The Choice of Law Against Terrorism

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On December 25, 2009, a 23-year-old Nigerian, Umar Farouk Abdulmuttalab, took Northwest Airlines Flight 253 from Amsterdam to Detroit, Michigan. Shortly before landing, he allegedly attempted to set off an explosive device. Abdulmuttalab was immediately arrested by police and within a few days was charged by U.S. federal prosecutors with six terrorism-related criminal counts.[1] By early January 2010, Senators Joseph Lieberman and Susan Collins, among others, were calling for Abdulmuttalab to be charged as an enemy combatant under the law of armed conflict rather than as a criminal suspect.[2] Those critical of the criminal charges generally expressed the view that as a combatant, Abdulmuttalab could be interrogated without the protections provided to a criminal suspect during questioning, especially the right to have a lawyer present.[3] Attorney General Eric Holder said that he had considered charging Abdulmuttalab under the law of armed conflict but decided to follow past precedent and policy and charge him under anti-terrorism laws.[4]

A similar debate was already underway regarding Khalid Sheik Mohammed, the alleged mastermind of the 9/11 attacks. Khalid Sheik Mohammed was originally captured in Pakistan, far from any on-going hostilities. He was subsequently held in secret CIA prisons, where he was waterboarded 183 times, then transferred to the prison at the U.S. Naval base at Guantánamo Bay.[5] Attorney General Eric Holder announced that Khalid Sheik Mohammed would be tried in a civilian court on criminal charges of terrorism, but politicians of both major U.S. political parties called on the President to reverse the decision and try him and several

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1. Sebastian Rotella, *U.S. Had Planned To Interview Would-Be Bomber on Landing*, SEATTLE TIMES, Jan. 6, 2010, *available at* http://seattletimes.nwsource.com/html/nationworld/2010725368_airline07.html.

2. *See*, *e.g.*, Joseph Lieberman, *Lieberman, Collins Urge Administration To Move Abdulmuttalab into Military Custody*, JOE LIEBERMAN, UNITED STATES SENATOR FOR CONNECTICUT (Jan. 25, 2010), http://lieberman.senate.gov/index.cfm/news-events/news/2010/1/lieberman-collins-urge-administration-to-move-abdulmutallab-into-military-custody.

3. *Id*.

4. *Holder Defends Handling of Abdulmutallab*, CBS NEWS (Feb. 3, 2010), http://www.cbsnews.com/stories/2010/02/03/politics/main 6170460.shtml. The article links to a letter sent by Attorney General Eric Holder to Republican Congressional leaders.

5. *See* Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER (Feb. 15, 2010), http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer.

others before the military commissions put together after 9/11.[6] In the midst of the controversy over Khalid Sheik Mohammed's trial, Senator Lindsey Graham offered to support closing the prison at Guantánamo Bay in exchange for domestic legal authority to detain some terrorism suspects without trial and to try others before military commissions, as is permitted with respect to enemy combatants.[7]

On May 1, 2010, Faisal Shahzad attempted to blow up a vehicle in Times Square, New York. Within days, police apprehended him on an airplane about to leave the United States. Soon thereafter a number of U.S. officials, including Senator John McCain, called for Shahzad to be treated not as a terrorist criminal suspect but rather as an enemy combatant.[8]

While these debates continue, the Obama administration also claims a right, asserted by the Bush administration, to kill suspected terrorists wherever found as if they were combatants. The Bush administration first took action based on this claim in November 2002 when the CIA launched Hellfire missiles from an unmanned aerial vehicle, or drone, at a car on a road in a remote part of Yemen, killing all six passengers.[9] By early 2010, U.S. Hellfire missiles launched from drones were attacking suspected terrorists in Pakistan about twice a week.[10] This was a significant increase in attacks compared with the final year of the Bush administration. The United States has continued to launch drone attacks in Yemen and is also using drones in Somalia.[11] In March 2010, at a meeting of the American Society of International Law, in response to a question by the author, the Legal Adviser to the State Department, Dean Harold Koh, sought to justify these killings on a different basis than the Bush administration's "global war on terror." Koh said, rather, that the United States "is in an armed conflict with [al Qaeda], as well as the Taliban and associated forces. . . ."[12]

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6. *Id*.

7. Charlie Savage, *Closing Guantánamo as a Priority*, N.Y. TIMES, June 25, 2010, at A13.

8. *See* Andrew Cohen, *Times Square Bomb Suspect Faisal Shahzad and the Miranda Warning*, POLITICS DAILY (May 6, 2010), http://www.politicsdaily.com/2010/05/06/times-square-bomb-suspect-faisal-shahzad-and-the-miranda-warning/print/.

9. Doyle McManus, *A U.S. License To Kill,* L.A. TIMES, Jan. 11, 2003, at A1.

10. The United States government does not release official data on the drone program. This article draws on a variety of media sources, such as the New America Foundation's drone database, which tracks strikes in Pakistan. *See The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2003-2010*, NEW AMERICA FOUNDATION, http://counter-terrorism.newamerica.net/drones. Care must be taken with this and most sources as international legal terms of art such as "civilian" and "combatant" are used imprecisely. For details on U.S. drone use, see Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, *in* SHOOTING TO KILL, THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144.

11. O'Connell, *Unlawful Killing*, *supra* note 10.

12. Harold Hongju Koh, *The Obama Administration and International Law*, U.S.

In April 2010, *The New York Times* reported that the Obama administration had authorized "the targeted killing of an American citizen" linked to al Qaeda living in Yemen.[13]

Under international law, in an armed conflict enemy fighters may be targeted and killed in situations not permitted in peace. Certain persons may also be detained without trial or tried before military commissions. Many important human rights protections may be relaxed or derogated from in the exigencies of armed conflict. This shift from the law that prevails during peace occurs only when armed conflict begins. It is, therefore, critical to understand what constitutes "armed conflict" in international law to make an appropriate choice of law between the law that prevails in peace and the law that may be applied during an armed conflict. This choice between bodies of international legal rules is, in turn, governed by international law. It is not a matter of policy or discretion.

Under international law the existence of an armed conflict is determined on the basis of certain objective criteria. Prior to the adoption of the U.N. Charter in 1945 a state could declare a legal state of war even without the firing of a single shot.[14] That is no longer the case. Today, we assess facts on the ground to determine whether there is a legal state of armed conflict. There must be organized armed fighting of some intensity for armed conflict to exist.[15] This is not an entirely objective standard, however. The level of intensity is open to subjective assessment and situations of violence may wax and wane, leading to gray areas in which situations are not clearly armed conflict. The restrictive rules on the right to resort to military force, and the important requirement of respecting human rights, demand that in such cases law-abiding states act in conformity with the law prevailing in peace.[16] This does not mean that states are left defenseless against terrorism. Peacetime criminal law and law enforcement methods permit the use of lethal force and provide punishment of terrorism. Moreover, as will be discussed below, law enforcement methods are far

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DEPARTMENT OF STATE (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm. At the time of writing, July 2010, the hostilities in Iraq had subsided to a level where the U.S. military was following peacetime rules of engagement. *See infra* note 104.

13. Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010, at A10. *See also* ACLU, *CCR and ACLU Receive License from OFAC To Pursue Challenge to Targeted Killing* (Aug. 4, 2010), http://www.aclu.org/national-security/ccr-and-aclu-receive-license-ofac-pursue-challenge-targeted-killing.

14. *See* INTERNATIONAL LAW ASSOCIATION, FINAL REPORT OF THE USE OF FORCE COMMITTEE: THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 8 (August 2010), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022 [hereinafter INTERNATIONAL LAW ASSOCIATION, FINAL REPORT].

15. *Id*.

16. *See* KENNETH ANDERSON, TARGETED KILLING IN U.S. COUNTERTERRORISM STRATEGY AND LAW, 16 (Working Paper of the Series on Counterterrorism and American Statutory Law, 2009), *available at* http://ssrn.com/abstract=1415070.

more successful in ending terrorists groups than military force.[17] It must be emphasized, however, that most of the examples reviewed above are not unclear cases. Most occurred far from any armed conflict where peacetime law applied. Under peacetime law, a person suspected of terrorism has the right to a fair and speedy trial before a regular court. Law enforcement authorities may use lethal force but only when absolutely necessary, a standard that the current generation of drones can rarely meet.[18]

The assessment of facts to determine if peacetime law or the law of armed conflict is the correct choice involves the same analysis used in resolving other choice of law questions. Lawyers and judges constantly make choice of law decisions.[19] Choice of law is part of the consideration of every legal matter. In most cases the choice is probably obvious and requires no particular effort. A good many issues do require careful consideration, however, and for those we have choice of law rules, which steer us toward the proper law for any particular matter, whether local, national, regional, or international law. If the matter involves an international boundary, international choice of law rules will guide the choice. Take a typical issue that arises frequently – the choice of law governing a contract between a seller in Indiana and a buyer in Provence, France. No one would expect the President of France or the President of the United States to declare, as a matter of discretion, what law governs this contract. The answer lies in international law, which, in this case, sends us to neither the contract law of Indiana nor the contract law of France, but to the U.N. Convention on Contracts for the International Sale of Goods, to which both France and the United States are parties.[20] International law regulates the choice of law, and in this case it is the Convention that governs – a treaty under international law.

In the terrorism-related cases discussed above, international law also determines the choice of law. In these cases, choice of international law sends us, generally, to the domestic criminal law of the United States, Pakistan, Yemen, and other states. It does not send us to the law of armed conflict.

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17. *See* SETH G. JONES & MARTIN C. LIBICKI, HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA (2008), *available at* http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf.

18. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 78-81 (2009), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/ htmlall/p0990/$File /ICRC0020990.pdf [hereinafter INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETATIVE GUIDANCE].

19. Concerning the choice of law, also known as conflicts of law, see DICEY, MORRIS & COLLINS ON THE CONFLICTS OF LAW (Lawrence Collins et al. eds., 14th ed. 2006 & Supp. 2009).

20. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature,* Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988).

I. THE CHOICE OF CRIMINAL LAW V. THE LAW OF ARMED CONFLICT

Before September 11, 2001, the United States applied its criminal law to terrorism suspects.[21] President Ronald Reagan explained that terrorists have and should have the status of criminals, not combatants. He said that to "grant combatant status to irregular forces even if they do not satisfy the traditional requirements . . . would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."[22]

In 1988, Israel sent a commando team to Tunis to kill the number two in command of the Palestinian Liberation Organization (PLO), Khalil Wazir, also known as Abu Jihad. The PLO was responsible for terror attacks in Israel. Yet, the U.N. Security Council condemned Israel, in Resolution 611, for carrying out an "assassination." The United States refused to veto Resolution 611. U.S. Ambassador Herbert Okun "referred to Tunisia as a friend of the United States and said 'the perpetration of political assassination on Tunisian soil stands in stark contrast to Tunisia's longstanding tradition of non-violence.'"[23] In 2001, the U.S. Ambassador to Israel, Martin Indyk, stated on Israeli television the U.S. position regarding Israeli targeted killing of suspected terrorists: "The United States government is very clearly on the record as against targeted assassinations. They are extrajudicial killings, and we do not support that."[24] The U.S. position with respect to terrorists generally has been to treat them as criminals.[25] After attacks by al Qaeda on American targets in 1993, 1998, and 2000, the United States used the criminal law and law enforcement measures to investigate, extradite, and try persons linked to the attacks.[26]

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21. *See* Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COLUM. J. TRANSNAT'L L. 435 (2005).

22. Ronald Reagan, *Letter of Transmittal*, The White House (Jan. 29, 1987), *reprinted in Agora: The U.S. Decision Not To Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT'L L. 910, 911 (1987). *But see* Hans Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987) (response).

23. Candice Hughes, *Security Council Condemns Wazir Slaying, U.S. Abstains*, ASSOC. PRESS, Apr. 25, 1988, *available at* 1988 WL 3779956.

24. Joel Greenberg, *Israel Affirms Policy of Assassinating Militants,* N.Y. TIMES, July 5, 2001, at A5.

25. The United States made an exception to this position when it discovered that Libyan agents bombed a Berlin disco that American service personnel often visited. The U.S. view was that such attacks and indications of future attacks led to a right to use force in self-defense under Article 51 of the U.N. Charter. For the facts, see Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933 (1987). Such a claim has always been controversial because of the low-level nature of the terrorist attack. It is unclear after the decision in *Nicaragua v. United States*, 1986 I.C.J. 14 (1986) [hereinafter Nicaragua] whether bombing or other significant military response is lawful against more minor attacks, even state-sponsored attacks. The ICJ indicated in Nicaragua that countermeasures are the appropriate response. *Id.* at 195, 230.

26. After attacks on the U.S. embassies in Kenya and Tanzania in 1998, the United

Allies that dealt for years with determined problems of terrorism have taken the same approach. The British, Germans, Italians, Indians, and others have all dealt with terrorist challenges using law enforcement methods.[27] When it became a party to the 1977 Additional Protocols to the 1949 Geneva Conventions,[28] the British appended the following to their acceptance: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."[29] France made a similar statement on becoming a party to the Protocol.[30]

In the days following the September 11 attacks, however, the United States asserted a different choice of law to deal with the attacks' perpetrators. President Bush declared a "war against terrorism" that would not end until every terrorist group had been found, stopped, and defeated.[31] In the months that followed, we saw the Administration invoke the core privileges available to lawful belligerents during an armed conflict, including an expanded right to kill, a right to detain without trial, and a right to search and seize cargo of foreign-flagged vessels.[32]

States used law enforcement techniques but also bombed sites in Sudan and Afghanistan. These bombings, like the Berlin disco bombing discussed in *supra* note 25, were controversial. *See, e.g.*, Jules Lobel and George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1071 (2005).

27. For a detailed account of the British struggle against the IRA and other counter-terrorism efforts, see LOUISE RICHARDSON, WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT (2006).

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

29. *See* AP I, Reservation/Declaration (July 2, 2002), *available at* http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument. The entire text of the treaty is available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079.

30. *See* AP I, Reservation/Declaration (Apr. 11, 2001), *available at* (in French) http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument.

31. *See* George W. Bush, President's Address to the Nation on the Terrorist Attacks, 37 Weekly Comp. Pres. Doc. 1301 (Sept. 11, 2001); President's Address to a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1348 (Sept. 20, 2001); Training Camps and Taliban Military Installations in Afghanistan, 37 Weekly Comp. Pres. Doc. 1432 (Oct. 7, 2001); President's Address Before a Joint Session of the Congress on the State of the Union, 39 Weekly Comp. Pres. Doc. 109 (Jan. 28, 2003), *all available at* www.gpoaccess.gov/wcomp/index.html (providing Bush statements to the effect that the United States was engaged in a "war against terrorism" that would last until every terrorist group of global reach had been found, stopped, and defeated).

32. Mary Ellen O'Connell, *Ad Hoc War*, *in* KRISENSICHERUNG UND HUMANITÄRER

It took some time before it was apparent that these privileges were being invoked outside of the armed conflict in Afghanistan that began on October 7, 2001. The first public evidence of expanded detention came on November 13, 2001, when President Bush issued a Military Order titled "Detention, Treatment, & Trial of Certain Non-Citizens in the War Against Terrorism." The Order stated that terrorist suspects would be tried before military tribunals and would be subjected to military detention, irrespective of where the suspects were captured.[33] Detention would be based on a person's associations, not on his actions or the factual situation in which he found himself. This was a novel assertion as to when armed conflict privileges could be claimed. The Military Order made no reference to armed conflict duties, nor did it take any stand on whether other states should also have the same right to treat terrorist suspects as enemy combatants. By January 2002, the prison at Guantánamo Bay was opened. Within a few years, the public learned that detainees had been brought there from Malawi, Bosnia, Algeria, and other places where no active hostilities were occurring.[34]

The first known killing under the "global war" declaration occurred in the November 3, 2002,[35] incident in Yemen described above. Yemen recognized no armed conflict on its territory at the time, nor was the United States at war with Yemen. The CIA carried out the operation after the Air Force questioned its legality.[36] National Security Advisor Condoleezza Rice, however, argued that the killings were lawful by saying, "We're in a new kind of war, and we've made very clear that it is important that this new kind of war be fought on different battlefields."[37] Also in 2002, a Department of Defense official said that al Qaeda suspects could be killed without warning wherever they were found. DoD Assistant Secretary Charles E. Allen said that the United States could target "[al Qaeda] and other international terrorists around the world, and those who support such

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SCHUTZ – CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 405 (Horst Fischer et al. eds., 2004). For a prescient article respecting the problems of trying to fit crime into the armed conflict legal paradigm, see Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1 (2002).

33. Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

34. The U.S. Department of Defense maintains a web page with extensive documentation relevant to the Guantánamo Bay prison. *See Detainee Related Documents*, DEPARTMENT OF DEFENSE, http://www.dod.gov/pubs/foi/detainees/. *See also* ANDY WORTHINGTON, THE GUANTÁNAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON (2007).

35. McManus, *supra* note 9.

36. *Id*.

37. *Fox News Sunday with Tony Snow* (Fox News Network television broadcast Nov. 10, 2002) (Lexis News library).

terrorists."[38] In 2006, Steven G. Bradbury, acting head of DOJ's Office of Legal Counsel, said in Congressional testimony that the President could order targeted killings inside the United States on the basis of the new kind of war – the global war on terror.[39]

As previously noted, State Department Legal Adviser Dean Harold Koh has made it clear that the United States no longer uses the term global war against terrorism.[40] Rather, drone strikes, detention without trial, and military commissions in the case of persons not involved in the hostilities in Afghanistan are now justified on the view that "as a matter of international law, the United States is in an armed conflict with [al Qaeda], as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."[41] Koh emphasized that in his view this is a different legal paradigm than the global war against terrorism.[42] He further believes "U.S. targeting practices . . . comply with all applicable law, including the laws of war."[43]

Whether in a global war against terrorism or an armed conflict against al Qaeda, the Taliban, and associated forces, these are new positions for the United States, apparently taken up in order to claim expanded wartime rights with respect to targeted killing, detention, and judicial procedure. Once an armed conflict is triggered, certain peacetime human rights protections no longer apply, or no longer apply in the same way. Under customary international law, governments may detain opposition fighters, and even use lethal force if reasonably necessary, in the emergency situation of armed hostilities.[44] State parties to certain human rights treaties must formally derogate from those treaties to be able to lawfully detain without trial or use lethal force at the more flexible level applicable in armed conflict. Most human rights applicable in peacetime continue during

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38. Anthony Dworkin, *Law and the Campaign against Terrorism: The View from the Pentagon*, CRIMES OF WAR PROJECT (Dec. 16, 2002), http://www.crimesofwar.org/print/onnews/pentagon-print.html.

39. Katerina Ossenova, *DOJ Official: President May Have Power To Order Terror Suspects Killed in US*, JURIST (Feb. 5, 2006), http://jurist.law.pitt.edu/paperchase/2006/02/doj-official-president-may-have-power.php.

40. Dean Koh made clear that new terminology was being used in an answer to a question from the author at the American Society of International Law Annual Meeting on March 26, 2010. It is not clear, however, that the new terms refer to a substantive change. The exchange was recorded and broadcast on NPR. *See* Ari Shapiro, *U.S. Drone Strikes Are Justified, Legal Adviser Says*, National Public Radio (Mar. 26, 2010).

41. Koh, *The Obama Administration and International Law*, *supra* note 12.

42. *See* Shapiro, *supra* note 40.

43. Koh, *The Obama Administration and International Law, supra* note 12.

44. *See generally* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005). These customary international law rights are not found restated as affirmative rights but may be deduced from the customary international law duties governing targeting and detention.

armed conflict, but the content of rights, such as the right to life, may differ depending on the situation in which it is invoked. According to the International Court of Justice (ICJ) in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "whether a particular loss of life . . . is to be considered an arbitrary deprivation of life contrary to Article 6 of the [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[45]

Other human rights conventions similarly couch the right to life in relative terms, depending on the circumstances. Thus, they reflect that in armed conflict hostilities lives may be taken lawfully in circumstances that would be unlawful outside armed conflict hostilities.[46] Governments reacting to violence in circumstances less than armed conflict may only lawfully use lethal force in situations of absolute necessity. Again, the choice of law is fundamental to these questions. The Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1990) formulated a principle shared by most states:

> Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.[47]

Within an armed conflict, lawful combatants are not restricted to killing only to save a human life immediately. Opposing combatants and civilians

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45. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶25 (July 8) [hereinafter Nuclear Weapons]. *See also* Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19) [hereinafter Congo]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter The Wall Case]. *See also* Constantine Antonopoulos, *The Relationship Between International Humanitarian Law and Human Rights*, 63 REV. HELLENIQUE DE DROIT INT'L (forthcoming 2010); Françoise Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT'L REV. RED CROSS 549 (2008); and William Schabas, Lex Specialis? *Belt and Suspenders? The Parallel Operation of Human Rights and the Law of Armed Conflict, and the Conundrum of* Jus Ad Bellum, 40 ISR. L. REV. 592 (2007).

46. *See* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW xiii (2008).

47. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, ¶9 (1990), *available at* http://www2.ohchr.org/english/law/pdf/firearms.pdf.

taking a direct part in hostilities may be killed in a zone of armed conflict hostilities unless they surrender or an alternative is available and dictated by the principles of humanity. In the International Committee of the Red Cross Customary Law Study, the right to target combatants but not civilians is the first rule:

> Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.[48]

This rule is supported by a number of legal authorities, including, perhaps most importantly, Additional Protocol I of 1977 to the 1949 Geneva Conventions:

> Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.[49]

In short, lawful combatants need to know two things with respect to the privilege to kill: they must know they are targeting combatants or persons taking direct part in hostilities, and they must know that they are killing in a situation of armed conflict.

The rules governing detention also differ depending on whether one is in an armed conflict or not. In an armed conflict, combatants who fall into the hands of a party to the conflict may be detained without trial until the end of hostilities.[50] "The purpose of captivity is to exclude enemy soldiers from further military operations. Since soldiers are permitted to participate in lawful military operations, prisoners of war shall only be considered as captives detained for reasons of security, not as criminals."[51] Detainees may, however, be tried for law violations committed prior to capture in proceedings consistent with minimum due process.[52] Arguably, the detaining power has a duty to try persons for grave breaches of

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48. I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 3.

49. AP I, *supra* note 28, arts. 43(2), 51(3). *See also* AP II, *supra* note 28, art. 13(3).

50. Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Prisoner's Convention]; *cf.* AP I, *supra* note 28, art. 75(3).

51. Horst Fischer, *Protection of Prisoners of War*, *in* The HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 321, 326 (Dieter Fleck ed., 1995).

52. Prisoner's Convention, *supra* note 50, arts. 84, 105; AP I, *supra* note 28, art. 75.

humanitarian law.[53] In international armed conflicts, detainees who have not violated humanitarian law may not be tried for the deaths or destruction they cause when in compliance with the law of armed conflict. In the absence of an armed conflict, international human rights law prohibits detaining people for months or years without trial.[54] If authorities wish to detain someone because he or she is a criminal suspect, the person may be detained only pursuant to a fair, public, and prompt trial.[55] Suspects may not be detained indefinitely.

In January 2002, the United States brought 110 persons for detention to the U.S. Naval Base at Guantánamo Bay. By mid-June, 2003, the 1000-person prison held 680 individuals from 42 countries including some as young as 13 years old.[56] It would eventually hold almost 800. While most detainees were taken from the fighting in Afghanistan, others were taken from countries where there was no fighting. When the author asked Administration officials in October 2002 if the detainees captured in Afghanistan would be released when the hostilities in Afghanistan ended, she was told that Guantánamo detainees would not be released until every terrorist in the world was killed or captured, or when every member of al Qaeda was killed or captured.[57]

The Bush administration planned to place some detainees on trial. It created special military commissions for the purpose. The United States has used military commissions in the past – on battlefields in the eighteenth and nineteenth centuries and in a few controversial instances during and right after World War II.[58] Today, the U.S. military uses courts martial to try persons, in particular members of the American military, for war crimes and other violations of the Uniform Code of Military Justice. The highest profile trials of U.S. troops to date since 9/11 have been those for the men and women accused of abusing prisoners at Abu Ghraib Prison in Iraq.[59] For the most part, however, persons accused of war crimes are tried in civilian criminal courts. The International Criminal Tribunal for the former Yugoslavia and national courts all over Europe have held civilian trials of

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53. Prisoner's Convention, *supra* note 50, art. 129.

54. International Covenant on Civil and Political Rights, art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

55. *Id*., art. 14(3)(c).

56. Ted Conover, *In the Land of Guantánamo*, N.Y. TIMES MAG., June 29, 2003, at 44.

57. These remarks were made during a conference where comments were not for attribution. But compare them with President Bush's public statements to the effect that the war on terror would end only when every terrorist group of global reach had been found, stopped, and defeated. *See, e.g*., Presidential Address to a Joint Session of Congress, *supra* note 31.

58. See the discussion of the use of military commissions in all six opinions in *Hamdan v*. *Rumsfeld*, 548 U.S. 557 (2006).

59. *See, e.g.,* Kate Zernike, *Ringleader in Iraqi Prisoner Abuse Is Sentenced to 10 Years*, N.Y. TIMES, Jan. 16, 2005, at A1.

persons accused of war crimes committed during the conflicts connected with the break-up of Yugoslavia.[60] Their laws support the use of civilian trials, not military commissions, for persons accused of crimes in war and peace.[61] The reasons for their laws include the fact that members of military commissions are under temporary military orders and not, therefore, as independent as civilian judges with lifetime appointments. Also, military commissions are extraordinary and not the "regular" courts called for in human rights law.

The third wartime privilege invoked by the Bush administration after 9/11 was search and seizure of foreign-flagged vessels on the high seas. American allies soon persuaded the United States, however, to get the consent of the ship's master or the flag state before searching even suspect vessels. The global war against terrorism would not be pursued on the high seas.[62]

Thus, while the *lex specialis* that applies in armed conflict – the law of armed conflict – does permit some greater privileges as regards the right to kill, detain, and try persons, and to seize cargo, trial procedures are not significantly looser than in civilian trials, and all wartime rights must be exercised while respecting important protections for the accused. Outside of armed conflict hostilities, peacetime criminal law applies to violent criminal acts, including terrorism. The United States had supported and complied with this principle until the President declared war after 9/11. The next section discusses why neither President Bush's declaration of a war on terror nor President Obama's position that the United States is in an armed conflict with al Qaeda, the Taliban, and associated forces is sufficient to shift from peacetime to wartime rules.

II. ARMED CONFLICT V. TERRORISM

Plainly, the correct choice of law in the aftermath of the 9/11 attacks rests on a proper characterization of armed conflict situations. The definition of armed conflict found in customary international law is based

60. *See, e.g.*, Director of Public Prosecutions v. T, Eastern High Court (3rd Div. Nov. 22, 1994) (Denmark) excerpted in MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 636 (2d ed. 2009) (discussing Denmark's prosecution of a Croatian citizen for prisoner abuse in Bosnia in violation of the Geneva Conventions).

61. *See, e.g.*, Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, 7 J. INT'L CRIM. JUST. 723 (2009); Harold Hongju Koh, *Against Military Tribunals*, 49(4) DISSENT 58 (2002).

62. Mary Ellen O'Connell, *Ad Hoc War, supra* note 32, at 418-421. U.S. Ambassador John Bolton apparently changed his position from 2002 to 2003 when he argued that post-9/11 the United States and its allies could stop and search shipping on the high seas without consent of the ship's master or flag state pursuant to the Proliferation Security Initiative. *See id.* Thereafter, the United States signed cooperation agreements with major flag states, including Panama and Honduras.

on objective evidence of fighting, not mere declarations. The legal significance of declarations in international law faded away with the adoption of the U.N. Charter in 1945. "War" as a technical, legal term fell out of use. It was replaced by a broader term, "armed conflict." The Charter in Article 2(4) prohibits all uses of force – war and lesser actions – except in self-defense in response to an armed attack or as mandated by the Security Council. Following the adoption of the Charter, treaties relevant to war, such as the Geneva Conventions of 1949, substituted the term "armed conflict" for "war." "War" ministries became "defense" ministries. States engaging in armed conflict rarely declared war. What mattered after 1945 was actual fighting, not nineteenth century formalities that recognized a legal state of war in the absence of any use of military force. We still use the term "war" to refer to any serious armed conflict. But indicative of the fact that "war" is no longer the significant legal term it once was, the United States fought a war on poverty and a war on drugs.

According to a study by the International Law Association's Committee on the Use of Force, international law defines armed conflict as always having at least two minimum characteristics: 1) the presence of organized armed groups that are 2) engaged in intense inter-group fighting.[63] The fighting or hostilities of an armed conflict occurs within limited zones, referred to as combat zones, theaters of operation, or similar terms. It is only in such zones that killing enemy combatants or those taking a direct part in hostilities is permissible.[64]

Because armed conflict requires a certain intensity of fighting, the isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict.[65] Terrorism is generally a crime, although in some

63. INTERNATIONAL LAW ASSOCIATION, FINAL REPORT, *supra* note 14.

64. The combat zone is a critical concept to the lawful waging of armed conflict. Today, the right to resort to armed force (*jus ad bellum*) is triggered by an armed attack or Security Council authorization in response to a threat to the peace, breach of the peace, or act of aggression. The lawful response to those provocations must be calibrated to be necessary and proportionate in the circumstances. This means that the old claim that a state may attack the opponent's forces anywhere they are found is no longer supportable. A parallel principle is found in the *jus in bello*. Combatants may not kill the enemy wherever they find him, but only when reasonably necessary. This means that a combatant may kill another person fighting against him in a combat zone, but someone away from the combat, who may be captured, may not be killed. For a more extensive discussion of these points and the law supporting them, see Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845 (2009); Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 61-62 (Dieter Fleck ed., 2d ed. 2008); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES (2004).

65. A significant armed attack may trigger the right to resort to armed force but an armed attack is not an armed conflict unless it is launched by an organized armed group and is responded to with the use of significant military force by another organized armed group. Thus the 9/11 attacks were found to be significant enough to trigger a right to respond under Article 51 of the U.N. Charter (see Security Council Resolution 1368) but an armed conflict

circumstances it may be carried out so continuously as to be the equivalent of an armed conflict. Terrorism is widely defined as the use of politically motivated violence against the civilian population to intimidate or cause fear.[66] The Supreme Court of Israel found in 2006 that Israel was engaged in a "continuous state of armed conflict" with various "terrorist organizations" due to the "unceasing, continuous, and murderous barrage of attacks."[67] The Court described a situation that meets the definition of organized armed groups engaged in intense fighting – with attacks and responses direct and constant enough to constitute armed conflict. The single, isolated act of terrorism, however, is consistently treated by states as crime, not armed conflict. Members of al Qaeda or other terrorist groups are active in Canada, France, Germany, Indonesia, Morocco, Saudi Arabia, Spain, the United Kingdom, Yemen, Kenya, Uganda, and elsewhere. Still, these countries do not consider themselves in an armed conflict with al Qaeda. As Judge Christopher Greenwood of the ICJ has concluded:

> In the language of international law there is no basis for speaking of a war on [al Qaeda] or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.[68]

One Supreme Court decision seems to be commonly misread as supporting the possibility of a worldwide "armed conflict against al Qaeda" or other terrorist organizations even in the absence of continuous attacks. In *Hamdan v. Rumsfeld*, the Supreme Court found the Bush administration's special military commissions for trials at Guantánamo Bay to be unconstitutional. The Court ruled that the President lacked the right to create military commissions and had to comply with a federal statute governing the matter. The federal statute in question permitted the creation of military commissions that complied with the laws of war. For purposes of testing the compliance of the Guantánamo commissions with the law of war, the Court accepted the Bush administration's assertion that the United States is in a "non-international armed conflict with [al Qaeda]." The Court

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did not follow until the United States and United Kingdom responded with significant military force in Afghanistan. Afghanistan was determined by the U.S. and U.K. to have been responsible for the 9/11 attacks, thus giving rise to the right to use force against it. For a detailed discussion of state practice and International Court of Justice decisions relevant to this law, see Mary Ellen O'Connell, *Preserving the Peace: The Continuing Ban on War Between States,* 38 CAL. W. INT'L L.J. 41 (2007) and Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 889-904 (2002).

66. *See generally* JONES & LIBICKI, *supra* note 17.

67. HCJ 769/02, The Public Committee Against Torture in Israel v. Israel [2006] (2) IsrLR 459, ¶16 (Dec. 14, 2006). *See also* The Wall Case, *supra* note 45.

68. Christopher Greenwood, *War, Terrorism and International Law*, 56 CURR. LEG. PROBS. 505, 529 (2004).

found that Common Article 3 of the 1949 Geneva Conventions covers even that purported conflict. It further found that the Guantánamo commissions did not comply with Common Article 3. The Supreme Court had only to find one plausible example of a violation of the laws of war to strike down the commissions. It did not find that the United States actually *is* in a worldwide armed conflict with al Qaeda. It could not make such a finding, as there is no such conflict.[69]

Despite what the Supreme Court actually said, following the *Hamdan* decision we began to see references to a non-international armed conflict against al Qaeda and associates not connected with any sovereign state.[70] Dean Koh made such a reference when he described the United States as being engaged in an "armed conflict with [al Qaeda], the Taliban and associated forces."[71] He said that the United States had an "inherent right of self-defense" and said that "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses."[72] To the author, these statements indicate the same basic argument to justify killings and detention far from battlefields used by the Bush administration.[73] The Obama administration has clearly changed the name of the conflict, dropping the reference to the global war against terrorism, but it has not, to date, provided a different legal rationale for why it is lawful to kill or detain persons who had no role in the Afghanistan hostilities or any other hostilities.

The Bush administration never developed a persuasive argument as to why the United States could use force on the basis of self-defense far from the location of those legally responsible for the 9/11 attacks. In October 2001, the United States and United Kingdom took the position that the Taliban government of Afghanistan was responsible for al Qaeda so that under the law governing resort to armed force (the *jus ad bellum*), the United States and United Kingdom had the right to use force against that sovereign state. The United States never argued that other states might also be responsible for the 9/11 attacks and thus has no right under the *jus ad bellum* to use force against other states, besides Afghanistan. Dean Koh has added nothing to the Bush administration arguments on this point.

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69. *Hamdan v. Rumsfeld*, *supra* note 58, at 628-631.

70. *See, e.g.*, Marco Sassòli, *Remarks at the Panel, Same or Different? Bush and Obama Administration Approaches to Fighting Terrorists*, Proc. of the Annual Meeting of the American Society of International Law (ASIL) (Mar. 26, 2010) (forthcoming]; *but see* Diane Amann, *Remarks*, *id*.

71. Koh, *The Obama Administration and International Law*, *supra* note 12.

72. *Id*.

73. At the 2010 ASIL Annual Meeting, the author requested the definition of armed conflict that Dean Koh was using to justify killing far from actual hostilities. Koh provided none.

Moreover, the war of self-defense in Afghanistan ended in 2002 when Hamid Karzai became Afghanistan's leader following a *loya jurga* of prominent Afghans who elected him.[74] Today, the United States and other foreign militaries are in Afghanistan at the invitation of President Karzai to suppress an insurrection. Thus, attacking or detaining members of al Qaeda or associates as a matter of the law of armed conflict must be connected with the suppression of an Afghan insurrection.

References by Bush and Obama administration officials to the right of self-defense offer no justification for using force or exercising wartime privileges beyond Afghanistan. Before Dean Koh's speech, Kenneth Anderson suggested that the Obama administration might have been basing its targeted killing and detention policies on anticipatory self-defense to prevent another 9/11. If targeted killing under this argument were lawful, logically mere detention would be too. This argument differs from the global armed conflict argument in that it does not conceive of a worldwide conflict but, rather, a right to attack individuals or small groups who might be planning future attacks. Koh's guidelines mentioned above would seem to be equally applicable under this conception. The basis for attacking would also be the "inherent right of self-defense," and "the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses" would be relevant.[75]

Anderson has pointed out that certain U.S. officials have long held that the United States has a right to target individuals in anticipatory self-defense: "The United States has long assumed, [as] then-Legal Adviser to the State Department Abraham Sofaer stated in 1989, that the 'inherent right of self defense potentially applies against any illegal use of force, and that it extends to any group or State that can properly be regarded as responsible for such activities.'"[76] Anderson also accepts, however, that much of the international community rejects this argument.[77]

International rejection is not based simply on policy or preference. The argument has virtually no support in international law. The right to use force in self-defense applies to inter-state uses of force. The law of self-defense was designed to allow a state to take necessary action against another state responsible for attacking the defending state, as in the case of the United States and United Kingdom attacking Afghanistan in response to

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74. *See President Hamid Karzai*, THE EMBASSY OF AFGHANISTAN, WASHINGTON D.C., http://www.embassyofafghanistan.org/president.html.

75. Koh, *The Obama Administration and International Law*, *supra* note 12.

76. ANDERSON, *supra* note 16. For an updated version of the Sofaer position in the context of targeted killing, see Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y (forthcoming 2010), *available at* http://ssrn.com/abstract=1520717.

77. ANDERSON, *supra* note 16, at 16.

9/11.[78] The law of self-defense is not designed for responding to the violent criminal actions of individuals or small groups.

The most important treaty on the use of force in self-defense is the U.N. Charter. Article 51 of the Charter permits the use of force in self-defense if an armed attack occurs, and permits collective self-defense if the state that has been attacked requests it. The Security Council may also authorize force in self-defense. In addition to the Charter, the ICJ and other international tribunals have clarified the general principles and the rules of state responsibility applicable to lawful uses of force. From many ICJ decisions, including, the 1949 *Corfu Channel* case,[79] the 1986 *Nicaragua* case,[80] the 1996 *Nuclear Weapons* case,[81] the 2003 *Oil Platforms* case,[82] the 2004 *Wall* case,[83] the 2005 *Congo* case,[84] and the 2007 *Bosnia v. Serbia* case,[85] it is clear that force in self-defense may only be carried out on the territory of a state responsible for a significant armed attack ordered by the state or by a state-controlled group that carried it out.

The *Congo* case is perhaps most on point regarding U.S. actions against al Qaeda. It concerned Uganda's use of force on the territory of Congo after years of cross-border incursions by armed groups from Congo into Uganda. The ICJ found that Congo was not legally responsible for the armed groups – it did not control them. Even Congo's failure to take action against the armed groups did not give rise to any right by Uganda to cross into Congo to attack.[86]

Where a state is responsible for attacks, the ICJ said in *Nicaragua*[87] and *Oil Platforms*[88] that low-level attacks or border incidents do not give rise to the right to use force in self-defense on the territory of the responsible state.

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78. *See* INTERNATIONAL LAW ASSOCIATION, FINAL REPORT, *supra* note 14 and accompanying text

79. Corfu Channel (U.K. v. Albania), Judgment, 1949 I.C.J. 4 (July 9).

80. *Nicaragua*, *supra* note 25.

81. *Nuclear Weapons, supra* note 45.

82. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶¶61-64 (Nov. 6).

83. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion of Judge Higgins, 2004 I.C.J. 207 (July 9), ¶¶33-34.

84. Congo, *supra* note 45, ¶¶146, 301. *But see* Paust, *supra* note 76 (objecting to the application of the *Congo* case to U.S. uses of force in Pakistan). He does not spell out why beyond citing *obiter dictum* in the decision saying it does not reach "large-scale attacks" by irregulars. Paust, *supra* note 76, at 15-16 n.33. However, the cross-border incursions from Pakistan into Afghanistan are comparable to the incursions the ICJ was considering in *Congo*. Nor have the armed activities emanating from Yemen and Somalia where the U.S. has also used drones been "large-scale."

85. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, ¶391 (Feb. 26, 2007), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf.

86. Congo, *supra* note 45, ¶¶146, 301.

87. Nicaragua, *supra* note 25, ¶¶195, 230.

88. Oil Platforms, *supra* note 82, ¶64.

The Ethiopia-Eritrea Arbitral Tribunal said much the same in the *Jus Ad Bellum* award.[89]

Additionally, in the *Nicaragua* case and the *Nuclear Weapons* case, the ICJ held that even where a state is responsible for a significant attack, there is no right to use force in self-defense if the use of force is not necessary to accomplish the purpose of defense and/or the purpose cannot be accomplished without a disproportionate cost in civilian lives and property. Necessity and proportionality are not expressly mentioned in the Charter, but according to the ICJ "there is a 'specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.' This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[90]

Under these treaties, as well as customary international law rules and general principles, the United States has virtually no support for its claim to a right to detain or target persons not fighting in Afghanistan. The U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions found that the 2002 strike in Yemen that killed six persons alleged to be associated with al Qaeda was an unlawful, extrajudicial killing.[91] This is the correct finding in the view of most states that simply do not accept targeted killing as justifiable under Article 51 in particular or international law in general:

> To put the matter simply, the international law community does not accept targeted killings even against al Qaeda, even in a struggle directly devolving from September 11, even when that struggle is backed by U.N. Security Council resolutions authorizing force, even in the presence of a near-declaration of war by Congress . . . and even given the widespread agreement that the U.S. was both within its inherent rights and authorized to undertake military action against the perpetrators of the attacks . . .
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> [A] strategic centerpiece of U.S. counterterrorism policy rests upon legal grounds regarded as deeply illegal . . . by large and influential parts of the international community.[92]

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89. Jus Ad Bellum (Eth. v. Eri.), Ethiopia Claims 1-8, Partial Award, ¶¶9-12 (Eri. Eth. Claims Comm'n 2005), http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf.

90. Nuclear Weapons, *supra* note 45, ¶41. *See also* Nicaragua, *supra* note 25, ¶176; Oil Platforms, *supra* note 82, ¶76.

91. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Report of the Special Rapporteur, Asma Jahangir, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, U.N. Doc. E/CN.4/2003/3, ¶¶37-39 (Jan. 13, 2003) [hereinafter *Report on Extrajudicial, Summary, or Arbitrary Executions*].

92. ANDERSON, *supra* note 16, at 16.

Another interpretation of Dean Koh's remarks is that he may have been referring to the U.S. right to resort to self-defense in Afghanistan, and, related to that right, the right to kill or detain al Qaeda or Taliban members who may be participating remotely by cell phone or computer, or who may be preparing to join the fight. Dean Koh mentioned a case from World War II in which the United States set out to kill a named individual far from actual hostilities, targeting the plane carrying Japanese General Yamamoto, reputedly a planner of the Pearl Harbor attack.[93]

There are several problems with this interpretation. First, Dean Koh did not refer to remote participation. Moreover, many persons killed and detained have had no connection with Afghanistan. Finally, the Yamamoto case was not uncontroversial at the time,[94] and today it would be in conflict with the basic treaties that form the law on the use of force, namely the 1945 U.N. Charter and the 1949 Geneva Conventions. These treaties provide little or no right to use military force against individuals far from battlefields. Moreover, if there was a right to target or detain such persons, CIA specialists participating in the drone program but located in the United States could equally be subject to targeted killing as unlawful combatants and equally subjected to indefinite detention.[95] For that matter, regular members of the U.S. armed forces could be subject to the same treatment. In fact, it is the U.S. view that no hostilities are occurring on U.S. territory and, thus, there is no right to use military force on U.S. territory. Other, less forceful measures must be taken against persons who might be undertaking unlawful activities abroad from a base in the United States.

Two different analyses can be employed to reach the conclusion that the U.S. may not kill without warning far from a battlefield. One is that adopted by the International Committee of the Red Cross (ICRC). In 2009, the ICRC produced interpretative guidance on the concept of direct participation in hostilities. The Guidance provides that all persons in a combat role, in a continuous combat function or directly participating in hostilities are lawfully targetable, but that it would violate the law of armed conflict to actually kill a person under the battlefield standard of necessity when conditions are actually peacetime ones, where law enforcement standards prevail.[96] The ICRC's Guidance includes a new category of persons who are lawfully targetable (and presumably detainable). In

93. Koh, *The Obama Administration and International Law*, *supra* note 12.

94. Diane Amann relates that at least one of the participants in that attack, U.S. Supreme Court Justice John Paul Stevens, today has doubts as to whether it was lawful. *See* Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569, 1582-1583 (2006).

95. *See* Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, at A17 (assessing the legality of CIA and private contractor participation in targeted killings).

96. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE, s*upra* note 18. The Guidance does not discuss the right to detain.

addition to the traditional categories – members of the armed forces of a state party to the conflict and civilians directly participating in hostilities for as long as they participate – the ICRC now recognizes the category of persons involved in an organized armed group who are in a "continuous combat function."[97] This new category provides that civilians who are members of organized armed groups need not be directly participating in hostilities at the time of targeting. The category brings such civilians closer to the category of combatants of the regular armed forces of a state. The Interpretative Guidance indicates that if a member of al Qaeda or a member of the U.S. armed forces participates in the fighting in Afghanistan, even remotely, he is a lawful target. The ICRC further indicates, however, that there would be no right to kill such a person far from actual hostilities under battlefield rules because he is not on a battlefield. He could be detained or killed by law enforcement authorities under local criminal law standards. To do otherwise would be to violate his human rights.

The other avenue to the same result is to say that peacetime conditions are peace, and no one may be targeted in peace as if in armed conflict hostilities. Under either assessment, it is difficult to make the case that persons may be killed or detained under the law of armed conflict as opposed to the criminal law of the place where they are physically located. The ICRC position is consistent with this war/peace distinction. Both analyses hold that far from armed conflict hostilities, states may not claim the combatant privilege to kill or detain without trial.[98] The second, incorporating the war/peace distinction, however, is more consistent with state practice on the definition of armed conflict.[99] Moreover, it is in keeping with the growing understanding that human rights law applies at all times and that governments' arguments for narrowing the scope of application of human rights law, or the grounds for derogating from it, are declining.[100]

For much of the period that the United States has used drones for targeted killing in Pakistan, Yemen, and Somalia, the killings occurred either in the absence of hostilities or when the United States was not participating in hostilities. In other words, the United States has targeted and killed persons under the combatant's privilege to kill where it did not possess that privilege. When the CIA carried out a drone strike in Yemen in November 2002, the U.N. Special Rapporteur concluded that the strike

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97. *Id*. at 32-35.

98. *See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, Study on Targeted Killings,* U.N. Doc. A/HRC/14/24/Add.6, at 3, 54, 85-86 (May 28, 2010) [hereinafter *Study on Targeted Killings*].

99. *See supra* note 64 and accompanying text.

100. *See supra* note 45, and accompanying text.

constituted "a clear case of extrajudicial killing."[101] The United States has carried out similar attacks in Yemen during the Obama administration.

The situation in Pakistan is particularly complicated. Initially, the Pakistan government decided to tolerate a level of autonomy in the provinces along its border with Afghanistan that obviated any need to fight militant groups. By the spring of 2009, Pakistan's armed forces began engaging various Taliban militants when one group tried to take over Buner Province. Pakistani forces repulsed the group in fighting that plainly amounted to armed conflict, but Pakistan did not request U.S. assistance, let alone authorize the use of drones to end the challenge to its authority in Buner. Pakistan has continued to fight in a number of provinces. In some of this fighting it has apparently requested or permitted U.S. drone attacks.[102] Many other drone attacks, however, have been carried out in areas where the Pakistani government had been attempting, through a variety of methods, to prevent armed conflict.[103]

Dean Koh has improved the U.S. position by clarifying that the United States is at war with persons and not with an abstract concept – terrorism. But the change seems to be more form than substance. Following the November 2001 Military Order on detention, the Bush administration actually focused its detention, trial, and targeting on al Qaeda or the Taliban. The weakness in the Bush administration position was not in what it called its campaign but rather that it focused on individuals' associations rather than the exigencies of fighting.

The Obama administration's approach to date shares this weakness. In international law, invoking the exceptional rights to kill and detain without trial is permissible only in the exceptional situations of actual hostilities. Only in Afghanistan today is the United States engaged in an armed conflict where combatants may lawfully kill on the basis of reasonable, as opposed to absolute, necessity. At time of writing, U.S. Marines in Marja Province in Afghanistan are facing ambushes daily and improvised explosive devices weekly. They are fighting to control the Province and end the violent contest against the government in Kabul and the local authorities loyal to

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101. *Report on Extrajudicial, Summary, or Arbitrary Executions*, *supra* note 91, ¶¶37-39. *But see* Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economics and Social Council*, 97 AM. J. INT'L L. 364, 367, n.17 (2003) ("The United States' response to the … Yemen allegations has been that its actions were appropriate under the international law of armed conflict and that the Commission and its special procedures have no mandate to address the matter.").

102. *See* Jane Mayer, *The Predator War: What are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, *available at* http://www. newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

103. *See*, *e.g.*, David Cortright, *"Winning" in Afghanistan: How To Splinter the Taliban and Support Afghans,* SOJOURNERS MAGAZINE, Mar. 2009, *available at* http://www.sojo.net/index.cfm?action=magazine.article&issue=soj0903&article=winning-in-afghanistan.

that government. In Iraq, by contrast, fighting had so declined by late 2009 that the U.S. troops began following law enforcement-type rules of engagement.[104] How can it be that the United States may use lethal force under battlefield rules in Yemen but not in Iraq? Absent armed conflict hostilities, the standard of absolute necessity governs uses of lethal force.[105]

The same choice of law should be made with respect to all persons detained outside of armed conflict hostilities and suspected of terrorist activities. Detention and trial should occur under peacetime law and procedures. This is the proper law in peace; it is even more imperative to make the proper choice of law in the case of targeting. If there is no right to detain terrorism suspects as enemy combatants, there is certainly no right to target them as such.

In only two cases – those of José Padilla and Ali Saleh Kahlah al-Marri – did the United States attempt to act as though the "global war" extended to U.S. territory. In both cases, the United States retreated from its "global war" arguments and proceeded under domestic criminal law. These cases and the 300 mentioned by Holder form a substantial body of precedent in line with the proper choice of law principles. To abandon both principles and precedent going forward would bring into question the legality of any U.S. proceedings against terrorism suspects.

The Padilla and al-Marri cases should make it difficult for any judge to take seriously the claim that someone who has never been in combat is an enemy combatant. President Bush had designated both men "enemy combatants" even though they were both first arrested in the United States on criminal charges and held in civilian jails. In early 2006, the Department of Justice requested that Padilla be moved back to the criminal system, shortly before the Supreme Court was to take up his case and his argument that he was not an enemy combatant. Padilla was convicted of terrorism-related charges and sentenced to seventeen years in prison.[106] In December 2008, the Supreme Court agreed to determine whether al-Marri was or was not an enemy combatant. The Obama administration prepared to defend President Bush's designation of him as a combatant, but then, shortly before the argument, moved al Marri to the criminal system. He pleaded guilty to the criminal charges against him and received a fifteen-year sentence.[107]

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104. U.S. rules of engagement are not public documents. The statement here regarding Iraq ROEs was informally confirmed to the author by several knowledgeable persons. The change followed President Obama's speech at Camp Lejuene on February 27, 2009 when he said that by August 31, 2010, the U.S. combat mission in Iraq would end. *In Announcing Withdrawal Plan, Obama Marks Beginning of Iraq War's End*, N.Y. TIMES, Feb. 27, 2009, at A06.

105. MELZER, *supra* note 46, at 397-398.

106. Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years*, *Cites His Detention*, WASH. POST, Jan. 23, 2008, at A3.

107. John Schwartz, *Plea Agreement Reached with Agent for Al Qaeda*, N.Y. TIMES,

In explaining his decision to try Abdulmuttalab in civilian courts under domestic criminal law statutes, Attorney General Holder wrote:

> Under a policy directive issued by President Bush in 2003, for example, "the Attorney General has lead responsibility for criminal investigations of terrorist acts or terrorist threats by individuals or groups inside the United States, or directed at United States citizens or institutions abroad, where such acts are within the Federal criminal jurisdiction of the United States, as well as for related intelligence collection activities within the United States." (Homeland Security Presidential Directive 5 (HSPD-5, February 28, 2003). . . .
>
> In keeping with this policy, the Bush Administration used the criminal justice system to convict more than 300 individuals on terrorism-related charges. For example, Richard Reid, a British citizen, was arrested in December 2001 for attempting to ignite a shoe bomb while on a flight from Paris to Miami carrying 184 passengers and 14 crewmembers. . . .[108]

The United States has asserted a right to kill or detain in places far from hostilities only in a few states with weak governments such as Yemen, Bosnia, Malawi, and Pakistan. This fact is further evidence against the U.S. claim that it is acting consistently with international law. If the United States really could target and detain persons simply because they are members of al Qaeda, it should be able to do so in Germany, the United Kingdom, Canada, Australia, and in the United States itself. The right to shift from the law of peace to the law of armed conflict does not turn on the strength of the government or the wealth of a state, but rather on whether the state in question is responsible for a significant armed attack on the United States or the state's legitimate government has requested U.S. assistance in fighting an insurgency on its territory.

III. THE PROPER AND EFFECTIVE LAW AGAINST TERRORISM

Terrorism is not new, nor has the United States demonstrated in argument or action that new rules are needed to deal with it. So much in current U.S. policy supports the rules that were in place on 9/11: The United States wants terrorism to be considered a heinous crime that all nations should join in suppressing through cooperative efforts. The United States wants peacetime human rights standards to be extended to its own

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Apr. 30, 2009, at A16.

108. Eric Holder, Letter to Senator Mitch McConnell, (Feb. 3, 2010), *available at* http://www.cbsnews.com/htdocs/pdf/AG_Letter_2-3-10.pdf?tag=contentMain;contentBody.

citizens – civilian and military alike – everywhere in the world, except in actual zones of armed conflict, such as Afghanistan. Indeed, as argued above there is little evidence that the Bush administration previously considered, or the Obama administration now considers, the whole world in reality to be a scene of armed conflict, whether against terrorism or al Qaeda and its associates.

The question remains whether the current law, as described here, should be changed. Should we accept that any significant use of violence by a terrorist organization qualifies that group as combatants under the law of armed conflict? Should we develop new law for today's terrorism challenge?

The success of the British against the Irish Republican Army (and more recently against the perpetrators of the July 2005 London subway bombings); the success of the Spanish against al Qaeda after the March 2004 Madrid train bombing, as well as the U.S. success after the 2000 attack on the *Cole* and the 1993 World Trade Center bombing, all support the conclusion that the best way to deal with terrorism is through the criminal law and police methods. By contrast, the use of military force has been counter-productive. Military force is a blunt instrument. Inevitably, unintended victims result from almost any military action. Drone attacks in Pakistan have caused large numbers of deaths, and are generally seen as fueling terrorism, not abating it. In Congressional testimony in March 2009, counter-terrorism experts David Kilcullen and Andrew Exum said that drones in Pakistan are fueling angry and growing militancy even far from the scene of the attacks.[109] Another expert told *The New York Times*, "The more the drone campaign works, the more it fails – as increased attacks only make the Pakistanis angrier at the collateral damage and sustained violation of their sovereignty."[110]

Guantánamo Bay and military commissions also make people angry. They are symbols of the gulf between the stated commitment of the United States to the rule of law and its actual conduct. The U.S. decision to treat all of the world as a zone of armed conflict (where drones may be used at will and persons may be secretly detained and brought to Guantánamo Bay or, today, Bagram prison in Afghanistan) cannot lead the way toward promoting the rule of law. It is counter-productive to promoting respect for

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109. Mary Ellen O'Connor, *Flying Blind: US Combat Drones Operate Outside International Law*, AM. MAG. Mar. 15, 2010, *available at* http:// www.americamagazine.org/ content/article.cfm?article_id=12179. *See also* David Kilcullen & Andrew McDonald Exum, Op-Ed, *Death From Above, Outrage Down Below*, N.Y. TIMES, May 17, 2009, at A13; David Kilcullen, Testimony Before the House Armed Services Committee Hearing on HR 1886, The Pakistan Enduring Assistance and Cooperation Enhancement (PEACE) Act 2009 (Apr. 23, 2009), *available at* http://armedservices.house.gov/pdfs/FC042309/ Kilcullen_Testimony042309.pdf.

110. Scott Shane & Eric Schmitt, *C.I.A. Deaths Prompt Surge in Drone War*, N.Y. TIMES, Jan. 23, 2010, at A1.

life, and it is counter-productive to promoting societies that respect the rule of law and reject violence.

Anti-American sentiment continues to grow. During Secretary of State Clinton's visit to Pakistan in late October 2009, a woman at a town hall meeting "characterized U.S. drone missile strikes on suspected terrorist targets in northwestern Pakistan as de facto acts of terrorism."[111]

In 2008, the Rand Corporation released a study that concluded:

> All terrorist groups eventually end. But how do they end? Answers to this question have enormous implications for counterterrorism efforts. The evidence since 1968 indicates that most groups have ended because (1) they joined the political process or (2) local police and intelligence agencies arrested or killed key members. Military force has rarely been the primary reason for the end of terrorist groups, and few groups within this time frame achieved victory. This has significant implications for dealing with [al Qaeda] and suggests fundamentally rethinking post-September 11 U.S. counterterrorism strategy.[112]

We are told with respect to detention without trial, military commissions, and targeted killing – as we were with regard to torture – that post-9/11 circumstances require extraordinary measures. Some of our leading ethicists countered those claims for torture by arguing that the absolute ban on torture must be respected as a moral imperative, regardless of the consequences.[113] We could say the same about targeted killing, indefinite detention, and military commissions. But, as in the case of torture, it turns out that doing the moral thing is also the effective thing. Torture is an unreliable means of interrogation that trained interrogators reject,[114] and, some of the best counter-terrorism experts similarly reject the use of military force in efforts against terrorism. Terrorists seek to undermine lawful institutions, to sow chaos and discord, and to foment hatred and violence. Upholding our lawful institutions, holding to our legal and moral principles in the face of such challenges, is not only the right thing to do – it is in itself a form of success against terrorism that can also lead to the end of terrorist groups.

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111. Alex Rodriguez, *Clinton Gets an Earful Against U.S. in Pakistan*, L.A. TIMES, Nov. 1, 2009, at A32.

112. JONES & LIBICKI, *supra* note 17, at xiii.

113. *See*, *e.g.*, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

114. Peter Bauer, Statement on Interrogation Practices, Statement in lieu of Appearance Before the International Commission of Jurists (Aug. 29, 2006), *available at* http://ejp.icj.org/IMG/Bauer_statement.pdf. *See also* Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L. J. 1231 (2005).

CONCLUSION

On 9/11, the United States made a radical change in its choice of law in defending against terrorism. After a century of pursuing terrorists using criminal law and police methods, the United States invoked the law of armed conflict and military means. This article has presented evidence that the change was not – and is not – supported by international law. In November 2008, this author and colleagues David Graham and Phillipe Sands drew up a set of principles to guide the Obama administration toward reforms of post-9/11 U.S. laws and policies. Our aim was to improve U.S. compliance with the world's law against terrorism. The first principle we stated urged cessation of reliance on war as the legal and policy basis for confronting terrorists:

> The phrase "Global War on Terrorism" should no longer be used in the sense of an on-going "war" or "armed conflict" being waged against "terrorism." Nor should it serve as either the legal or security policy basis for the range of counter- and anti-terrorism measures taken by the Administration in addressing the very real and present challenges faced by the United States and other nations in addressing terrorism.[115]

Peacetime criminal law, not the law of armed conflict, is the right choice against sporadic acts of terrorist violence. The example of the United States adhering closely to its legal obligations in this vital area can only help create greater respect for the rule of law worldwide.

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115. Washburn Consensus Post-9/11 Principles are reproduced in Mary Ellen O'Connell, *The Way Forward: Post 9/11 Principles*, JURIST, Nov. 25, 2008, *available at* http://jurist.law.pitt.edu/forumy/2008/11/way-forward-post-911-principles.php.