non-state armed groups as non-international armed conflicts is an attempt by humanitarian actors to minimize the role of IHL in such conflicts in order to enable a greater role for international human rights law (IHRL) norms, which, in their view, will bring

164. Shereshevsky, *supra* note 14, at 462-67.

165. M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 729 (2008).

166. See David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 8, 36 (2009). This might change with an increased legitimacy to the establishment of armed groups courts, as the recent commentary on the First Geneva Convention suggests. INTERNATIONAL COMMITTEE OF THE RED CROSS, *Commentary of 2016 Article 3: Conflicts Not of an International Character* ¶¶ 689-95 (2016). However, this position is controversial, especially regarding the ability to prosecute in these courts for the mere participation in hostilities; see Parth S. Gejji, *Can Insurgent Courts Be Legitimate Within International Humanitarian Law?*, 91 TEX. L. REV. 1525, 1542 (2013); Monica Hakimi, *Fair Trial Guarantees in Armed Conflict*, LAWFARE (Sept. 23, 2016), <https://www.lawfareblog.com/joint-series-international-law-and-armed-conflict-hakimi-fair-trial-guarantees-armed-conflict>.

167. See *supra* note 21.

168. THE 2014 GAZA CONFLICT REPORT, *supra* note 2, ¶ 233.

169. See, e.g., H CJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) PD 62(1) 507, ¶ 23 (2006) (Isr.).

more protection to the victims of such conflicts.¹⁷⁰ I have pointed out the potential burden from a humanitarian perspective of straying from the pragmatic compromise of IHL. The classification of the conflict in the report is the state's parallel attempt to stray from the full application of IHL norms, without a willingness to apply the full protections under IHRL.¹⁷¹ While the humanitarian classification of such conflicts aims to increase the protection for the victims of armed conflicts, the classification by states of the conflict as non-international armed conflict aims to apply the legitimizing aspects of IHL norms, such as the formal membership approach to targeting, without the burden of providing POW status to non-state armed groups and with a more limited scope of application of international criminal law norms.¹⁷² We still live in a world where there is limited accountability for states' conduct. Enabling states to deviate from the full application of IHL norms, even if intended to bring more protection, might lead to less protection. This is where the utopian vision of international law meets the apologetic legal positions of states at the expense of the pragmatic protective potential of IHL norms.

The normative symmetry principle and the status-based approach to targeting are representative examples of the uniqueness of the pragmatic compromise of IHL—it is difficult to justify the application of the formal membership approach without the willingness to grant combatant immunity to non-state armed group members. The normative symmetry principle and the formal membership approach are examples of IHL's willingness to replace common principles of attribution and liability, which are based on individual accountability, with a status-based approach. In both cases, the adoption of a status-based approach comes with a price—it is difficult to justify the equal application of IHL rules to the just and unjust parties to a conflict,¹⁷³ and it is hard to justify the targeting of the military cook, gardener, or lawyer. In the former, IHL allows soldiers of the unjust party (or the party that violates the prohibition on the use of force) to kill with immunity the soldiers of the just party to the conflict, such as in the paradigmatic example of Nazi soldiers in WWII who were allowed to kill with immunity Allied soldiers, without taking into account individual responsibility. In the latter, IHL allows the targeting of soldiers regardless of the threat that they pose or whether their targeting constitutes an actual military necessity. In both cases, the main justification is the need to minimize suffering in warfare and the need for clear-cut rules

170. Shereshevsky, *supra* note 14.

171. For an analysis of U.S. and Israeli reluctance to apply IHRL to such conflicts, see *id.* at 495-96.

172. For the role of international criminal law in the debate over the scope of IHL, see Jens Davis Ohlin, *Is Jus in Bello in Crisis?*, 11 J. INT'L CRIM. JUST. 27, 36 (2013).

173. See, e.g., Jeff McMahan, *Laws of War*, in THE PHILOSOPHY OF INTERNATIONAL LAW 493 (Samantha Besson & John Tasioulas eds., 2010); David Rodin, *The Moral Inequality of Soldiers: Why jus in bello Asymmetry is Half Right*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 44 (David Rodin & Henry Shue eds., 2008).

which incentivize all parties to the conflict to comply with the norms.¹⁷⁴ When states refuse to apply the norms equally to non-state actors, especially with respect to one of the key incentives for fighters to comply with the rules—combatant immunity—it is difficult to defend the formal membership approach. In fact, it is somewhat misleading to argue that armed group members can target soldiers based on a formal membership approach if they do not enjoy combatant immunity—it seems that they cannot legally target any soldier (under domestic law). Without combatant immunity, it is much easier to justify the *Targeted Killings* case—if armed group members are treated as persons without the right to participate in hostilities, then they should not be targeted under the unique regime of targeting combatants under IHL.

Thus, the argument for normative symmetry cannot hold until it is applied in full to all parties to the conflict. This is not to say that normative symmetry should not play an important role in the debate over IHL norms – it should. Taking normative symmetry seriously mandates the equal application of IHL norms and principles to all parties to the conflict, including in those areas where states were traditionally reluctant to apply the norms to non-state actors.

It is important to note that this section does not suggest states cannot offer an account of the *lex lata* which allows, on one hand, targeting based on formal membership and, on the other hand, does not grant combatant immunity to armed group members. It only criticizes the reliance on normative symmetry as the main *justification* for the adoption of the formal membership approach.

To conclude this part, the normative symmetry argument should be taken into account in the formal/functional approach debate. State soldiers and non-state armed groups fighters should be targeted under the same conditions. Nonetheless, this argument applies to all other IHL norms as well: state soldiers and non-state armed groups fighters should equally enjoy the full range of IHL protections. For the integrity of IHL rules, its normative symmetry should be applied in a symmetrical way.

B. *The Functional Membership Approach as an Alternative to the Formal Membership Approach under Normative Symmetry*

Even if we apply normative symmetry to the targeting of individuals, the formal membership approach to targeting is not the only possibility. Indeed, the traditional approach to the targeting of soldiers is a status-based, or formal membership approach. According to the traditional approach, all members of the armed forces are liable for an attack regardless of their role in the organization.¹⁷⁵ Nonetheless, in recent years, there has been a growing trend to rethink the status-based approach to targeting,

174. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 *Yale J. Int'l L.* 47 (2009).

175. Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 *J. LEGAL ANALYSIS* 115, 128-29 (2010).

suggesting that not all members of the armed forces should be equally liable for an attack. For example, Gabriella Blum suggests that “soldiers who play roles and functions that have a clear civilian corollary, and which in their civilian corollary do not give rise to loss of immunity, should be spared.”¹⁷⁶ This approach resembles the approach of the Interpretive Guidance to the obligation to use the least harmful means. It does not restrict the obligation to the targeting of armed group members but also allows the targeting of state soldiers, while taking into account the external circumstances of each case when deciding whether use of least harmful means is a viable option.¹⁷⁷

As a result of these developments, accepting the relevance and importance of the normative symmetry of IHL does not mandate an adoption of the formal membership approach. Instead, it is possible to advocate for the adoption of a universal functional membership approach to the targeting of both soldiers and armed group members. In fact, it seems that specifically in the context of asymmetric warfare there are compelling reasons to adopt a functional membership approach to targeting. Most notably, the difficulty in applying clear distinctions between combatants and civilians on the one side, and the increasing ability to differentiate between those who hold a combat function and those who do not hold such function on the other side, suggest that the traditional categorical distinction might be less important in contemporary warfare.¹⁷⁸

Thus, the adoption of the formal membership approach is not the only viable option under normative symmetry. Considering the potential harsh consequences of adopting a wide definition of legitimate targets in densely populated areas, the decision to adopt a formal membership approach should be reconsidered, and in any case, all IHL norms should be applied symmetrically to all parties to the conflict.

CONCLUSION

The *Targeted Killings* case played an important role in two distinct discussions in international law—in the debate over the targeting of non-state actors, it served, together with the ICRC Interpretive Guidance, as one of the two leading sources which support a conduct-based approach to targeting, and in research on the role of international law in domestic courts, it served as a symbol of a unique willingness of a domestic court, the ISC, to review military operations. This Article suggests that recent developments represent a significant change in both of these contribu-

176. *Id.* at 155. See also ADIL AHMED HAQUE, LAW AND MORALITY AT WAR 89-92 (2017); Samuel Issacharof & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1598 (2013); Yishai Beer, *Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity*, 26 EUR. J. INT'L L. 801 (2015) (suggesting a unit-based threat assessment rather than an individual one).

177. INTERPRETIVE GUIDANCE, *supra* note 9, at 77-82; see also Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819 (2013).

178. Blum, *supra* note 175.

tions. First, it analyzes the explicit adoption of the formal membership approach to the targeting of armed group members in the 2014 Gaza Conflict Report, and argues that the Israeli administration has diverged from the *Targeted Killings* case position. Thus, Israel has joined the United States as one of the two strongest proponents of the formal membership approach to targeting.

Second, the Article demonstrates that in recent years the ISC has become much more deferential in military operation cases, in contrast to its previous activist trend in such cases. Such deference enables the Israeli administration to aggressively interpret the *Targeted Killings* case. This Article suggests that such deference was partially driven by increasing international pressure on Israel, including potential future proceedings in the ICC. In contrast to the literature that suggests a more active role for national courts in such circumstances, this Article points to a potential opposite effect. This is due to a greater focus of the Court on its role as a domestic actor at the expense of its role as an international actor. This new theoretical insight on the relation between international and domestic institutions should be further explored in future research. Specifically, this Article's focus on the analysis of seminal military operations cases and an empirical examination of all Israeli national security case law post 2009 can provide a wider understanding of the Court's approach.

In addition, this Article uses the 2014 report to stress the complex role of transnational legal actors, which not only contribute to the internalization of international law norms but also play a role in the struggle over the content of such norms. It suggests that in the case of the formal/functional membership debate, the community of military lawyers' and the U.S. administration's explicit adoption of the formal membership approach enabled the "Americanization" of the Israeli position on targeting. It signals the current victory of the "military lawyers" version of the law of asymmetric conflicts over the "humanitarian lawyers" version of this law, which the ISC's *Targeted Killings* case's functional membership approach represented.

Finally, the Article critically addresses the normative symmetry argument for the adoption of the formal membership approach. The use of this argument by military lawyers is a good opportunity to rethink the deficiencies of the law of asymmetric conflicts and to examine the possibility of introducing the full range of IHL rights and obligations to all parties of such conflicts.