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## ARTICLES

### TARGETED WARFARE: INDIVIDUATING ENEMY RESPONSIBILITY

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*Legitimacy of the use of military force is undergoing a fundamental but insufficiently appreciated moral and legal transformation. Whereas the traditional practices and laws of war defined enemy forces in terms of categorical, group-based judgments that turned on status—a person was an enemy not because of any specific actions he himself engaged in but because he was a member of an opposing military force—we are now moving to a world that, implicitly or explicitly, requires the individuation of enemy responsibility of enemy persons in order to justify the use of military force. Increasingly, the legitimate use of military force is tied to quasi-adjudicative judgments about the individual acts and roles of specific enemy figures; this is the case whether the use of force involved is military detention or targeted killing. This transformation transcends conventional debates about whether terrorist actions should be treated as acts of war or crime and is more profound in its implications.*

*This readjustment in the basic premises underlying the justified use of military force will have, and is already having, implications for all the institutions involved in the use of military force and in the processes by which decisions are made to use force. For the military, this change will generate pressures to create internal,*

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*quasi-adjudicative processes to ensure accurate, credible judgments about the individual responsibility of particular enemy fighters. For the executive, these changes will propel greater engagement in decisions that had previously been exclusively within the province of the military. For the courts, this transformation toward individuated judgments of responsibility will inevitably bring about a greater judicial role in assessing wartime judgments than in the past; this expansion has begun to occur already. These changes are not yet directly reflected (or at least fully reflected) in the formal laws of war, but we anticipate that as these changes embed themselves in the practices of states, especially dominant states, these changes in practice will also eventually be embodied in the legal frameworks that regulate the use of force. This Article will identify this fundamental transformation as the central factor driving struggles over the proper boundaries of military force and then explore the ramifications of this change for issues like military detention and targeted killings.*

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INTRODUCTION

The morality and legitimacy of the practices of war—or at least, the use of military force—are undergoing a fundamental transformation. This transformation is not yet directly or fully reflected in the formal laws of war, but as these changes embed themselves in the practices of states, especially dominant states, these changes in practice may eventually be embodied in the legal frameworks that regulate the use of force. The fundamental transformation is this: Whereas the traditional practices and laws of war defined “the enemy” in terms of categorical, group-based judgments that turned on *status*—a person was an enemy not because of any specific actions he himself engaged

in, but because he was a member of an opposing army—we are now moving to a world that implicitly or explicitly requires *the individuation of enemy responsibility* of specific enemy persons before the use of military force is considered justified, at least as a moral and political matter. This shift applies not to any one particular type of military force, such as lethal force, but to all exertions of military power over enemies, including the ways in which they are captured, detained, incapacitated, or tried.

This transformation is reflected to a limited but significant extent in the domestic law, including the constitutional law, of some countries—including in decisions of the United States Supreme Court.<sup>1</sup> It is also present in the interpretations of international law that some courts, such as the Israeli Supreme Court, have generated.<sup>2</sup> But this subtle and inadequately appreciated transformation has been taking place more as a matter of slowly accepted practices than as settled legal development.<sup>3</sup> Accordingly, we proceed in this Article by giving an account of the central manifestations of the transformation in two distinct areas of high-profile debate: the detention of foreign nonstate combatants and the targeted killing of their leaders in the irregular combat that characterizes war against terrorist groups. These are the two most visible manifestations upon which to create an acceptable legal regime for modern state conflicts with stateless belligerents, but we contend that these areas are at the epicenter of the broader transformation of warfare beyond its conventional state-to-state assumptions.

Even within these two areas of high-profile debate, we are not merely concerned with giving an integrated descriptive account of how the same departures from conventional war shape the corresponding sense of legality in the pursuit of military objectives. Rather,

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<sup>1</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (holding a congressional act suspending habeas review for detainees at Guantánamo unconstitutional because the procedural protections of the Combatant Status Review Tribunals as then constituted did not provide a constitutionally adequate substitute for habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) (finding that an American citizen held in the United States as an enemy combatant was entitled to a habeas petition to challenge the factual basis of his detention).

<sup>2</sup> See, e.g., H CJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Israel 62(1) PD 507, 590 [2006] (Isr.) (restricting conditions under which Israeli military could select militants for targeted killing, and mandating that all such killings be carried out in accordance with customary international law).

<sup>3</sup> The Obama administration has developed a set of elaborate protocols for making the determination of whether and under what circumstances to place enemy combatants on the “kill list” used for targeted killing determinations. See Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1, available at <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

the crux of our argument is that a new legality is emerging from on-the-ground experience with a new kind of warfare. That legal transformation is emerging from a process of institutional settlement that incorporates incomplete intuitions from law, politics, and morality. Despite the incremental consolidation of this body of law, the transformation is pervasive, with sweeping ramifications.

Even as the U.S. government asserts that it is at war, it is not mechanically applying—outside the active, hot-battlefield context—the traditional law-of-war principle that lethal force and the power to detain can be directed against any member of the enemy armed forces. Instead, the government is individuating the responsibility of specific enemies and targeting only those engaged in specific acts or employed in specific roles. The government is making what appear to be (and in reality, are) quasi-adjudicative judgments based on highly specific facts about the alleged actions of particular individuals. The key legal, moral, and policy question is: How should an appropriate framework for making such individualized decisions be structured? From an *ex ante* perspective, what kinds of processes should be considered adequate to make these judgments? Which institutions should play what roles in such individuated judgments about the identity of the enemy? From an *ex post* perspective, what kind of review and accountability ought to be required of these decisions? After clearing the ground of the more common misperceptions about the use of drones, the Article begins to develop a general framework for designing processes and institutions that offer appropriate answers to these essential questions.

Our aim is to elucidate how this process of legal transformation in turn shapes the arguments about the proper uses of military force in the context of fighting terrorism, and how it yields a debate that often appears polarized, confused, or simply comprised of advocates unable to engage with the positions of others. No prior legal framework, either domestic or international, exists to organize an attempt to address the transformed nature of modern warfare, precisely because we are in the midst of this transformation. Instead, we begin with an examination of the inherited framework of the law of war to show its increasing remove (outside the active battlefield context) from the context of war against nonstate belligerents. We then discuss how this new framework of individuated enemy responsibility presents itself in the context of military detention, the most notorious example being the continued incarcerations at Guantánamo Bay Naval Base in Cuba. We conclude by examining the use of drones and other sophisticated modern technology, the most contentious issue at present concerning

the targeted killing of individual enemy combatants outside the conventional field of battle.

## I

### INDIVIDUATING ENEMY RESPONSIBILITY

We begin with an account of how modern warfare has shifted from the premises of the traditional model of state-to-state conflict and two critical resulting implications for the law of war. In the first instance, war against ill-defined, nonstate forces requires unique responsibility both in selecting the targets of lethal force during military engagement and in the incapacitation of enemy combatants who are detained. The need for accurate identification of enemy combatants introduces into military conduct issues of proper identification and proportionate responses generally associated with domestic criminal law rather than the law of war. Further, the need for individual inquiry moves this form of irregular warfare away from the state-to-state obligations of diplomacy and battle that have defined the law-of-war regime for several centuries.

#### A. *The Individuated Combatant*

The key to the traditional, status-based laws of war was that conventional soldiers fought openly as members of an organized military under state control. In particular, they wore uniforms (except for covert operatives), displayed weapons, and fought under an organized command structure. As a result, it was accepted, legally and morally, that the opposing side could treat them on the basis of their status, simply as members of the opposing fighting force. The Supreme Court addressed this directly in the context of Nazi saboteurs during World War II:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.<sup>4</sup>

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<sup>4</sup> *Ex parte Quirin*, 317 U.S. 1, 31 (1942). The emphasis on recognized membership in an armed force was later codified in the Geneva Conventions, in which prisoner-of-war protections for militia or volunteer forces is made contingent upon their “carrying arms openly” and “having a fixed distinctive sign recognizable at a distance.” Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138 [hereinafter Geneva III].

As an initial matter, there was typically little dispute about the identity of conventional soldiers as members of the enemy forces; the open carrying of weapons and wearing of uniforms resolved that issue.<sup>5</sup> In addition, there was no need to determine whether such a soldier had committed any specific identifiable act that would legitimately make him a target for the use of military force. Whether a soldier had fired at the opposing side, planted a bomb, or even just handled clerical duties was irrelevant; group membership in the opposing army was sufficient.<sup>6</sup> Thus, in the traditional uses of force—capture, detention, even uses of lethal force—there was no need to differentiate among soldiers in order to attempt to individuate enemy responsibility for participation in the enemy's war machinery. There was only the need to determine individual responsibility in extraordinary circumstances when enemy soldiers were tried for war crimes—acts outside the permissible scope of war.<sup>7</sup> Finally, the same status-based, group-membership principles applied in detention operations: How long an enemy soldier would be detained was not a function of his own individual responsibility for specific acts but of his membership in the group. Prisoners of war were released collectively, as part of a group, at the war's end or as part of mutually agreed prisoner exchanges.<sup>8</sup>

Terrorism and the new face of warfare inherently change all of these processes. Because these unorthodox and usually unlawful combatants do not wear uniforms, attributions of status based on group membership are far more uncertain and complex. They violate the cardinal principle of distinction by which all combatants can be clearly differentiated from the civilian population.<sup>9</sup> Some of these combatants are true terrorists in the sense that they actively target civilian

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<sup>5</sup> See *id.*

<sup>6</sup> For example, in discussing the general power to detain in wartime, the Supreme Court in *Hamdi* pointed out that “[t]he time has long passed when ‘no quarter’ was the rule on the battlefield . . . . It is now recognized that ‘Captivity is neither a punishment nor an act of vengeance.’ . . . . ‘A prisoner of war is no convict; his imprisonment is a simple war measure.’” *Hamdi*, 542 U.S. at 518 (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 788 (rev. 2d ed. 1920)).

<sup>7</sup> See, e.g., *id.* (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” (emphasis added) (quoting *Ex parte Quirin*, 317 U.S. at 28, 30)).

<sup>8</sup> Geneva III, *supra* note 4, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

<sup>9</sup> MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, *INT’L INST. OF HUMANITARIAN LAW, MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY* art. 1.2.2 (2006) (reviewing the various sources of international law and finding that the principle of distinction is key to the modern laws of war).

populations to invoke terror.<sup>10</sup> Others are more conventional in engaging military forces, though they don't carry the differentiating identifiers of military forces.<sup>11</sup> In practice, regardless of whatever significance the distinction may have conceptually, irregular combatants routinely slip into acts of terror directed at the civilian population.<sup>12</sup>

Moreover, apart from the issue of uniforms, it is difficult to know that an individual is part of a terrorist organization on any basis other than his own individual acts of terrorism. Terrorists typically do not join an organization in some formal or visible way.<sup>13</sup> While some terrorists do swear oaths of affiliation to signify their membership in the organization, many do not; in addition, even if such an oath has been taken, obtaining proof of it is far more difficult than identifying a uniformed soldier. Indeed, it might be easier to prove that an individual committed a specific act of terrorism than it is to prove that he or she took an oath of affiliation.<sup>14</sup> Attributions of status through group membership alone are therefore extremely difficult to establish. Most terrorists, therefore, are not identified on the basis of membership *per se*, but because of the specific acts in which they have engaged. Perversely, the act defines the status.

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<sup>10</sup> The UN defines terrorism as

[an] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, art. 2, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

<sup>11</sup> William H. Ferrell III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 105 (2003) ("Not only must parties to the conflict refrain from targeting civilians and civilian objects, they must also ensure that their own combatants are distinguishable from civilians.").

<sup>12</sup> See, e.g., Sarah Sewall, *Introduction to the University of Chicago Press Edition: A Radical Field Manual*, in U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MAN., at xxvii (2007) ("[Guerrillas dressed in civilian clothes] kill civilians to show that the government can't protect its own citizens. Insurgents' favorite tactic is to provoke overreaction from counterinsurgent forces, discrediting them before a local and increasingly international audience."); Trevor A. Keck, *Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare*, 211 MIL. L. REV. 115, 124 (2012) ("Most attacks on civilians are perpetrated by insurgents as part of a strategy not only to coerce and terrorize the civilian population, but also to undermine the state.").

<sup>13</sup> Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1099 (2008) ("[A]ssociational status as a detention trigger is difficult to apply to an amorphous clandestine network such as al-Qaeda. Beyond the leadership core, it is difficult to determine what degree of association with al-Qaeda suffices to warrant status-based detention even if the facts can accurately be determined.").

<sup>14</sup> *Id.*

In addition to modern challenges in identifying nonstate enemy combatants, two other factors are driving the transformation of the morality and practices in modern uses of military force. First, technological developments like the increased use of weaponized drones make modern warfare potentially more threatening to civilians by eroding the battlefield-nonbattlefield distinction. That distinction once allowed civilians far from battle to live without fear of harm, or at least with a relative measure of security away from the heart of the military engagement. At the same time, this new technology also enables dominant states to respond in more precise ways that can, to some extent, offset the threat to civilians, even while operating far from the battlefield. The capacity to be more discriminating in military targeting is likely to generate an obligation to avoid unintended harm (if “ought” implies “can,” as theorists have long debated,<sup>15</sup> “can” sometimes implies “ought”). Second, the post–World War II rise of human rights (as a legal and cultural matter) has created a pressure on dominant states seeking legitimacy for their actions to incorporate humanitarian concerns into their military operations, especially with respect to the rights of enemies during wartime.<sup>16</sup>

The structural features of modern terrorism and the resulting changes in enemy identification, military technology, and humanitarian concerns promote the use of force against individuals based on specific *acts*, rather than on status or group membership. As such, the use of military force against terrorists *necessarily* must shift, and has shifted, away from the traditional group-based membership attributions of responsibility to individuated judgments of responsibility.<sup>17</sup> The pressure to maintain this individuation applies to every stage of the use of military force.

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<sup>15</sup> See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 5 (2010) (applying ought/can analysis in context of executive action); Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 164 (2010) (examining the greater obligations that greater military capacity may impose in war settings).

<sup>16</sup> See *infra* notes 32–33 and accompanying text (discussing post–World War II law of war treaties and their focus on traditional, state-based armed conflict).

<sup>17</sup> For example, in the detention context, Afghan detainees now routinely have the appropriateness of their detention evaluated on an individual basis. See generally Lt. Col. Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., June 2010, at 9, 15–20, 22 (describing the evolution and structure of detainee review procedures in Afghanistan). With respect to targeted killings, evaluation of the threat posed by specific *individuals* dictates their inclusion or exclusion from the Obama administration's kill list. See Becker & Shane, *supra* note 3 (“Given the contentious discussions, it can take five or six sessions for a name to be approved, and names go off the list if a suspect no longer appears to pose an imminent threat . . .”).



First, the initial threshold issue of identification becomes far more complex and consequential: Is this actually the specific person believed to have committed specific acts? A whole new regime (whatever its precise contours) to ensure the *accuracy* of the initial identification question becomes necessary—something virtually irrelevant in the traditional war context. Even when the identification problem is resolved, the *degree* and *type* of the appropriate initial military response up front might become relevant in a way that they are not in the traditional context. In a traditional war context, one did not distinguish among soldiers and officers based on any sense of specific responsibility; if a barracks was to be bombed or artillery to be directed at an advancing force, there was no attempt to differentiate the different levels of responsibility or culpability of individual soldiers or officers.<sup>18</sup> Today, however, it might well be that uses of lethal force, in the form of targeted killings of specific individuals through measures like drone attacks, are more appropriate and justified against high-level commanders than low-level foot soldiers.<sup>19</sup> Similarly, on the back end of the use of military force, when it comes to matters like detention of enemy combatants, individuating enemy responsibility might also be proper as a moral and political matter, regardless of lagging legal frameworks. We might hold the architects of the September 11 terrorist attacks indefinitely, but it might not be similarly appropriate to hold low-level couriers indefinitely.

In traditional wars, of course, these distinctions were mostly irrelevant; all members of the enemy, based on their status, were released

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<sup>18</sup> See Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268, 1270 (2013) (“[I]n international humanitarian law . . . there simply is no *codified* duty to attempt the capture of enemy combatants. Combatants open themselves up to the reciprocal risk of killing, and the lawfulness of killing combatants is based entirely on their status as combatants.”). The application of this principle to nontraditional warfare is deeply contested. See Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT’L. L. (forthcoming 2013) (arguing for a duty to attempt capture before killing).

<sup>19</sup> Officials associated with the United States’ targeted killing program have apparently determined that strikes against individuals are, in fact, most appropriately directed at terrorist leaders rather than foot soldiers. See Becker & Shane, *supra* note 3 (“William M. Daley, Mr. Obama’s chief of staff in 2011, said the [P]resident and his advisers understood that they could not keep adding new names to a kill list, from ever lower on the Qaeda totem pole.”). Current CIA Director John O. Brennan’s speech on the legality of targeted killings at the Wilson School likewise adverts specifically to the need to discriminate in target selection based on leadership positions or “operational skills” rather than merely based on group membership. See John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at The Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy> (explaining that “when considering lethal force we ask ourselves whether an individual poses a significant threat to U.S. interests”).

as part of group-based releases.<sup>20</sup> But once warfare interjects the question of why a particular enemy is being targeted, and whether the targeting corresponds to the threats presented by a particular individual, the inquiry starts to take on the feel of individualized adjudication. The great traditions of the law of war necessarily address the conditions for states to enter into warfare, the conduct of military battle itself, and the postwar restoration of the peace.<sup>21</sup> As Barak Medina well articulates, the “[i]nternational laws of war mostly address collectives.”<sup>22</sup> By contrast, focusing on the culpability of and threat posed by a particular enemy combatant necessarily diminishes the question of statecraft and recasts military objectives in terms of individual culpability.

The central focus of this Article is on the effects of the altered battlefield on the conduct of war. There is a great but unrecognized paradox underlying the emerging individuation of responsibility. This paradox accounts for a good deal of the polarized positions that have circulated since September 11 about the legitimate uses of military force. As the fundamental transformation of military force continues, even implicitly, toward an individuated model of responsibility, the use of military force in combat is justified by processes similar to those that justify punishment in a criminal justice context. That is, when an enemy can be targeted for the use of military force (capture, detention, killing) because of the specific acts in which he or she as an individual participated, military force begins to look more and more like an implicit adjudication of individual responsibility.

A tremendous premium is immediately placed on what we might call “adjudicative facts”—is this the person who did X?—rather than “legislative facts”—is this person a soldier in the opposing army? And as soon as military force must be tied to individuated judgments of

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<sup>20</sup> See Geneva III, *supra* note 4, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224 (referring merely to “prisoners of war” as a category, rather than distinguishing individuals among them).

<sup>21</sup> These are the defining obligations of *jus ad bellum*, *jus in bello*, and *jus postbellum*. For an exploration of international jurisprudence and state practice regarding the proper use of force, see generally CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (Oxford Univ. Press 3d ed. 2008). For the application of these concepts to nonstate actors, see Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, 34 *YALE J. INT’L L.* 541, 541 (2009). For fuller discussion of the international law features of war against nonstate actors, see *infra* notes 31–37, 44–67, and accompanying text.

<sup>22</sup> Barak Medina, *Regulating Anti-Terror Warfare Through the Individual Dangerousness Doctrine: Theory and the Israeli Supreme Court Jurisprudence* 7 (Aug. 1, 2013) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2259158](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2259158). Medina provides a sophisticated account of the Israeli jurisprudence on the issues of detention and other means of antiterrorism. His thesis on the need to make individualized determinations of dangerousness parallels the concerns in this Article.

responsibility, it is easy to understand why some critics of the use of force question why it is the military, and not the judicial system, that is making these individualized, adjudicative judgments.<sup>23</sup> These kinds of individuated judgments have not traditionally been the province of the military, after all. And there is an understandable impulse to conclude that in the world of individualized, quasi-adjudicative judgments, the judiciary is the institution most traditionally suited for that function.<sup>24</sup>

Thus, as the unavoidable structural forces that drive uses of military force against modern terrorism come to depend on individuated judgments of responsibility, it is also inevitable that the boundaries between the military system and the judicial system will become more permeable than in the past. The two systems are unlikely to exist in hermetic isolation from each other. The considerations that have traditionally informed one will spill over into the other—and vice versa. This is the fundamental reason that the debates over the appropriate uses of military force have been, and are likely to remain for some time, so unresolved, uncertain, confused, and polarized.<sup>25</sup>

In our view, the principal task of the modern morality of war and, eventually, the law of war—indeed, the very task this Article sets for itself—is to come to terms with both the transformed legal and military environment of modern warfare and with the emerging imperative to individuate responsibility when using lethal force against terrorism. We believe it is a serious mistake to conclude from this inevitable individuation that the traditional civil and criminal judicial system should, as a result, fully supplant and displace the uses of military force altogether. But on the other hand, the use of military force must continue to adapt, under both internal and external pressures, in

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<sup>23</sup> See, e.g., Oona Hathaway, Samuel Adelsberg, Spencer Amdur, Philip Levitz, Freya Pitts & Sirine Shebaya, *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 *YALE J. INT'L L.* 123, 162 (2013).

<sup>24</sup> Among the critiques of the military's Detention Review Board system developed for detainees in Afghanistan is the fact that fundamentally adjudicative proceedings are conducted by military tribunals without sufficient trappings of the civilian justice system. See DAPHNE EVIATAR, HUMAN RIGHTS FIRST, *DETAINED AND DENIED IN AFGHANISTAN: HOW TO MAKE U.S. DETENTION COMPLY WITH THE LAW* 13–19, 27–28, (2011), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf> (arguing for the importance of providing legal counsel to detainees and claiming that the current system of “personal representatives” for detainees—who need not be lawyers—is insufficient as a substitute).

<sup>25</sup> Among the most visible confrontations over the appropriate use of military force came with the Senate confirmation of John O. Brennan, one of the architects of the Obama administration's policy on the use of drones, as CIA director. See Laura Matthews, *John Brennan Confirmed as CIA Director*, 63–34, *INT'L BUS. TIMES* (Mar. 7, 2013, 4:00 PM), <http://www.ibtimes.com/john-brennan-confirmed-cia-director-63-34-1115860> (reporting Senate resolutions on targeted killing and use of military force in the United States).

order to embrace and to take fully into account the reality that enemy responsibility in this era must be individuated. The military, for example, is already in the process of trying to generate procedural protections, analogous to those used in more traditional adjudicative settings but adapted to the unique context of military force, that provide sufficient accuracy and legitimacy to ensure that individuated attributions of responsibility are being made through credible processes and structures to make them as accurate and fair as possible.<sup>26</sup> That is true whether the military force at issue involves detention or targeted killings, the two specific subjects we review. To the extent the government as a whole succeeds in generating the novel structures, institutions, and processes necessary to legitimate the use of military force in an age of individuated enemy responsibility, these uses of force will be more widely accepted.<sup>27</sup> Our aim is to contribute to that project.

We structure our inquiry around the key issue of the individuation of proper targets in modern war settings, whether for purposes of long-term detention or, more dramatically, for purposes of targeted killing. Targeted killing shares with the detention of irregular combatants the critical features of modern individuated warfare. Both turn on proper and legally justifiable decisions about the nature of the individuals selected for coercive action, be it capture or killing. To the extent the objective is not prospective punishment but incapacitation of a military threat, both detention and targeted killing fall within the historic domain of military conduct. Yet the requirement of certainty as to individual complicity in threatening activities lends legalization to the individual-specific determinations and begins to bleed into the civilian law concepts of criminal proof and due process.

Much of the pre- and post-September 11 thinking on the proper response to national security threats was organized into two categories: law enforcement and military operations. In the simplest rendition, the object of capturing enemy forces in war is to neutralize enemy combatants so that they no longer pose a risk to our troops. The object of the criminal law is to punish individuals for completed

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<sup>26</sup> Aware of the importance of perceived legitimacy and credibility, the military in Afghanistan has begun to allow NGOs to observe the unclassified portions of proceedings in Detainee Review Board adjudications. Bovarnick, *supra* note 17, at 38.

<sup>27</sup> Beginning at least with the creation of the Lieber Code to instruct troop behavior during the Civil War, the American military has maintained a public handbook of the conditions for the use of military force, in part to help maintain discipline in the use of force, and in part to ensure public awareness of the country's rules of engagement. *See generally* JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012).

acts.<sup>28</sup> The laws of war assign a dignity to the status of being a soldier and the object of detention is to render them incapable of further acting pursuant to their mission. By contrast, the criminal law seeks to condemn the individual who is found to have broken the fundamental codes of permissible conduct. The soldier is presumptively an honorable individual, while the criminal is an outcast.

While there is a merger of methods between the civilian criminal prosecution and the determination of military justification for targeting, the difference in purpose between the systems remains critical. Even the individual-specific determinations of modern warfare mask the fundamentally different objectives of criminal and military determinations. In its pure form, the criminal law justifies ongoing detention by a retrospective examination of the severity of the proven crime. Military decisions, whether through detention or targeted attack, are prospective assessments of the future dangerousness of the enemy combatant<sup>29</sup>—a decision for which past conduct may be the most important evidentiary consideration, yet may not be determinative, as we shall set out further.

### B. *The Stateless Combatant*

The problem in dealing with nonstate combatants flows from the ambiguous nature of the current form of military engagement. War necessarily implicates the two great traditions of international law. In its classic form, war is armed battle between two states that, in its conduct, puts civilians at risk of harm. Interstate relations and human rights protections for civilians together provide the defining wellspring for the broad sweep of international law.<sup>30</sup> Unifying the two is a sense

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<sup>28</sup> In constitutional terms this distinction is manifest in the prohibition on incarceration based on status rather than proof of criminal activity. *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 666–76 (1962) (holding a crime predicated on one’s status as a drug user to be unconstitutional).

<sup>29</sup> *See* Bovarnick, *supra* note 17, at 29 (“[T]he board must determine whether the detainee meets the criteria for internment and, if so, whether continued internment is necessary to mitigate the threat the detainee poses.”); Becker & Shane, *supra* note 3 (“[N]ames go off the list if a suspect no longer appears to pose an imminent threat.”).

<sup>30</sup> *See* Gabriella Blum, *The Laws of War and the “Lesser Evil,”* 35 *YALE J. INT’L L.* 1, 2–3, 7–9 (2010) (illustrating the importance of protecting civilians in conflict by drawing on human rights law and international humanitarian law). As expressed by the International Committee of the Red Cross, “[T]he law of war and the law of peace, international law and internal law, the scopes of which were at first clearly distinct, are today often applicable at the same time side by side. Thus, the Geneva Conventions and the human rights conventions may often be applied in cumulative fashion.” Dietrich Schindler, *The International Committee of the Red Cross and Human Rights*, 208 *INT’L REV. RED CROSS* 3, 9 (1979); *see also* RUTI TEITEL, *HUMANITY’S LAW* (2012) (discussing the impact of human rights norms across diverse international legal regimes); José E. Alvarez, *State Sovereignty Is Not Withering Away: A Few Lessons for the Future*, in *REALIZING UTOPIA—THE FUTURE OF*

of prohibition on state conduct. This prohibition can take two forms: limits on what constitutes legitimate belligerent actions toward other states (e.g., distinguishing self-defense from wars of conquest), or limits on how state conduct can permissibly affect civilians (e.g., the emergence of proportionality concerns on the relation between military objectives and the anticipated loss of civilian life or in the form of broader protections of human rights). By contrast, “[i]nternational law provides no clear guidance on when, in the absence of sustained interstate hostilities, an ‘armed conflict’ exists so as to trigger the application of the law of armed conflict.”<sup>31</sup>

Simply put, there is a great deal about the preexisting laws of war that seems poorly addressed to the current circumstances. For example, even a cursory review of the first two articles of each of the four Geneva Conventions reveals that they are meant to be organized as pacts among the “High Contracting Parties” governing their conduct in war among states.<sup>32</sup> The most ambitious of the four basic Conventions, the Third and Fourth Conventions, define their scope in terms of armed conflict among the contracting states or the territorial occupation of a state. Even under Common Article 3, which conditions the treatment of noncombatants, the contemplated application is outside of what is conventionally understood as international war; indeed, the predicate for Common Article 3 is “the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>33</sup>

The key, then, is that modern warfare challenges the state-focused premises of international law. Whether termed asymmetric warfare, the war on terror, or simply unconventional warfare, the critical fact is that states find themselves in protracted conflict with non-state actors, making direct application of old doctrine impossible. Indeed, in the aftermath of September 11, the Bush administration seized upon the fractured relation between terrorism and the laws of war to claim that, in the absence of complete correspondence between

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INTERNATIONAL LAW 26–28 (Antonio Cassese ed., 2012) (discussing the continuing relevance of sovereignty, albeit as changed by human rights norms).

<sup>31</sup> Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict–Criminal Divide*, 33 YALE J. INT’L L. 369, 376 (2008).

<sup>32</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 1, 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 1, 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva III, *supra* note 4, arts. 1, 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 1, 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

<sup>33</sup> Geneva III, *supra* note 4, at art. 3, 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

current emergencies and classic forms of war, the laws of war simply did not apply.<sup>34</sup> According to this logic, the absence of a state acting as the enemy obviated international law's limitations upon American conduct.<sup>35</sup> This position did not survive repeated scrutiny by the U.S. Supreme Court.<sup>36</sup>

Despite the arrival of the Obama administration, the questions raised over the past decade about the exact requirements of international law have not subsided. If anything, the increased use of drones for targeted killings in Yemen and Pakistan has only served to accentuate the pressures that modern warfare places upon the inherited laws of war.<sup>37</sup>

With the urgency of resolving this question undiminished, it is no surprise that debates over the proper way forward rage on. At present, the debaters fall into three basic camps. First there are those inclined to deal militarily with all suspects associated with terrorist activity, even if they are American citizens and even if their alleged connections to our enemies are more attenuated than the connections that have typified enemies in past wars.<sup>38</sup> Starkly opposed are civil libertarians, who challenge any departure from the normal operation

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<sup>34</sup> See Memorandum from President George W. Bush to Vice President Dick Cheney, et al. (Jan. 7, 2002), available at <http://www.npr.org/documents/2005/nov/torture/torturebush.pdf> (“I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.”).

<sup>35</sup> *Id.*

<sup>36</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006) (considering and rejecting the Bush administration's argument that “[s]ince Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a ‘High Contracting Party’—*i.e.*, a signatory of the Conventions, the protections of those Conventions are not . . . applicable to Hamdan”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 527 (2004) (considering and rejecting the Bush administration's argument that “respect for separation of powers and the limited institutional capabilities of courts in matters of military decisionmaking in connection with an ongoing conflict ought to eliminate entirely any individual process” (internal quotation marks omitted)).

<sup>37</sup> We turn specifically to the use of strikes by unmanned aircraft, the now well-known drones, in the discussion of targeted killing. For a comprehensive account and analysis of the expansion of drone use by the United States under President Obama, and of the use of internal procedures to compile kill lists of suspected terrorists, including in Pakistan and Yemen, see Gregory S. McNeal, *Kill-Lists and Accountability*, 102 *GEORGETOWN L.J.* (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1819583](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819583).

<sup>38</sup> Among the prominent advocates of this position was Senator Lindsey Graham. See Chris McGreal, *Military Given Go-Ahead to Retain Terror Suspects Without Trial*, *GUARDIAN*, Dec. 14, 2011, <http://www.guardian.co.uk/world/2011/dec/15/americans-face-guantanamo-detention-obama> (quoting Senator Graham as saying, “It is not unfair to make an American citizen account for the fact that they decided to help al Qaeda . . . and hold them as long as it takes to find intelligence about what may be coming next . . . . And when they say, ‘I want my lawyer,’ you tell them, ‘Shut up. You don’t get a lawyer.’”).

of the criminal justice system and who attempt to fold most or even all of the multifaceted military campaign against al-Qaeda into the mold of a criminal conspiracy, no different in kind from the Mafia or the Medellin cartel.<sup>39</sup>

These are oversimplifications, of course. There are many variations on both the hawkish and civil libertarian positions that embrace some but not all of the claims we have associated with these polar positions. In the main, however, each camp is fond of staking its arguments as a matter of the “rights” of the accused terrorists; for the proponents of the military model, the accused have no judicially enforceable rights comparable to those of criminal defendants, while for the civil libertarians the rights of captured terrorist suspects consist of the normal operation of the criminal justice system.

The third and final approach assumes the irreconcilability of the first two and proposes the creation of a distinct branch of the judiciary, sometimes called a national security court or terrorism court, with discrete procedures for handling allegations of involvement in terror, and with exclusive jurisdiction for such cases. As the leading proponents of this approach argue:

We already have specialized federal courts to deal with matters like bankruptcy, taxes and patents; the case here is far more compelling. In the past, Americans might have hoped that a national security threat would abate over time, and so the pressures on the civilian courts, whatever they were, would subside. Today we have no such luxury. We must create sensible institutions for the long haul.<sup>40</sup>

In our view, the issue of the forum is not central; whether adjudication occurs in the courts, the military, or some new institutional hybrid, the challenge remains the same. The core problem is the *object* of the inquiry that incorporates difficult adjudicative evaluations of enemy responsibility in the new form of warfare.

At the same time, we share a frustration with myopic debates that pit rights and no-rights arguments against one another. Our view, however, is that a properly grounded inquiry into the objectives of detention and prosecution, combined with an institutional sensitivity to the differences between law enforcement and military combat, can resolve many of the contested issues within the confines of existing

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<sup>39</sup> See, e.g., Anthony D. Romero, *Terrorists Are Criminals and Should Be Tried in Civilian Court*, U.S. NEWS & WORLD REP. (Feb. 16, 2010), <http://www.usnews.com/opinion/articles/2010/02/16/terrorists-are-criminals-and-should-be-tried-in-civilian-court> (explaining that federal courts are well equipped to handle cases like that of the Christmas Day bomber).

<sup>40</sup> Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19.



institutions. We therefore direct ourselves to the notion of targeting specific individuals in modern warfare, and not to the question of whether one or another tribunal is the appropriate venue for eventual prosecution. Our approach is to set out the objectives of combating terrorism and then to draw out the institutional and legal conclusions that flow from these objectives.

The Supreme Court has recognized on at least two occasions, perhaps in response to these competing considerations, that the capacity to detain enemy combatants outside the normal channels of state-to-state war was incident to the post-September 11 Authorization of Use of Military Force (AUMF).<sup>41</sup> We therefore begin by taking up the question of detention in order to highlight the difference between law enforcement functions and military operations. Our inquiry begins a step back from the immediate issues presented by the Guantánamo detainees, including the Supreme Court cases addressing their claims to habeas corpus relief, and constructs a ground-up foundation upon which to fashion a defensible detention and punishment system for the modern conflict with nonstate belligerents.

## II

### DETENTION AND ASYMMETRIC WARFARE

Detention provides the richest framework for legal doctrine to engage the challenge of war against nonstate actors. The brute fact of holding an individual in custody sharpens the analogy to the criminal law. As time passes from the moment of capture, questions press on the frail invocation of military necessity: Why detain *this* individual? And for how long? Furthermore, unlike the targeted killing discussion to which we turn later, detention is not necessarily a time-limited event; the legal questions resurface in everything from the conditions of detention to the prospect of ultimate release.

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<sup>41</sup> See *Hamdi*, 542 U.S. at 518 (finding that detention “for the duration of the particular conflict in which [the detainees] were captured is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use”); see also *Boumediene v. Bush*, 553 U.S. 723, 733–34 (2008) (reaffirming the holding of *Hamdi* while striking down the particular form of the Combatant Status Review Tribunals utilized for long-term Guantánamo detainees). Although neither the original nor the Iraq AUMF specifically addressed the detention of individuals without full criminal prosecutions, this was understood to be an inescapable incident of military engagement, presumably captured within the “necessary and appropriate” use of military force provisions of both AUMFs. For a fuller treatment of the relation between the AUMF and the need for detention authority, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2117–27 (2005).

### A. Normalizing “Transnational” Warfare

We start from the view that the legal categories inherited from instruments of international law do not provide direct answers to many of the crucial legal questions concerning modern warfare that law-bound governments now confront, particularly as presented in the need to detain combatants until the cessation of hostilities. At the heart of the difficulty is that the conventional laws of war do not adequately identify an intermediate status between combatants and civilians. As we have discussed, these controlling legal instruments were not drafted or designed with attention to the specific circumstances of long-term, multifront engagements with nonstate actors. As a matter of positive law, the structure of the formal laws of war does not fit protracted combat against nonstate forces. We thus begin by examining this problem of fit before reflecting on its potential resolution.

The problem begins with the absence of a definition of the detention of an irregular combatant. Under the international laws of war, a person captured by a belligerent power would fall within one of only two categories: combatant or civilian. The detention of combatants as prisoners of war is governed by the Third Geneva Convention,<sup>42</sup> while detained civilians fall under the Fourth Geneva Convention.<sup>43</sup> As the Israeli Supreme Court explained, a detainee became either a prisoner of war under the Third Geneva Convention, or a protected civilian under the Fourth Geneva Convention. Consequently, the law of war “regards unlawful combatants . . . as civilians” through a process of exclusion, given that they cannot be recognized as “combatants.”<sup>44</sup>

Under the Geneva Conventions, the void between combatants and civilians meant that the protections afforded to prisoners of war and the limitations on criminal punishment of soldiers would not attach to any irregular fighters. According to Article 4 of the Third Geneva Convention, a combatant is a prisoner of war if he belongs to any of the following categories: a member of the armed forces of a party to the conflict (there is no specified requirement that members of the armed forces wear a uniform to be eligible for prisoner-of-war status); members of a militia who meet the specified conditions (command responsibility, insignia, carrying arms openly, following laws of war); members of regular armed forces professing allegiance to a “government or an authority not recognized by the Detaining Power”; or “[i]nhabitants of a non-occupied territory, who on the approach of

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<sup>42</sup> Geneva III, *supra* note 4, 6 U.S.T. at 3317, 75 U.N.T.S. at 135.

<sup>43</sup> Geneva IV, *supra* note 32, 6 U.S.T. at 3518, 75 U.N.T.S. at 290.

<sup>44</sup> HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Israel 62(1) PD 507, 557 [2006] (Isr.).

the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”<sup>45</sup> Article 5 provides that when there is any doubt as to a captured person’s status, there is a presumption that such a person is a prisoner of war until a “competent tribunal” makes a determination to the contrary.<sup>46</sup> Thus, the only requirement of states holding prisoners of war under the Third Geneva Convention, apart from the protections against mistreatment in Common Article 3, was that a “competent tribunal” be available to determine if an individual was improperly classified as a combatant or civilian.<sup>47</sup>

Civilians under the Geneva Conventions fall under the reserve category of “protected persons”—all persons captured by a party to a conflict who are not protected under one of the other Geneva Conventions.<sup>48</sup> If a protected person is “suspected of or engaged in activities hostile to the security of the State,” that person may not be entitled to the full protections of the Fourth Geneva Convention.<sup>49</sup> In such a case, “such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.”<sup>50</sup> The clearest example of this circumstance occurs in Article 5, which explicitly provides that the right to communication may be denied to a protected person “where absolute military security so requires.”<sup>51</sup> However, such restrictions must be removed “at the earliest date consistent with the security of the State or Occupying Power.”<sup>52</sup>

The Fourth Convention also makes clear that the detention of protected persons is permitted if necessary for security reasons.<sup>53</sup> Here too the operative time seems to be detention until the “cessation of hostilities,” as with prisoners of war.<sup>54</sup> Article 27 permits states to

<sup>45</sup> Geneva III, *supra* note 4, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40.

<sup>46</sup> Geneva III, *supra* note 4, art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142.

<sup>47</sup> *Id.*

<sup>48</sup> Geneva IV, *supra* note 32, art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

<sup>49</sup> Geneva IV, *supra* note 32, art. 5, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

<sup>50</sup> Geneva IV, *supra* note 32, art. 5, 6 U.S.T. at 3520–22, 75 U.N.T.S. at 290, 292.

<sup>51</sup> Geneva IV, *supra* note 32, art. 5, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

<sup>52</sup> *Id.*

<sup>53</sup> See generally Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48 (2009) (analyzing Geneva IV).

<sup>54</sup> See Geneva III, *supra* note 4, at art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”). Indeed, some have argued that the distinction between POWs and civilian detainees is inconsequential on this score. See, e.g., Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 375 (2004).

“take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”<sup>55</sup> While Article 27 allows a state to deviate from some of the general protections afforded to protected persons, such measures may not be “more severe than . . . assigned residence or internment,”<sup>56</sup> and these measures may only be adopted when “absolutely necessary.”<sup>57</sup> The Fourth Convention also requires periodic review of the necessity for the involuntary detention of protected persons. According to Article 43, a protected person “shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board.”<sup>58</sup> If detention will be extensive, the detention must be reviewed at least twice a year, “with a view to the favourable amendment of the initial decision.”<sup>59</sup>

In the aftermath of the Geneva Conventions, the lack of an intermediate category became a serious problem in addressing wars fought by guerilla bands, particularly in cases of insurgency against colonial powers with decidedly superior conventional military forces. The formal application of the Geneva criteria would have guerilla fighters choose between the path of illegality in war or else certain defeat were they to choose to fight standing armies in uniform with firearms displayed, a militarily doomed enterprise. Additional Protocol I to the Geneva Conventions attempted to fill that gap by allowing guerilla fighters to hide their identities, with imprecise language holding them to the other obligations of fighting military targets and not deliberately targeting civilians.<sup>60</sup> In effect, the Additional Protocol would have defined the boundaries of warfare by the targets chosen. Targeting civilians—what today we would term terrorism—remained impermissible, while unconventional warfare against armies would fall within a new legalized category.

Unfortunately, the Additional Protocol called into question the fundamental premises of the Geneva Conventions: that it was possible to distinguish military and civilian combatants and objectives, and that battle could be directed to military objectives, as with the capturing of

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<sup>55</sup> Geneva IV, *supra* note 32, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

<sup>56</sup> Geneva IV, *supra* note 32, art. 41, 6 U.S.T. at 3544, 75 U.N.T.S. at 314.

<sup>57</sup> Geneva IV, *supra* note 32, art. 42, 6 U.S.T. at 3544, 75 U.N.T.S. at 314.

<sup>58</sup> Geneva IV, *supra* note 32, art. 43, 6 U.S.T. at 3544, 75 U.N.T.S. at 314.

<sup>59</sup> *Id.*

<sup>60</sup> See George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 7–10 (1991) (arguing that the purpose of Protocol I was to create an incentive for irregular fighters to distinguish civilian targets while allowing them to hide their identities some of the time).

territory or overtaking of a military installation.<sup>61</sup> Neither premise characterizes military engagements in asymmetric war, leading one critic to suggest that if “wars between States are on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well.”<sup>62</sup> The “dynamic of reciprocity and retaliation”<sup>63</sup> that allowed for the emergence of norms of state-to-state warfare over centuries was lacking in asymmetric warfare, leaving participants and civilians at considerable risk.

Additional Protocol I, in effect, partially relieved combatants of the obligation to distinguish themselves from civilians, which had in turn created a corresponding obligation of opposing armies to train their fire on the identified combatants rather than on the now-distinguished civilians.<sup>64</sup> In law-of-war terms, this was called the principle of distinction.<sup>65</sup> Among other reasons, because the Additional Protocol would have endangered civilian populations by removing the incentive for irregular combatants to distinguish themselves and would have expanded prisoner-of-war protections to such combatants, the United States refused to ratify the protocol.<sup>66</sup> It must be emphasized that, even under Additional Protocol I, al-Qaeda could not claim the status of a lawful belligerent because it is not fighting “against colonial domination and alien occupation” in a battle for self-determination.<sup>67</sup>

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<sup>61</sup> See Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT’L L. 339, 341–44 (2010) (distinguishing battle objectives in asymmetric war from those operative in conventional battles for territory).

<sup>62</sup> Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT’L REV. RED CROSS 149, 158 (2005).

<sup>63</sup> W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 86 (2003).

<sup>64</sup> Under Article 44 of Additional Protocol I, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly[.]

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 23 [hereinafter Additional Protocol I].

<sup>65</sup> SCHMITT, GARRAWAY & DINSTEIN, *supra* note 9, at 10–11 (reviewing law of armed conflict and finding that the principle of distinction is key to the modern law of war).

<sup>66</sup> PRESIDENT RONALD REAGAN, LETTER OF TRANSMITTAL OF PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 100-2, at iv (1987), *reprinted in* 81 AM. J. INT’L L. 910 (1987) (indicating American refusal to ratify).

<sup>67</sup> Additional Protocol I, *supra* note 64, art. 1, ¶ 4; Hakimi, *supra* note 31, at 378 (setting forth the criteria of Additional Protocol I).

Beyond the question of the formal classifications of combatants in asymmetric conflicts lies the further difficulty of the repudiation of norms of conduct applicable to battlefield armies by nonstate combatants. The routine disregard for any conventions of war (as with the al-Qaeda use of prisoner beheadings to sow terror) makes it increasingly difficult for a state army then to view itself as constrained by norms of conduct that emerged out of wars characterized by reciprocal stakes between soldiers. Armies have long inflicted harsh treatment on opposing forces thought to have violated reciprocal obligations on the battlefield. Indeed, the traditional laws of war, going back to the Lieber Code crafted for the Union Army in the Civil War, assumed the right of reprisal against soldiers who violated customary obligations, such as the right to safe surrender or the humane treatment of the wounded.<sup>68</sup>

Further, the use of civilians as camouflage challenges the obligation to protect civilians that emerges from both humanitarian law and human rights norms. The strategic recourse of nonstate combatants to hiding among the civilian population to conduct asymmetric warfare vitiates the assumption that state militaries can accurately distinguish (putatively nonbelligerent) civilian populations from enemy forces. Every military engagement then compels a separate analysis of the justification for the use of force because of uncertainty about who the combatants really are and the difficulty of disentangling the civilian population from the combatants.

For the United States, the unacceptability of Additional Protocol I left the unhappy choice of treating irregular combatants either as soldiers or as civilians. In the latter case, presumably civilian criminal law must apply (leaving aside the question of how such law would be applied by normal criminal courts of military commissions) unless there were some proof of specific security concerns—a category that raises once again the indeterminate status of prolonged detention of nonstate belligerents.<sup>69</sup> Thus, for example, U.S. Army Regulation

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<sup>68</sup> See FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 34 (Gov't Printing Office 1898) (1863), available at [http://www.loc.gov/tr/frd/Military\\_Law/pdf/Instructions-gov-armies.pdf](http://www.loc.gov/tr/frd/Military_Law/pdf/Instructions-gov-armies.pdf). For a magisterial treatment of the relationship between the Lieber Code and the muscular Union efforts during the war, see WITT, *supra* note 27, at 234–44 (2012).

<sup>69</sup> Under Geneva IV, a state involved in a war or other armed conflict with another state that is also a signatory to the Geneva Conventions is allowed to detain civilians for security reasons. Geneva IV, *supra* note 32, arts. 27, 42, 43, 6 U.S.T. at 3536, 3544–46, 75 U.N.T.S. at 306, 314, 314–15. There is no corresponding recognized law of war addressed to what we are terming transnational warfare. A detainee in this transnational warfare may be covered only by the International Covenant on Civil and Political Rights. See GERRY SIMPSON, LAW, WAR & CRIME 160 (2007). This treaty in turn addresses primarily the conditions of detention rather than its objectives and seeks to compel “respect for the inherent

190-8 anticipates a determination that an individual who is not a combatant would not be entitled to the protections of the Third Geneva Convention.<sup>70</sup> In such cases, those individuals would have to be tried criminally for specific criminal conduct, presumably under the ordinary law applied to civilians: “Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine *what acts* they have committed and what penalty should be imposed.”<sup>71</sup> At the same time, most human rights conventions allow some right of detention for purposes of national security, so long as such detentions are “grounded in law.”<sup>72</sup>

Thus, even to the extent that these issues were looming on the horizon in anticolonial uprisings that occurred at the time some of these instruments were drafted, no clear resolution emerged as to how they should legally be addressed. That lacuna does not stop advocates from arguing that international law *does* require A, B, or C; moreover, the values and principles underlying various bodies of international law might usefully inform the application of international law to modern terrorism. But we see these arguments more as aspirational—about what international law ought to be, in the minds of various proponents—than as positivistic statements about what international law already *is*. This lacuna, however, should not be taken as an invitation to claim that no law, or no international law, applies at all. Instead, it requires us to reflect on the foundational structures of modern warfare and how underlying normative legal principles and values ought to be adapted and applied to these circumstances.

The problem then becomes what to do with prisoners taken in what Eyal Benvenisti helpfully characterizes as transnational war, in which a state actor finds itself combating foreign nonstate actors beyond the state’s borders, as with the actions against al-Qaeda in Afghanistan.<sup>73</sup> Here the normal category of wartime detention does not readily apply to combatants who do not wear uniforms, blend into

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dignity of the human person” for all those under a state’s authority, regardless of the reason for and circumstances of the detention. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 176.

<sup>70</sup> DEP’T’S OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE MARINE CORPS, ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES ¶ 1.6(e)(10) (1997), available at [http://armypubs.army.mil/epubs/pdf/r190\\_8.pdf](http://armypubs.army.mil/epubs/pdf/r190_8.pdf).

<sup>71</sup> *Id.* ¶ 1.6(g) (emphasis added); see also BENJAMIN WITTES, LAW AND THE LONG WAR 40–41 (2008) (discussing the tension between ordinary criminal law and the Geneva Conventions).

<sup>72</sup> Hakimi, *supra* note 31, at 380–81 & n.51, 387 (explaining the reserved powers of detention under national security authority).

<sup>73</sup> Benvenisti, *supra* note 61, at 341 (defining transnational warfare).

the civilian population, and engage in a military conflict of unspecified duration. Given the amorphous front and fighting force, an indiscriminate use of detention until the end of hostilities could amount to possible life sentences for captured militants—including those captured at a young age or those who have not committed particularly heinous acts—an outcome that seems disproportionately harsh.<sup>74</sup>

Despite the formalism of the inherited categorical distinction between civilians and combatants, the practical laws of war and human rights law have effectively created new categories for addressing the persistent problem of asymmetric war. In the Israeli Supreme Court's discussion of targeted killings, for example, the formal (and somewhat formalistic) treatment of all nontraditional combatants as presumptively protected civilians is quickly coupled with practical exceptions of military necessity that act to create a third category between civilians and combatants.<sup>75</sup> A similar approach to developing practical accommodation has come with the increased focus on the proportionality between the overall military objectives and the likely collateral consequences of civilian casualties.<sup>76</sup> Here again, the practicalities of this form of warfare have moved out ahead of the formal doctrines of international humanitarian law.<sup>77</sup>

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<sup>74</sup> See Jack Goldsmith, *Long-Term Terrorist Detention and a U.S. National Security Court*, in *LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM* 75, 77 (Benjamin Wittes ed., 2009) (identifying as “problematic” the harsh consequences of indefinite detention in the context of unconventional war).

<sup>75</sup> HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov't of Israel* [Dec. 13, 2006] (Isr.), slip op. paras. 38–40, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/A34/02007690.A34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf) (laying out conditions under which a person classified as a civilian under the Geneva civilian/soldier binary may nevertheless be targeted for killing under the Convention “for such time as he is taking part in . . . hostilities” (internal quotation marks omitted)). The Israeli Supreme Court's opinion stresses the danger of a “revolving door” of terrorism in which complete immunity from military response inures to militants so long as they are not in the very act of committing violence. *Id.* at para. 40.

<sup>76</sup> The Israeli Supreme Court was acutely aware of such proportionality concerns in its landmark decision. *Id.* at para. 45 (“[A]ttack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage . . .”).

<sup>77</sup> Notably, both the United States and Israel have placed internal limits on their respective targeted killing programs such that the chief executive's personal approval is required prior to carrying out strikes that implicate innocent civilians. Steven R. David, *Israel's Policy of Targeted Killing*, 17 *ETHICS & INT'L AFFS.* 111, 117 (2003) (“[I]f innocent casualties could occur as a result of the operation, the IDF will again seek the approval of the minister of defense and the prime minister before launching the attack.”); Becker & Shane, *supra* note 3, at A1 (“When a rare opportunity for a drone strike at a top terrorist arises—but his family is with him—it is the president who has reserved to himself the final moral calculation.”).



### B. *Limits of Criminal Law*

In the first years after September 11, much of the debate about the use of domestic legal structure to handle foreign combatants centered on the question of whether terrorism was more like crime or like war; once that threshold judgment was made, various legal entailments and consequences were thought to follow logically.<sup>78</sup> But as we have accrued more experience with these issues over a decade, it has become clearer that the threshold question of war versus crime does not fully or adequately resolve the range of urgent legal questions that must be answered.

Invoking the criminal law immediately differentiates the new asymmetric warfare from customary state-to-state conflicts. The basic problem is that war turns on killing and capture—the heart of the prohibitions of ordinary criminal law. The attempt to impose a legal regime on the conduct of warfare required a disciplinary convention apart from the ordinary criminal code, even though many of the captured soldiers would have engaged in acts of violence that would otherwise routinely be subject to criminal prosecution. In dealing with captured soldiers in the conventional war context, act-based prosecutions are not even an option for detained enemy soldiers.<sup>79</sup> Detention is the only form of incapacitation permitted, other than killing.<sup>80</sup> Soldiers are not committing crimes; as such, they are immune from prosecution (unless they engage in nonroutine means of waging war, that is, war crimes). Under the Geneva Conventions, for example, captured soldiers are prisoners of war and are afforded the same protections against punishment as the soldiers of the detaining army.<sup>81</sup> This is referred to in the commentary as the principle of assimilation.<sup>82</sup> In turn, the principle of assimilation is the modern adaptation of the Civil War-era Lieber Code, which stated that the “municipal laws,” as the normal civilian power was termed, of the

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<sup>78</sup> Framed in those terms, the debate over the criminal versus military nature of terrorism was present from the immediate aftermath of September 11. *See, e.g.*, JENNIFER ELSEA, CONG. RESEARCH SERV., RL31191, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 2 (2001), available at <http://www.fas.org/irp/crs/RL31191.pdf> (presenting early debate over the criminal versus military quality of terrorist attacks and legal responses to terrorism).

<sup>79</sup> *See* Geneva III, *supra* note 4, at art. 87–88, 6 U.S.T. at 3384–86, 75 U.N.T.S. at 202 (discussing sentencing and punishment).

<sup>80</sup> *See* Geneva III, *supra* note 4, at art. 89, 6 U.S.T. at 3386, 75 U.N.T.S. at 204.

<sup>81</sup> *See* Geneva III, *supra* note 4, at art. 82, 6 U.S.T. at 3382, 75 U.N.T.S. at 200.

<sup>82</sup> Int'l Comm. of the Red Cross [ICRC], *Commentary, Convention (III) Relative to the Treatment of Prisoners of War* art. 46 (Jean S. Pictet ed., 1960) [hereinafter Geneva III Commentary], available at <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=A649D1CF505571E3C12563CD0051AE42>.

respective countries of armies facing one another have no effect and may not be applied to captured soldiers.<sup>83</sup>

As a result, there has never been a general practice of trying enemy soldiers as soldiers *in any court*.<sup>84</sup> Part of the reason is that the detention of enemy soldiers involves a prospective judgment of their future dangerousness, while criminal law is concerned with the proper level of punishment for already-completed acts. In contrast to the detention of enemy combatants, under the criminal law the “focus is retrospective, rather than prospective . . . .”<sup>85</sup> Consequently, the laws of war have been directed to detention rather than criminal prosecution because soldiers are not being punished; they are detained to keep them from being a threat on the battlefield. We did not try enemy soldiers simply because they shot at Union troops in the Civil War, or at American troops in World War I, World War II, or any other war. Although military tribunals have been used in extraordinary cases to try enemy belligerents whose conduct was deemed to violate fundamental humanitarian norms and thereby to constitute war crimes, trial has never been the presumptive disposition of the enemy in war.<sup>86</sup> Instead, captured enemy soldiers have typically been detained for the purpose of disabling them from continuing the fight, then released once the war ends or in pursuit of some tactically valuable end, as through an exchange of prisoners.<sup>87</sup>

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<sup>83</sup> Article 41 of the Lieber Code provides, “All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.” LIEBER, *supra* note 68.

<sup>84</sup> As late as World War II, the idea of prosecuting soldiers was seen as a departure from the norm that required justification. See Jonathan Hafetz, *Military Detention in the “War On Terrorism”: Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 44 (2012) (“[W]hereas a typical German soldier during World War II could be detained only as a prisoner of war, and was not subject to prosecution under domestic criminal law, a person held today for aiding al Qaeda may be prosecuted in federal court for providing material support for terrorism, held indefinitely in law-of-war detention under the AUMF, or prosecuted for a war crime in a military commission.”).

<sup>85</sup> Hakimi, *supra* note 31, at 383.

<sup>86</sup> The formal contours of the prosecution of soldiers for war conduct begins with the Nuremberg trials, which limited the jurisdiction of war crime prosecutions, irrespective of domestic law, as follows:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288.

<sup>87</sup> See Geneva III, *supra* note 4, at art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224 (requiring repatriation of prisoners of war as quickly as possible at the cessation of hostilities).

This is the heart of the problem. Unlike the criminal law, status-based wartime detention often does not even involve a specific act; it is much more obviously tied to affiliation, namely, the wearing of a uniform. But terrorism itself is also a crime. Terrorist organizations (unlike armies) are criminal organizations whose object is to attack civilians, not capture territory. Thus, anyone participating in such an organization is also committing a crime and can be prosecuted.<sup>88</sup>

In fighting a nonstate adversary organized as a paramilitary force, neither category fits well. Because al-Qaeda is a military force, it may be necessary in the course of degrading its military capacity to detain the cook and the driver, rather than just the bomb-maker—as indeed we have.<sup>89</sup> It would be easy to justify detention of the cook or driver if al-Qaeda were viewed as a proto-army and principles of disabling an adversary were to apply. But it is hard to bring the act of driving or cooking into the act-based domain of criminal prosecution, except through expansive recasting of what constitutes a crime.<sup>90</sup>

One of the effects of a prolonged and legally unclear war against terrorist operatives has indeed been the significant expansion of the reach of a series of inchoate crimes. This is part of the effort to enlist the criminal law in the larger project of emphasizing prevention of terrorist attacks before they occur. Since September 11, more of the actions taken by members, affiliates, or individual supporters of terrorist groups are now prosecuted as crimes. This is the logic of the expansive practice of charging alleged terrorists with the crime of material support to terrorism, as well as the aggressive use of criminal conspiracy charges.<sup>91</sup> It is not only the concrete act of terrorism itself, such as bombing a subway, that is criminal, but other forms of

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<sup>88</sup> Indeed, it has been criminalized as such in the United States. See *infra* notes 91–93 and accompanying text.

<sup>89</sup> *Bin Laden Cook Arrives in Sudan After Guantánamo Release*, BBC NEWS, July 11, 2012, <http://www.bbc.co.uk/news/world-africa-18799181>.

<sup>90</sup> Matthew Waxman aptly captured this problem in an article that examined the evidentiary questions posed by the individual assessments necessary to detain suspected terrorists. The problem, as Waxman summarized, is that in the “criminality-versus-warfare dichotomy,” the basic decisions that must be made with regard to suspected terrorists “do not fit neatly into either framework.” Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1376, 1378 (2008).

<sup>91</sup> See 18 U.S.C. §§ 2339A, 2339B (2012) (defining the crimes of providing material support to terrorists and criminal conspiracy to engage in certain acts associated with terrorism). For an early, post-September 11 comprehensive analysis of these statutes, see Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408 (2003). For an excellent analysis of how these statutes have been used in concrete cases and an analysis of the general subject, see Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007).

connection and participation (including providing oneself as material support) that can be crimes or trigger associated civil penalties.<sup>92</sup>

If we were thinking and acting fully within the conventional “law of war” framework, this would present a marked contrast. Not only are soldiers immune from criminal prosecution, but we would find it all the more strange to consider prosecuting the general’s driver, cook, etc. But even these low-level actors, when providing material support to terrorism in the form of attacking military targets such as our soldiers even on the conventional battlefield, are committing crimes and can be prosecuted no matter how remote they are from actual attacks upon civilians.

The crime of material support for terrorism is a broad concept that has already forced courts to confront the limits of what may be prosecuted, including against American citizens.<sup>93</sup> At Guantánamo, for example, some detainees are detained for attacks on our soldiers on the conventional battlefield.<sup>94</sup> These individuals would be treated as simple prisoners of war had they been part of a conventional army; in a conventional war, this is ordinary military activity.

In general, some alleged terrorists, such as Khalid Sheikh Mohammed, might be responsible for acts that could be prosecuted even in a customary war (such as acts of terror directed at civilians); other times their acts are those that would be privileged in wartime (such as shooting in a firefight with soldiers). But in unconventional war, these acts are both evidence of affiliation and specific acts for which criminal prosecution may be sought. Unlike conventional war, in which it is the status of being a soldier that typically controls, in the context of terrorism it is natural to think in terms of specific acts, which creates a pull toward an act-based justification for detention. This partly explains why the line between detention and criminal prosecution becomes so blurred.

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<sup>92</sup> See 18 U.S.C. § 2339A(b)(1) (2012) (defining “material support” to include “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials”).

<sup>93</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2714, 2720–21 (2010) (holding that “material support” as used in 18 U.S.C. § 2339B applied to the provision of expert advice (including legal advice) by U.S.-based organizations, even for seemingly benign legal advocacy activities, and that this provision withstood First Amendment scrutiny).

<sup>94</sup> For the best account of the difficulty of prosecuting, even in military commissions, the low-level functionaries held at Guantánamo, see JESS BRAVIN, *THE TERROR COURTS: ROUGH JUSTICE AT GUANTÁNAMO BAY* (2013).

As a practical matter, however, it is often difficult to use the forms of normal civilian prosecution for individuals who are seized in the course of a military conflict.<sup>95</sup> But the critical question is not simply one of criminal procedure; it is the *object* of the investigation. Ascertaining status as a combatant for purposes of detention is not the same thing as deciding to try individuals as punishment for discrete acts of terror. Despite the repeated habeas petitions presented to the District of Columbia courts on the propriety of detention,<sup>96</sup> there is no reason that this form of review should be available in the Article III courts in the *first* instance. In the absence of tribunals capable of making the initial screening decision—and, especially, as the time of detention grows—federal courts will be conscripted to serve this role.<sup>97</sup> But as a matter of policy, it appears preferable to have in place institutions that can make initial determinations of the propriety of detention of irregular combatants whether the zone of conflict and the *situs* of detention are near or far from the territorial United States.<sup>98</sup>

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<sup>95</sup> One of the obvious challenges to such prosecution is, of course, evidentiary. Lieutenant Colonel Bovarnick notes that the rules of evidence employed by Detainee Review Boards include few restrictions on admissibility. Bovarnick, *supra* note 17, at 23 (“The rules of evidence that apply in a criminal court do not apply at a DRB, which is an administrative hearing. The board may consider any information offered that it deems relevant and non-cumulative.”). Among the aspirational goals for improving the Detainee Review Boards, highlighted by observing NGOs, is making earnest attempts to have capturing units focus on evidence gathering notwithstanding the fact that this is outside the traditional purview of soldiers on the battlefield. *Id.* at 39 (“While this is not likely to occur in the near term, a culture change such as the one suggested by Mr. Horowitz [of the Open Society Institute]—evidence gathering rather than intelligence gathering—is a method that units could adopt.”).

<sup>96</sup> See Benjamin Wittes, Robert M. Chesney & Larkin Reynolds, *The Emerging Law of Detention 2.0: The Guantánamo Habeas Cases as Lawmaking*, BROOKINGS INST. 1 (May 12, 2011), <http://www.brookings.edu/research/reports/2011/05/guantanamo-wittes> (last updated Mar. 29, 2013) (reporting on the development of the law of detention “through the common-law process of litigating the habeas corpus cases of the roughly 170 detainees still held at Guantánamo”); see also *infra* note 109 (detailing numerous habeas cases in D.C. courts).

<sup>97</sup> In *Hamdan*, the Supreme Court made clear that the ad hoc quality of the government’s detention policies was a source of liability under both domestic and international law. In response to the government’s argument that the Geneva Conventions did not apply to the war with al-Qaeda, which was not a signatory to the Conventions, the Court pointed to Common Article 3 of the Geneva Conventions and found that the term “regularly constituted court” in Common Article 3 excluded specially constituted military commissions. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006).

<sup>98</sup> The lack of clear institutional responsibility for the detention decisions compromised the government’s claim for military authority to maintain the detention regime. Indeed, in *Hamdi*, Justice Souter found that the government had not demonstrated that it was “acting in accord with the laws of war authorized to be applied against citizens by the [AUMF].” *Hamdi v. Rumsfeld*, 542 U.S. 507, 551 (2004) (Souter, J., concurring in part and dissenting in part).

The task of ensuring accurate initial identification decisions could be handled by civilian courts, though it is a nonobvious use of the judiciary to make determinations of the military role of detained individuals without any necessary sentencing implications. Thus, for example, the “Determination of Guantánamo Cases Referred for Prosecution” from the Department of Justice (DOJ) and Department of Defense (DOD) addresses in broad strokes the considerations for referral to military commissions or Article III courts, with a preference for the latter, but only for matters already referred for possible prosecution.<sup>99</sup> The DOJ-DOD protocols do not address the verification issue for detention.

But individuals captured through military actions are not necessarily either best or most efficiently tried through the normal criminal justice system. There are a range of protocols that need to be established to address the particulars of bringing criminal charges against these individuals that are unlikely to be in conformity with normal criminal procedure, and it is unlikely that individuals such as Khalid Sheikh Mohammed would or could be released from detention if the prosecution for specific criminal conduct were to fail.<sup>100</sup> The limited U.S. practices from past wars do not indicate that the criminal culpability of enemy combatants has generally been thought to be a matter of ordinary criminal prosecution. Nuremberg is a clear example of a tribunal specifically designed to *prosecute* the specific criminal conduct of German officers and soldiers. Because it was constituted after the war was over, its only function was to assess criminality, and those individuals acquitted at Nuremberg were released.<sup>101</sup> Similarly, a special military commission was convened for the trial of Masaharu

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<sup>99</sup> U.S. DEP’T OF DEFENSE & U.S. DEP’T OF JUSTICE, DETERMINATION OF GUANTÁNAMO CASES REFERRED FOR PROSECUTION 1 (2009), available at <http://www.justice.gov/opa/documents/ta-ba-prel-rpt-dptf-072009.pdf>.

<sup>100</sup> Attorney General Holder adverted to this point in his initial declarations that Khalid Sheikh Mohammed (KSM) would be subject to criminal prosecution, presumably in New York. To some consternation, he also added that even were KSM to be acquitted of the specific criminal charges brought against him, the government would nonetheless continue to hold him. Jake Sherman, *Eric Holder Grilled by Senate Republicans*, POLITICO (Nov. 19, 2009, 4:54 PM), <http://www.politico.com/news/stories/1109/29670.html> (“Wisconsin Sen. Herb Kohl . . . asked the question that many have raised: What if Mohammed gets off on a technicality or is acquitted? Holder assured the committee that the United States has the ability to keep Mohammed in custody as an enemy combatant.”). For an earlier discussion of the pressures on the criminal justice system from the efforts to try foreign terrorists, see generally Samuel Issacharoff, *Judging in the Time of the Extraordinary*, 47 HOUS. L. REV. 533 (2010).

<sup>101</sup> Specifically, the Nuremberg court acquitted and ordered the release of defendants Hjalmar Schacht, Franz von Papen, and Hans Fritzsche. See 22 INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG), THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG,

Homma for, among other things, his responsibility for the Bataan Death March.<sup>102</sup> But there have been only a handful of prosecutions of Axis war criminals in the ordinary criminal courts of any country after World War II, as with the trial of Klaus Barbie in France in 1987.<sup>103</sup>

### C. *War and Crime*

For much of its existence as a detention site, Guantánamo's name has served as shorthand for the initial forms of responding to September 11 under the Bush administration. Although as a candidate for office in 2007, President Obama vowed to close Guantánamo,<sup>104</sup> the political and logistical realities frustrated that aim.<sup>105</sup> To this day, much attention is still focused on the approximately 171 detainees who remain at Guantánamo,<sup>106</sup> particularly as these detainees have become a focus of partisan divides.<sup>107</sup> Our concern, however, is with the policies underlying detention more generally, rather than with the particular *situs* of detention, whether at Guantánamo or in Afghanistan or aboard a naval vessel.<sup>108</sup> Absent some coherent policy

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GERMANY 507, 519, 526 (1946), available at <http://werle.rewi.hu-berlin.de/IMTJudgment.pdf>; Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488, 510 (1955).

<sup>102</sup> See generally David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MIL. L. REV. 40, 45–58 (2002) (discussing trial by military commission of Masaharu Homma).

<sup>103</sup> For an overview of the historical background of the Barbie Trial and its relationship to the Nuremberg tribunals, see Guyora Binder, *Representing Nazism: Advocacy and Identity and the Trial of Klaus Barbie*, 98 YALE L.J. 1321 (1989).

<sup>104</sup> ROGER D. HODGE, *THE MENDACITY OF HOPE: BARACK OBAMA AND THE BETRAYAL OF AMERICAN LIBERALISM* 182 (2010).

<sup>105</sup> The first major recognition of the need for some system of prolonged detention came in a speech at the National Archives. See Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. TIMES, May 22, 2009, at A1, available at <http://www.nytimes.com/2009/05/22/us/politics/22obama.html>. For the full text of the speech, see *Remarks of the President on National Security*, WHITE HOUSE (May 21, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09).

<sup>106</sup> See Ben Fox, *Guantánamo Closure Hopes Fade as Prison Turns 10*, Jan. 10, 2012, <http://www.deseretnews.com/article/700214085/Guantanamo-closure-hopes-fade-as-prison-turns-10.html> (discussing the remaining 171 Guantánamo prisoners in depth). Of those 171 detainees, forty-six are “indefinite detainees” who will not be charged or released, eighty-nine are eligible for transfer or release, six face death-penalty trials, four are convicted war criminals, and one is serving a life sentence. Carol Rosenberg, *Why Obama Hasn't Closed Guantánamo Camps*, MIAMI HERALD, Jan. 7, 2012, available at <http://www.miamiherald.com/2012/01/07/2578082/why-obama-hasnt-closed-Guantanamo.html>.

<sup>107</sup> The stalemate over Guantánamo resulted in the statutory prohibition on the transfer of detainees under the terms of the National Defense Authorization Act for Fiscal Year 2012. H.R. Res. 1540, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540enr/pdf/BILLS-112hr1540enr.pdf>.

<sup>108</sup> See DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 249–52, 258 (2012) (discussing the capture in Somalia of Ahmed Abdulkadir Warsame, who was then held for three months in international waters

on detentions, the legal challenge to the indeterminate status of detainees plays out in the habeas context in the federal courts (whether in claims by detainees at Guantánamo<sup>109</sup> or in Afghanistan<sup>110</sup>). Ultimately, however, we agree with Ben Wittes that “habeas review shows up only as a stopgap against injustice. It never operates as the front-line defense against wrongful conviction.”<sup>111</sup>

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aboard the U.S.S. Boxer while being interrogated and while officials wrestled over where to send him for detention or trial).

<sup>109</sup> After *Boumediene v. Bush*, 553 U.S. 723 (2008), the D.C. District and Circuit Courts issued numerous decisions in response to Guantánamo habeas petitions, thereby creating a de facto common law on the scope of the government’s authority to detain. The Obama administration argued that it could detain members of AUMF-covered groups as well as nonmembers who provided support to such groups. See Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay at \*2, *In re Guantánamo Bay Detainee Litigation*, No. 08-442 (TFH) (D.D.C. Mar. 13, 2009), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>. However, the D.C. District Court held that while individuals who participated in the command structure of a terrorist organization could be detained at Guantánamo, nonmembers who merely provided support to such an organization could not. See *Hamlily v. Obama*, 616 F. Supp. 2d 63, 76–77 (D.D.C. 2009) (holding that substantial support for a terrorist organization could not, by itself, justify detention); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68, 71 (D.D.C. 2009) (authorizing detention for those who “receive and execute orders within [the enemy organization’s] command structure,” but precluding it for those not “members of the enemy organization’s armed forces”). A D.C. Circuit panel subsequently adopted a more expansive view of the executive’s detention authority, however, holding that nonmembers who had “purposefully and materially supported” enemy forces could be detained. See *Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010). The *Al-Bihani* panel majority also declared the international laws of war to be “inapposite” in determining the scope of the president’s war powers, but, in a subsequent explanatory statement denying *en banc* review, a majority of the circuit judges declared the discussion of international law of war principles in *Al-Bihani* to be “not necessary to the disposition of the merits.” *Id.* at 871; *Al-Bihani v. Obama (Al-Bihani II)*, 619 F.3d 1, 1 (D.C. Cir. 2010) (*en banc*). D.C. Circuit decisions also clarified what types of evidence could be used to demonstrate membership in a terrorist group, including attendance at a training camp or guesthouse. See *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011) (discussing the significance of guesthouse attendance); *Al Odah v. Obama*, 611 F.3d 8, 17 (D.C. Cir. 2010) (considering whether training camp attendance alone could be sufficient to justify detention).

<sup>110</sup> In *Al-Maqaleh v. Gates*, District Judge John Bates held that habeas was indeed available for at least three non-Afghan individuals being held at the Bagram Theater Internment Facility in Afghanistan. 604 F. Supp. 2d 205, 235 (D.D.C. 2009). The D.C. Circuit reversed Bates’s ruling, however, holding that, under *Boumediene*, federal district courts did not have jurisdiction over such habeas claims because the United States had no intent to permanently occupy Bagram, and because Bagram was located in an active war zone. *Al-Maqaleh v. Gates*, 605 F.3d 84, 97–98 (D.C. Cir. 2010).

<sup>111</sup> WITTES, *supra* note 71, at 152. Habeas review through the D.C. courts has now become the driving force for all sorts of detention policies, including even the standards for the government’s evidence justifying detention. District Judge Kessler first resisted the government’s reliance on “mosaic theory,” which would allow individual pieces of evidence to be assessed in the context of all of the evidence on record, rather than independently. See *Ahmed v. Obama*, 613 F. Supp. 2d 51, 56 (D.D.C. 2009) (arguing that mosaic theory is “only as persuasive as the tiles which compose it”). Circuit Judge Randolph of the



Despite the heat over the detention debate, or perhaps because of it, it may be more fruitful to rediscover first principles.

The Supreme Court's Guantánamo decisions, as we read them, invite precisely this inquiry. Starting with *Hamdi v. Rumsfeld*,<sup>112</sup> the Court held out the possibility that the constitutional requirements for detention decisions "could be met by an appropriately authorized and properly constituted military tribunal."<sup>113</sup> In *Boumediene v. Bush*,<sup>114</sup> the Court analyzed the availability of habeas relief as turning in large measure on "the *adequacy* of the process through which that status determination was made."<sup>115</sup>

Focusing on process unfortunately strains the historic divide between military and police activities. The objective of police work is to apprehend targets and to bring them to trial in the criminal justice system. Virtually all aspects of their engagement with arrestees, from the *Miranda/Dickerson* warnings to the formalized chain of custody processes for evidence, are undertaken with an eye to permitting the orderly prosecution of the criminal suspect. By contrast, the objective of a military operation is to disable a threat and to render the enemy incapable of posing a new threat, including through the use of deadly force. All the objectives of a military action concern the termination of the threat, and battlefield procedures are generally not designed to

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D.C. Circuit repudiated Judge Kessler's approach, however, and suggested that courts apply "conditional probability analysis," in which they view each allegation in light of the other evidence. See *Al-Adahi v. Obama*, 613 F.3d 1102, 1105–06 (D.C. Cir. 2010) (noting that the district court "wrongly required each piece of the government's evidence to bear weight without regard to all (or indeed any) other evidence in the case" (internal quotation marks omitted)). Subsequent D.C. Circuit decisions followed Judge Randolph's admonition. See, e.g., *Uthman*, 637 F.3d at 407 (noting that the court is to "consider all of the evidence taken as a whole"); *Salahi v. Obama*, 625 F.3d 745, 753 (D.C. Cir. 2010) (deeming it appropriate to consider the evidence "collectively rather than in isolation"). Other procedural issues that the D.C. courts addressed include the admissibility of hearsay evidence and the appropriate standard of proof in Guantánamo habeas proceedings. See *Al-Bihani*, 590 F.3d at 879 (permitting the use of hearsay evidence but requiring courts to assess the evidence's reliability); *id.* at 878 (holding a preponderance of the evidence standard constitutional); *Al-Adahi*, 613 F.3d at 1103 (suggesting that a standard lower than preponderance of the evidence might be appropriate).

<sup>112</sup> 542 U.S. 507 (2004).

<sup>113</sup> *Id.* at 538.

<sup>114</sup> 553 U.S. 723 (2008).

<sup>115</sup> *Id.* at 766 (emphasis added). Justice Kennedy went on to contrast the role of habeas: "Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. It appears the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause . . ." *Id.* at 779–80 (citations omitted). See also *Hamdan v. Rumsfeld*, 548 U.S. 557, 587 (2006) (striking down detention review because "the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established").

facilitate an alternative goal of eventual prosecution. Mission-specific rules of engagement and the background principles of the law of war primarily ensure that military engagements themselves remain within prescribed boundaries. They are not designed to enable persons captured in those engagements to be prosecuted in a civilian court system.

As much as the new battlefield places a premium on adjudicative facts (i.e., why this person?), this does not merge the objectives of trial for criminal and military detention purposes. Criminal defendants are charged with violating the norms of our society, applicable to them because they are citizens or residents or are involved in activities that take place within our borders or have effects there, or that affect our personnel or other sovereign interests abroad. Generally speaking, our constitutional norms of criminal procedure are designed to provide protections to those within or sufficiently connected to our society who are charged with violating the norms of that same society.<sup>116</sup> Turning nonprivileged captured combatants or irregular armies, such as al-Qaeda, into criminal defendants may paradoxically entitle them to *more* legal protection than the soldiers of lawful armies who are obligated to distinguish themselves from the civilian population.<sup>117</sup>

For our purposes, however, the central effects of the failure of irregular combatants to identify themselves are that it increases the risk of error in determining who is and who is not a properly detained combatant, and correspondingly increases the likelihood of innocent civilian casualties and detentions. This lack of certainty over identification means that legal processes will be infused into the detention regime of nonprivileged combatants in a way that would not be true of captured uniformed soldiers from conventional armies. Where the status of a detainee as a combatant is in dispute, as with individuals seized in the course of military operations abroad against a clandestine force, there is a need for a competent tribunal to make that

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<sup>116</sup> Philip Hamburger provides an illuminating discussion of the traditional view that allegiance to the nation was a precondition for the protections of its laws. The young American republic considered itself bound by its internal laws but not as a consequence of the rights claims of those who had taken up arms against the U.S. Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009).

<sup>117</sup> One reason for the specific protections afforded prisoners of war was to induce soldiers to conform to the rules of war and to protect the noncombatant civilian population from being confused for belligerents. To offer the same treatment, let alone superior treatment, to nonprivileged combatants would undermine whatever remains of the incentive structure for soldiers to advertise the fact of their being combatants. Under traditional law-of-war terms, the fact that unlawful combatants do not wear uniforms and do not display weapons has the primary effect of raising the risk of civilian casualties in battle.

determination. It matters whether someone detained at Guantánamo or elsewhere is an al-Qaeda operative as opposed to some villager who was turned over to local forces because someone coveted his motorbike.

In the terms of the Geneva Conventions, it is only civilians under Geneva IV whose status is subject to periodic review every six months, not privileged prisoners of war under Geneva III.<sup>118</sup> By contrast, the extra process measures that are emerging in the battlefield attach to the assessment of whether or not a detainee is in fact an unlawful combatant.<sup>119</sup> Once that status determination is made, however, there is no reason under the laws of war or any sensible policy to give irregular combatants more rights than ordinary soldiers. Simply put, the unilateral conduct of unlawful combatants in refusing to distinguish themselves from the civilian population cannot endow them with rights they would not have as lawful combatants. At the same time, the fact that there is no corresponding state enemy imposes on the capturing nation responsibility for monitoring the continued well-being of the captives, including the decision as to when release is justified or compelled. In normal war conditions, that decision ultimately rests with the state patron of the captured soldier, who through surrender or prisoner exchanges can secure the end of detention and its attendant burdens.

Uncertainty over the status of detainees should not be confused with the beginning of a prosecution. As expressed by the Supreme Court with regard to the AUMF following September 11, “[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.”<sup>120</sup> Thus, in the first instance, military tribunals, such as the Detainee Review Boards currently being used in Afghanistan, appear best situated to determine the status of a battlefield captive as a combatant, and to assess preliminarily the continued threat posed by that individual. As we will set out, the need to make that individuated assessment differentiates immediately the detention of irregular combatants from the relatively routine processing of prisoners of war of a belligerent army—the customary instruction to yield “name, rank, and serial number” upon capture.

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<sup>118</sup> Geneva IV, *supra* note 32, art. 78, 6 U.S.T. at 3366–68, 75 U.N.T.S. at 336–38 (requiring that internment of noncombatants “shall be subject to periodical review, if possible every six months, by a competent body set up by the said [capturing] Power”).

<sup>119</sup> John Duffy helped us with formulating this point.

<sup>120</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *see also* *Hakimi*, *supra* note 31, at 379 (“Detention . . . is not about punishment; it is about incapacitating persons and thereby containing the security threat they pose.”).

The historic legitimacy of detaining enemy fighters not for what they have done but because of who they are—on account of their *status* as enemy belligerents as opposed to their having committed any particular criminal *act*—is why it is possible that an individual alleged to belong to al-Qaeda might be absolved of war crimes and yet still be subject to detention. Substantive criminal law in the United States has long forbidden detention based on status rather than conduct,<sup>121</sup> with only discrete and distinguishable exceptions. In the military context, in contrast, status-based detention of enemy belligerents is the norm, not the exception. Moreover, the traditional scope of this detention authority is broad: In times of war, it is as permissible to detain the enemy military's cook as it is the bombardier. Absent a specific war crimes prosecution, it is the fact of being a soldier that justifies detention rather than specific proof of having committed a particular offense.

#### *D. Individuated Proof and the Justification for Detention*

The object of this Article is not to provide a top-to-bottom account of a fully formed detention policy. Rather, the goal is to situate the current debates over detention—and subsequently over the use of targeted killings—within the framework of legally justifiable war aims directed against nonstate combatants. We turn now to three of the most important legal and moral questions, in our view, about processes and institutional structures regarding military detention in asymmetric warfare.

##### *1. Are Particular Detentions Justified Initially?*

As discussed, the Geneva Conventions specify the treatment owed to prisoners of war, but assume both that the combatants could be identified and that the duration of the confinement would be the customary boundaries of declared war. The object of the detention was to disable combatants so that they could not contribute to further military opposition to the captors. Because prisoner-of-war status did not involve a moral condemnation of the detainees as criminals, the Geneva Conventions specified norms of treatment that went beyond basic norms of humane accommodations. An examination of the policies that emerged in Iraq in the second Bush administration and under the Obama administration show the move to integrate the wartime model into the real world of asymmetric warfare. As a threshold matter, a credible and humane detention policy is central to the

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<sup>121</sup> See, e.g., *Robinson v. California*, 370 U.S. 660, 666–78 (1962) (holding status-based crimes unconstitutional).

objectives of irregular war, well captured by military officers charged with the development of detention policies at Camp Bucca, Iraq:

In Iraq, 160,000 people have been through the detention process, and we estimate that each detainee has a network that includes approximately 100 other Iraqi citizens. As a result, detainee experiences under America's care and custody may influence up to 16 million of Iraq's 26 million inhabitants. To see the potential future effects of current detention operations, one need only recall that many former detainees such as Nelson Mandela, Fidel Castro, Daniel Ortega, and Jomo Kenyatta became important national leaders after their release from custody.<sup>122</sup>

The American intervention into Afghanistan and Iraq did not focus particularly on the question of detentions for reasons that are increasingly hard to recall as the years of military engagement continue to mount. With regard to Iraq, for example, "detention operations did not figure prominently in pre-invasion planning because the assumptions driving that planning did not include a sustained U.S. ground presence, let alone an extended occupation and counterinsurgency campaigns."<sup>123</sup> With operations on the ground, however, came the problem of holding prisoners, particularly with enemy fighters refusing to distinguish themselves from civilians.

Because of the violation of the principle of distinction by nonuniformed fighters, any detention system begins with the difficult task of identification of unlawful combatants. As these systems mature, they learn to use field intelligence to identify operatives subject to some form of verification. In practice, the process of determining combatant status functions as the de facto substitute for the identification provided by the uniforms of lawful combatants. Necessarily, the identification process coincides with military objectives because the same determination of belligerent status, even when engaged in noncombatant activities, may be the trigger for the use of force.<sup>124</sup> But these investigatory efforts are always limited by the reality of war. As

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<sup>122</sup> Col. James B. Brown, Lt. Col. Erik W. Goepner & Capt. James M. Clark, *Detention Operations, Behavior Modification, and Counterinsurgency*, MIL. REV., May–June 2009, at 40, available at [http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview\\_20090630\\_art009.pdf](http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20090630_art009.pdf).

<sup>123</sup> Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. 549, 563 (2011).

<sup>124</sup> Even here, the line between military and police functions begins to blur. Because of uncertainty over the identity of enemy combatants in Afghanistan, the individuation problem at the heart of the Article influences many aspects of modern military engagement. As a matter of *military* necessity, American forces have begun to rely on sophisticated systems of biometric identification of individuals encountered through contractors, applications of employment, and military operations. The result is a significant database of personal identification that assists both in military assessments and in obtaining more

Lieutenant Eddie Johnson told Robert Chesney, “There were numerous occasions where we felt very exposed and at risk during an operation. This was due to the fact that proper evidence collection was very time-intensive. There were times where I pulled my platoon off an objective, in lieu of evidence collection, in order to protect it.”<sup>125</sup> Or, put more succinctly by Captain Joshua Lewis, “[O]ur main effort was to stay alive and get home.”<sup>126</sup>

The alternative argument, that an unlawful combatant can only be attacked when in action but then assumes safety as soon as his weapon is put away, would again create an indefensible legal protection to unlawful combatants not shared by lawful soldiers.<sup>127</sup> Such preliminary identification “does not imply criminal guilt or outlaw status but establishes affiliation in the same way that uniforms do.”<sup>128</sup>

At the same time, even the initial screening of detainees cannot escape the question of what the object of the initial review should be. Any criminal-law-infused notion of probable cause points back to illicit actions that can be traced back to the detainee. Yet, as played out in battle in Iraq, “soldiers routinely took custody of persons who were not linked to any particular act, but, instead, simply had been identified as ‘bad’ by a neighbor or had been part of a large group of individuals detained in a general sweep of an area.”<sup>129</sup> The question of identity alone could not establish whether detention was justified for any particular individual. The lack of a formal military structure meant that being “bad” was an insufficient substitute for the clarity provided by a uniform and a rank in an army. Instead, identifying individuals that needed to be detained meant assessing their individual acts and distinguishing the real combatants from the civilian web in which they embedded themselves.

The need to distinguish enemy combatants from civilians made it an operational necessity to create a robust system of Detention Review Boards (DRBs) in Iraq and then, most notably, in

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police-like evidentiary proof. For an overall discussion of the military use of biometric information, see *The Eyes Have It*, *ECONOMIST*, July 7, 2012, at 40.

<sup>125</sup> Chesney, *supra* note 123, at 571.

<sup>126</sup> *Id.*

<sup>127</sup> In Michael Walzer’s famous discussion, a soldier bathing naked and unarmed remains a military target of opportunity. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 143 (1977). For perhaps the most provocative reassessment of the impact of modern warfare on traditional norms regarding the killing of opposing forces, see Gabriela Blum, *The Dispensable Lives of Soldiers*, 2 *J. LEGAL ANALYSIS* 115 (2010).

<sup>128</sup> MICHAEL L. GROSS, *MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT* 108 (2010).

<sup>129</sup> Chesney, *supra* note 123, at 579.

Afghanistan, to assess the propriety of prolonged detention.<sup>130</sup> As the system evolved, it took on more of the characteristics of the formalized detention system in Israel,<sup>131</sup> one that has in turn developed under the most careful judicial scrutiny of any country.<sup>132</sup> What is more striking is the rising standard of proof as these review boards acquire the characteristics of bureaucratic legalism, to borrow John Witt's term for the maturation of the civil tort system.<sup>133</sup> One study in Israel found that detention review resulted in immediate release of the detainee in about five percent of cases, in an order of release upon completion of a six-month period of detention in about seventeen percent of cases, and in a reduction of planned detention in another nine percent of cases.<sup>134</sup> In Iraq, an initial review of detentions under new DRB procedures implemented in 2007 resulted in an immediate increase in rates of release from around five percent to thirty percent.<sup>135</sup> In the first period of operation of the final version of DRBs in Afghanistan, running from September 2009 through June 2010, continued detention was recommended in sixty-four percent of cases, with the bulk of the remainder split between outright release and transfer to Afghan authorities.<sup>136</sup>

Beginning in 2009, the current DRBs reviewed the propriety of all persons held in the Detention Facility in Parwan (DFIP).<sup>137</sup> Persons detained in the field may be held for up to two weeks, primarily for information gathering purposes, before being transferred to DFIP.<sup>138</sup> Once in formal detention, a DRB must convene at six-month

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<sup>130</sup> Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, 85 INT'L L. STUD. 343, 350 (2009) (noting the convergence of pragmatic and legalistic approaches to this adjudication in the creation of DRBs).

<sup>131</sup> For comparisons of detention regimes and their evolution, see Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 432 (2009).

<sup>132</sup> See Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1923–24 (2004) (describing the Israeli abandonment of prudential barriers to judicial review, such as standing, and the limited deference to military authorities on detention decisions, resulting in broad judicial review of detention decisions).

<sup>133</sup> John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 263 (2007).

<sup>134</sup> B'TSELEM & HAMOKED CTR. FOR THE DEFENCE OF THE INDIVIDUAL, WITHOUT TRIAL: ADMINISTRATIVE DETENTION OF PALESTINIANS BY ISRAEL AND THE INTERNMENT OF UNLAWFUL COMBATANTS LAW 18 (2009), available at [www.btselem.org/Download/200910\\_without\\_trial\\_eng.pdf](http://www.btselem.org/Download/200910_without_trial_eng.pdf).

<sup>135</sup> U.S. Government Efforts to Counter Violent Extremism: Hearing Before the Subcomm. on Emerging Threats and Capabilities of the S. Comm. on Armed Services, 111th Cong. 48 (2010) (statement of Sen. Graham, Member, S. Comm. on Armed Services).

<sup>136</sup> Bovarnick, *supra* note 17, at 29–30 n.141.

<sup>137</sup> *Id.* at 25. The DFIP facility is located near Bagram airfield. *Id.*

<sup>138</sup> There are some challenges to the implementation of these policies. See EVIATAR, *supra* note 24 (articulating legal challenges to this implementation).

intervals to assess a detainee's continued detention, with the first such DRB occurring within sixty days of a detainee's arrival at DFIP.<sup>139</sup> The DRB, using a preponderance of the evidence standard,<sup>140</sup> must make two determinations: (1) Is the detainee a member of al-Qaeda or the Taliban subject to detention?; and (2) If so, what course of detention should be followed?<sup>141</sup> A negative answer to the first question requires release.<sup>142</sup> If the detainee is either a member of an opposing force, or if the answer is uncertain, the DRB must recommend a specified course of action, leading to release, to continued detention in prisoner-of-war-like conditions, or in some circumstances to criminal prosecution, as set forth in a Department of Defense memo from the Assistant Secretary of Defense to the Chairman of the Senate Armed Services Committee.<sup>143</sup>

In practice, the detention review system built from the ground up seems to take elements from Geneva III and Geneva IV to yield a pragmatic accommodation between the uncertainty of the status of irregular combatants and the need for the continued disabling of forces that would again take up arms against American interests. From Geneva III comes the notion of tolerable, humane treatment of wartime combatants once rendered *hors de combat*.<sup>144</sup> From Geneva IV comes the need for evidentiary certainty in the detention of nonuniformed combatants and the need for periodic review of status

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<sup>139</sup> Bovarnick, *supra* note 17, at 22.

<sup>140</sup> *Id.* at 29.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* ("If a majority of the board determines the detainee does not meet the criteria for internment, the detainee must be released from Department of Defense custody as soon as practicable. The decision to release cannot be changed by the convening authority.").

<sup>143</sup> Memorandum for U.S. Military Forces Conducting Detention Operations in Afghanistan from Robert S. Harward, Vice Admiral, U.S. Navy (July 11, 2010), *available at* [http://www.politico.com/static/PPM205\\_bagrambrfb.html](http://www.politico.com/static/PPM205_bagrambrfb.html). The possible recommendations are:

- (a) Continued internment at the DFIP. Such recommendation must include a determination not only that the detainee meets the criteria for internment, but also that continued internment is necessary to mitigate the threat the detainee poses.
- (b) Transfer to Afghan authorities for criminal prosecution.
- (c) Transfer to Afghan authorities for participation in a reconciliation program.
- (d) Release without conditions.
- (e) In the case of non-Afghans and non-U.S. third-country national[s] . . . transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.

*Id.* at 9.

<sup>144</sup> Geneva III, *supra* note 4, art. 79–82, 85–96, 6 U.S.T. at 3378–82, 3384–90, 75 U.N.T.S. at 196–200, 202–08.



to ensure the continued need for detention.<sup>145</sup> Consistent with our overall theme, there is little formal law to guide this intuitively sensible detention regime, but it seeks to accomplish the basic aims of wartime detention in promoting military security while providing for humane treatment of prisoners taken during periods of hostility.

## 2. *How Long Can and Should Detentions Last?*

The second major problem derives from the uncertain boundaries of unconventional war. In conventional war, detention has an end, as does the war itself. Detainees are held until the end of hostilities, a prisoner exchange, or some other intervening event. In unconventional war, there is no state to surrender or negotiate a prisoner exchange. Anyone picked up for being an al-Qaeda cook or driver, for example, could, in theory, be held forever under the traditional laws of war—an unseemly prospect. This temporal uncertainty creates tremendous pressure to funnel everything through the act-based system because at least that system generates determinate sentences.

If we return to the impetus for the Lieber Code during the Civil War, there is a need to normalize the rules of military engagement, both to provide direction to soldiers and to force accountability for the decisions of the belligerent powers. The challenge is to build a system that normalizes in the law recognition that there must both be nonpenal detention and some form of act-based determination to justify that detention. Two options for doing so exist. The first would be to derive more force from the criminal justice model and create some presumed fixed-length terms of detention based on the seriousness and nature of the underlying acts, or the depth and seriousness of the individual's involvement in al-Qaeda or associated terrorist organizations. Fixed terms would eliminate the prospect that the lowest-level foot soldiers would be held as long as the masterminds of September 11, and ensure that similarly situated detainees are treated similarly. And the United States would show that it recognizes that, while detention might be appropriate and necessary for some core group of fighters who cannot sensibly be tried as criminals, the prospect of prolonged, indefinite detention is a troubling prospect (we leave aside those implicated in mass murder, such as the September 11 plotters). Nonetheless, forcing every detainee into the criminal justice system is not inherently more protective of the detainees. Unlike incarceration after conviction, noncriminal detention under the laws of war can never be used for punishment; its sole justification is incapacitation.

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<sup>145</sup> Geneva IV, *supra* note 32, art. 27, 41–43, 6 U.S.T. at 3536, 3544–46, 75 U.N.T.S. at 306, 314–16.

This is precisely why the laws of war, going back to the initial formulation in the Lieber Code, prohibited the use of “municipal” or customary civilian law to judge the conduct of troops at war. And criminal conviction for the material support of terrorism, probably the most common available charge, carries a maximum sentence of fifteen years in most cases and a life sentence if death results.<sup>146</sup> Fixed terms of detention, based on these factors, might yield shorter terms for low-level fighters and certainly have in historic warfare.

Alternatively, the United States could create a credible system of periodic hearings to determine whether a detainee remains enough of a threat to justify continued detention. It is not enough to provide one round of legal process to make sure the right person is being held; some way to periodically revisit these cases is also vital. The key factual inquiry in these hearings would be whether an individual remains so dangerous that his continued detention is a matter of national security. In the field in Afghanistan, this has meant the development of a formalized use of specially commissioned DRBs to determine on a regular semiannual basis whether continued detention is justified.<sup>147</sup> The inquiry here must be, as helpfully framed by Curtis Bradley and Jack Goldsmith, “whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger of rejoining hostilities.”<sup>148</sup>

Alternatively, the two approaches—fixed terms and periodic review—could be combined. Instead of being automatically entitled to release after a certain number of years, a detainee could instead be presumptively entitled to release. A hearing to assess whether he remains a continuing threat could be held. The structure of those hearings could be tied to how strong the presumption of release ought to be.

Noncriminal detention has been a fact of national security policy since September 11, whether in Afghanistan, Iraq, or Guantánamo. Defining who may (legally) and should (strategically) be detained is not easy. But if there are good reasons that not every captured fighter or terrorist can be put into the criminal justice system, the government will need some system of prolonged noncriminal detention. Any such system will have to be designed in ways that come to terms with the

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<sup>146</sup> 18 U.S.C. § 2339A(a) (2012).

<sup>147</sup> A detailed account of the evolved practices in Afghanistan can be found in Bovarnick, *supra* note 17.

<sup>148</sup> Bradley & Goldsmith, *supra* note 41, at 2125. Among the relevant factors that Bradley and Goldsmith suggest examining are “the detainee’s past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile.” *Id.*

specter of endless detention. On the other hand, there must be some credible detention policies in place any time military force is projected internationally. The absence of a secure and meaningful detention capability for captured enemy combatants creates a strong incentive not to capture but instead to neutralize the threat posed by enemy forces through lethal force.<sup>149</sup> Indeed, the most detailed account of internal Obama administration deliberations on this issue quotes leading military and counterterrorism officials, including the Vice Chairman of the Joint Chiefs of Staff, decrying the fact that the administration had no viable option or plan for capturing and detaining high-level terrorists. The inability to settle, for political reasons, on a legitimate place in which to detain suspects leads to the possibility that a bridge figure between al-Qaeda and Somali terrorists was killed, rather than captured—despite his enormous potential intelligence value—in part because of the lack of a viable detention option. One anonymous top Obama counterterrorism advisor is quoted as saying that the lack of a viable detention option, which then pushed options toward more lethal ones, was always on the back of everyone’s mind: “Anyone who says it wasn’t is not being straight.”<sup>150</sup> As a result, “[t]he inability to detain terror suspects [created] perverse incentives that favored killing or releasing suspected terrorists over capturing them.”<sup>151</sup>

There is little historic experience in the United States with long-term detention strategies. Countries that have dealt with semi-permanent internal national security threats, such as Israel<sup>152</sup> and India,<sup>153</sup> have developed detention regimes with highly developed

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<sup>149</sup> See Chesney, *supra* note 123, at 573–74 (citing episodes of U.S. troops resorting to killing dangerous enemy combatants to serve as “a useful reminder of the subtle relationship between detention and the use of lethal force, not to mention a cautionary tale regarding the manner in which that relationship can transmit incentives when detention options are restricted in a combat setting”); see also Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT’L L. 1, 83–85 (2006) (providing interviews regarding troop responses to leniency toward detainees by the Central Criminal Court of Iraq, which was established in 2003).

<sup>150</sup> KLAIDMAN, *supra* note 108, at 126–27.

<sup>151</sup> *Id.* at 126.

<sup>152</sup> The Israeli detention policy depends on whether a suspected combatant is captured in Israel proper, in the occupied West Bank, or in other sites, such as Lebanon or Gaza, as summarized in CrimA 3261/08 A and B v. State of Israel ¶¶ 11, 36 [2008] (Isr.), available at [http://elyon1.court.gov.il/Files\\_ENG/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/Files_ENG/06/590/066/n04/06066590.n04.pdf), the structure of which appears *infra* Appendix I.

<sup>153</sup> India shares two features with Israel. Both were governed colonially through the British Mandate and integrated features of British law into the law of security detentions. Furthermore, both have had to confront internal acts of terror launched from surrounding states. The combination leads to similar formal structures of detention authority. The Indian Constitution formally recognizes exceptions to the rules governing swift legal

appeals mechanisms that operate in coordination with the national court system, either directly or by right of ultimate appeal.

What is striking, however, is that the American experience is far more developed on the ground in Afghanistan than it is formally—again reflecting the dead weight of the political impasse over Guantánamo.

### 3. *Military Commissions or Criminal Courts?*

We leave for last the debates over the forum for reviewing detentions. In our view, the most important threshold issue in dealing with captured individuals alleged to be involved in terrorism is not the choice of forum for a trial—military commissions or civilian courts—but the more fundamental question of whether those individuals should be detained or tried. As discussed above, detention is a status-based regime justified not as a means of punishment for specific criminal acts, but as a means of defusing a threat that arises in a military or analogous context. Only once the decision is made that act-based criminal punishment is the appropriate means of dealing with a particular individual does the narrower question come into play of whether that individual should be tried in a military commission or civilian court.

What principles should guide this allocation? The Attorney General, with the assistance of a task force from various parts of the U.S. government, put forth a set of guidelines for making these decisions.<sup>154</sup> Under those guidelines, one important factor was whether

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process and access to counsel for “any person who is arrested or detained under any law providing for preventive detention.” CONST. OF INDIA Dec. 1, 2011, art. 22, cl. 3, subcl. b. Preventive detention is also authorized for “any person who for the time being is an enemy alien.” *Id.* at subcl. a. Most recently, in response to the Mumbai attack, Parliament passed The Unlawful Activities (Prevention) Amendment Act, 2008, No. 35, Acts of Parliament, 2008 (India). Despite the formal limitations on judicial review, the Indian courts have developed numerous doctrines based on “non-application of the mind,” an arbitrariness standard, to yield what has been termed “meaningful” and even “unusually robust” judicial review. Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT’L L. 311, 331 n.108 (2001). For recent examples of the “application of the mind” standard being used to order prisoner release, see *8 Detained Under Security Act for British Couple’s Abduction*, TIMES OF INDIA, June 21, 2013, [http://articles.timesofindia.indiatimes.com/2013-06-21/chennai/40117929\\_1\\_nsa-detention-preventive-detention-national-security-act](http://articles.timesofindia.indiatimes.com/2013-06-21/chennai/40117929_1_nsa-detention-preventive-detention-national-security-act). For discussion of courts quashing preventive detention orders related to everyday criminal acts by looking to the “application of mind” by executive officials, see *Rekha v. State of Tamil Nadu*, (2011) 4 S.C.R. 740, 756, 758 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=37849>; *Vairam v. Sec’y to Gov’t, Home, Prohibition & Excise Dep’t*, No. 698 (2011) (Madras), [http://judis.nic.in/judis\\_chennai/qrydisp.aspx?filename=59879](http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=59879).

<sup>154</sup> Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011), available at <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html>. For the policy protocol suggesting which detainees would be tried before

the individual had attacked military forces or civilians. Under this principle, the Attorney General initially decided that those involved in the bombing of the U.S.S. Cole were to be tried in a military commission, while those involved with the September 11 attacks were to be tried in civilian courts. That distinction quickly broke down in the face of resistance from a variety of local and national political actors, and the Attorney General was forced to change this decision and hold the trials for the September 11 plotters before a military commission.<sup>155</sup> Congress has also legislated to prohibit the transfer of all those currently held at Guantánamo Bay to American soil, effectively prohibiting civilian trials for them and requiring military trials for any who are tried.<sup>156</sup> The President has signed the legislation containing these provisions but has objected that Congress is interfering inappropriately with presidential decisions that implicate matters of foreign affairs and national security. The President has thus far stopped short of arguing directly that this legislation is an unconstitutional interference with his prerogatives under Article II of the Constitution.<sup>157</sup>

The issue of how to decide between military commissions and civilian courts will nonetheless arise if the United States captures additional alleged terrorists, or if the President is ultimately able to persuade Congress to relax the current restrictions on those held at Guantánamo.<sup>158</sup> That still leaves unresolved the threshold question of

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civilian or military courts, see *Determination of Guantánamo Cases Referred for Prosecution*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/opa/documents/ta-ba-prel-rpt-dptf-072009.pdf>. President Obama ordered the creation of this task force to generate these protocols in Exec. Order 13492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

<sup>155</sup> Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES (Apr. 4, 2011), <http://www.nytimes.com/2011/04/05/us/05gitmo.html>.

<sup>156</sup> See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (prohibiting the use of federal funds for any kind of transfer to the United States for Guantánamo detainees, presumably including for trial).

<sup>157</sup> Barack Obama, *Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011*, 2011 DAILY COMP. PRES. DOC. 10 (2011). The most direct engagement with the question of presidential powers regarding the Guantánamo detainees came in Judge Kavanaugh's concurring opinion in *Al-Bihani*, in which he asserted that "when the President acts extraterritorially against non-U.S. citizens in self-defense of the Nation, especially in support of a war effort that Congress has authorized . . . the President possesses broad authority under Article II . . . that does not depend on specific congressional authorization." *Al-Bihani v. Obama (Al-Bihani II)*, 619 F.3d 1, 50 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring). In this zone, the President is not "subject to judicially enforceable *international-law* limitations." *Id.* at 51.

<sup>158</sup> We leave aside here questions about whether these policies should and can, under international law, distinguish between American citizens and noncitizens. American policy since September 11 in certain areas, like use of military commissions for those accused of war crimes, has limited these policies to non-American citizens. In addition, no American citizens are presently being held in long-term detention at Guantánamo Bay. These limitations might be a reflection of politics, of political culture more broadly, or of American law—American constitutional law might give greater protection to the rights of citizens

whether military commissions should be used at all to try any alleged terrorists. The determination of status is likely best handled by military procedures on the model developing through the DRBs. But for those who are detained going forward and for whom criminal prosecution is sought, some rationale has to be put forward as to the allocation of responsibility between civilian and criminal tribunals. If an individual can lawfully be detained, does it follow that he can and should be tried, if at all, before a military commission? If only some of those in this category should be tried before a military commission while others should be tried before a civilian tribunal, what are the principles that ought to determine that allocation?

We also leave aside whether the outcome should differ for those captured in the United States, whether citizens or not, and those captured outside our territory. Policy on this issue has been ambivalent; in the early years after September 11, the government did detain one person (an American citizen) captured within the United States. Jose Padilla, an American citizen, was seized at O'Hare Airport in 2002 on suspicion of being involved in an attempt to set off a crude radioactive

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than to those of noncitizens, particularly if those noncitizens are not long-term lawful residents of the United States. Both American political culture and law appear to vest more legal significance in the fact of citizenship (and, perhaps, long-term lawful residence) than that of many other democracies. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 532–33 (2004) (implicitly recognizing the applicability of habeas petitions solely to American citizens prior to their extension to aliens in *Boumediene v. Bush*, 553 U.S. 723 (2008)). Yet many sources of international law, including international human rights law, have sought to erode the distinction between citizens and noncitizens and to require uniform treatment of all those held by the state.

Thus, if American policy distinguishes between citizens and noncitizens and recognizes greater rights (as a matter of policy or law) for citizens, that might undermine the legitimacy of American policy, or its perceived legality, among some other countries or human rights activists. *See, e.g., David Cole, The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 629 (2006) (advocating for stronger domestic application of human rights law to achieve greater legal parity for immigrants); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002) (arguing both “normatively and constitutionally” that citizens and noncitizens are entitled to equal core human rights unrelated to privileges of citizenship); Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUP. CT. REV. 23, 34 (2008) (describing a school of thought advocating for a “Cosmopolitan-American Constitution” that extends constitutional rights equally to citizens and noncitizens).

In the area of targeted killings, President Obama has recently stated in a major policy address that the same substantive standards will apply to citizens and noncitizens regarding whether such a strike is justified. President Barack Obama, Remarks at National Defense University: The Future of Our Fight Against Terrorism (May 23, 2013), available at <http://www.lawfareblog.com/2013/05/text-of-the-presidents-speech-this-afternoon/>. Can other coercive policies, such as detention and military trials, be legitimate if they continue to single out citizens for special immunity? If some differences between citizens and others remain appropriate, what should those differences be and what justifies the relevant distinctions?

device termed a “dirty bomb.”<sup>159</sup> He was held for over three years in a Navy brig as challenges to his detention worked their way through the courts, including to the Supreme Court in *Rumsfeld v. Padilla*.<sup>160</sup> Ultimately, the government filed criminal charges against Padilla, who was subsequently convicted; this remains the only use of detention for someone captured in the U.S.<sup>161</sup>

As a matter of formal law, it might be the case that the location of capture and the inside-outside distinction has no legal significance. If the nature of the acts an individual commits makes it legal to detain him or try him before a military commission, it might not matter whether he commits those acts inside or outside the United States (this geographical boundary might also roughly, though, imperfectly, track the citizen-noncitizen distinction). But the specter of the United States government employing warlike powers within the United States will nonetheless understandably generate considerable concerns. As a result, there might be sound policy and pragmatic reasons to limit the geography of law-of-war–like measures to those captured outside the United States, whether that is legally required or not.

At the same time, limitations of this sort will raise similar issues in other countries about whether the United States is acknowledging that the coercive measures associated with asymmetrical warfare are inappropriate at home. To the extent that many exceptional measures reflect military exigency—as we will discuss with regard to targeted killing—the distinction might be justified so long as the United States has complete control of its territory. At the same time, American policy must confront the possibility that engaging emergency measures only abroad may undermine the legitimacy of those policies.

As should be evident throughout, we do not view judicial review as the most essential element in the legal structure for addressing the legal challenges of targeted warfare. Many critical decisions are unlikely to get to courts; those that do might well involve deferential judicial reluctance to second-guess front-line institutional actors. Nonetheless, it is a remarkable and underappreciated fact that so many key legal questions after September 11 still have no judicial resolution. There are real costs to the American system of reactive and concretely focused judicial review. One of the central functions of law is to provide sufficiently clear guidance to primary actors, including government officials, to enable them to plan in advance and make

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<sup>159</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004).

<sup>160</sup> *Id.*

<sup>161</sup> See *United States v. Jayyousi*, 657 F.3d 1085, 1109–11, 1113 (11th Cir. 2011) (describing Padilla’s arrest in Chicago and subsequent detention and designation as an enemy combatant).

concrete policy judgments within the constraints of the law. Yet it is remarkable, more than a decade after September 11, how much legal uncertainty remains regarding many central issues in this area and how much time is spent within the government and outside trying to determine the boundaries of the controlling legal regime. It is easy to forget that one of the important functions of a legal system is to legitimate public action by clarifying what the law permits and prohibits. Yet the American system of judicial review has mostly failed to perform that function. We should keep in mind the costs as well as the benefits of the reactive and limited system of American judicial review when understanding how we have arrived at the framework (or uncertainty) we have today.

### III

#### TARGETED KILLINGS AND DRONES

The general legal concerns over lawful and appropriate uses of military force in today's circumstances were acutely brought to light in the context of the lethal use of force when the United States government killed Anwar al-Awlaki, an American-born radical Islamist cleric, on September 30, 2011, while he was traveling between Marib and Jawf Provinces in northern Yemen.<sup>162</sup> The killing, carried out by the Joint Special Operations Command in collaboration with the CIA,<sup>163</sup> occurred when two Predator drones flew from a secret American base in the Arabian Peninsula into Yemen and fired Hellfire missiles at a car that was carrying al-Awlaki and other alleged operatives from al-Qaeda's branch in Yemen.<sup>164</sup> The Obama administration had explicitly authorized the targeted killing of al-Awlaki early in 2010, placing him on lists of terrorists approved for capture or

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<sup>162</sup> See Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html>; Sudarsan Raghavan, *Awlaqi Hit Misses al Qaeda Bomber, Yemen Says*, WASH. POST (Sept. 30, 2011), [http://articles.washingtonpost.com/2011-09-30/world/35274051\\_1\\_al-qaeda-bombmaker-al-asiri-leader-of-external-operations/](http://articles.washingtonpost.com/2011-09-30/world/35274051_1_al-qaeda-bombmaker-al-asiri-leader-of-external-operations/).

<sup>163</sup> Jennifer Griffin & Justin Fishel, *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, FOXNEWS.COM (Sept. 30, 2011), <http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed/>.

<sup>164</sup> See *id.*; Mazzetti et al., *supra* note 162.



killing<sup>165</sup>—lists that are maintained and made operational by the CIA and the military.<sup>166</sup>

Such targeted killings highlight the reality that the modern practice of military force in asymmetric conflicts cannot be carried forward without a kind of individuation of enemy responsibility that was largely unknown to the traditional laws of war. As a result, analogous kinds of novel process and institutional issues, both *ex ante* and *ex post*, inevitably emerge concerning when specific individuals can properly be targeted for lethal military force. Targeting a particular enemy combatant may be viewed as the antithesis to the general, indiscriminate bombing of civilian centers during World War II, or the general strafing of enemy armies. Indeed, as practiced, the most sophisticated targeted killing programs make fine-grained distinctions among and between enemy soldiers; only those exceptionally high in the command and operational structures are singled out for personalized targeting.<sup>167</sup> Thus, as with detention, there is a tremendous premium on making sure the initial identification decision is accurate, unlike in conventional wars when battlefield armies and uniforms inherently resolve the identification and accuracy issues. What processes should suffice to ensure proper accuracy in the critical initial determination that the specific acts of a particular individual rise to the level appropriate to trigger the use of lethal force? Which institutions in the government, and how many branches of the government, should be required to participate in that decision, and what form should their involvement take? Similarly, *ex post* process and accountability issues arise concerning how to assess whether the individuated judgments of enemy responsibility were indeed accurate and how

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<sup>165</sup> *American-Born Cleric Added to Capture-or-Kill List, Called 'Terrorist No. 1,'* FOXNEWS.COM, Apr. 6, 2010, <http://www.foxnews.com/politics/2010/04/06/radical-cleric-reportedly-added-capture-kill-target-list/>; Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES (Apr. 6, 2010), <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>.

<sup>166</sup> See Shane, *supra* note 165; see also N.Y. Times Co. v. U.S. Dep't of Justice, Nos. 11 Civ. 9336 (CM), 12 Civ. 794 (CM), at \*10–14 (S.D.N.Y. Jan. 3, 2013) (reviewing public statements by the Obama administration on targeted killings). The U.S. Treasury Department also added al-Awlaki to its list of Specially Designated Global Terrorists on July 16, 2010. This froze any U.S. bank account he may have possessed, forbade Americans from doing business with him, and banned him from traveling in the United States. *U.S.-Born Radical Cleric Added to Terror Blacklist*, FOXNEWS.COM (July 16, 2010), <http://www.foxnews.com/us/2010/07/16/born-radical-cleric-added-terror-blacklist/>.

<sup>167</sup> See, e.g., John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Harvard Law School Program on Law & Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (noting that the United States will only target individuals whose elimination would cause major disruptions to al-Qaeda plans).

proportionate the effects of a targeted killing were to the legitimate military objectives.

Retrospective refinement of the criteria and processes used for decisionmaking emerges as critical to all targeted warfare decisions. While the *ex post* issues differ between detention and targeted killings in certain obvious ways—in detention, the issue is how to determine appropriately whether someone represents a continuing threat, while in targeted killings, the issue is retrospective analysis of the initial targeting judgments—the fact that individualized judgments of responsibility are involved creates similar pressures for *ex post* assessment to ensure the justification of subsequent military action.

Finally, the recurring paradox associated with individuation arises just as much with targeted killings as with detention: If government is making such quasi-adjudicative judgments of individual responsibility before using military force, should it be required to use the more traditional institutions and processes through which similar ascriptions of individual moral and legal responsibility are traditionally made—namely, the criminal law?<sup>168</sup> The *al-Awlaki* case provides a useful introduction because, “[u]nlike detention, for which litigation has produced detailed public elaboration of the government’s legal standards, the drone program is shrouded in secrecy, though presumably targeting decisions are based on similar law of armed conflict standards in assessing who is or is not an enemy fighter.”<sup>169</sup>

### A. *Killing the Enemy*

Targeting critical enemy leaders is a longstanding, if delicate, facet of warfare. Whether the means involved training the long rifles of the post-Civil War era on opposing field commanders, deploying snipers, or shooting down the airplane of Admiral Yamamoto during World War II, warring armies have always recognized that while all soldiers are soldiers, some pose a more lethal threat than others. Nor are the central legal issues altered dramatically by the fact that new forms of targeting allow warfare to be conducted from distances far removed from the exchanges of fire on the battlefield. The history of military technology has always focused on the ability to deliver lethal

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<sup>168</sup> Others have also explored the potential relationship between detention and targeted killings. Matthew Waxman, for example, has asserted that the more tolerant standard of “reasonable care” that attaches to targeting decisions should govern, at least initially, the decision to detain. Waxman, *supra* note 90, at 1401–02; *see also* Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1366 (2012) (arguing against the utility of the binary combatant/noncombatant and civilian/noncivilian division and in favor of the proportionality test applied in an individualized decision framework).

<sup>169</sup> Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429, 448 (2010).

force from a distance. The current debate over drones and targeted killings is in one sense a mere technological update of earlier efforts to degrade the military ability of the enemy.

In an important sense, however, modern targeting and the use of drones are more central parts of contemporary warfare. What may have originated as a tactical response now emerges as a central strategy for attacking enemy forces. The specific forms of targeting are a reflection of the particular geopolitical context in which we live, the military technology now available, and weak or failed states that cannot or will not control the threat these groups pose to citizens and residents of other countries.

Military attacks conducted from a distance involve either static or dynamic targeting. Static targeting, in which the aim is to take out a particular, fixed facility, is essentially no different than bombing runs of World War II, save for the technology. By contrast, the new technology, as with cruise missiles and drones, offers the ability to engage in dynamic targeting that responds to momentary windows of opportunity against specific individuals or activities, rather than the more examined decision to take out fixed structures.<sup>170</sup>

Drones present the question of dynamic targeting most clearly and in at least two contexts, according to news accounts. Two hypothetical situations capture the different scenarios. In the first, the government might be aware that a certain house is used by Taliban-associated forces for bomb-making. When drone surveillance detects a group of militants entering the house carrying weapons and materials used to make bombs and the drone operators launch a missile strike at the house, they might not know the names of any of the individuals involved. In the second context, intelligence actors might have been tracking the whereabouts of the Taliban's chief bomb-making expert, and when he enters the house, the drones are ordered to strike—in this context, military decision makers know the name of the figure involved.

Traditionally, the laws of war grew out of the intersection between the Law of Armed Conflict (LOAC) developed by militaries to govern the rights of combatants, on the one hand, and International Humanitarian Law (IHL), which largely developed to govern the treatment of civilian noncombatants and combatants *hors service* (as when prisoners of war), on the other hand.<sup>171</sup> Even for soldiers who

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<sup>170</sup> For the changing nature of this technology, see generally PETER W. SINGER, *WIRED FOR WAR* (2009). Our thanks to Major Andrew Gillman of the U.S. Air Force for addressing the distinction between static and dynamic targeting in a conversation.

<sup>171</sup> See TEITEL, *supra* note 30. The terms “international humanitarian law,” “law of war,” and “law of armed conflict” are all used to describe the legal regime governing the

fell under the LOAC, the use of lethal force was limited to the military objective, usually defined territorially as the need to take a particular hill or similar objective. The first formal international gathering on war practices, the St. Petersburg Conference of 1868, issued a series of limitations on the application of lethal force and asserted that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”<sup>172</sup> Specifically, the St. Petersburg Declaration prohibited the use of small projectiles “either explosive or charged with fulminating or inflammable substances,” such as expanding bullets, that would not so much disable enemy forces but guarantee subsequent death.<sup>173</sup> Similarly, later military conventions would ban serrated bayonets on the grounds that a straight-edge bayonet wound would disable an enemy combatant whereas the serrated edge would serve to ensure subsequent death from an infected wound that could not heal.<sup>174</sup> This logic took hold even in the worst of direct combat, and French troops in World War I had a standing order to shoot immediately any German prisoner captured with a serrated bayonet—a consequence that was quickly internalized by the German forces who abandoned the prohibited weapon.<sup>175</sup> Thus, even in traditional wars against conventional enemies, the LOAC contained incipient, if not highly developed, principles against the infliction of gratuitous or excessive violence against enemy soldiers beyond the need to disable the enemy’s military capacity.

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battlefield, with some disputation about whether they are fully synonymous or evolutions of one from the other. See Robin Geiss, Book Review, 24 EUR. J. INT’L L. 722, 727 (2013) (reviewing TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (2012); ROLAND OTTO, TARGETED KILLINGS AND INTERNATIONAL LAW (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012); WILLIAM H. BOOTHBY, THE LAW OF TARGETING (2012)). For our purposes, the terms are used interchangeably.

<sup>172</sup> St. Petersburg Conference of 1868, Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles (Nov. 29, 1868), available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C> [hereinafter St. Petersburg Declaration]; see also Luis E. Chiesa & Alexander K.A. Greenawalt, *Beyond War: Bin Laden, Escobar, and the Justification of Targeted Killing*, 69 WASH. & LEE L. REV. 1371, 1392 (2012) (“[T]he first international agreement to prohibit the use of a weapon of war [was] the 1868 Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight . . .”).

<sup>173</sup> St. Petersburg Declaration, *supra* note 172.

<sup>174</sup> GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 578–79 (2010) (explaining how the 1980 U.N. Certain Conventional Weapons Convention restricts use of weapons calculated to cause unnecessary suffering, including bayonets with serrated edges).

<sup>175</sup> See MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR 63 (2010) (tracing this historical development).

In our view, a proper analysis of the historic use of targeted killing reveals that four common arguments about the modern use of drones to target specific, identifiable individuals for lethal force are myths. The first myth is that targeting specific individuals for death is a dramatically modern innovation in military practice. Technology has certainly enhanced the capacity to use this tactic effectively, but the tactic itself has long been a part of military practice. The invention of the long rifle, for example, gave snipers the ability to pick off opposing field officers. There is a grain of truth here, however, as the modern practice does depart from previous practice with the advent of the discrete act of seeking out military enemies outside normal war-time engagements based on an individualized assessment of the threat they present. The use of lethal force is no longer incidental to a battlefield objective of capturing a particular piece of territory. Instead, killing has become the objective itself because of a specific determination about the threat posed by the continued operation of an individual. At a more fundamental level, as Eyal Benvenisti argues, the law of war had two major premises that fail in modern asymmetric conflict. Traditionally, it was possible to distinguish military and civilian objectives, and battle could be directed to military objectives, as with the capturing of territory or overtaking a military installation. Neither premise necessarily characterizes military engagements in asymmetric war—or put another way, the military objective becomes killing itself.<sup>176</sup>

This changed object of the targeted attack seems morally superior. Drones enable military planners to focus on high-level targets, and we should appreciate a technology that can discriminate between low-level and high-level combatants and minimize the loss of life to foot soldiers of the other side by concentrating fire on the leaders. Precision targeted killings should be seen as a substantial humanitarian advance in warfare, assuming that use of force is justified in the first place. Whereas the traditional LOAC placed the foot soldier at greatest risk of being killed in combat, the new targeted killing regime initially redirected lethal force to the command structure of the enemy. In our view, it is a mistake to focus exclusively on the level of force being used without also understanding that the targets (if accurately identified) bear a moral culpability for unlawful warfare completely distinct from anything that could be attributed to conventional soldiers in a state-authorized war, especially in the case of conscript armies. As the technology improves, most notably with drones, the

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<sup>176</sup> Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 340–41 (2010).

targets could expand from the command structure to operational centers, as with attacks on remote sites at which enemy combatants trained or assembled.

A second myth concerning targeted killings as a new form of warfare is that this ability to project force from a distance itself raises new legal issues. But this view is simply an exercise at drawing a technological line that, in our view, has little moral or legal force in and of itself. Drones present the same *legal* issues as any other weapons system involving the delivery of lethal force. Advances in military technology have always been about the ability to project force from a distance. Drones are a technology, the latest technological development in the history of warfare, but they do not change the legal issues, under either domestic or international law, relevant to deciding whether particular uses of force are justified. In technologically advanced countries, militaries have long been in the business of delivering lethal force at great distances from their targets. The U.S. Navy has engaged enemy personnel by firing cruise missiles from ships in the Mediterranean into Libya, Iraq, and Sudan.<sup>177</sup> Air Force pilots frequently take off from bases far removed from the actual theater of conflict and drop their bombs based on computer-generated targeting information from thousands of feet above the ground; the bombing campaign over Serbia during the Kosovo war, for example, involved pilots taking off from the Midwest in the United States and returning there.<sup>178</sup> Ancient advances, such as catapults and longbows, involved the delivery of force from a distance instead of hand-to-hand personalized combat. U.S. drone operations reportedly follow the same rules of engagement and use the same procedures as manned aircraft that use weapons to support ground troops.<sup>179</sup> The military's use of drones is viewed as a mere extension of traditional Air Force capabilities; drones are thus presumably subject to the same level of civilian oversight as all other uses of military force.<sup>180</sup>

One can view the technological advances that make drone warfare possible with horror or with fascination (or both), but the idea of projected force beyond hand-to-hand warfare does not of itself

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<sup>177</sup> Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 507–12 (2002).

<sup>178</sup> Kenneth Anderson, *Efficiency In Bello and Ad Bellum: Making the Use of Force Too Easy?*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 374, 380 (Claire Finkelstein et al. eds., 2012).

<sup>179</sup> MATT J. MARTIN & CHARLES W. SASSER, PREDATOR: THE REMOTE-CONTROL AIR WAR OVER IRAQ AND AFGHANISTAN: A PILOT'S STORY 104 (2010) ("To us, the Predator is a longer-duration, lightly armed (and much less survivable) version of an F-16 . . .").

<sup>180</sup> *Id.*

present radically new legal issues. As the philosopher David Luban rightly concludes, targeted killings “are no different in principle from other wartime killings, and they have to be judged by the same standards of necessity and proportionality applied to warfare in general: sometimes they are justified, sometimes not.”<sup>181</sup> Nor is there anything particularly novel about concerns that advances in military technology somehow fundamentally alter the nature of warfare. John Witt describes the revulsion of Francis Lieber in grappling with the introduction of new Civil War armaments, including early versions of land mines and underwater torpedoes. Lieber confessed, “[T]he soldier within me revolts at the thing. It seems so cowardly. . . . [But] the jurist within me cannot find arguments to declare it unlawful.”<sup>182</sup>

Technological advances in warfare combine with the changed nature of combatants to challenge the inherited categories of combat, including such important questions as the ability to draw a sharp distinction between the operation of humanitarian law governing the treatment of combatants and human-rights commands over the protection of civilian noncombatants. David Kretzmer, for example, has thoughtfully argued that debates over the legitimacy of targeted killing turn on the inability to fit the technical and legal justifications within inherited legal categories.<sup>183</sup>

A third prevalent misconception, in our view, is that drones and targeted killing pose a major threat to the humanitarian purposes and aims of the law of war. The key principles of the law of war are the principles of necessity, distinction, and proportionality—the principles that force should intentionally be used only against military targets and that the damage to individual citizens should be minimized and proportionate.<sup>184</sup> Drones, as against other uses of military force, better realize these principles than any other technology currently available. Indeed, they allow for *the most discriminating uses of force*

<sup>181</sup> David Luban, *What Would Augustine Do?: The President, Drones, and Just War Theory*, BOSTON REVIEW (June 6, 2012), <http://bostonreview.net/david-luban-the-president-drones-augustine-just-war-theory/>.

<sup>182</sup> WITT, *supra* note 27, at 237. As Lieber concluded, wars “are no Quixotic tournaments.” *Id.*

<sup>183</sup> David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 186 (2005) (suggesting the need for a mixed approach to capture the moral and legal issues at stake in targeted killings); see also Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457 (2002) (presenting the case for the collapse of clear legal categories governing this form of warfare).

<sup>184</sup> *E.g.*, *N.Y. Times Co. v. U.S. Dep’t of Justice*, Nos. 11 Civ. 9336 (CM), 12 Civ. 794 (CM), at \*13 (S.D.N.Y. Jan. 3, 2013); see also Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 472 (2007) (noting that “the principles of necessity, distinction, and proportionality” are key principles in the law of war).

in the history of military technology and warfare, in contexts in which the use of force is otherwise justified. If the alternative is sending U.S. ground forces into Yemen or the frontier regions of Pakistan, the result will be far greater loss of civilian life, and far greater loss of combatant lives, than with drone technology.

Fourth, a more subtle concern that perhaps underlies the humanitarian critique of targeted killings is that drone warfare might make the use of force “too easy.” Since powerful states do not have to put their own pilots or soldiers directly at risk, will they resort to force and violence more easily? This is a serious issue, but some historical perspective might help put this concern into a broader frame. Throughout the modern history of warfare, there has been concern that humanitarian developments in the way war is conducted will, perversely, make it more likely that states will go to war. The argument is that there is a Faustian tradeoff between the laws of war and the initial decision to go to war. This is an enduring, complex moral issue that has attended virtually every effort in the paradoxical-sounding project of making warfare more humane; pacifists in the nineteenth century objected to the formation of the International Committee of the Red Cross and its efforts to mitigate the horrors of war.<sup>185</sup> Moreover, the same paradox surrounds even purely humanitarian aid during wartime; in some contexts, access to such aid has become a strong economic incentive to continue the war for the very purpose of extracting more of this financial assistance.<sup>186</sup>

A more complicated picture emerges if we shift from the perspective of the civilian leaders who authorize the use of force to those who actually deliver that force. One of the consequences created by individuating the responsibility of specific enemies, combined with drone technology, is the possibility of a much greater sense of personal

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<sup>185</sup> This was exactly the argument that led Florence Nightingale to oppose, initially, the development of the International Committee of the Red Cross to monitor treatment of prisoners. As she wrote to the founder of the ICRC in initially rejecting the organization: “[S]uch a Society . . . would relieve (governments) of responsibilities which really belong to them which they only can properly discharge . . . and being relieved of which would make war more easy.” CAROLINE MOOREHEAD, *DUNANT’S DREAM: WAR, SWITZERLAND AND THE HISTORY OF THE RED CROSS* 30 (1998) (quoting Letter from Florence Nightingale to Dr. Thomas Longmore (July 23, 1864) (on file with the Wellcome Inst., London)). She eventually changed her mind, of course. Anderson, *supra* note 178, at 389.

<sup>186</sup> See Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CALIF. L. REV. 1171, 1197–204 (2009) (discussing the factors that led rebel factions in Darfur to behave intransigently at peace talks in order to exploit the possibility that outside intervention could force a favorable settlement to the conflict); see also Daniel, *The International Presence in Sudan*, in *THE SUDAN HANDBOOK* 164, 164–76 (John Ryle et al. eds., 2011) (similarly addressing disequilibrium created by foreign humanitarian intervention).



responsibility and accountability on the part of drone operators for lethal uses of force than that exhibited by prior generations of fighters. At least some drone operators report exactly this kind of experience of personal responsibility for their actions, including their mistakes, that was much less likely in earlier generations when “the enemy” was faceless and undifferentiated in most circumstances.<sup>187</sup>

Of course, if such a perverse tradeoff does end up driving state practice, the same concern could be applied to the use of force for humanitarian purposes, as in Libya. Did the use of drones in the Libya operation make humanitarian interventions too attractive an option? The right question, it seems to us, should focus on whether the use of force is justified in the first place. Moreover, one should be careful not to romanticize traditional combat and the pressures toward excessive violence it nearly always unleashes. To the extent the humanitarian critique of the use of drones is that sending in ground troops acts as a restraint on the use of force, compared to the use of force from remote locations, such as with drones technology, this idea might have matters backwards, at least once the decision to use force at all has been made (and made, hopefully, for appropriate and lawful reasons). Dramatic overuse of force is most likely when scared kids come under attack on an active battlefield and respond with massive uses of force directed at only vaguely identified targets. Remoteness from the immediate battlefield—with operators able to see much more of what is going on—almost surely enables much more deliberative responses. One Air Force combat officer who became a drone operator supports this conclusion: He comments that compared to conventional combat, both in the air and on the ground, the distance involved with drones enable operations to be “deliberate instead of reactionary”;<sup>188</sup> compared to manned combat flights, he experienced drones as affording

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<sup>187</sup> As an example, consider the following account of an exchange between a drone operator and Harold Koh, the Legal Adviser to the State Department, when Koh commented that he had heard drone operators had a “PlayStation mentality”:

The lead operator lit into Koh. “I used to fly my own air missions,” he started, defensively. “I dropped bombs, hit my target load, but had no idea who I hit. Here I can look at their faces. I watch them for hours, see these guys playing with their kids and wives. When I get them alone, I have no compunction about blowing them to bits, but I wouldn’t touch them with civilians around. After the strike, I see the bodies being carried out of the house. I see the women weeping and in positions of mourning. That’s not PlayStation; that’s real. My job is to watch after the strike too. I count the bodies and watch the funerals. I don’t let others clean up the mess.”

KLAIDMAN, *supra* note 108, at 217. Similarly, as Martin puts it: “I doubted whether B-17 and B-20 pilots and bombardiers of World War II agonized over dropping bombs over Dresden or Berlin as much as I did over taking out one measly perp in a car.” See MARTIN & SASSER, *supra* note 179, at 53.

<sup>188</sup> MARTIN & SASSER, *supra* note 179, at 104.

“the ability to think clearly at zero knots and one G.”<sup>189</sup> He observed that other “methods of warfare could be, and often were, much more destructive”<sup>190</sup>—indeed, he goes so far as to comment that when Marines were sent into operations, they “broke things and killed people,” while drones enabled U.S. military force to be “less brutal.”<sup>191</sup>

Whether one accepts or not this particular self-reported drone operator experience as representative, a realistic appraisal of all the costs and benefits of the use of drones must confront the “compared to what” question. Perhaps in some contexts, if drones were not available, no force would be used; but in many cases, it seems likely that much greater force would be used instead. Put another way, powerful nation-states are unlikely to remain passive in the face of significant risks to the physical security of their citizens and property that emanate from other nations that are unwilling or unable to control these threats. Nor is it clear why states should be understood to have a moral obligation to permit their citizens and territory to be attacked. If states have the capacity to do so, they will neutralize these threats through killing or capture; at times, the humanitarian costs of capture in terms of harm to innocent others will be great, while at other times, capture might not be practicable for any number of reasons (a complex issue to which we return below). As a result, it seems to us that any general humanitarian critique of the targeted killing has a moral obligation to offer a credible, practical alternative that a state can realistically employ to protect the lives of its citizens and that better serves the humanitarian aims of the laws of war.

### *B. Legal Justifications: The Novel Role of Individuation*

The government’s legal justifications under domestic and international law for targeted killings, including of American citizens overseas in certain contexts, have been laid out in broad outline through a series of speeches by key legal and counterterrorism officials, including National Security Advisor John Brennan,<sup>192</sup> State Department Legal Advisor Harold Koh,<sup>193</sup> Department of Defense

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 108.

<sup>192</sup> Brennan, *supra* note 19.

<sup>193</sup> Harold Hongju Koh, Legal Advisor, 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), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

General Counsel Jeh Johnson,<sup>194</sup> Attorney General Eric Holder,<sup>195</sup> and ultimately, in the most significant speech, by President Obama himself.<sup>196</sup> We do not want to tarry long on these already much-discussed general legal principles or on the puzzles presented about applying them properly at the margins (such as whether the same principles appropriate for the conventional battlefield of Afghanistan can properly be extended to targeted killings in places like Yemen and Somalia,<sup>197</sup> or whether the same principles that justify targeted killings of al-Qaeda operatives can properly be extended to individuals working for groups loosely affiliated with al-Qaeda or generally aligned in aim, which was true of al-Shabab before that organization formally affiliated with al-Qaeda in 2012). Instead, we focus on the ways in which these legal justifications reflect our central theme, which is the increasing individuation of enemy responsibility under both the practice of modern military uses of force against alleged terrorists and the legal understandings (or at least, the perceived legal understandings of the United States) of what the law permits and requires with respect to targeted killings. Some aspects of this individuation are well-recognized by specialists in this area, but others are more subtle.

In the administration's first major articulation of its legal justification for the targeted killing program, Legal Adviser Koh concluded that the United States was engaged in an ongoing armed conflict under international law with al-Qaeda, the Taliban, and associated forces, and that a state that is "engaged in an armed conflict or in legitimate self-defense" has the right to use lethal force and is not legally required to provide those targets with any kind of legal process before targeting them.<sup>198</sup> This use of lethal force had to meet the IHL

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<sup>194</sup> Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Defense, Nat'l Sec. Law, Remarks at Yale Law School: Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>.

<sup>195</sup> Eric Holder, U.S. Att'y Gen., Remarks at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

<sup>196</sup> Obama, *supra* note 158.

<sup>197</sup> For a significant article on legal issues concerning the proper geographic scope of detention and targeted killings outside conventional "hot battlefield" settings from a former Human Rights Watch lawyer and national security lawyer in the Obama administration, see 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 (2012). For a critical response to Daskal's attempt to resolve these issues, see Kenneth Anderson, *Readings: Jennifer C. Daskal, The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, LAWFARE (May 5, 2012, 4:32 PM), <http://www.lawfareblog.com/2012/05/readings-jennifer-c-daskal-the-geography-of-the-battlefield-a-framework-for-detention-and-targeting-outside-the-hot-conflict-zone/>.

<sup>198</sup> As Koh elaborated:

requirements of distinction and proportionality as well. In a later and more detailed speech that specifically addressed the application of these principles to the intentional targeted killing of American citizens who are overseas and allegedly involved in terrorism (of which there has been one at the time of this writing), Attorney General Holder asserted that such targeting was permitted at least when (1) the citizen targeted is located overseas; (2) he has a senior operational role (3) with an al-Qaeda or al-Qaeda-associated force; (4) he is involved in plots that aim at harm or death of Americans; (5) he poses a threat that is “imminent,” though the precise boundaries of this concept have yet to be made specific;<sup>199</sup> (6) there is no feasible option of capture without undue risk; and (7) the attack complies with IHL principles of necessity, distinction, and proportionality.<sup>200</sup> And in more recent and important further elaborations of the legal, ethical, and prudential principles that inform the administration’s targeted killing decisions,

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[A] state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Koh, *supra* note 193.

<sup>199</sup> According to Klaidman’s account, Harold Koh argued for a legal theory called “elongated imminence,” which Koh analogized to the battered wife syndrome defense; if alleged terrorists showed a consistent pattern of violence, that should be understood to meet the “imminence” standard, even if they were not about to engage in any specific strike at the moment at which they were targeted. KLAIMAN, *supra* note 108, at 219–20. This “elongated imminence” legal theory might be appropriate for the context of terrorism, but whether it is consistent with prior understandings of imminent threat under international law doctrines might be the subject of continuing debate. Holder himself appeared to reject strict notions of temporal imminence for what he instead called the last “window of opportunity” to stop an attack. Holder, *supra* note 195. Consider also this striking passage on how the administration defines “imminence” from John Brennan’s speech, given before Holder’s speech:

This Administration’s counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa’ida and its associated forces. Practically speaking, then, the question turns principally on how you define “imminence.” We are finding increasing recognition in the international community that a more flexible understanding of “imminence” may be appropriate when dealing with terrorist groups, in part because threats posed by nonstate actors do not present themselves in the ways that evidenced imminence in more traditional conflicts.

Brennan, *supra* note 167.

<sup>200</sup> Holder, *supra* note 195.

President Obama stated that the United States engages in targeted killing only when it lacks the ability to capture instead, and key White House adviser John Brennan asserted that lethal force was used only when capture was “not feasible.”<sup>201</sup> Brennan described this principle as an “unqualified preference,” which suggests ambiguity about whether the administration regards the principle as a legal constraint or an ethical and prudential one; he also appeared to limit the infeasibility of capture as a constraint that applied to those targeted away from the “hot battlefield” of Afghanistan, which suggests this constraint might not apply to targeted killings on more conventional battlefields.<sup>202</sup>

What emerges is a new American doctrine governing the use of lethal force outside the traditional battlefield context.<sup>203</sup> The result does not yet have the form of hard law, but it provides legal-style guidance. Within this general framework, the emergence of individuated enemy responsibility as an essential predicate to the use of military force against that individual—as in the detention context—raises at least at two points. First, all these accounts of the legal framework employed make clear that lethal force outside the conventional battlefield context is not employed against any “member” of the enemy. As John Brennan put it: “We do not engage in . . . lethal action in order to eliminate every single member of al-Qaida in the world.”<sup>204</sup> Targeted killings are limited to those who pose a “significant threat”<sup>205</sup> to U.S. interests. Brennan offered illustrative examples, such as an individual identified as an operational leader of al-Qaeda or associated forces; an operative in the midst of training for or planning to carry out attacks against U.S. interests; or someone with “unique operational skills that are being leveraged in a planned attack.”<sup>206</sup> In his remarks, Koh used the language of “high-level al-Qaeda leaders who are planning attacks” to refer to the individuals who were being targeted without any further specification of how far the legal or ethical justifications for targeted killings extended.<sup>207</sup> And Holder referred only to targeting “senior operational leaders of al Qaeda and associated forces.”<sup>208</sup> In addition, credible journalistic accounts report highly

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<sup>201</sup> Obama, *supra* note 158; Brennan, *supra* note 167.

<sup>202</sup> Brennan, *supra* note 19.

<sup>203</sup> For the argument that the laws of war should distinguish between “active battlefields” and other areas in which the use of military force is still justified but should be more constrained, see Daskal, *supra* note 197.

<sup>204</sup> Brennan, *supra* note 19.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Koh, *supra* note 193.

<sup>208</sup> Holder, *supra* note 195.

focused internal deliberations and even debates about whether specific individuals, based on extremely specific facts about their alleged role, can or should be targeted.<sup>209</sup>

It is important not to lose sight of the profound transformation these developments reflect. Even as the U.S. government asserts that it is at war and has the power to use lethal force against its enemies, it is not adhering to the traditional law-of-war principle that lethal force can be directed against any member of the enemy armed forces, whether high-level commander or low-level foot soldier. Instead, the government is individuating the responsibility of specific enemies and targeting only those engaged in specific acts or employed in specific roles. The government is making what has all the appearance (and reality) of quasi-adjudicative judgments based on highly specific facts about the alleged actions of particular individuals (and not their membership *per se* in the opposing side). And here too, as with detention, this individuation of enemy responsibility is undoubtedly part of what fuels the demand in some quarters that the criminal justice system, rather than unilateral executive direction of military force, should be used instead. If the government is using force only after such fact-bound determinations of responsibility are made, isn't that the traditional province of criminal law? Of course, this criticism does not address the fundamental underlying pragmatic problem, which is that the government cannot feasibly capture these individuals in the first place.

What motivates this change in practice in the perceived legitimate use of military force? The short answer is that the lines between law, morality, and prudence become blurred here; the categories spill over into each other, and they spill over into each other in the context of unconventional war and technological change in the conduct of war. It is not clear whether the Obama administration believes that some or all of this individuation is already legally required by international law or whether this individuation is thought necessary as a matter of morality and sound strategy.<sup>210</sup> Because courts play so little role in adjudicating these questions, particularly in the targeted killing area, the lines between law, morality, and prudence are likely to remain

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<sup>209</sup> KLAIDMAN, *supra* note 108, at 199–223.

<sup>210</sup> Attorney General Holder's remarks on targeted killing, in particular, do not speak directly to the perceived *requirements* of international law regarding individuation of targets, but the Attorney General frequently insists in his address that such killings at least conform with international law. *See* Holder, *supra* note 195 ("This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally.").

blurred for some time to come. Much greater technological capacity at refining the use of force undoubtedly also plays a role in driving these uses of force in a more individuated direction. As Jack Goldsmith nicely notes, “[T]echnological developments that in [one] sense enhance the United States’ military authority also end up constraining it because once there is capacity to be precise in targeting, the moral or political (and, soon, legal) duty to do so soon follows, regardless of what the law previously required.”<sup>211</sup> That dynamic is part of what is fueling the transformation of the law of war into the more individuated framework of enemy responsibility.

The policy preference for capture over killing is a second, more subtle, outcropping of the emerging norm of individuation. Again, the departure from the traditional laws of war is striking; no such preference, let alone legal requirement, exists in the traditional laws of war. The traditional understanding is that enemy soldiers can be killed, even if they could be captured, except in the limited circumstance in which they have engaged in extremely clear manifestations of surrender or are considered *hors de combat* as a result of wounds.<sup>212</sup> There is no obligation to differentiate between soldiers whose threat can be neutralized by capture versus those who can be neutralized only by killing. To be sure, there is ambiguity in the emerging American practice about whether what we might call the “least restrictive alternative” requirement of “capture over killing” is a legal requirement necessary to justify targeted killings or merely a policy preference rooted in strategic calculations (capture enables mining for intelligence) or moral considerations (killing is gratuitous when

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<sup>211</sup> Jack Goldsmith, *Thoughts on the Latest Round of Johnson v. Koh*, LAWFARE (Sept. 16, 2011, 8:43 AM), <http://www.lawfareblog.com/2011/09/thoughts-on-the-latest-round-of-johnson-v-koh/>; see also Blum, *supra* note 127, at 120 (2010) (indicating that the changing form of warfare “requires states to invest in military technologies that enable them to tell combatants apart from civilians and target the former without harming the latter,” and often requires them to “engage in individual-based determinations of the identity and role of their target”).

<sup>212</sup> Recently, our colleague Ryan Goodman has argued that this “least-restrictive-means” test is, in fact, the correct understanding of international humanitarian law, at least in contexts in which doing so does not impose any risk to the attackers. See Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT’L. L. (forthcoming 2013); see also NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 289 (2008) (arguing that international humanitarian law presupposes the necessity of a given action compared with less harmful alternatives). This position, however, has been vigorously disputed. See Jens David Ohlin, *The Kill-Capture Debate: Lost Legislative History or Revisionist History?* (Cornell Legal Studies Research Paper No. 13-90, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2230486](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230486) (criticizing the Goodman position). For the argument that this kind of least-harmful-means test should be applied to targeted killings and detention outside any zone of active hostilities, see Daskal, *supra* note 197, at 1214–18.

capture is possible). John Brennan's statement suggests a policy preference, not a legal requirement.

The first publicly acknowledged, successful personality-based targeting in the context of the modern form of nonstate belligerents was conducted by Israel in 2001 (recall that President Clinton in 1998 ordered unsuccessful cruise missile strikes specifically targeting Osama bin Laden).<sup>213</sup> Israel sent a helicopter gunship to successfully kill a militia leader in Bethlehem.<sup>214</sup> The then-administration of President George W. Bush criticized the use of this tactic, though there appear to have been internal divisions within the administration and then-Senator Joe Biden defended Israel's action.<sup>215</sup> By 2002, in the wake of September 11, the Bush administration and the American government had changed their views and initiated the first American targeted killings.<sup>216</sup>

As the legal framework for this issue evolved and became more public in Israel, including through litigation before its High Court, the legal understanding of the constraints under which targeted killings can permissibly take place does appear to make this least-restrictive-alternative constraint an actual legal requirement.<sup>217</sup> Thus, even

<sup>213</sup> Uri Friedman, *Targeted Killings: A Short History*, FOREIGN POL'Y (Sept.–Oct. 2012), available at [http://www.foreignpolicy.com/articles/2012/08/13/targeted\\_killings/](http://www.foreignpolicy.com/articles/2012/08/13/targeted_killings/).

<sup>214</sup> *Id.*

<sup>215</sup> The State Department "strongly deplored" the attack as a "new and dangerous" escalation of violence. *Powell: Israel 'Too Aggressive' in Hamas Attack*, CNN.COM (Aug. 2, 2001, 7:06 AM), <http://asia.cnn.com/2001/US/08/01/powell.mideast/index.html>. However, Senator Joe Biden was quoted as stating, "I don't believe this is a policy of assassinations. There is [in] effect a declared war, a declaration by an organization that has said its goal is to do as much as it can [to kill Israeli civilians]." Janine Zacharia, *Sen. Biden Defends Targeted Killings*, JERUSALEM POST, Aug. 3, 2001, at 6A.

<sup>216</sup> Friedman, *supra* note 213.

<sup>217</sup> The emerging American doctrine has striking parallels to the decision of the Israeli Supreme Court on the lawfulness of targeted killing. Israel accepts a much greater judicial role in overseeing military operations, thus leading to an earlier hardening of the legal categories. Per the decision by President Aharon Barak, there are four requirements:

- (1) Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities . . . .
- (2) Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. . . .
- (3) Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent . . . .
- (4) Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test.

HCI 769/02 Pub. Comm. Against Torture in *Isr. v. Gov't of Israel* [2005], slip op. para. 40, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/A34/02007690.A34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf).



before the Israeli High Court adjudicated the legality of these killings, the internal executive branch guidelines developed from 2000 to 2002 specified a six-factor set of requirements, including that “arrest is impossible” and that such operations were to be limited to areas not under Israeli control (presumably because in those areas, capture is feasible).<sup>218</sup> Moreover, in the most important judicial decision thus far on the legality of targeted killing, the Israeli High Court in 2005 specifically held that Israeli law precludes a targeted killing “if a less harmful means can be employed.”<sup>219</sup> As a matter of Israeli domestic law, Justice Aharon Barak concluded for the High Court, Israeli law includes a proportionality requirement, which entails the constraint that, among available military measures, the military “must choose the means whose harm to the human rights of the harmed person is smallest.”<sup>220</sup> If this principle actually becomes embedded in Israeli law, it would constitute in two respects an even more radical reconceptualization of the legal constraints on the use of military force during wartime. Moreover, this appears to be an example in which the emerging legal rules of warfare concerning terrorism might be spilling over even into more conventional war contexts; nothing in the Israeli High Court decision suggests that this principle of minimal required force is limited to the asymmetric warfare setting as opposed to being a general legal principle applicable to all war contexts. That would constitute an even more remarkable move toward construing law (either domestic or international) in ways that highly individualize both the nature of the specific individuals’ actions involved and the contexts in which force can be applied against particular persons.

Within American domestic law, the requirement that capture not be feasible before killing is justified does appear to be a *constitutional* requirement with respect to American citizens, at least in the understanding of Attorney General Holder and the Obama administration.<sup>221</sup> Moreover, President Obama has stated that America does not engage in targeted killings “when we have the ability to capture individual terrorists.”<sup>222</sup> Thus, whatever the ambiguity as to whether this “least restrictive alternative” requirement applies to targeted killings

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<sup>218</sup> See Laura Blumenfeld, *In Israel, a Divisive Struggle over Targeted Killing*, WASH. POST, Aug. 27, 2006, at A1 (describing internal executive branch processes for targeted killings by Israeli forces).

<sup>219</sup> HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Israel [2005], slip op. para. 40, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/A34/02007690.A34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf).

<sup>220</sup> *Id.*

<sup>221</sup> See Holder, *supra* note 195 (explaining that targeting U.S. citizens is constitutional at least where, *inter alia*, capture is not feasible).

<sup>222</sup> Obama, *supra* note 158.

in general, as reflected in the uncertainties about how to construe John Brennan's statement, the targeted killing of American citizens overseas does specifically require that capture not be feasible. A host of questions arise, of course, about precisely what it means for capture not to be "feasible." It appears that the term "feasible" in this context derives from the relative level of military risk involved in capture, rather than any sense of impossibility.<sup>223</sup> What remains most essential to notice about this requirement is that, at least with respect to American citizens, we are seeing further recognition even from within the executive branch, without judicial compulsion, of an even more individuated approach to uses of military force. Moreover, President Obama has recently stated that these same requirements apply when noncitizens are targeted.<sup>224</sup>

As this move toward individuating enemy responsibility continues to develop, one question it will confront is whether law itself (as opposed to morality or political prudence) will require or permit different treatment of a country's own citizens who pose terrorist threats from that of noncitizens who pose the identical threat. Currently, American legal understandings apparently are that there is a significant *legal* difference between citizens and noncitizens, as reflected in the differences and tensions between the Brennan and Holder speeches. According to the Obama administration, American citizens overseas who pose identical threats are entitled to greater substantive legal protection than noncitizens; force must be the only feasible option for the former but not the latter.

Differentiating the treatment of threats coming from citizens as opposed to noncitizens is a deeply controversial matter, both in theory and in international law. Particularly when force can be used only once the enemy "target" is highly individuated, in terms of his specific actions, it is not at all clear why, in principle, an American citizen in the same overseas location who poses a threat identical to that posed by a non-American should have greater legal protection. As a matter of domestic politics, perhaps, one can understand why political leaders would want to ensure that their own citizens receive special protection against the exceptional circumstance of their own government using lethal force against them. But as a matter of law, why should governments have the power to kill noncitizens who could otherwise be captured but not kill citizens in that circumstance? As a matter of

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<sup>223</sup> See, e.g., Holder, *supra* note 195 ("[Feasibility] is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel.").

<sup>224</sup> Obama, *supra* note 158.

morality, David Luban argues, “[T]he nationality of casualties is irrelevant. . . . To focus only on the lives of Americans is parochial in a way that the morality of war is not.”<sup>225</sup>

Further, as a matter of international law and the domestic law of some countries, providing greater protections to one’s own citizens in the terrorism context can be a reason to *condemn*, not praise, the practices by which a country metes out its use of military force; political process theory would suggest that the only protection noncitizens are likely to have in these and similar contexts is if a country’s own citizens must live under the same legal regime. Indeed, the United Kingdom’s House of Lords held a central element in British antiterrorist detention policy illegal precisely because it imposed greater restrictions on nonnationals than on British citizens.<sup>226</sup> And finally, despite the apparent distinctions suggested by Attorney General Holder’s speech between targeting citizens and noncitizens, Daniel Klaidman, in describing President Obama’s decision to authorize the killing of al-Awlaki, writes that after the President reviewed the intelligence and was left with no doubt that al-Awlaki posed a major and imminent threat to American security, the fact that al-Awlaki was an American “was immaterial” to him.<sup>227</sup> Perhaps there is journalistic license in that summary statement, but whether the emerging individuation of the *laws* of war, both domestically and in international law, requires or permits the further individuation and differentiation of citizens and noncitizens remains a difficult and unresolved question. But in a recent, major statement of administration policy, President Obama stated that his administration would apply the same substantive standards to determine whether a lethal strike was justified, regardless of whether the targets were citizens or not.<sup>228</sup>

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<sup>225</sup> Luban, *supra* note 181 (“From the point of view of just war theory, the nationality of casualties is irrelevant. If they are enemy belligerents, they can be targeted, regardless of their nationality; if they are not enemy belligerents, they can’t be, regardless of their nationality.”).

<sup>226</sup> *A v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, at 68 (appeal taken from Eng.).

<sup>227</sup> KLAIMAN, *supra* note 108, at 265.

<sup>228</sup> President Barack Obama, Remarks at National Defense University: The Future of Our Fight Against Terrorism (May 23, 2013), *available at* <http://www.lawfareblog.com/2013/05/text-of-the-presidents-speech-this-afternoon/> (“But the high threshold that we have set for taking lethal action applies to all potential terrorist targets, regardless of whether or not they are American citizens. This threshold respects the inherent dignity of every human life.”).

### C. *Procedural Safeguards*

As with all use of lethal force, it is essential that there be adequate procedures in place to maximize the likelihood of correct identification and minimize risk to innocents. In the absence of formal legal processes, sophisticated institutional entities that are engaged in repeated, sensitive actions—including the military—will gravitate toward their own internal analogues to legal process, even without the compulsion or shadow of formal judicial review. The need to provide a formal structure to military power is as present with regard to targeted drone warfare as it was in the ground-up detention practices that emerged in Iraq and Afghanistan. This is the role of bureaucratic legalism in developing sustained institutional practices, even with the dim shadow of unclear legal commands. These forms of self-regulation are generated by programmatic needs to enable the entity's own aims to be accomplished effectively; at times, that necessity will overlap with humanitarian concerns to generate internal protocols or process-like protections that minimize the use of force and its collateral consequences in contexts in which the use of force itself is otherwise justified. But because these process-oriented protections are not codified in statute or reflected in judicial decisions, they typically are too invisible to draw the eye of constitutional law scholars who survey these issues from much higher levels of generality.

In theory, such review procedures could be fashioned alternatively as a matter of judicial review (perhaps following warrant requirements or the security sensitivities of the FISA court), accountability to legislative oversight (using the processes of select committee reporting), or the institutionalization of friction points within the executive branch (as with review by multiple agencies). Each could serve as a check on the development of unilateral excesses by the executive. And, presumably, each could guarantee that internal processes were adhered to and that there was accountability for wanton error.

The centrality of dynamic targeting in the active theaters such as the border areas between Afghanistan and Pakistan makes it difficult, however, to integrate legislative or judicial review mechanisms. Conceivably, the decision to place an individual on a list for targeting could be a moment for review outside the boundaries of the executive branch, but even this has its drawback. Any court engaged in the *ex parte* review of the decision to execute someone outside the formal mechanisms of crime and punishment risks appearing as a modern

variant of the Star Chamber.<sup>229</sup> Similarly, there are difficulties in forcing a polarized Congress as a whole to assume collective responsibility for decisions of life and death, and the incentives have turned out not to be well-aligned for a subset of Congress, such as the intelligence committees, to play this role effectively.<sup>230</sup>

Under President Obama, the choice has been a far more formalized process of executive oversight drawing on multiple agencies to cross-check targeting decisions. According to the most credible journalistic account of these processes in the Obama administration: “It is the strangest of bureaucratic rituals: Every week or so, more than 100 members of the government’s sprawling national security apparatus gather, by secure video teleconference, to pore over terrorist suspects’ biographies and recommend to the president who should be the next to die.”<sup>231</sup> It is difficult to know, of course, how robust and adequate that process is in fact, but it is surely broader and more widespread across different parts of the executive branch than many outsiders seem to assume.

In addition, the recent work of Professor Gregory S. McNeal sets out the detailed formal procedures that exist *ex ante* and the mechanisms of accountability that exist *ex post* for evaluating pre-planned targeted strikes by the military in Afghanistan, including targeted killings by military-controlled drones (note that this analysis covers only military strikes, not those that might be engaged in by the CIA).<sup>232</sup> Any evidence on these questions at this stage of experience must, of

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<sup>229</sup> There are some mechanisms that try to implement a form of judicial oversight of unilateral executive decisions on a kill list, incorporating a distinct set of legal procedures. One insightful commentator has looked for guidance to the long-established English (and, in some cases, American) practice of “outlawry.” Under this conventional approach, an individual who refuses to respond to a criminal indictment in a court of law may be deemed to have forsworn customary legal protections regarding their person or property. The condition of outlawry could justify state use of lethal force to control the threat posed by such individuals, so long as the individuals so designated do not surrender to authorities to face the charges against them. In essence, judicial procedures would remain an alternative available to alleged (citizen) terrorists, but the executive would not be prevented from using lethal force when persons like Anwar al-Awlaki chose to remain in the Yemeni hinterland rather than submitting to formal judicial procedures. See Jane Y. Chong, Note, *Targeting the Twenty-First-Century Outlaw*, 122 YALE L.J. 724, 754–56 (2012).

<sup>230</sup> See AMY B. ZEGART, *Policemen, Firefighters, and Spooks*, in EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY 55 (2011) (analyzing different models of congressional oversight and finding that the normal incentives, such as electoral politics, that drive effective oversight in most other areas are inadequate in the intelligence context).

<sup>231</sup> Becker & Shane, *supra* note 3.

<sup>232</sup> See McNeal, *supra* note 37, at 21–51, 84–90. Given that any drone program the CIA might control has not been publicly acknowledged by the United States government, there is, needless to say, no comparable information on any such program, assuming from news accounts that one does exist.

course, be viewed as highly uncertain, given that these attacks take place by definition in areas in which it is very difficult to get reliable reports on the numbers and identities of those killed or wounded. Moreover, we must stress that McNeal's account involves only operations the military conducts. There is a fair amount of public information now available, as in McNeal's work and that of journalists, about the extensive interagency processes involved in targeting decisions involving the military. By contrast, there is at this stage virtually no public-record information about the *ex ante* and *ex post* processes used for targeting operations that the CIA allegedly conducts.<sup>233</sup> Thus, there might well be significant differences in many of the key elements—how accurate the identifications are, or what the ratio of combatant to civilian deaths or injuries are—between targeted strikes conducted by the military and those conducted by the CIA.

Professor McNeal reports two striking findings. First, civilian casualties reportedly occurred in less than one percent of pre-planned strikes (and other strikes, when time and combat circumstances make it possible)<sup>234</sup> that followed the protocol the military now employs, called a Collateral Damage Mitigation Assessment (CDM). Second, under internally self-generated guidelines, a senior commander (typically a general officer), the President, or the Secretary of Defense is required to approve in advance any pre-planned military strike in Afghanistan in which one or more collateral civilian casualties is projected. To be sure, as the first analysis to open up these issues, McNeal's work has yet to be tested; the empirical facts on matters such as these are likely to be much debated. But as the first actual descriptive account of the processes and protocols the military uses in pre-planned targeted strikes, McNeal's work advances public knowledge considerably.<sup>235</sup>

As McNeal describes, even *before* military planners and their lawyers turn their attention to law-of-war and international-law requirements, such as proportionality analysis, they engage in the CDM process, designed to generate a less than ten percent probability that a pre-planned strike will produce any collateral damage. In any

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<sup>233</sup> For the most extensive analysis of the CIA's targeted killing program, see MARK MAZZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH* (2013).

<sup>234</sup> McNeal, *supra* note 37, at 79. McNeal reports that since June 2009, pre-planned operations constituted all air-to-ground operations in Afghanistan other than emergency situations in which close air support was called in. *Id.* at 53 n.225.

<sup>235</sup> Recent disclosures confirm the high-level authorization requirement. Becker & Shane, *supra* note 3 ("In Pakistan, Mr. Obama had approved not only 'personality' strikes aimed at named, high-value terrorists, but 'signature' strikes that targeted training camps and suspicious compounds in areas controlled by militants.").

targeted strike, a first and essential stage is implementing the law of distinction, of course, which means correctly identifying the person who is properly treated as a legitimate target of lethal military force. Both legally, with respect to who can be made a lawful target, and factually, with respect to the accuracy of these initial determinations, this subject is one of those most often discussed in academic literature and public debate.

But McNeal also recounts a far less familiar second *ex ante* stage, in which military planners first identify the collateral damage concerns, to persons or the environment, within the radius likely to be affected by the strike. These planners then implement a series of “mitigation techniques” designed to minimize the probability and amount of damage or injury to collateral individuals and property. These techniques, based on empirical data and computer analyses, involve the use of “progressively refined analysis of available intelligence, weapon type and effect, the physical environment, target characteristics and delivery scenarios keyed to risk thresholds established by the Secretary of Defense and the President of the United States.”<sup>236</sup> These measures aim to ensure less than a ten percent probability of serious or lethal wounds to noncombatants and of damage to collateral structures.<sup>237</sup> These techniques *precede* legal analysis of the proportionality issue.

These protocols also build in heightened procedural protections and enhanced executive branch accountability when the analysis suggests substantial collateral damage. The rules of engagement contain a noncombatant casualty cutoff value, established by the President and Secretary of Defense. For estimates below this level, a senior commander (major general (two-star rank)) may authorize the operation; for estimates at or above the cutoff, the target must be approved by the National Command Authority<sup>238</sup> and military commanders must have gone through a special Sensitive Target Approval and Review Process.<sup>239</sup> According to McNeal, for pre-planned military strikes in Afghanistan, the current cutoff is one that reflects the strategic importance in counterinsurgency operations of minimizing civilian casualties. Thus, if a targeted strike operation is expected to result in even one civilian casualty, the National Command Authority must approve it. The reported results for these planned military strikes, no doubt still subject to confirmation, reveal low levels of unintended

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<sup>236</sup> McNeal, *supra* note 37, at 69.

<sup>237</sup> *See id.*

<sup>238</sup> This authority is apparently delegated to the commander of U.S. and ISAF forces, which had been General Petraeus and as of this writing is General Allen. *Id.* at 78 n.361.

<sup>239</sup> *See id.* at 75–78.

casualties,<sup>240</sup> certainly far removed from the carpet bombing of the aerial wars of the twentieth century. Independent of the accuracy of reported numbers of such casualties,<sup>241</sup> though, the point is that the CDM and related processes reveal the internal development of law-like institutional procedures and protocols that the military and executive branch can develop to discipline their discretion, without the direct intervention of courts (and where even the shadow of judicial oversight is small).

With respect to alleged CIA targeted killings in Pakistan, one important source of independent evidence, the New America Foundation (which works through prominent Western and Pakistani media sources to compile statistics on remote killings in Pakistan),<sup>242</sup> has concluded that the program is becoming increasingly effective at hitting the appropriate targeted individuals while reducing civilian deaths. In several recent articles, Peter Bergen of the New America Foundation has argued that the data suggest a precipitous decline in civilian casualties from drone strikes, falling from a high of nearly fifty percent of drone strike casualties in 2008 to the rather remarkable conclusion that the rate had dropped by 2012 effectively to zero percent.<sup>243</sup> Bergen attributes this rapid improvement to the use of smaller munitions, improved drone flight technology, increased congressional oversight, and stricter executive guidelines regarding the use of drones.<sup>244</sup> Tallies of civilian deaths remain an inexact science and Bergen's reports have been met with some criticism. Still, even the London-based Bureau of Investigative Journalism, which is generally more skeptical of the strikes, in addition to being skeptical of Bergen's

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<sup>240</sup> Chris Woods, *Analysis: CNN Expert's Civilian Drone Death Numbers Don't Add Up*, BUREAU OF INVESTIGATIVE JOURNALISM (July 17, 2012), <http://www.thebureauinvestigates.com/2012/07/17/analysis-cnn-experts-civilian-drone-death-numbers-dont-add-up/>.

<sup>241</sup> See Becker & Shane, *supra* note 3 (reporting the "disputed method" the administration was using for counting civilian casualties, in which all military-age males in a strike zone were presumptively counted as combatants).

<sup>242</sup> See Woods, *supra* note 240 ("[The New America Foundation's data is] the most frequent source of statistics for the US media, including CNN itself. So the accuracy of its material is important."). See generally *An Analysis of U.S. Drone Strikes in Pakistan, 2004–2012*, NEW AMERICA FOUNDATION, <http://counterterrorism.newamerica.net/drones>.

<sup>243</sup> See Peter Bergen, *Drones Decimating Taliban in Pakistan*, CNN.COM (July 4, 2012), <http://edition.cnn.com/2012/07/03/opinion/bergen-drones-taliban-pakistan/index.html>; Peter Bergen & Jennifer Rowland, *Civilian Casualties Plummet in Drone Strikes*, CNN.COM (July 14, 2012), <http://www.cnn.com/2012/07/13/opinion/bergen-civilian-casualties/index.html>.

<sup>244</sup> See Bergen & Rowland, *supra* note 243.



claim that no civilians were killed in 2012, recorded a similar dramatic decline by 2012.<sup>245</sup>

In addition, as of May 2013, civilian casualties are reported by some to be at their lowest ever. That is partly the result of a sharply reduced number of drone strikes in Pakistan—12 in 2013 as of May, compared with a record 122 in 2010<sup>246</sup>—and also of more precise targeting. According to data collected by the New America Foundation, in 2013, three to five civilians were killed in drone strikes by July.<sup>247</sup> Two other organizations that track the CIA drone program in Pakistan, the Bureau of Investigative Journalism and the *Long War Journal*, report zero civilian deaths<sup>248</sup> and eleven civilian deaths<sup>249</sup> respectively for the same time period.

Even a procedurally regulated use of targeted weaponry will remain highly dependent, of course, on military intelligence about the enemy. The fewer the resources on the ground, the more likely that mistakes will be made, including terrible losses of civilian life. To the extent that drones or air strikes are used as the primary form of engagement, as for example in Yemen, the greater the risk of error appears to be.<sup>250</sup>

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<sup>245</sup> Shane Scott, *The Moral Case for Drones*, N.Y. TIMES, July 14, 2012, at SR4 (“The bureau has documented a notable drop in the civilian proportion of drone casualties, to 16 percent of those killed in 2011 from 28 percent in 2008. This year, by the bureau’s count, just three of the 152 people killed in drone strikes through July 7 were civilians.”); *Pakistan Civilian Deaths from US Drones ‘Lowest Since 2008’*: Report, EXPRESS TRIB. (PAK.) (July 2, 2012), <http://tribune.com.pk/story/402505/pakistan-civilian-deaths-from-us-drones-lowest-since-2008/>; Conor Friedersdorf, *CNN’s Bogus Drone-Deaths Graphic*, THE ATLANTIC (July 6, 2012, 10:44 AM), <http://www.theatlantic.com/politics/archive/2012/07/cnns-bogus-drone-deaths-graphic/259493/>; Chris Woods & Jack Serle, *June 2012 Update: US Covert Actions in Pakistan, Yemen and Somalia*, BUREAU OF INVESTIGATIVE JOURNALISM (July 2, 2012), <http://www.thebureauinvestigates.com/2012/07/02/june-update-us-covert-actions-in-pakistan-yemen-and-somalia/> (“[F]ewer civilians are being killed in CIA drone strikes in Pakistan than at any time in the Obama presidency.”).

<sup>246</sup> *The Drone War in Pakistan*, NEW AM. FOUND., <http://natsec.newamerica.net/drones/pakistan/analysis> (last updated July 28, 2013).

<sup>247</sup> *Id.* (reporting three to five civilians killed in a drone strike on Feb. 6, 2013).

<sup>248</sup> *Pakistan Drone Strikes Visualized*, BUREAU OF INVESTIGATIVE JOURNALISM (July 2, 2012), <http://www.thebureauinvestigates.com/2012/07/02/resources-and-graphs/>. This site concludes that the average number of people killed per CIA drone strike in Pakistan has gone down from 8.76 in 2009 to 4.65 in 2013. *See id.* (reporting 473 deaths in 54 drone strikes in 2009 and 79 deaths in 17 drone strikes in 2013 through August 21).

<sup>249</sup> Bill Roggio & Alexander Mayer, *Charts on U.S. Strikes in Pakistan*, LONG WAR J., <http://www.longwarjournal.org/pakistan-strikes.php> (last updated July 29, 2013, 9:23 AM). According to this site, since 2010, the ratio of combatants killed to noncombatants killed is about 27:1. *See id.* (reporting 1590 Taliban or al-Qaeda casualties and 59 civilian casualties in Pakistan since the start of 2010).

<sup>250</sup> According to a remarkable piece of reporting, a recent strike in Yemen appears to have rested on faulty intelligence, with major loss of innocent lives and serious counter-productive strategic consequences, if the article is accurate. *See* Sudarsan Raghavan, *Yemen Tries to Cover Up Drone Hits*, WASH. POST, Dec. 25, 2012, at A1.

What emerges overall is the beginning of institutional practices rooted in the hazy intersection of the laws of war, the moral obligations of democratic states, and evolving military capabilities. It is unclear precisely what procedural safeguards and institutional structures were used to make targeting decisions in the initial phases of the emerging use of drones as a central platform in counterterrorism policy. As reflected in more recent public presentations of policy by Holder, Koh, and Brennan, as well as in journalistic accounts of the internal decisionmaking process, the Obama administration has tried to systematize the military use of drones by creating internal procedures that assess the importance of the target, the risks of civilian casualties, and the quality of the information about the proposed strike. Though reliable data is hard to come by, it appears that the error rate in drone strikes has diminished over time.

As a substantive matter, there are many myths or confusions or misunderstandings in public debates about drones and targeted killings. But drone technology itself, and the manner in which it has been deployed, does not raise exceptional legal issues. The central legal question is whether use of force is justified, and if it is, then delivery of that force through a drone rather than a manned plane or cruise missile does not raise novel issues. As a procedural matter, though, it is extremely important that the legal justifications for this power be articulated fully, publicly, and as transparently as possible. The importance of these constraints is due to what one of us has elsewhere called “the general dynamic of terrorism policy.”<sup>251</sup>

As we have now seen across two administrations since September 11, modern terrorism confronts government with certain challenges different from more conventional crime. In response, government might conclude that pragmatic, functional, and effective responses require adapting policy to these new circumstances, including using powers not used in ordinary times or in response to conventional crime. Some of these powers might have deep roots in past American practice and law during conventional wars (such as detention); others might be relatively more novel (targeted killings). These policies involve particularly aggressive uses of coercive, even lethal, power; they are unfamiliar, not only to most citizens, but to many legally educated actors, since the last use of even the more familiar of these powers was, essentially, almost seventy years ago during World War II. The policies might (or might not) be functionally appropriate,

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<sup>251</sup> See Rick Pildes, *How Government Silence Undermines Terrorism Policies: Part One*, LAWFARE (Oct. 9, 2011, 3:27 PM), <http://www.lawfareblog.com/2011/10/how-government-silence-undermines-terrorism-policies-part-one>. A previous version of the next two paragraphs appears on LAWFARE. *Id.*

effective, and legally justified. But government actors need to recognize that these kinds of coercive and less familiar powers will understandably and predictably trigger concerns in many quarters about whether what is being done is justified; whether the actions rest on sound reasons; and whether the government is using these powers in appropriately restrained ways, including showing appropriate respect for the interests and values that these policies sometimes override (that is, whether these values are compromised no more than necessary to accomplish the government's legitimate aims).

If government is going to use these powers, it needs to respond to these understandable concerns. Astute policymakers should recognize that the tradeoff for deploying these powers is that government assumes a greater burden to provide a full public accounting and explanation of why it is using these powers, how they are being used, with what internal substantive and process-based constraints, and with what understanding of the legal principles involved. As scholars of the presidency going back at least to Richard Neustadt have observed, the effective power of a president—and of government—is bound up in the credibility of the president's actions, including the bases for them.<sup>252</sup> The capacity of the government to sustain these kinds of policies over extended periods of time is intimately tied to the credibility of these policies with various audiences, such as Congress, the courts, and public opinion. Where international cooperation and support is inevitably required, these policies will also need to have some degree of credibility with those audiences as well. If this was true when Neustadt first wrote on the eve of the 1960s, it is true in spades today. Government actions today, including many previously secret ones, quickly get disclosed in the modern age of digital cameras, the Internet, numerous nongovernmental organizations that exist to monitor government conduct, and a journalistic culture that thrives on exposing the government's actions. The credibility of government action, even legitimate, justified action, can easily be undermined, including by misperceptions, misunderstandings, or willful distortion, if government does not participate actively in putting forth the reasons for its actions in a credible, public way.

Even if some or most of the procedural safeguards to ensure accurate decisionmaking are likely to be internal to the executive branch, that does not remove the importance of the formalization of consistent policy or internal legal safeguards. Nor should that fact undermine the government's obligation to provide as much

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<sup>252</sup> RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29–50 (1990).

transparency as is consistent with other legitimate governmental policy interests.

### CONCLUSION

We are at the early stages of a profound but partial transformation regarding the legitimate use of military force: An emerging imperative increasingly requires quasi-judicative individualized judgments about the particular responsibility of specific individual enemies before military force can legitimately be used against them. This is a transformation from the traditional status-based or group-based justifications for use of force against the enemy to a more act-based or individuated justification for when force is legitimate.

This change is being propelled by a combination of the inherent structural differences between the nature of insurgent, guerilla, and terrorist groups (the principal targets of military force by democratic forces in today's world) and the conventional armies of the past; by technological changes that enable far more discriminating deployments of force; and by the post-World War II emergence of a more general humanitarian sensibility among at least Western democracies.

In turn, the evolving military practices of dominant states are beginning to reflect this new military reality. Military practice and moral arguments about this change will move far more quickly than legal change, but to an extent this transformation is also beginning to be reflected in the domestic law of some states and in arguments about obligations under international law. Military practice, perceptions of morality, and legal obligation will mutually influence each other as this transformation unfolds.

The ramifications of this emerging imperative to individuate enemy responsibility are wide-ranging. Military forces will inevitably have to develop analogues appropriate to the military context for the procedural protections (hearings, evidence-based assessments, and the like) designed to ensure accuracy of quasi-judicative judgments of individual responsibility when coercive state power is deployed domestically. The United States military in its evolving post-September 11 self-understanding has been doing that, and these kinds of procedural protections will have to be credible if military force will be sustainable over the long run in these contexts. Similarly, it is probably also inevitable that courts will step in to play a somewhat more significant role to assess the use of at least certain exercises of military force (perhaps more in the context of detention than military operations themselves) than they have in the past. As the justification for force becomes more closely tied to ascriptions of

individualized responsibility, the courts will instinctively experience certain of these issues as closer to the kinds of questions with which courts deal traditionally. Once we recognize that we are moving toward a regime of individuating enemy responsibility, at least to some extent, it is also perhaps inevitable that pressure will arise from some quarters to insist that only the most traditional model for how to assign those judgments—the criminal justice system—is fit for this task.

But a central theme of this Article is that the existing legal frameworks, both domestic and international, do not provide direct answers to the critical legal questions this transformed military context spawns. The question is not whether terrorism is more similar to war than to crime. Neither the legal regimes for regulating war (primarily, international law) nor for regulating crime (primarily, domestic law) were designed to reflect the emerging individuation of responsibility towards which practice and morality are moving. The question is how best to adapt either international law or domestic law or both to come to terms with the perceived imperative to individuate responsibility while also recognizing the functional and practical constraints under which military power must inevitably be deployed.

While we seek to capture one important emerging strand in the practice of warfare in certain modern contexts, we do not suggest that our account offers a comprehensive descriptive or normative perspective on all forms of modern military practice. Surely there will continue to be contexts in which traditional armies of nation states confront each other on conventional battlefields, as in the two recent wars the United States fought against Iraq. In addition, even outside this traditional warring of nation-state armies, there will be many contexts in unconventional wars in which military force still continues to be directed against groups of individuals believed to consist of enemy forces (or against military objects, such as training camps, where such groups of individuals are thought to be present). In these contexts, the traditional status-based distinctions and justifications for the use of military force continue to characterize its use.

We will, however, briefly consider ways the emerging individuation of enemy responsibility might affect these more traditional contexts.<sup>253</sup> In one projection of the future path of the morality and law of the use of military force, we might envision two distinct regimes that manage to coexist side by side: a regime of status-based uses of force in more traditional contexts alongside the more individuated regime of enemy responsibility we describe here. But we might also ask

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<sup>253</sup> We are particularly indebted to Marty Lederman for pressing this point with us.

whether it is plausible or stable that two such distinct regimes could be sustained in such stark acoustic separation from each other.<sup>254</sup>

In a different projection of that future, therefore, we might imagine that the emergence of the more individuated regime will have moral or legal ramifications that spill back, to some extent, into the more traditional regime. Gabriella Blum, for example, speaks of the “changing nature of the battlefield” creating a military environment that “is becoming increasingly dependent on case-by-case judgments.”<sup>255</sup> To the extent that technologies of intelligence and military force enable more discriminating judgments even in more traditional contexts between those enemy soldiers who pose a serious threat and those who do not (by virtue of their specific role, for example, in the enemy’s army), perhaps pressure will arise to refine traditional status-based attacks to more individuated, threat-based attacks.

We are not arguing that the use of military force in all contexts is moving from a status-based to act-based regime. There are and will continue to be many contexts in which the traditional status-based approach will continue to be justified and legitimate, both morally and legally. But we have only dimly seen that the fundamental imperative driving policy and argument on these issues is the need to individuate enemy responsibility in a credible and justifiable way. The more we grasp that fundamental transformation, the more clarity we can bring to the creative act of deciding how to design military and legal regimes that will appropriately reflect this transformed military, moral, and legal environment.

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<sup>254</sup> See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (describing the notion of such separation).

<sup>255</sup> Blum, *supra* note 127, at 120.

APPENDIX I

STRUCTURE OF ISRAELI DETENTION POLICY PER  
A AND B V. STATE OF ISRAEL

	<i>Emergency Powers</i>	<i>Internment Law</i>	<i>Occupied Territories</i>
Applies to	Israeli residents/citizens	Foreigner unlawful combatants (residents of Gaza and Lebanon, but not residents of the West Bank)	Residents of the Occupied Territories (West Bank)
Basis for Detention	Minister of Defense orders arrest	Army Chief of Staff orders arrest	IDF commander orders arrest
Detention Requirements	1) Declared state of emergency (“meaningless”) 2) Reasonable cause to believe security so requires	1) Participate in a hostile act against Israel; or 1a) Be a member of a force carrying out hostile acts against Israel; and 2) Release would harm security (presumed)	1) Reasonable cause to believe security so requires; and 2) Believe detention is necessary for “imperative security reasons”
Initial Review	48 hours	8 days	14 days
Subsequent Review	3 months	6 months	6 months
Appeal	Supreme Court	Supreme Court	Military Appeals Court
Judicial Review	Civilian	Civilian	Military
In-Camera Hearings	Yes	Yes	Yes
Deviations from Rules of Evidence	Yes	Yes	Yes