2009

Combatants and the Combat Zone

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ESSAYS

COMBATANTS AND THE COMBAT ZONE

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Shortly after the attacks of September 11, 2001, the Bush Administration ("Administration") presented a definition of "enemy combatant" created for purposes of waging a war against terrorism.[1] The definition was only tangentially related to the definition of combatant supported by international humanitarian law ("IHL").[2] Nevertheless, the Administration asserted rights and privileges imparted under IHL with respect to combatants—namely, the right to detain without trial until the end of hostilities and the right to kill without warning.[3] The Administration used its definition of combatant in November of 2002 to justify the use of an unmanned drone to fire a missile at a passenger vehicle traveling on a road in a remote part of Yemen.[4] All six persons in the vehicle were killed.[5] The definition was also used to justify capturing individuals in Bosnia, Malawi, and other places

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1. *See* Memorandum from William J. Haynes II, Gen. Counsel of the Dep't of Def., to Members of the ASIL-CFR Roundtable (Dec. 12, 2002), http://www.cfr.org/publication.html?id=5312 (last visited Feb. 26, 2009) [hereinafter Haynes]; *see also* Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (2006).

2. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 4, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. "International humanitarian law" or "IHL" are the more common terms used for the law that applies to the conduct of hostilities and occupation. *See* Jonathan Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, ASIL Insight, Aug. 24, 2006, http://www.asil.org/insights060824.cfm (last visited Feb. 26, 2009).

3. *See id.* arts. 42, 111.

4. *See* Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike: Action's Legality, Effectiveness Questioned*, WASH. POST, Nov. 8, 2002, at A1.

5. *Id.*

where no hostilities were being waged, and imprisoning them at Guantánamo Bay, Cuba, without trial.[6] The Administration further claimed the right to kill people in Germany and other peaceful places without warning. In fact, "Steven Bradbury, acting head of the US Justice Department's Office of Legal Counsel, told Senator Dianne Feinstein [in 2006] . . . that the president may have the executive power to order the killing of terrorist suspects inside the US."[7] The Administration based all of these claims and actions on its own definition of combatant.

This short essay discusses that definition as it emerged following September 11, 2001. The essay compares the Administration's definition with the definition of combatant found in international law. This essay will not discuss in any detail the additional—and even more questionable—claim by the Administration that certain persons designated "enemy combatants" enjoy neither U.S. nor international human rights or IHL rights or protections.[8] Suffice it to say that no human being can be denied his or her fundamental rights—there are no legal black holes.

The Administration's Combatant

The Administration's understanding of "combatant" must be pieced together from documents, statements, litigation positions, and the like. We know from these sources that for President Bush, someone could be a combatant even in the absence of armed conflict. This definition is not consistent with that found in international law, which clearly requires the presence of armed conflict for an individual to be categorized as a "combatant."[9] "Armed conflict" is also defined in international law.[10] Both of these definitions will be discussed following a review of the Administration's definitions.

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6. *See* Jason Burke, *Terror Backlash: Global Web of Secret U.S. Prisons*, OBSERVER (U.K.), June 13, 2004, at 22; William Glaberson, *Judge Opens First Habeas Corpus Hearing on Guantanamo Detainees*, N.Y. TIMES, Nov. 7, 2008, at A1.

7. 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 (last visited Feb. 26, 2009).

8. Haynes, *supra* note 1.

9. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 2.

10. *Id.* art. 2.

Probably the Administration's first indication that it was creating its own definition of combatant, one not grounded in international law, came with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" ("President's Military Order").[11] The President's Military Order authorized the Secretary of Defense to "take all necessary measures to ensure that any individual subject to [the] [O]rder [was] detained," and defined such individuals as any person who, at the relevant times, "(i) is or was a member of the organization known as [al Qaida]; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism . . . on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described."[12] Sections 4(a) and 7(b)(1) provide for trials by military commissions of persons detained under the President's Military Order.[13] The President's Military Order did not say the individual had to be engaged in the fighting in Afghanistan, or in fighting anywhere, to be subjected to trial by military commission—it referred to anyone associated with Al-Qaeda, wherever found.[14]

A year after the President's Military Order was issued, the Pentagon's top lawyer, William J. Haynes II, defined "enemy combatant" as "an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, the term includes a member, agent, or associate of al Qaida or the Taliban."[15]

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11. Military Order of Nov. 13, 2001, *supra* note 1, at 918. The President relied on two sources of authority for the Order: Congress's Joint Resolution for the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), and Title 10 of the United States Code, sections 821 and 836, 10 U.S.C. §§ 821, 836 (2006). Military Order of Nov. 13, 2001, *supra* note 1, at 918.

12. *Id.*

13. *See id.* at 919–20, 921.

14. *See id.* at 919. The President's Military Order provides that the Secretary of Defense will appoint the commissions. *Id.* at 920. Persons subject to the Commissions' jurisdiction have no right of access to any U.S. civilian court, foreign court, or international tribunal. *See id.* at 921. While the President's Military Order indicates in its title and substantive provisions that it applies to non-citizens of the United States, section 7(a)(3) states that it shall not be construed to "limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order." *Id.* The Pentagon developed regulations to implement the President's Military Order. *See, e.g.*, 32 C.F.R. § 18 (2006) (establishing Military Commissions as required under the Order).

15. Haynes, *supra* note 1.

Haynes did not base this "combatant by association" test on any international law authority. Rather, he relied on a 1942 Supreme Court decision, *Ex parte Quirin,* to justify declaring individuals enemy combatants and detaining them until the end of hostilities in the "novel" conflict with Al-Qaeda.[16] However, the only issue before the *Quirin* Court was whether the President had the authority to try the defendants before a military tribunal rather than in a civilian court.[17] The Court was not asked "Who is a combatant?" The answer to that question lies not in *Quirin* but rather in international law—international law that did not even exist at the time of *Quirin.*

In 2003, several months after the Haynes memorandum, and following the President's Military Order, President Bush declared Ali Saleh Kahlah al-Marri an enemy combatant.[18] Al-Marri, a Qatari citizen, was studying in Peoria, Illinois on September 11, 2001.[19] After the attacks, he was placed in civilian custody as a material witness.[20] Between 2002 and 2003, he was charged with lying to the FBI and with credit card fraud.[21] President Bush declared al-Marri an enemy combatant on June 23, 2003, and he was moved from a prison in Illinois to a military brig in South Carolina.[22] In late 2008, the Supreme Court granted certiorari in al-Marri's case to hear and decide his claim that he did not act as a "combatant."[23] On January 23, 2009, President Obama signed executive orders with respect to major aspects of the "global war on terror."[24] Mr. al-Marri's case, however, remained pending before the Supreme Court at the time of this writing.

In 2002, prior to the Haynes memorandum but after the President's Military Order, President Bush declared José Padilla an

16. *See id.* (citing *Ex parte* Quirin, 317 U.S. 1, 37–38 (1942)).

17. *See Ex parte* Quirin, 317 U.S. at 18–19.

18. A redacted version of the President's order is available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/almarri/almarri62303exord.pdf (last visited Feb. 26, 2009).

19. *See* Al-Marri v. Pucciarelli, 534 F.3d 213, 219 (4th Cir. 2008) (en banc), *cert. granted*, 129 S. Ct. 680 (2008).

20. *Al-Marri*, 534 F.3d at 219.

21. *Id.*

22. *Id.*

23. *See* 129 S. Ct. 680 (2008).

24. *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009); Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

enemy combatant.[25] José Padilla was arrested in Chicago on May 8, 2002.[26] He too was originally arrested by civilian authorities and charged with various terrorism crimes, and was moved from a civilian to a military prison when President Bush declared him an enemy combatant.[27] In a redacted statement declaring Padilla an enemy combatant, the President said Padilla qualified for combatant status for his "conduct in preparation for acts of international terrorism."[28] In 2005, however, the Administration requested that Padilla be moved back to the criminal system; the Supreme Court granted the request while it reviewed Padilla's petition for certiorari.[29]

On November 3, 2002, agents of the CIA, using an unmanned Predator drone, fired a Hellfire missile at a vehicle in remote Yemen, killing six men.[30] One of those men was a suspected high-ranking Al-Qaeda lieutenant.[31] According to the media, Yemen had knowledge of the operation.[32] Following the strike, then-National Security Adviser Condoleezza Rice stated, "[W]e'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."[33] The Deputy General Counsel for International Affairs at the Department of Defense, Charles Allen, made it even clearer how the Administration viewed the Yemen killings. He said the United States could target "al-Qaeda and other international terrorists around the world, and those who support such terrorists."[34] He

25. A redacted version of the President's order is available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/padillabush60902det.pdf (last visited Feb. 26, 2009) [hereinafter Presidential Determination on José Padilla].

26. Padilla v. Bush, 233 F. Supp. 2d 564, 568 (S.D.N.Y. 2002). In *Padilla v. Rumsfeld*, the Court of Appeals, by a vote of two-to-one, found the President had insufficient authority from Congress to declare Padilla an enemy combatant under the circumstances. 352 F.3d 695, 712–18 (2d Cir. 2003), *rev'd on other grounds by* Rumsfeld v. Padilla, 542 U.S. 426 (2004).

27. *See Padilla*, 233 F. Supp. 2d at 571.

28. Presidential Determination on José Padilla, *supra* note 25.

29. Hanft v. Padilla, 546 U.S. 1084, 1084–85 (2006) (order granting Government's transfer request). The Court subsequently denied Padilla's petition for certiorari. Padilla v. Hanft, 547 U.S. 1062 (2006).

30. Jack Kelly, *U.S. Kills Al-Qaeda Suspects in Yemen,* USA TODAY, Nov. 5, 2002, at A1.

31. *See id.*

32. *See id.*

33. *Fox News Sunday: Interview with Condoleezza Rice* (Fox television broadcast Nov. 10, 2002).

34. 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/on

stated that suspects could be targeted and killed on the streets of a European city such as Hamburg.[35] And, as noted at the outset of this essay, a top Justice Department lawyer said the President had the authority to order suspects killed in the United States.[36] The Administration apparently developed this position regarding the right to kill mere suspects based on the IHL principle of combatant immunity.[37]

Further confirmation that the Administration labeled individuals combatants on the basis of association alone came during an oral argument in a federal court challenge by detainees held at Guantánamo Bay. According to the New York Times,

> The judge, Joyce Hens Green of the Federal District Court in Washington, asked a series of hypothetical questions about who might be detained as an enemy combatant under the government's definition. What about "a little old lady in Switzerland who writes checks to what she thinks is a charitable organization that helps orphans in Afghanistan but really is a front to finance Al Qaeda activities?" she asked. And what about a resident of Dublin "who teaches English to the son of a person the C.I.A. knows to be a member of Al Qaeda?" And "what about a Wall Street Journal reporter, working in Afghanistan, who knows the exact location of Osama bin Laden but does not reveal it to the United States government in order to protect her source?" [Department of Justice attorney] Boyle said the military had the power to detain all three people as enemy combatants.[38]

Boyle spoke only of detaining these individuals. Yet, the Administration's position also encompassed killing combatants without warning—not just indefinite detention.[39]

International Law's Combatant

As the example of the elderly Swiss lady indicates, the Administration's definition of "combatant" was apparently designed to achieve certain outcomes. It is only tangentially related to the de-

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news/pentagon-print.html (last visited Feb. 26, 2009).

35. *Id.*

36. *See supra* note 7 and accompanying text.

37. *See* Dworkin, *supra* note 34; *see also* Mary Ellen O'Connell, *New ILA Study Committee To Report on the Meaning of War*, ABILA NEWSLETTER, Jan. 2006, at 2–3.

38. Adam Liptak, *In Terror Cases, Administration Sets Own Rules*, N.Y. TIMES, Nov. 27, 2005, at A1.

39. Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight against Terrorism*, *in* HUMAN RIGHTS WATCH WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 177 177–78 (2004).

finition of combatant under international law. Under international law, a combatant is either a member of a state's armed forces during armed conflict or a person who takes direct part in armed conflict hostilities. These definitions are supported by a number of legal authorities, including, perhaps most importantly, Additional Protocol I of 1977 to the 1949 Geneva Convention.[40] Under Additional Protocol I,

> 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.[41]

Persons with a right to take direct part in hostilities are lawful combatants; those without such a right are unlawful combatants.[42]

Some prefer to continue to reserve the term "combatant" for members of a state's armed forces in an international armed conflict.[43] They use the term "unprivileged belligerent" for someone with no right to engage in an international armed conflict.[44] This

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40. 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. 3 [hereinafter Additional Geneva Protocol I]; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Geneva Protocol II]; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 27 (2004); Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, *in* KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 505 (Horst Fischer et al. eds., 2004).

41. Additional Geneva Protocol I, *supra* note 40, arts. 43, 51.

42. *See* Knut Dörman, The Legal Situation of "Unlawful/Unprivileged Combatants", 85 INT'L REV. RED CROSS 45, 46 (2003) ("[U]nlawful/unprivileged combatant/belligerent is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy.").

43. *See, e.g.*, Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U. L. REV. 759, 767 (2007).

44. Frits Kalshoven remarks, "The 'unprivileged belligerent' goes back to [Richard] Baxter's famous article; he was an army major (and a lawyer) at the time and his terminology came from the Hague Regulations. In the seventies, he [ ] was not using this terminology any longer, so we may all forget it. The choice is reduced to 'combatant' or 'civilian'!" E-mail from Frits Kalshoven, Professor Emeritus of Law, Leiden University, to Mary Ellen O'Connell, Robert and Marion Short Chair in Law, Notre Dame Law School (Feb. 26, 2009, 11:47 EST) (on file with author); *see* Dörmann, *supra* note 42, at 46–47. *See generally* Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerillas, and*

term may also be used respecting rebels in an internal or non-international armed conflict.[45] "Unprivileged belligerent" is, however, increasingly being abandoned.[46] The term "combatant" in English means someone who takes part in combat.[47] That meaning tracks the more up-to-date use adopted here. Attempts to substitute other straightforward terms, such as "fighter" have not succeeded, in part because other languages do not reflect a distinction between "fighters" and "combatants."[48] The International Committee of the Red Cross ("ICRC") defines "enemy combatant" as "a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an international armed conflict."[49] However, a comprehensive study of customary international law undertaken under the ICRC's auspices indicates,

> Persons taking a direct part in hostilities in non-international armed conflicts are sometimes labeled "combatants." For example, in a resolution on respect for human rights in armed conflict adopted in 1970, the UN General Assembly speaks of "combatants in all armed conflicts." More recently, the term "combatant" was used in the Cairo Declaration and Cairo Plan of Action for both types of conflicts. However, this designation is only used in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts.[50]

Saboteurs, 28 BRIT. Y.B. INT'L L. 323 (1951). Kalshoven adds:

> Baxter's use of the phrase "unprivileged belligerents" went back to the Hague Regulations, where both the parties at war and the persons fighting it are referred to as belligerents. Since the making of [the] 1977 Protocol I the term has replaced the "belligerent", and taking part in hostilities is no longer regarded as a privilege but is recognised as an entitlement, or right.

E-mail from Frits Kalshoven, Professor Emeritus of Law, Leiden University, to Mary Ellen O'Connell, Robert and Marion Short Chair in Law, Notre Dame Law School, (Jan. 30, 2009, 11:58 EST) (on file with author).

45. *See* Baxter, *supra* note 43, at 333–34.

46. CrimA 6659/06, 1757/07, 8228/07, 3261/08 A, B v. Israel [2008] at 9–13 (S. Ct. Israel), *available at* http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (accepting an Israeli law on detention that defined "unlawful combatant" as someone involved only indirectly in hostilities). *See id.*

47. *See* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 261 (2d ed. 1997).

48. *See* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 13 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

49. Official Statement, International Committee of the Red Cross, The Relevance of IHL in the Context of Terrorism (July 21, 2005), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/terrorism-ihl-210705 (last visited Feb. 26, 2009) [hereinafter ICRC Statement].

50. I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 48, at 12 (footnotes omitted).

It is imperative to have a clear, straightforward distinction between those who may be a target and those who may not. The preferred terms today are "combatant" and "civilian." Whether a combatant can later be tried for unlawfully participating in an armed conflict is not of such urgent importance as the need for clarity on the battlefield as to who may be killed. Combatants may be; civilians may not. The use of clear terms is critical in training soldiers. For purposes of prosecution or determining prisoner-of-war status, the term "unlawful" can be added.[51] Nor does there appear to be any reason to restrict the term "combatant" to international armed conflicts, as the "direct participation" definition appears in Additional Protocol II to the Geneva Conventions relative to non-international armed conflict.[52] Other terms are used, such as "rebel," to denote anyone rebelling against a government, and "insurgent," to denote a member of a group that does not control territory and is, therefore, unlikely to be participating in an armed conflict, which generally requires all sides to control some territory.[53]

One aspect of the definition of combatant that remains disputed is whether those who are no longer directly engaged in hostilities in the context of an armed conflict are, in fact, still combatants, or whether they become civilians upon their cessation of active involvement. The ICRC provides that "[p]eople who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, *without any unfavorable distinction whatever*."[54]

Regardless, no one is a combatant in the absence of armed conflict. According to the ICRC, "From an IHL perspective, the term 'combatant' or 'enemy combatant' has no legal meaning outside of armed conflict."[55] To know who is a combatant, therefore, requires knowing the meaning of armed conflict. Like the definition of combatant, the meaning of "armed conflict" must be found in international law; it cannot be constructed to suit a particular pur-

51. *See* ICRC Statement, *supra* note 49.

52. Additional Geneva Protocol II, *supra* note 40, art. 13(3).

53. *See infra* notes 83–86 and accompanying text.

54. International Committee of the Red Cross, *What are the Essential Rules of International Humanitarian Law?* (Oct. 31, 2002), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5KZFJU (last visited Feb. 26, 2009) (emphasis added).

55. ICRC Statement, *supra* note 49.

pose. Armed conflict is determined today by facts of fighting, not mere declarations as in the period before the adoption of the United Nations Charter.[56] The International Law Association ("ILA") tasked its Committee on the Use of Force in 2005 to report on the definition of "armed conflict" in international law.[57] The Committee gave its Initial Report in 2008 and identified the following two core characteristics of any armed conflict:

> Looking to relevant treaties—in particular IHL treaties—rules of customary international law, general principles of international law, judicial decisions and the writing of scholars, as of the drafting of this Initial Report, the Committee has found evidence of at least two characteristics with respect to all armed conflict:
>
> 1.) The existence of organized armed groups
> 2.) Engaged in fighting of some intensity
>
> These characteristics were restated perhaps most authoritatively in a 1995 decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Tadic*. That decision has been widely cited for its description of the characteristics of armed conflict.[58]

According to the International Criminal Tribunal for the Former Yugoslavia in *Tadic*, an armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[59] The *Tadic* decisions do not mention whether fighting must be significant or intense, but the 1977 Additional Protocols to the Geneva Conventions incorporate both concepts of intensity and organized fighting for a situation to be an "armed conflict."[60] Additional Protocol II applies only to conflicts that are more than "situations of internal disturbances and tensions, such as riots, isolated and

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56. *See* Mary Ellen O'Connell, *What is War?*, JURIST, Mar. 17, 2004, http://jurist.law.pitt.edu/forum/oconnell1.php (last visited Feb. 26, 2009); Gary D. Solis, *Are We Really at War?*, 127 U.S. NAVAL INST. PROC. 34 (2001).

57. INT'L LAW ASS'N, COMM. ON THE USE OF FORCE, INITIAL REPORT ON THE MEANING OF ARMED CONFLICT IN INT'L LAW 1–2 (2008), http://www.ila-hq.org/download.cfm/docid/0C19D883-3312-4731-92C4A18A55147597 [hereinafter ILA USE OF FORCE COMM. REPORT].

58. *Id.*

59. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 70 (Oct. 2, 1995), *available at* http://www.icty.org/x/Cases/tadic/tdec/en/100895.htm.

60. Additional Geneva Protocol II, *supra* note 40, art. 1.

sporadic acts of violence."[61] The cases surveyed by the ILA Use of Force Committee plainly support the element of "intensity."[62]

The International Court of Justice in the *Nicaragua* case also distinguished minor armed exchanges from attacks that give rise to the right of self-defense as too insignificant to be labeled "armed conflict,"[63] as did the Eritrea Ethiopia Claims Commission in 2005.[64] Incidents that do not trigger the right of self-defense are too insignificant to be armed conflicts:

> [M]any isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply.[65]

Nor is the single attack, regardless of how significant, an armed conflict. Armed conflict requires exchange.[66] It begins not with the attack, but with the counter-attack.[67] A State may have the right to engage in a war of self-defense following an attack, but if the State chooses not to exercise that right, there is no armed conflict.[68] Likewise, if an individual is punched, but walks away from his attacker, we do not say there is a fight. Without a counter-punch the person is a victim, not a fighter. Parallel concepts apply among states. We understand armed conflict to require armed exchange by organized groups lasting for some pe-

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61. *Id.*

62. USE OF FORCE COMM. REPORT, *supra* note 57, at 9–12.

63. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 102–04 (June 27).

64. Partial Award, *Jus Ad Bellum* (Eth. v. Eri.), Ethiopia's Claims 1–8, at 4–8, (Eritrea Ethiopia Claims Comm'n Dec. 19, 2005), 45 I.L.M. 430 (2006).

65. Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 39, 42 (Dieter Fleck ed., Oxford Univ. Press 1995) (footnotes omitted).

66. Even when an attack is significant, other conditions must be met before the victim of such an attack may respond in lawful self-defense. *See* Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, U. PITT. L. REV. 889, 889–90 (2002). A significant armed attack, something more than a frontier incident, may give rise to the right of self-defense. *See id.* at 891–92. In addition to the armed attack, the victim state must be able to achieve the purpose of self-defense and it must focus its response on a state that is responsible for the unlawful initial attack. *See id.* at 893, 899. The mere presence of terrorists, for example, on the territory of a state is insufficient to trigger the territorial state's right of self-defense. *See id.* at 902.

67. Mary Ellen O'Connell, *When Is a War Not a War? The Myths of the Global War on Terror*, 12 ILSA J. INT'L & COMP. L. 535, 538 (2006).

68. *Id.*

riod and involving more than a *de minimis* amount of force.[69] In other words, there must be "hostilities" for there to be an armed conflict. Hostilities are the actual engagement in fighting.[70] One-way attacks and minor armed exchanges are not armed conflicts.

Some argue that we must treat one-sided, intense armed attacks, such as the 9/11 attacks or the attacks by Israel on Syria in September of 2007, as armed conflicts so that IHL will apply.[71] The thinking is that we must hold attackers to IHL requirements to make them accountable for attacking civilians and civilian objects.[72] But this is not the right body of rules to govern attacks outside an armed conflict. IHL does not apply, but, rather, the law of peace—criminal law. Criminal law not only makes it murder to kill civilians in such situations, but also to kill members of the military. There is no combatant's privilege to kill outside armed conflict.[73] Under the "one-sided attack is armed conflict" view, if Al-Qaeda had sent an unmanned drone to bomb the Pentagon on 9/11, that would have been a lawful attack. The Israeli bombing of Syria also would have been lawful because Israel used military jets and attacked a suspected weapons facility.[74] Israel's attack was no more lawful, however, than its 1981 attack on the Osirik nuclear reactor in Iraq, which was unanimously condemned by the U.N. Security Council.[75]

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69. *See* O'Connell, *supra* note 66, at 890–91 & n.12; *see also* Definition of Aggression, G.A. Res. 3314 (XXIX), Annex, U.N. Doc. A/9619 and Corr. 1 (Dec. 14, 1974), *reprinted in* 69 AM. J. INT'L L. 480 (1975).

70. *See* International Committee of the Red Cross, *Third Expert Meeting on the Notion of Direct Participation in Direct Hostilities* 18–19 (2005), http://icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205 (follow "Summary Report 2005" hyperlink).

Several important protections in IHL are linked to "hostilities" and not armed conflict, such as the requirement that detainees not charged with a crime be released at the end of hostilities. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 2, art. 118. A civilian who takes direct part in "hostilities" loses his or her civilian immunity. *See* Margaret C. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1410 (2007). It is argued below that he or she becomes a "combatant."

71. *See, e.g.*, Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003).

72. *See id.* at 47.

73. *Cf.* Additional Geneva Protocol I, *supra* note 40, art. 43(a) (limiting the right to participate in hostilities to combatants).

74. *See* Uzi Mahnaimi, Sarah Baxter & Michael Sheridan, *Israelis "Blew Apart Syrian Nuclear Cache,"* SUNDAY TIMES (London), Sept. 16, 2007, at 24, *available at* http://www.timesonline.co.uk/tol/news/world/middle_east/article2461421.ece.

75. S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981).

It is not entirely clear why some scholars press for finding one-sided attacks to be armed conflicts. One argument is that if such situations are armed conflicts, IHL applies.[76] IHL is well-regarded and the ICRC has had perhaps more success in implementing and enforcing it than other human rights bodies have in implementing and enforcing human rights and international criminal law. But human rights are more restricted in wartime than in peace: the combatant's privilege to kill does not apply. It would be murder to send a drone to bomb the Pentagon because military targets are not lawful targets in peacetime. The only acceptable legal position is to determine the proper law—IHL or peacetime human rights law—and do our utmost to ensure its proper application.

Nevertheless, Administration officials argued that an armed conflict began on 9/11 because the attacks were "acts of war."[77] Some also point to other attacks by Al-Qaeda during the previous ten years and the U.S. counter-attacks in Sudan and Afghanistan to argue that this series amounts to a sort of slow-motion armed conflict.[78] The United States did "counter-punch" for the embassy attacks in East Africa in 1998. Some months after the embassies were attacked, the United States dropped bombs on a factory in Sudan and on Al-Qaeda camps in Afghanistan.[79] These bombings by the United States were not treated as an armed conflict. Neither Sudan nor Afghanistan responded militarily, and, given the long delay between these uses of force and September 11, 2001, the 1998 bombings are more appropriately classified as "sporadic acts of violence" or "incidents." They were not part of an armed conflict.[80]

Nathaniel Berman, nevertheless, suggests that a worldwide struggle with Al-Qaeda could meet the definition of armed con-

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76. *See supra* notes 70–71 and accompanying text.

77. Remarks Following a Meeting with the National Security Team, 2 PUB. PAPERS 1100 (Sept. 12, 2001).

78. *See, e.g.*, Matthew Scott King, Comment, *The Legality of the United States' War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket To Cover Up International War Crimes*, 9 ILSA J. INT'L & COMP. L. 457 (2003).

79. Eugene Robinson & Dana Priest, *Reports of U.S. Strikes' Destruction Vary; Afghanistan Damage 'Moderate to Heavy'; Sudan Plant Leveled*, WASH. POST., Aug. 22, 1998, at A1.

80. *See generally* Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 353–57 (2004) (discussing the difference between "armed conflict" and "sporadic acts").

flict developed in *Tadic* as long as "protracted" is deemed to include "a conflict that is both spatially dispersed and temporally discontinuous, waxing and waning by fits and starts for over ten years—and provided that such a discontinuous conflict is not disqualified as an armed conflict by describing it as 'sporadic.'"[81] Yet, this description plainly applies to international criminal activity, not armed conflict as defined in the ILA's Use of Force Committee's Report.[82] Long-running sporadic acts of violence, such as those carried out by the Irish Republican Army or the Palestine Liberation Organization, have not been treated by states as armed conflict but instead have been treated for the scourge they are—terrorism.[83] Outside armed conflicts involving the United States in Afghanistan, Iraq, and Somalia, Al-Qaeda's actions and U.S. responses have been too sporadic and low-intensity to qualify as armed conflict.

In addition to exchange, intensity, and duration, armed conflicts have a spatial dimension. It is not the case that if there is an armed conflict in one state—for example, Afghanistan—that all the world is at war, or even that Afghanis and Americans are at war with each other all over the planet. Armed conflicts inevitably have a limited and identifiable territorial or spatial dimension because human beings who participate in armed conflict require territory in which to carry out intense, protracted, armed exchanges.[84] International armed conflicts involving sovereign states inevitably implicate the territory controlled by those states. Additional Protocol II, Article 1 includes a requirement of territorial control for the Protocol to apply to non-international armed conflict:

> This Protocol . . . shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part

81. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 32–33 (2004).

82. *See* ILA USE OF FORCE COMM. REPORT, *supra* note 57.

83. *See, e.g.*, David Turns, *The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspectives on Selected Legal Issues*, 10 N.Y. CITY L. REV. 435, 445–46 (2007).

84. Although it has not been done and seems unlikely, groups could carry out an armed conflict on the high seas.

> of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[85]

As Article 1 indicates, for fighting to reach the requisite level of intensity between groups that are sufficiently well organized control of territory is generally a necessity.[86] Sufficient weapons for intense fighting, space to train with weapons, a command structure, and training to act in a coordinated fashion under command are concomitants of armed conflict—and all require some territorial control.[87]

Terrorists need not have such control. By building bombs or plotting airplane hijackings, small terrorist cells can operate without detection on territory controlled by others. Preventing such terrorist acts and dismantling terrorist organizations require careful police work. The success of the British against the Irish Republican Army and, more recently, against the July 2007 terrorists,[88] the Spanish success against Al-Qaeda after the March 2004 bombing,[89] as well as the U.S. success after the 1993 World Trade Center bombing[90] all support the importance of the law enforcement approach. Sending major military forces has proven not only less successful, but counter-productive, as the use of force against Al-Qaeda in Afghanistan, beginning October 7, 2001, and in Somalia, beginning in January of 2007, demonstrate.[91]

During the Second World War, there was intense fighting in large parts of the world. Nothing of the kind has been seen since. The Cold War had global dimensions but was only a war in the rhetorical sense. Defense Secretary Donald Rumsfeld tried in the summer of 2005, and again in early 2006, to move away from the

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85. Additional Geneva Protocol II, *supra* note 40, art. 1.

86. *See* Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27:2 FLETCHER F. WORLD AFF. 55, 62 (2003).

87. *See* Mariano-Florentino Cuéllar, *The Untold Story of al Qaeda's Administrative Law Dilemmas*, 91 MINN. L. REV. 1302, 1329 (2007).

88. *See* Editorial, *The British Way with Terrorists*, BOSTON GLOBE, July 3, 2007, at A10.

89. *See* Sebastian Rotella, *Spain Hunts Fugitive Tied to Al Qaeda*, L.A. TIMES, Apr. 14, 2004, at A3.

90. *See* Patricia Cohen, *Convicted: 4 Guilty in the Plot To Bomb the World Trade Center*, NEWSDAY, Mar. 5, 1994, at 3.

91. For a discussion of why treating terrorism as armed conflict—not crime—may prove counter-productive in the suppression of terrorism, see Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANS. NAT'L L. 435 (2005).

label "global war on terrorism" to "global struggle against violent extremism" (G-SAVE) or "the Long War"—a label meant to be reminiscent of the Cold War.[92] Apparently it became clear to Rumsfeld that calling the campaign against terrorism a war when it lacked the basic indicia of a war or armed conflict had serious disadvantages; in particular, it would be difficult to provide indications of when the "war" would be won. President Bush, however, clarified that he considered the war on terror a real war—one in which persons could be killed without warning all over the globe and detained indefinitely.[93]

Rumsfeld's attempt to back away from the assertion that the United States became involved in an actual world-wide armed conflict on 9/11 reminds us why the declaration of a "global war" was such a departure from state practice. States are generally reluctant to acknowledge armed conflict is occurring on their territory. Armed conflict means a government has failed to maintain control. By contrast, all societies suffer criminality—that is not the same kind of failure. As such, governments typically try to claim any violence on their territories is crime, not armed conflict. The claim that violence is criminality and not armed conflict is plausible, however, only to the extent the armed group does not control territory.

The preference for limiting the understanding of what constitutes armed conflict is also seen in the concept of the conflict zone. Armed conflict inevitably occurs in limited spaces—a theater of operations, zone of combat, or conflict zone. The United Nations Charter limits the right to use force to self-defense or to situations where the Security Council has provided authorization.[94] Lawful force in either case must be limited to what is necessary and proportional to achieve the lawful purpose.[95] States acting lawfully cannot escalate a conflict by using more force than is necessary and proportional to achieve the intended purpose.[96] "Ne-

92. *See, e.g.*, Paul Richter, *Rumsfeld Hasn't Hit a Dead End in Forging Terms for Foe in Iraq*, L.A. TIMES, Nov. 30, 2005, at A11.

93. *See supra* notes 3, 76 and accompanying text.

94. U.N. Charter art. 51.

95. Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391 (1993).

96. *See* Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 273, 279 (Yoram Dinstein & Mala Tabory eds., 1989).

cessity" refers to military necessity and the obligation that force should be used only if necessary to accomplish a reasonable military objective.[97] "Proportionality" prohibits that "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated."[98] This restriction on permissible force extends to both the quantity and geographic scope of the force used.[99] A state acts in lawful self-defense when it responds to an armed attack using only necessary and proportional force.[100] According to Christopher Greenwood,

> Military operations will not normally be conducted throughout the area of war. The area in which operations are actually taking place at any given time is known as the "area of operations" or "theatre of war." The extent to which a belligerent today is justified in expanding the area of operations will depend upon whether it is necessary for him to do so in order to exercise his right of self-defence. While a state cannot be expected always to defend itself solely on ground of the aggressor's choosing, any expansion of the area of operations may not go beyond what constitutes a necessary and proportionate measure of self-defence. In particular, it cannot be assumed—as in the past—that a state engaged in armed conflict is free to attack its adversary anywhere in the area of war.[101]

Greenwood further points out,

> Portugal did not react to India's seizure of Goa in 1961 by seizing Indian shipping in European waters where Portugal enjoyed naval superiority. Similarly, had a British warship encountered an Argentine warship in an area of the Pacific, far removed from the Falkland Is-

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97. *See* W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86, 94–95 (1998).

98. Additional Geneva Protocol I, *supra* note 40, art. 51(5). According to Gardam:

> The legitimate resort to force under the United Nations system is regarded by most commentators as restricted to the use of force in self-defense under Article 51 and collective security action under chapter VII of the UN Charter. The resort to force in both these situations is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.

Gardam, *supra* note 95, at 391.

99. *See* Additional Geneva Protocol I, *supra* note 40, art. 51(5).

100. *See* Greenwood, *supra* note 65, at 53.

101. *Id.*; *see also* JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 162–63 (2004); Greenwood, *supra* note 96, at 276–78. *But see* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 19–20 (4th ed., 2005).

> lands, at the time of the Argentine invasion, it would not have been a lawful measure of self-defence for one ship to engage the other unless there was clear evidence that the other ship was about to launch an attack.[102]

We can add to these examples the extent of force used to liberate Kuwait from Iraq's unlawful invasion in 1990–1991. The coalition that liberated Kuwait used the force necessary to liberate and provide for future defense. It did not go to Baghdad and change the regime of Saddam Hussein—action not necessary to the liberation.[103]

Yoram Dinstein, however, continues to hold the view that when two states engage in armed conflict, the conflict extends to all of the states' territory, regardless of the actual incidence of intense fighting.[104] Indeed, he argues that it extends to ships and planes far from the state's territory or actual combat zone: "The combat zone on land is likely to be quite limited in geographic scope, yet naval and air units may attack targets in distant areas."[105] This statement does not, however, take into account the requirements of necessity and proportionality, or the actual practice of states, which support the Greenwood view.

State practice shows that government officials do not recognize the rights and duties of the battlefield as extending far beyond it. In the United States, after 9/11, the U.S. government behaved consistently with the reality that armed conflicts were being waged in Afghanistan, Iraq, and Somalia, but not within the United States. If a uniformed member of the U.S. armed forces had been killed by a uniformed member of the Iraqi Republican Guard on the streets of any U.S. city, such killing would have been considered murder. If an Iraqi civilian carried out such a killing, it would also have been murder, and the accused would have been placed in the civilian criminal justice system. To become a combatant, a civilian must take direct part in hostilities, and no hostilities have occurred in the United States on 9/11 or in the seven years following.

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102. Greenwood, *supra* note 95, at 277; *see also*, John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 276 (2004) ("Wars often have a geographic limitation, so that we might employ such terms as 'theatres of war,' or 'regions of warfare.'").

103. *See* GARDAM, *supra* note 101, at 165–66. *But see* DINSTEIN, *supra* note 101, at 211.

104. DINSTEIN, *supra* note 101, at 20.

105. *Id.* at 19–20.

Combatants, lawful and unlawful, could be found in Afghanistan, Iraq and Somalia, but not in places where there are no hostilities such as Hamburg, Germany, O'Hare Airport in Chicago, Peoria, Illinois, or Switzerland. The idea of the theater of war or combat zone is closely tied to our thinking regarding who is a combatant.

In the case of *Hamdi v. Rumsfeld*, the U.S. Supreme Court had to determine whether a U.S. citizen who denied he was an enemy combatant was entitled to any neutral process in which to make his case.[106] Justice O'Connor, writing for a plurality, regretted that the Administration had supplied no clear understanding of what it meant by "enemy combatant."[107] She supplied this definition for purposes of the case: "'One who takes up arms against the United States in a foreign theater of war . . . may properly be designated an enemy combatant.'"[108]

Because it is not appropriate to apply IHL in peace, and because peace is what we strive for, governments should apply normal criminal law as much as possible. Certainly when there is doubt as to whether a situation is one of armed conflict or peace, governments should err on the side of peace.

Conclusion

In an armed conflict, in the zone of hostilities, combatants may be targeted without warning or detained without trial. Such treatment is unlawful against persons engaging in violence in the absence of armed conflict.[109] Armed conflict occurs when organized armed groups exchange protracted, intense, armed hostilities. The groups must be associated with territory. In addition to the concept of armed conflict, the concept of conflict zone is important. Killing combatants or detaining them without trial until the end of hostilities is consistent with the principles of necessity and proportionality, as well as general human rights, when related to a zone of actual armed hostilities. Outside such a zone,

106. Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality opinion).

107. *Id.* at 516.

108. *Id.* (quoting Hamdi v. Rumsfeld, 316 F.3d 450, 475 (4th Cir. 2003)).

109. *See* Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT'L L. 71, 97 (2005); Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499, 502 (2005) (footnotes omitted).

however, authorities must attempt to arrest a suspect and only target to kill those who pose an immediate lethal threat and refuse to surrender. Those arrested outside a conflict zone should receive a speedy trial on the basis of the evidence that has led to the arrest. There must be an evidentiary basis to charge a person with a crime—much more evidence than supports the right to detain an enemy combatant captured on an actual battlefield in a zone of combat.