

THE LAWS OF WAR¹ AND THE KILLING OF SUSPECTED TERRORISTS:

FALSE STARTS, RABBIT HOLES, AND DEAD ENDS

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I. INTRODUCTION

The variety of circumstances in which individuals and governments have used terror to advance their goals suggests there

1. I prefer this older term to the Law of Armed Conflict (“LOAC”) or International Humanitarian Law (“IHL”). The “Law of War” is more specific and knowable. For example, the International Committee of the Red Cross (“ICRC”) prefers the term International Humanitarian Law. Yet the ICRC does not regularly distinguish in speech or documents among countries that are not parties to conventions, such as the 1977 Protocols I and II to the 1949 Geneva Conventions. Nor does the ICRC recognize that its views of the customary laws of war have invited criticism by states and commentators alike. *See generally* 71 INTERNATIONAL LAW STUDIES, THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM (Michael N. Schmitt & Leslie C. Green eds., 1998) (containing nineteen articles on LOAC).

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must be an array of lawful responses. While the justice system seems adequate on practical, as well as conceptual grounds, to deal with Timothy McVeigh and his ilk,² how should states treat members of groups like Hamas or Hezbollah or al-Qaeda? Those entities fit on a spectrum of organizational maturity from governmental to armed band. They use terrorist tactics as a normal way of conducting hostilities because they offer the best chance of success at low cost to themselves. Counterterrorist operations, whatever their nature, are far more costly than terrorist operations. That is part of the nature of asymmetric warfare.³ Terrorism also creates a reputation for violence that by itself intimidates and thus helps achieve political or diplomatic goals.⁴ Are these groups governed by the same body of law? Do the laws of war, for example, apply and, if so, the law of international or non-international armed conflict? If neither applies, how should governments and their armed forces, which espouse the rule of law, handle such issues as targeting and detention? Does physical location of the group and ease of access dictate whether one should use military force or the police in the effort to enforce the law against terrorists? Are terrorists on a spectrum, allowing governments to use a particular tactical response depending on the particular circumstance? For example, could a government reasonably use police, intelligence, or military tactics against the same person or group depending on their location and how they operated? And what of their supporters: financiers, chauffeurs, families, flacks, and others more or less directly connected to terrorists and their activities?

Governmental tactics and public concerns underline the relevancy of these questions. For example, in recent years, the United States in its battle with al-Qaeda has confronted dilemmas about how to treat captured terrorists or suspected terrorists. The results have been unsatisfactory. Some have been held in Guantánamo Bay, presumably in the belief that the U.S.

2. Differentiating McVeigh and those like him as individuals with more personal agendas as opposed to the broader political goals and activities of formal terrorist organizations. See Anne-Marie Slaughter, *Beware the Trumpets of War: A Response to Kenneth Anderson*, 25 HARV. J.L. & PUB. POL'Y 965, 971-72 (2002); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635, 639 (2002).

3. See, e.g., Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 339-40 (2010); 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, 542-44 (2009).

4. I observed this phenomenon at the United Nations, where small countries acted out of a sense of vulnerability to terrorism rather than out of conviction or policy. Senegal reportedly broke diplomatic relations with Israel after the Six Day War in June 1967 because President Nasser of Egypt threatened to kill Senegalese ambassadors around the world.

Constitution and its protections for defendants did not apply there. The United States has not granted these detainees prisoner of war status out of the mistaken belief that doing so would prevent interrogation and perhaps prosecution for prosecutable war crimes, thus changing their status from persons subject to prosecution. Others have been held by foreign governments, whose rules of criminal procedure are different from those of the United States. Others have simply been killed, perhaps in order to avoid having to deal with detention and its attendant controversies. It is past time to clarify legally permissible options and consequences.

The first part of this Article identifies different results if al-Qaeda, for example, controlled a state—let us call it Al Qaeda county for these purposes—if al-Qaeda is a true nonstate actor with no state support, and if al-Qaeda is a voluntary organization that operates with the knowledge and support of governments or parts thereof.

The second part takes up three examples of analysis: the U.S. Department of State Legal Adviser's defense of U.S. counterterrorism policy as a matter of international law; the critique by Professor Philip Alston as "Special Rapporteur on extrajudicial, summary, or arbitrary executions" of the UN Human Rights Council; and the analysis by John Bellinger, former Legal Adviser to the National Security Council and Legal Adviser to the U.S. Department of State. The final part will take up the case for leaving the Geneva Conventions alone and for applying common sense to the problems evoked by terrorists of the nongovernmental stripe.

I. TERRORISTS AND TERRORIST STATES

Al-Qaeda's attacks on the United States on September 11, 2001, seemed to end the debate about whether terrorists are subjects of criminal law only or also are legitimate, lawful military targets depending on the circumstances. As time has passed and military operations against suspected terrorists have continued with a high degree of lethality, doubts about the lawfulness of such counterterrorist methods have displaced certainty.

At the time of his death, Osama bin Laden and al-Qaeda did not control a state; at the time of the September 11, 2001 attacks, they appeared to have done so, or at least to have had sufficient influence in Afghanistan as to amount to control. In any event, their control or lack of control of a state does not determine the permissible range of responses under international law. Rather, a state victim of an armed attack emanating from another state, whether or not conducted by members of the state's armed forces, may have a right to use force in self-defense depending on the ability of the state from which the attacks emanated to prevent additional attacks and to

punish the perpetrators. The customary law principles of necessity and proportionality govern actions taken in these circumstances.⁵

This conclusion is independent of whether or not the Geneva Conventions of 1949 apply or are deemed to apply;⁶ indeed, terrorists like bin Laden, as a formal matter, fall outside the protections of the Geneva Conventions of 1949.⁷ Such individuals do not meet the Conventions' definition of a combatant, which in relevant part is as follows:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.⁸

5. See, e.g., Nicholas Rostow, *International Law and the Use of Force: A Plea for Realism*, 34 YALE J. INT'L L. 549, 550-51 (2009).

6. States must apply the Geneva Conventions, whether or not they are a party, because the international community universally accepts them as part of customary international law and because so many states are parties to them. See, e.g., DOCUMENTS ON THE LAWS OF WAR 196 (Adam Roberts & Richard Guelff eds., 3d ed. 2000). At the same time, states *may* decide to apply the Conventions even in the event that the other side is not a state or does not meet the criteria for combatant status. See *infra* text accompanying note 16.

7. See Article 2, common to the four Geneva Conventions; see also, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (who, as a matter of law, is a combatant and entitled to prisoner of war treatment).

8. Third Geneva Convention, *supra* note 7, art. 4. Professor Amos N. Guiora of the S.J. Quinney College of Law, the University of Utah, has summarized the Conventions' definition clearly. See Amos N. Guiora, *Determining a Legitimate Target: The Dilemma of the Decision Maker*, 46 TEX. INT'L L.J. (forthcoming Aug. 2011) (citing Third Geneva Convention, *supra* note 7, art. 2), available at <http://ssrn.com/abstract=1905130> ("According to the traditional law of armed conflict, in order to be defined as a lawful combatant—and thus a person who may rightfully be identified as a legitimate target on the battlefield—a participant in a conflict must wear a uniform, carry his weapon openly, belong to a chain of command, and have readily identifiable insignia."). Al-Qaeda, operating from Afghanistan in September 2001, may have "belonged" to Afghanistan for purposes of this Article.

In addition, “[e]very prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”⁹ Article 3 common to the four Geneva Conventions makes clear that a state is free to apply the Geneva Conventions as a matter of policy choice in cases where it is not formally required to do so.¹⁰ For this reason, the Article sets forth minimum standards for treating enemy fighters.

a. Al Qaeda country

It is conventional wisdom that al-Qaeda is a nongovernmental organization, a nonstate actor. What if it were a state—Al Qaeda country—with a territory to control and foreign relations to conduct? Al Qaeda country’s attacks on the United States on September 11, 2001, would have been unlawful uses of force, in violation of Article 2, paragraph 4, of the UN Charter.¹¹ The United States would have had the right to strike back with military force, a necessary response to an unprovoked attack that left little reasonable basis for thinking another approach would bring an end to the threat of more such attacks. The United States could use a quantum of force reasonably calculated to bring to an end the situation that gave it the right to use force in the first place—a proportional use of force. U.S. Armed Forces would have to conduct themselves according to the U.S. Uniform Code of Military Justice, of course, which incorporates into U.S. law the 1949 Geneva Conventions and other customs and usages of war.¹² As such, U.S. Armed Forces would have to discriminate between military and civilian targets and use only the force reasonably necessary to achieve the lawful military goal of bringing to an end the threat of continued attacks against the United States by Al Qaeda country.

In these circumstances, Al Qaeda country forces, wearing uniforms and conducting themselves under command in accordance with the laws and customs of war, would be combatants enjoying the status of prisoners of war on capture. As such, they would not have

9. Third Geneva Convention, *supra* note 7, art. 17.

10. *Id.* art. 3.

11. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

12. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (“The UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the ‘rules and precepts of the law of nations,’ . . . including, *inter alia*, the four Geneva Conventions signed in 1949.”) (citation omitted) (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)).

to respond to questioning beyond identifying themselves, but they could be questioned.¹³ They could be detained until the end of hostilities.¹⁴ If there was evidence that they had been involved in carrying out the September 11, 2001 attacks, they would be subject to prosecution as accessories to intentional targeting of civilians, which would violate a principle embedded in the Geneva Conventions and the contemporary law of war.¹⁵ Thus, the defendants would have to answer charges that they had engaged in grave breaches of the 1949 Geneva Conventions—which are accepted as customary law binding on all states whether or not parties to them¹⁶ and other applicable law. If they were tried, convicted, sentenced, and imprisoned, they would return to prisoner of war status at the end of the sentence in the event the conflict had not ended and prisoners were not returned home.¹⁷

Given Al Qaeda's history of using terrorism as an instrument of national policy, the question arises whether overthrowing the regime is a lawful purpose of military force used in self-defense. If it were reasonable to conclude, taking into account the totality of the circumstances, that leaving the government of Al Qaeda in place, although its armed forces were defeated, would not bring to an end the threat of additional terrorist attack by Al Qaeda, then removal of that regime arguably would be a lawful use of force in self-defense in response to the initial attacks.

b. Al-Qaeda as Nonstate Actor

Of course, so far as is known, there is no state of Al Qaeda. The United States and other victims of al-Qaeda terrorism have had to deal with irregular forces. Al-Qaeda has "declared war" on the United States.¹⁸ Yet the use of military force against al-Qaeda, including its leaders and supporters as well as those undertaking or preparing to undertake terrorist attacks, raises questions that do not arise in the event of armed conflict with another state. At the most basic is the question why may one use lethal force against Osama bin Laden and not against, for example, Al Capone (except in self-defense or to prevent lethal force being used against another)? Both engaged in criminal conduct. But of the two,

13. Third Geneva Convention, *supra* note 7, art. 17.

14. *Id.* art. 118.

15. *See id.* art. 82.

16. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 113-14 (June 27) (stating the Court may apply the Conventions on its own initiative, even when they are not invoked).

17. *See* Third Geneva Convention, *supra* note 7, art. 118.

18. *See, e.g.,* LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11 307 (2006) ("The bombings would be worthy of bin Laden's grandiose and seemingly lunatic declaration of war on the United States . . .").

only Osama bin Laden had a political agenda and proclaimed his determination to use force against the United States, its people, its friends, and its allies whenever and wherever the opportunity arose.¹⁹ In addition, of course, Al Capone did not engage in attacks on the scale of those of September 11, 2001, and trumpet his willingness—eagerness—to repeat the experience. Al-Qaeda, unlike individuals such as Al Capone, specializes in the international use of force to obtain political and social change by means of terrorist attacks.

Even if they are legitimate military targets, when they are not combatants as defined in the third Geneva Convention of 1949, irregular forces pose difficulties for their opponents.²⁰ If they are captured, whether by police or members of the armed forces, they are subject to prosecution for unlawful acts, conspiracy, and the like.²¹ If they are acquitted, they must be set free.²² As we have seen, such is not necessarily the case for prisoners of war accused of crimes, even those who are successfully prosecuted. As a result, as a matter of prudence, belligerents should consider treating all detainees as prisoners of war.²³

In the United States, the defendant is entitled to legal representation²⁴ and to remain silent.²⁵ The defendant need not testify. The state bears the burden of proving guilt beyond a reasonable doubt. Evidence used must have been obtained lawfully.²⁶ This prosecutorial burden is high. Battlefield conditions make it higher. For example, the capture of a person on a battlefield who does not meet the standards for combatant status may be prosecuted for accessory to murder. Prosecutors may find it hard to obtain evidence of the crime that can be used in court. In addition, intelligence requirements may lead to interrogations, which, even if they do not amount to torture, violate the U.S. criminal law requirements of legal representation and *Miranda* warnings.²⁷

19. *See id.*

20. *See* Third Geneva Convention, *supra* note 7, art. 4; *see also* TIMOTHY SNYDER, BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN 234 (2010) (“The German Army chief of staff later fantasized about using nuclear weapons to clear [Belarus’] wetlands of human population.”).

21. Third Geneva Convention, *supra* note 7, art. 121.

22. *See id.* art. 5.

23. Such a policy would have the added advantage that guards would be trained in one system of detention applicable to all those captured.

24. U.S. CONST. amend. VI; *see* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (explaining that the Sixth Amendment right to counsel is fundamental and essential to a fair trial).

25. U.S. CONST. amend. V.

26. *See* U.S. CONST. amend. IV.

27. *Miranda v. Arizona*, 384 U.S. 436 (1966). *See* Justice Scalia’s intemperate

Soldiers are not trained to be policemen. They are not looking for evidence. They capture people not only based on past acts but also on the basis of capability to inflict harm in the future. A boot camp trainee, even in an al-Qaeda boot camp, may not be a criminal; his or her capture is based on the notion of potential future harm.

II. KOH, ALSTON, BELLINGER

Three documents shed light on these issues: first is the position of the Obama administration as articulated by the Department of State Legal Adviser, Professor Harold Koh of Yale Law School. The second is the report of Professor Philip Alston of the New York University Law School acting as “Special Rapporteur on extrajudicial, summary, or arbitrary executions” of the UN Human Rights Council. The third is the analysis by John Bellinger, Harold Koh’s predecessor at the Department of State, of the law governing detention of suspected terrorists.

a. Koh

Koh’s March 2010 speech to the American Society of International Law began with the assertion that the attacks of September 11, 2001, triggered the U.S. right of self-defense under international law against al-Qaeda, the Taliban, and other terrorist organizations. Koh said that the United States is engaged in a number of armed conflicts simultaneously: “[A]s 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.”²⁸

Koh’s premise is important because it puts the struggle into the arena where the international use of force is permissible. “[I]n this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.”²⁹ All decisions about targeting, location, and treatment of prisoners flow from this proposition. In addition, armed conflict means that one applies the laws of war.

Koh said the use of force in self-defense includes controversial

dissent in *Boumediene v. Bush*, 553 U.S. 723, 827, 850 (2008) (Scalia, J., dissenting) (“The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application The Nation will live to regret what the Court has done today.”).

28. Harold Koh, Legal Adviser, U.S. Dep’t of State, Address to the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>.

29. *Id.*

targeting practices: “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”³⁰ As a result of this “authority” and “responsibility,” Koh stated that the United States recognizes the applicability of the law of armed conflict and the core principles of distinction and proportionality. Targeting individuals who are legitimate military objectives, such as commanders, planners, supporters, and the like, is within international law. Killing such persons is not to deprive them of judicial due process, for none is due; for the same reason, such killings do not violate U.S. legal prohibitions on assassination. Legitimate and lawful acts of self-defense are not crimes. Finally, Koh defended the use of unmanned vehicles as increasing the precision of attacks and limiting collateral damage.³¹ He did not address the question of where law enforcement ends and the international use of force begins.

The U.S. position raises additional questions, such as the use of precision weapons. What legal consequences flow from possession of such weapons? Do they affect the way a state, as a matter of law, must conduct military operations, including those in exercise of the inherent right of self-defense codified in Article 51 of the UN Charter?³² Do precision weapons eliminate recognition that error is endemic to warfare and mean that civilian casualties, if they occur, must be intended (as the Goldstone Report suggests)?³³ How does the requirement to distinguish between military and civilian targets affect, if it does, the right to use force in self-defense when the state with the right does not possess precision weapons, and its enemy hides among, or otherwise exploits, civilians?

b. Alston

Alston’s paper has stimulated much interest because it addresses subjects of current concern.³⁴ Up to a point, Alston shares

30. *Id.*

31. *Id.*

32. See UN Charter art. 51.

33. See Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, 12th Sess., ¶ 61, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009); Nicholas Rostow, *The Human Rights Council (Goldstone) Report and International Law*, 40 ISR. Y.B. ON HR 275, 286-87 (2010).

34. See, e.g., Charlie Savage, *U.N. Report Highly Critical of American Drone Attacks, Warning of Use by Others*, N.Y. TIMES, June 3, 2010, at A10; David S. Cloud, *U.N. Analyst Faults U.S. Drone Use; Official Says Military Should Take Over CIA’s ‘Targeted Killings’ Program*, L.A. TIMES, June 3, 2010, at A1; Peter Finn, *U.S. Urged to Stop CIA Drone Hits in Pakistan; Secrecy Raises Questions about Legality of Killing*, U.N. Official Says, WASH. POST, June 3, 2010, at A10; see also Yoram Dinstein, Professor Emeritus, Tel Aviv Univ., Counter-Terrorism and Extra-Judicial Killing:

Koh's view, particularly in setting forth in general terms the international law governing the use of force and the rules for military operations. Alston begins by focusing on unmanned aerial vehicles and weapons fired from them as among the most controversial instruments used in the conflict with terrorists. He asserts that

a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with [International Humanitarian Law].³⁵

Alston argues that each use of force must be consistent with conclusions about proportionality reached with respect to "each attack individually, and not for an overall military operation."³⁶ He thus elides the *jus ad bellum* and the *jus in bello*. While each operates in different contexts and with different understandings, Alston treats them as unified, which leads to confusion, mistake of law, and uncertainty. Recognizing that the proportionality standard must be met for a use of force to be lawful and that the principle at the core of the modern law of armed conflict is discrimination between military and civilian targets, Professor Yoram Dinstein put it better than Alston: those who plan attacks need to take into account the need to minimize civilian casualties.³⁷

Perhaps because his audience is the UN Human Rights Council, and perhaps because the focus of his own work is international human rights law, Alston looks at uses of force with international human rights concerns foremost in his mind. First, he takes a limited view of what constitutes a legitimate target for killing in armed conflict: "combatant," "fighter," "or, in the case of a civilian, only for such time as the person 'directly participates in hostilities.'"³⁸ Alston asserts, without analysis:

It is not easy to arrive at a definition of direct participation that

Can Such a Policy Be Justified?, Remarks at the Raoul Wallenberg International Human Rights Symposium (Jan. 19, 2006) (transcript on file with Rutgers Law Review).

35. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Addendum, ¶ 79, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Phillip Alston) [hereinafter Alston Report].

36. *Id.* ¶ 93.

37. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 126 (2004). Of course, the nuclear weapon raises a question about all these principles.

38. See Alston Report, *supra* note 35, ¶ 30. Alston cites common Article 3 of the Geneva Conventions as support for his assertion. Quite apart from the fact that Alston misquotes Article 3—it provides for humane treatment of "persons taking no active part in the hostilities," not persons who take no "direct" part—common Article 3 is concerned with humane treatment, not differentiation among combatants, fighters, and civilians. Third Geneva Convention, *supra* note 7, art. 3.

protects civilians and at the same time does not “reward” an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities. The key, however, is to recognize that regardless of the enemy’s tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does [sic] not constitute direct participation.³⁹

Alston thus asserts that “direct participation” excludes activities that may support “the general war effort”—e.g., political advocacy, supplying food or shelter, economic assistance, and propaganda.⁴⁰ He adopts what he calls the “farmer by day, fighter by night” distinction to protect the farmer by day from being a legitimate target.⁴¹ Such an approach, included in Additional Protocol I,⁴² favors the terrorist.⁴³

The “farmer by day, fighter by night” distinction is aligned with the guidance of the International Committee of the Red Cross with respect to direct participation in hostilities, as it permits it to stop and start on a continuing basis. One becomes a legitimate target only when engaged in a targetable activity.⁴⁴ This position will not win many advocates among those engaged in combating terrorists and their attacks.⁴⁵ Thus, Alston’s report suffers by seeming to take terrorism less seriously than governments and publics do.

The UN Security Council has suggested that one take a broader view of the issues Alston, in particular, addressed. In Resolution 1373 (2001), adopted after September 11, 2001, the Security Council “decide[d]” that all states shall:

39. *Id.* ¶ 60 (footnote omitted).

40. *Id.* ¶ 61.

41. *Id.*

42. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 23.

43. The United States is not a party to Additional Protocol I because of this bias, among other things. *See* Message to the Senate Transmitting the Protocol, 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987) (“The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.”).

44. Alston Report, *supra* note 35, ¶ 62 (“[T]he ICRC Guidance takes the view that direct participation for civilians is limited to each single act: the earliest point of direct participation would be the concrete preparatory measures for that specific act . . . and participation terminates when the activity ends.”).

45. Further, if his goal is “to protect the vast majority of civilians,” then one might have thought he would have emphasized the importance of suppressing terrorism, which, after all, aims at civilians above all other targets. *See id.* ¶ 60.

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.⁴⁶

While engaging in criminal support for terrorism may not *per se* make one a lawful target, it does suggest that Alston is rather too quick to narrow the categories of legitimate military targets.

UN Security Council resolutions are both more inclusive and more imprecise. Their language reflects political compromises achieved through the drafting process—compromises that allow unanimous adoption of counterterrorist resolutions. Thus, UN Security Council resolutions routinely reaffirm:

[T]hat terrorism in all its forms and manifestations constitutes one of the most serious threats to [international] peace and security

. . . [and] the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts⁴⁷

Those engaged in combating terrorism may use this UN Security Council language as a standard against which to evaluate plans. While Alston may regard command and control, training, and supplying of material as putting one in the category of legitimate target, the fact that he excludes financiers is troublesome. By not evaluating the impact of UN Security Council resolutions on his assumptions, Alston undermines the usefulness of his work.

Alston's report also raises problems with his interpretation of terrorism and terrorists. Achieving a general definition of terrorism has bedeviled the international community. At the same time, through a series of UN Security Council resolutions and multilateral treaties, the same community has narrowed the definitional gap for disagreement about whether a particular act is, or is not, terrorist by defining acts usually committed by terrorists as "terrorist."⁴⁸ Alston seems to define terrorist in such a way as to make status severable. Thus, for Alston, the terrorist can be many things at once, each one separable from the other, with different legal consequences for each.

46. S.C. Res. 1373, ¶ 2(e), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

47. S.C. Res. 1904, pmb. ¶¶ 3-4, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

48. See G.A. Res. 49/60, ¶ 3, U.N. Doc. A/RES/49/60 (Dec. 9, 1994) ("Criminal acts intended or calculated to provoke a state of terror . . . are in any circumstance unjustifiable . . .").

Alston insists that the laws of war and international human rights law apply in the context of armed conflict without analyzing how they do and what the consequences for operations are. Thus, Alston asserts, where the law of armed conflict is unclear or uncertain, “it is appropriate to draw guidance from human rights law.”⁴⁹ At the same time, he does not specify the content of such law and whether, to the extent it derives from treaties, all or just some states are parties. The same is true in his treatment of the law of armed conflict, as his references to the 1977 Geneva Protocols show.⁵⁰ Alston’s operational concern is procedural. He argues that, as a result of failing to disclose the legal basis for individual targeting decisions and who has been killed with what collateral consequences, “clear legal standards [have been displaced] with a vaguely defined licence to kill, and the creation of a major accountability vacuum.”⁵¹ As Alston notes, targeted killings have taken place in a variety of contexts—Russia’s war in Chechnya; the U.S. war with al-Qaeda; Sri Lanka’s war with rebel groups; and Israel’s war with Arab states, quasi-states, and groups are a few examples.⁵² Alston sums up the situation as follows:

Although in most circumstances targeted killings violate the right to life, in the exceptional circumstances of armed conflict, they may be legal. This is in contrast to other terms with which “targeted killing” has sometimes been interchangeably used, such as “extrajudicial execution[,]” “summary execution[,]” and “assassination[,]” all of which are, by definition, illegal.⁵³

This approach to conceptually distinct acts reflects a rush to conclusion based on insufficient and imprecise analysis.

Alston raises an additional issue—the status of CIA officers engaging in armed conflict with al-Qaeda and its allies.⁵⁴ Do they, as Alston asserts, not enjoy combatant status even if they meet the requirements of the Geneva Convention? Should one distinguish between the CIA officer engaged in cloak and dagger and those who

49. Alston Report, *supra* note 35, ¶ 29.

50. *Id.* ¶ 52 (“The tests for the existence of a *non-international* armed conflict are not as categorical as those for international armed conflict. . . . The applicable test may also depend on whether a State is party to Additional Protocol II to the Geneva Conventions.”).

51. *Id.* ¶ 3.

52. *See id.* ¶¶ 11-26 (detailing targeted killing policies in Israel, the United States, and Russia); *see also* Guiora, *supra* note 8 (citing AMOS N. GUIORA, GLOBAL PERSPECTIVES ON COUNTERTERRORISM 37-43 (2d ed. 2011)) (addressing operational counterterrorism efforts in Russia, Spain, China, India, Israel, and the United States).

53. Alston Report, *supra* note 35, ¶ 10 (footnote omitted) (citing Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 611-12 (1992)); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, 1989 ARMY LAW. 4, 7-8 (1989)).

54. *See* Alston Report, *supra* note 35, ¶¶ 65-66.

engage in military operations and look and behave like the regular armed forces except for the source of their paycheck?

c. Bellinger

Former Department of State and National Security Council Legal Adviser John Bellinger recently took on the issues raised here in the context of examining the George W. Bush administration's view of relevant law, categorization of detainees, and detention policies in general.⁵⁵ Bellinger argues that:

The traditional international armed conflict paradigm, featuring prisoners of war detained until the end of hostilities, breaks down in a conflict of indefinite, and potentially unending, duration, with actors not entitled to combatant status under international law. Likewise, the criminal law model developed for peacetime arrests of those within a state's jurisdiction is typically unavailable or, at best, impractical for detaining nonstate actors that military or intelligence personnel pick up outside a state's borders. In these circumstances, a state is left without clear, comprehensive international rules to govern its detention operations.⁵⁶

While undoubtedly it is going too far to conclude that the Bush administration blames a shortage of law for its detention policy woes,⁵⁷ a substantial number of commentators advocate the conclusion that the international community needs new law in this area.⁵⁸

Bellinger's premise, which he shares with others,⁵⁹ is that the

55. See generally John B. Bellinger, III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201 (2011) (arguing that existing law provides inadequate guidance to governments involved in combating nonstate actors in conflicts of indefinite duration).

56. *Id.* at 202.

57. See *id.* at 241 ("Our goal has been to demonstrate the need to develop new international law regarding the detention of persons in conflicts with nonstate actors.").

58. See, e.g., *id.* (discussing existing gaps and possibility for new international law); Jakob Kellenberger, President of the Int'l Comm. of the Red Cross, Address on the ICRC Study on the Current State of International Humanitarian Law (Sept. 21, 2010), available at <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm> ("ICRC believes . . . there is an urgent need to explore new legal ways for dealing exhaustively with the subject of protection for persons deprived of liberty during non-international armed conflict."); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1379-80 (2005) (discussing "how the law of war might evolve or be supplemented with additional domestic or international law"); Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 76 (2004) (concluding that the current state of the law needs development).

59. See, e.g., Derek Jinks, *The Declining Significance of POW Status*, 45 HARV.

1949 Geneva Conventions primarily apply to conflicts between or among states party to the Conventions. Therefore, in a conflict between a state and a nonstate entity, such as al-Qaeda, “[o]nly common Article 3 and Additional Protocols I and II apply, as a matter of treaty law, to at least some conflicts involving nonstate groups.”⁶⁰ Among the questions this premise raises for policymakers is how to apply the law we have in a way that makes sense and, at least, is consistent with the policies represented by the texts. Two generations ago, Myres McDougal and Florentino Feliciano addressed this issue:

Because the law of war is designed for the benefit of all mankind and not merely of certain belligerents, most observers agree, further, that this most basic policy of minimum unnecessary destruction of values applies to all forms of hostilities, irrespective of the characterization of the resort to violence as lawful or unlawful; of the formal character of one or the other participant as an intrastate rebel group or unrecognized government or authority, or international organization; of the intensity of the violence and its extension in time and space; and of recognition or nonrecognition of the existence of a technical state of war.⁶¹

Further, McDougal and Feliciano make clear that they are analyzing “the actual and active application of violence between contending belligerents.”⁶² Their analysis is tied not to particular words but to the values and policies those words express; hence, therein lies the ongoing relevance of their perspective and methodology.⁶³ In fact, contrary to Bellinger’s view, U.S. detention policies have matured over the past decade to the point that they may well provide a new international standard for implementing the Geneva Conventions.⁶⁴

INT’L L.J. 367, 374 (2004); David V. Rivkin, Jr. & Lee A. Casey, *The Use of Military Commissions in the War on Terror*, 24 B.U. INT’L L.J. 123, 132-33 (2006); Lori Hosni, *The ABCs of the Geneva Conventions and Their Applicability to Modern Warfare*, 14 NEW ENG. J. INT’L & COMP. L. 135, 135 (2007); David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 8, 13 (2009); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 74 NOTRE DAME L. REV. 1335, 1351-52 (2004).

60. Bellinger & Padmanabhan, *supra* note 55, at 205 (footnotes omitted).

61. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 72-73 (1961) (footnotes omitted).

62. *Id.* at 520.

63. Unlike most writers on international law, they sweep into their analysis as many dimensions of reality as possible. The result is a jurisprudence of originality and exceptional realism. For this reason, McDougal and Feliciano’s work retains its vitality and relevance fifty years after publication.

64. See Jill Greenfield, *National Security Experts Discuss Detention and Prosecutions Post 9/11*, HARVARD LAW SCHOOL (Feb. 18, 2011), http://www.law.harvard.edu/news/2011/02/18_understanding-detention-predicting-prosecutions.html

III. THE GENEVA CONVENTION APPROACH

The Geneva Conventions, binding as they are on all states, provide a useful guide for governments. If one accepts that the variety of potential terrorist activities justifies a variety of counterterrorist activities, then terrorists may be legitimate targets for military operations and criminal prosecution as well. The issue becomes one of feasibility rather than theory.

Professor Yoram Dinstein has offered a practical and legal approach.⁶⁵ He notes that confusion about definitions, stemming from the Supreme Court's decision in *Hamdan v. Rumsfeld*, which found there to be a global, non-international armed conflict,⁶⁶ has resulted in a loss of common sense. Dinstein's analysis of the relevant international law led him to conclude that a non-international armed conflict is confined to the territory of a single state. It involves armed conflict between a government and an organized armed group, or groups, or among organized armed groups in the absence of government. In Dinstein's view, international law does not recognize as non-international an armed conflict that crosses borders.⁶⁷ Accordingly, the U.S. conflict with al-Qaeda is an international armed conflict, governed by the international law applicable to such conflicts. Whether or not one agrees with Dinstein's analysis, one may urge the United States to treat the conflict as governed by the international law of armed conflict, thus simplifying the problem of administering the law with respect to targeting decisions and to the treatment of detainees.

Academic and political debate about the categorization of armed conflict as international or non-international has long roots, as President Reagan noted in 1987.⁶⁸ As Dinstein explained, a non-

("The legal regime that emerges from this era will likely alter for all time the way nations and states apply the rule of law in combating external, transnational terrorist threats."); see also U.S. Dep't of Def., *Testimony of William K. Lietzau, Deputy Assistant Secretary of Defense for Defense Policy House Armed Services Committee, Sub-Committee on Oversight and Investigations* (Apr. 13, 2011), <http://www.dod.gov/dodgc/olc/docs/testLietzau04132011.pdf> (discussing the Obama administration's desire to maintain a flexible approach to detention policy in light of twenty-first century warfare).

65. Yoram Dinstein, Professor Emeritus, Tel Aviv Univ., Closing Remarks at the International Law Conference 2011 (June 23, 2011), available at <http://www.usnwc.edu/events/international-law-conference-2011.aspx> [hereinafter Dinstein Remarks]. Professor Dinstein's remarks will be published by the U.S. Naval War College in the near future.

66. 548 U.S. 557, 630 (2006) ("The term 'conflict not of an international character' is used here in contradistinction to a conflict between nations."). Perhaps the Supreme Court decision lies behind John Bellinger's conclusion.

67. See Dinstein Remarks, *supra* note 65.

68. See President Ronald Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1987 PUB. PAPERS 88 (Jan. 29, 1987).

international armed conflict involves civil war, territorially bounded.⁶⁹ As a result, one is left with the choice of categorizing the conflict with al-Qaeda, for example, as an international armed conflict, which makes geographical sense, or neither a non-international armed conflict nor an international armed conflict. If it is neither, then the international community may need a new set of rules, an outcome that would be extremely difficult to negotiate. From a practical standpoint, it makes sense to treat conflicts with terrorist groups that involve more than one state's territory as international armed conflicts, governed by the relevant laws of war. Doing so would also simplify the problem of deciding when the use of the armed forces or police forces is appropriate.

For the United States, this approach would mean that the government should treat captives according to the same rules, regardless of their technical status as combatants who are entitled to prisoner of war status as a matter of law, or as noncombatants⁷⁰ who are not allowed to conduct battlefield operations without committing murder or being accessories to murder. The advantage would belong to the capturing party—it would apply one set of rules for which it can train all its armed forces. It would not have to worry about having different rules for different people. And, whether convicted of a crime or not, the detainee could be held until the end of hostilities or some other time short of that which is humane and prudent.

For example, the United States' killing of Anwar al-Aulaqi poses no legal dilemma under Dinstein's paradigm for analyzing the targeted killing of terrorists under international law.⁷¹ Because al-Aulaqi was a publicly identified terrorist who served as an "operational leader" of the command structure of al-Qaeda in the

69. See Dinstein Remarks, *supra* note 65.

70. The Supreme Court has also used the term "unlawful combatant." See *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) ("By universal agreement and practice the law of war draws a distinction between . . . those who are lawful and unlawful combatants."). The term represents a confusion between those engaged in hostilities who are allowed to be so engaged because they meet the standards of the Third Geneva Convention, see *supra* notes 5-10 and accompanying text, and those whose engagement in hostilities is not sanctioned by law. This fact makes them criminals *per se*, although proving that fact beyond a reasonable doubt poses challenges that most prosecutors believe to be insurmountable. The Court would have avoided much subsequent confusion had it used the term "fighters" instead of "combatants." If one is a combatant, one may engage in military operations. If one is not a combatant, one may not lawfully do so.

71. See Dinstein Remarks, *supra* note 65; see also John B. Bellinger III, Editorial, *Obama's Drone Danger*, WASH. POST, at A17 (Oct. 3, 2011) ("The United States also believes that drone strikes are permitted under international law and the United Nations Charter as actions in self-defense, either with the consent of the country where the strike takes place or because that country is unwilling or unable to act against an imminent threat to the United States.").

United States' crossborder conflict with the terrorist organization; his U.S. citizenship is irrelevant⁷² and the analysis simple: the United States maintained the international law and constitutional authority to kill an operational threat to the United States in an international armed conflict.⁷³

IV. CONCLUSION

Koh, Alston, and Bellinger have raised numerous issues of high importance to success in the effort to combat terrorism and terrorists. Other issues are significant as well, including the fact, which seems often to be forgotten, that the use of force is a political act, aimed at political objectives. This is true whether the goal is capitulation or change of policy. For the United States, the goals invariably include persuading the adversary to comply with international legal standards of behavior. At the same time, the tactical choices made also have political consequences. These need to be considered as one goes forward with a use of force. In addition, calls for the introduction of including judicial process in military decisions, not just the detention of prisoners, seem to be growing louder. Is such involvement of the judiciary necessary or wise? And what are the consequences of introducing judicial process as a routine part of military operations?

If al-Qaeda were a state—Al Qaeda country—these questions would be simpler to answer. Dinstein comes closest to providing answers and suggesting policies that are coherent and realistic. Following his view that non-international armed conflict refers to intra-state conflict, one sensibly may treat hostilities between a government and an organized armed group as an international

72. See Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, at A9 (Oct. 1, 2011) (discussing an unclassified Department of Justice memorandum justifying the Obama administration's killing of al-Aulaqi). In fact, an Obama administration official made clear,

[a]s a general matter, it would be entirely lawful for the United States to target high-level leaders of enemy forces, regardless of their nationality, who are plotting to kill Americans both under the authority provided by Congress in its use of military force in the armed conflict with al-Qaeda, the Taliban, and associated forces as well as established international law that recognizes our right of self-defense.

Id.

73. See Bellinger, *supra* note 71; Koh, *supra* note 28; see also Authorization of Use of Military Force, 50 U.S.C. 1541 § 2(a) (2006) (authorizing the President to use "all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such . . . persons"). But see Mary Ellen O'Connor, Editorial, *Explaining the Awlaki Killing*, WASH. POST, Oct. 6, 2011, at A20.

armed conflict, applying, as a matter of choice, the international law of armed conflict to al-Qaeda and associated forces. Doing so would resolve most of the issues Koh and Alston have raised. As the war with al-Qaeda and its associates continues with no end in sight, getting the analysis and argument right is a political and legal necessity.