If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists

Vincent-Joel Proulx

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Articles

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Targeted Killing of Suspected Terrorists

VINCENT-JOËL PROULX*

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INTRODUCTION

Since 9/11, much has been written on the legality of the war on terror and, more importantly, on the legal repercussions and changes it

has engendered on the international scene. Although there seems to be a consensus in approving U.S.-led worldwide action against members of Al-Qaeda, such efforts were not met with comparable enthusiasm in the case of the Taliban government. In addition, the strong international support gathered in mounting Operation Enduring Freedom has not carried over to the invasion of Iraq. The United States' rationale of preemptive action in Iraq did not generate the expected approval among


Some scholars argue that the United States cannot legally declare war against Al Qaeda. See, e.g., Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War, 28 Yale J. Int'l L. 325, 326 (2003)* [hereinafter Paust, *Attacks on the Laws of War*]. Contrary to the assertion of President Bush, the United States simply cannot be at war with bin Laden and al Qaeda as such, nor would it be in the overall interest of the United States for the status of war to apply merely to conflicts between the United States and al Qaeda. Bin Laden was never the leader or member of a state, nation, belligerent, or insurgent group (as those entities are understood in international law) that was at war with the United States. Armed attacks by such non-state, non-nation, non-belligerent, non-insurgent actors like bin Laden and members of al Qaeda can trigger the right of selective and proportionate self-defense under the United Nations Charter against those directly involved in an armed attack, but even the use of military force by the United States merely against bin Laden and al Qaeda in foreign territory would not create a state of war between the United States and al Qaeda.


Use of force against al Qaeda in Afghanistan was justified, and justifiable, as self-defense against ongoing nonstate actor armed attacks by members of al Qaeda on the United States and its nationals. Both the U.N. Security Council and NATO recognized the propriety of "self-defense" against such nonstate actor attacks, but it should be recalled that permissible self-defense actions against nonstate actors within another state that are not directed at the state itself or its military or general population do not create a state of "war."

*Id.*

On the legal implications of invoking self-defense against non-state actors, see Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond, 35 Cornell Int'l L.J. 533, 533-44 (2002).*

2. See, e.g., Michael Byers, *Terrorism, the Use of Force and International Law After 11 September, 51 Int'l & Comp. L.Q. 401, 408 (2002); Paust, Post-9/11 Overreaction, supra note 1, at 1344 ("[U]se of force against the Taliban regime was highly problematic under international law.... [I]t should be recalled that permissible self-defense actions against nonstate actors within another state that are not directed at the state itself or its military or general population do not create a state of "war."").

the international community, especially within the UN Security Council framework. Support for the U.S.-led effort has continued to wane. One criticism consistently voiced is that the global counter-terrorism campaign is subverting crucial categories in international law.

It is no secret that both terrorism and counter-terrorism do not fit neatly within the “crime” or “war” paradigms. In addition, security has pervaded legal rhetoric and political speech since 9/11, often in a way that subsumes legally distinct concepts, such as state responsibility or use of force, within one confused framework. Well-established legal standards are being distorted or contorted to serve the purposes of the “war on terror,” or to cater to certain political objectives, while fundamental protections of international law are being eroded in a fashion that the global legal order cannot countenance. As a consequence, we are witnessing a widening of the gap between Western and Arab societies, while the margin for tolerance and harmony is rapidly narrowing across the globe.

In analyzing the legal, social and political realities of the “war on terror” one must bear in mind that the whole campaign translates into an

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4. The United States pursued a United Nations Security Council first resolution before invading Iraq. See S.C. Res. 1441, U.N. SCOR, 57th Sess., U.N. Doc. S/Res/1441 (2002). However, a consensus has emerged stating that a second United Nations Security Council resolution was required, although France had expressed its intent to veto such a resolution. See, e.g., Hal Blanchard, Vengeance and Empire: The Leftist Case for War in Iraq, 27 FORDHAM INT'L L.J. 2062, 2082 (2004) (“Although Resolution 1441 was passed by a vote of 15-0 on November 8, 2002, the deliberate ambiguity of its phrasing was meant to appease the reservations of more reticent Council Members like France, which insisted that any response to Iraqi noncompliance be worked out in a second resolution.”) (citation omitted).


exercise in risk assessment. State sovereignty and individual civil liberties are truly essential values but remain skewered next to an equally important set of international ideals, such as the protection of civilian life, a paramount objective in the human rights paradigm.

As a direct consequence of the war on terror, international human rights of suspected terrorists often take a back seat to more pressing needs, as required by any emergency situation. This reality is further exacerbated by the legal characterization and treatment of suspected terrorists espoused by the Bush Administration. In mounting Operation Enduring Freedom, the United States was adamant in expounding that Taliban members would be stripped of prisoner of war ("POW") status, while it also claimed that members of the Al Qaeda network would not benefit at all from the protection of the Geneva Conventions.


9. Although not directly on point, The Paquete Habana did make a significant contribution to this principle, stating that civilian non-combatants, along with their property, should not be targeted in times of war. See 175 U.S. 677, 708 (1900). The Court found that this rule belonged to the realm of customary international law. See Henry J. Steiner & Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 64-65 (2d ed. 2000). Steiner and Alston write:

[It] is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling or catching and brining in fresh fish, are exempt from capture as prize of war. Id.; see also INT'L COMM. OF THE RED CROSS, Basic Rules of the Geneva Conventions and Their Additional Protocols (1988); Edward Kwakwa, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 39 (1992). The International Court of Justice ("ICJ") has also pronounced on the importance of protecting civilian life. Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 827 para. 78 (Advisory Opinion of July 8, 1996) (categorizing the non-targeting of civilians as one of the "cardinal principles" of humanitarian law).

10. See, e.g., Emanuel Gross, The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001, 28 N.C. J. INT'L L. COM. REG. 1, 15 (2002) ("The United States has again proved, as it did in 1996, that in times of emergency and crisis, democracy does not succeed in preserving its values, and human rights are violated in the name of safeguarding national security."); see also William Rehnquist, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 222 (1998) ("In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being."). Cf. Steven R. Shapiro, Defending Civil Liberties in the War on Terror: The Role of the Courts in the War Against Terrorism: A Preliminary Assessment, 29 FLETCHER FORUM OF WORLD AFFAIRS 103 (2005) ("Unsurprisingly, many of our nation’s most shameful civil liberties violations have occurred during war or under a perceived threat of war.").

The underlying rationale behind the United States' decision to forego the application of POW status to the Taliban government was, at best, poorly-justified. To systematically deny this status, and the rights flowing from it, to Taliban members, which, based on the publicly available facts, did not participate in the planning or execution of the 9/11 attacks, seems hardly defensible. However, to substantiate this position through a flimsy application of the Geneva Conventions, namely by stripping Taliban members of POW status because their black turbans were not sufficiently visible or distinctive and because they did not conduct their operations in accordance with the laws and customs of war, as the Bush administration did, yields perverse results for the international human rights framework.

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12. Convention III, supra note 11, sets forth a series of rights flowing to the recipients of prisoner-of-war (POW) status. These rights include, for example, the right of POWs to give limited information upon interrogation, such as name and rank (Article 17); the right to be quartered under equally favorable conditions as those for the forces of the detaining state (Article 25); the right to send and receive correspondence (Article 71); the right to be sentenced only to the penalties provided for with regard to members of the armed forces of the detaining party who have committed the same acts (Article 87); the right to be sentenced under the same courts and the same procedures as in the case of military officials of the detaining party (Article 102); and the right to be released and repatriated after the cessation of hostilities (Article 118). The Bush Administration did not apply specific POW rights to Guantanamo Bay detainees. See White House Fact Sheet, supra note 11 ("[T]he detainees will not receive some of the specific privileges afforded to POWs, including:—access to a canteen to purchase food, soap, and tobacco—a monthly advance of pay—the ability to have and consult personal financial accounts—the ability to receive scientific equipment, musical instruments, or sports outfits.").

13. In fact, the United States' condemnation of the Taliban regime did not specifically set out to demonstrate the involvement of the de facto Afghan government in the planning and execution of the attacks. It rather hinged on the fact that the Taliban had offered sanctuary and logistical support to members of Al Qaeda, thereby suggesting a considerable relaxation of the test of attribution in international law. See, e.g., Derek Jinks, State Responsibility for the Acts of Private Armed Groups, 4 Chi. J. Int'l L. 83, 89–90 (2003). See generally Proulx, supra note 8. In fact, the Al Qaeda network actually operated independently of the Taliban regime, while most of its membership comprised non-Afghan citizens. See Manooher Mofidi & Amy E. Eckert, "Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels, 36 Cornell Int'l L.J. 59, 75 (2003).

14. In fact, several commentators have deplored the policy of denying POW status to prisoners captured in the war on terror. See generally Jennifer Elsea, Treatment of "Battlefield Detainees" in the War on Terrorism 1–5 (Novinka Books 2003). However, it is interesting to note that the lack of direct involvement by the Taliban in the attacks of 9/11 does not, prima facie, absolve it from a possible finding of state responsibility for subsequent endorsement of said attacks. See Proulx, supra note 8.

15. For a concise statement of the major stakes involved in denying POW status to Taliban detainees, see Joan Fitzpatrick, Jurisdiction of Military Commissions and the Ambiguous War on Terrorism, 96 Am. J. Int'l L. 345, 353 (2002) ("[T]he denial of POW status brings with it far more
Similarly, the decision to deny Al Qaeda members the protection afforded by the Geneva Conventions is equally problematic under international law. Before the response to 9/11 was deployed, international human rights discourse had always specifically recognized two types of individuals in times of turmoil, with no margin for alternate designations: prisoners of war and protected persons. With regard to Al Qaeda, the Bush administration created a third category: “international outlaws.”

This action is tantamount to an affront to the current human rights scheme. While fundamental freedoms have sometimes been curtailed in times of chaos, human rights proponents should nevertheless voice their opposition, as a substantial portion of the Geneva Conventions is being undermined by the war on terror. Although it has sometimes proved difficult to implement the rule of law in the Middle East, it does not follow that Western forces should short-circuit the application of well-established legal principles and capitalize on self-serving and superficial interpretations of international law in favor of strategic or political gains.

These considerations become even more relevant in light of the ongoing insurgency in Iraq. In the past year and a half, there has been a proliferation of kidnappings and beheadings of foreign workers in Iraq. Several guerilla groups, some of whom praise allegiance to Osama bin Laden, have targeted such serious and relevant deprivations, including such vital protections as exemption from punishment for lawful acts of war, repatriation at the conclusion of hostilities, and internationally defined fair trial rights.

[There is no gap between the various Geneva Conventions of 1949—an individual is entitled to protection as a prisoner of war under GC III, protection against grave breaches afforded to soldiers under GC I or GC II, or protection under GC IV; there is no intermediate status. This protection arises ipso facto and ipso jure.]

17. For historical examples of this practice and the attitude of United States courts in assessing civil liberties in times of chaos, see, for example, Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 Theoretical Inqury L. 1 (2004). Issacharoff and Pildes write: “Times of heightened risk to the physical safety of their citizens inevitably cause democracies to recalibrate their institutions and processes and to reinterpret existing legal norms, with greater emphasis on security, and less on individual liberty, than in ‘normal’ times.” Id. at 2; see also Stephen J. Schulhofer, The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11, 7-10 (2002).

18. See, e.g., Muhamad Mugraby, Some Impediments to the Rule of Law in the Middle East and Beyond, 26 Fordham Int'l L.J. 771 (2003).

Laden's purported follower Abu Musab al-Zarqawi, have resorted to systematic abductions of Westerners and non-Westerners in Iraq. Insurgents have also resorted to murdering humanitarian workers in Iraq. These kidnappers engage in such practices in an attempt to extort a variety of objectives, including obtaining lucrative ransoms, ejecting the abductees' employers out of Iraq or inducing them to freeze their operations, forcing states to withdraw troops from the country, preventing states from sending troops to Iraq, dissuading foreign companies and contractors from helping to rebuild Iraq, punishing individuals for cooperating with the United States or with the Iraqi interim authority, obtaining the release of female Iraqi prisoners in Um Qasr and Abu Ghraib prisons, blackmailing France into repealing its controversial headscarf ban, etc. Others have simply equated the

22. Karl Vick, Captors in Iraq Free Italian Aid Workers; Rome Welcomes Pair Held for 3 Weeks; Some Egyptian Hostages Also Released, WASH. POST, Sept. 29, 2004, at A21.
kidnappings with a century-old tactic, now used by insurgents in Iraq in an attempt to apply pressure to the U.S.-led coalition and to expel troops from the country.\textsuperscript{30}

As a counteraction, it is foreseeable that the military will proceed to large-scale arrests and detentions of suspected insurgents, al-Zarqawi accomplices, and Al Qaeda members.\textsuperscript{31} In fact, the United States has already initiated retaliatory aerial strikes on suspected al-Zarqawi safe houses in Iraq, namely in Fallujah,\textsuperscript{32} and on other Iraqi rebel strongholds. It is appropriate to ask whether this policy of targeted strikes has, to date, produced more civilian casualties\textsuperscript{33} than it has eliminated terrorists.\textsuperscript{34} In responding to these acts of terror, the United States and its allies will have to exert some level of caution in hunting down al-Zarqawi and his associates. Otherwise, the military campaign in Iraq, coupled with the recent abuse and torture scandals at Abu Ghraib prison, will continue to engender deleterious effects on international law and signal a blatant disregard for and ultimate failure of the human rights project.


Thus, the most serious questions of human rights will arise not here, but abroad, if we attempt to export the counter-terrorism costs of extensive searches, electronic surveillance, coercive interrogation, and limitations on association, detention, and speech. Each of these measures, controlled or forbidden by the United States Constitution, are likely to be promising ways of obtaining needed information about terrorists’ plans and of otherwise preventing terrorist initiatives.


\textsuperscript{33} Edward Cody, U.S. Strike In Fallujah Kills 20; Officers Say Target Was Safe House, WASH. POST, June 20, 2004, at A1; Jackie Spinner & Steve Fainaru, U.S. Planes Bomb Suspected Militant Refuge in Iraq; Strike in Fallujah Kills 20; Ambulance Shelled During Raid, WASH. POST, Sept. 14, 2004, at A19. While describing the aftermath of Operation Enduring Freedom in Afghanistan, Marcy Strauss delivers a poignant statement on this very issue, which could easily be transposed to the situation in Iraq. See Marcy Strauss, Torture, 48 N.Y.L. SCH. L. REV. 201, 259 (2003–2004) (“To stop the future threat of terrorism, this country was willing to wage war—a war, which not only killed those dedicated to harming us, but also, unfortunately, maimed and killed thousands of innocent lives in Afghanistan.”).

A policy of targeted killing of suspected terrorists also carries with it great propensity for collateral damage and unnecessary death of civilians. This issue is addressed, \textit{infra}, in Part III. For an example of collateral damage following an aerial strike, see, for example, Emanuel Gross, Use of Civilians As Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?, 16 EMORY INT’L L. REV. 445, 509 (2002).

\textsuperscript{34} The aerial strikes have, nevertheless eliminated some members of al-Zarqawi’s network. Steve Fainaru, Airstrike Is Said to Kill Aide To Zarqawi; Fallujah Residents Identify Saudi as Right-Hand Man, WASH. POST, Sept. 27, 2004, at A14.
There are no ideal solutions or courses of action when chasing a threat as complex and polymorph as terrorist networks. Hence, mitigation of tensions between competing legal concerns and the protection of human life remain noble objectives. We must strive to instill some legitimacy and caution into this international initiative, namely to make the war on terror a preventive rather than curative effort. Each competing legal value must be weighed against similar values with the aim of striking a delicate balance between the objectives of preventing, deterring, and prosecuting terrorist attacks, and fostering a multilateral legal system underpinned by reciprocal respect, restraint, and dignity. Hence, two inextricably linked aspects of the war on terror must be briefly re-analyzed from a human rights perspective. First, is the question of indefinite detention of suspected terrorists, and second is the issue of targeted killing. In addressing the legality of both policies, I survey some of the major relevant international legal restraints, so as to explore whether indefinite detention and targeted killing can prove compatible or, at least, somewhat aligned with the ideals of human rights law.

The aim of this paper is not to dissect recent Supreme Court decisions, nor is it to analyze decisions by other courts, both in the United States and abroad. The purpose of this project is to highlight some of the more egregious violations of human rights law in the war on terror over the last three years. This article attempts to establish that the executive's actions and policies following 9/11 are inconsistent with the current international human rights scheme and are irreconcilable with the United States' international obligations, regardless of judicial pronouncements on the matter.

Part I of this article provides a framework for the discussion by outlining the major international authorities that apply in situations like the United States faces. Part II discusses the legality of indefinite detention of suspected terrorists under international law. In addressing this policy, several arguments ranging from moral perspectives to international legitimacy pervade the discussion and ultimately lead to the condemnation of indefinite detention under the extant human rights scheme. Part III turns to the examination of targeted killing of suspected terrorists under international law. Again, arguments for and against this practice are contrasted. Ultimately the article advocates for an absolute ban on targeted killing. In dealing with these two politically sensitive issues, the discussion canvasses major international and national legal restraints on unilateral executive policy. Finally, Part IV delves into the fallacies and inaccuracies of the balancing metaphor, while exploring the relationship connecting reasonableness and the equilibrium between security and liberty.
I. INTERNATIONAL AUTHORITIES

To provide a framework for the discussion that follows, I will briefly outline the major international authorities that apply to the type of conduct the United States is engaged in and that could potentially limit its scope of action.\(^{35}\)

The conduct of international hostilities, which falls within the ambit of the laws of war, is governed by an overarching dichotomy. On the one hand, the scheme of *jus ad bellum* pertains to the rules governing the entrance into international armed conflict. This branch of international law hinges to a large extent on the prohibition of the use of force contained in Article 2(4) of the *UN Charter*, and on the inherent right of self-defense afforded states pursuant to Article 51 of the *UN Charter*. Hence, *jus ad bellum* centers on whether an attacked state may legitimately invoke its right to self-defense in retaliating against the aggressor. In invoking this right, proportionality, necessity, and imminence remain guiding principles.\(^{36}\) For the purposes of this article, it is assumed that the United States has engaged combat, or triggered the application of *jus ad bellum*, in Afghanistan and in Iraq.\(^{37}\)

The scheme of *jus in bello*, on the other hand, corrals rules and principles commonly referred to as international humanitarian law, purporting to regulate the conduct of hostilities and the rules of engagement. The principal relevant legal texts under *jus in bello* are the *Geneva Conventions*, which govern a variety of war-related dimensions ranging from the treatment of prisoners of war ("POWs") to treatment of the sick and wounded on the battlefield. More importantly, the *Geneva Conventions* also set out important criteria and definitions in identifying major stakeholders in armed conflict, such as POWs, "protected persons," mercenaries, irregular belligerents, etc. A vital distinction between lawful and unlawful combatants, sometimes referred to as privileged or unprivileged belligerents, lies at the very heart of international humanitarian law and will be discussed thoroughly in this article. Equally important to the framework of *jus in bello* are the *Protocol Additional to the Geneva Conventions*\(^{38}\) and the Hague

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Regulations, which provide further insight into who may be lawfully targeted on the battlefield, the obligation encumbering upon combatants to distinguish themselves from civilians, and other modalities underlying the conduct of warfare, such as the obligation to provide quarter.

International law has always upheld an impermeable chasm between jus ad bellum and jus in bello. As a corollary to this proposition, it follows that underlying motives for entering into armed conflict become immaterial once the state of war has been proclaimed and, thus, jus in bello has been engaged. From that point onward, international humanitarian law becomes applicable and the principle of reciprocity pervades the relationships between belligerent nations. In this article, significant emphasis will be placed on the principles and authorities encompassed under jus in bello.

Finally, although analytically different from humanitarian law, relevant international human rights treaties are juxtaposed to international humanitarian law and converge in the analysis. The International Covenant on Civil and Political Rights enshrines key procedural and substantive individual rights, such as the right to a fair trial and the inherent right to life. Furthermore, the Convention Against Torture promotes essential and fundamental human rights via a universal ban on torture and inhuman and/or degrading treatment. Deferential reliance on both of these international treaties, and any parallel derogation scheme flowing from them, will animate my discussion and evidence an important symbiosis between international humanitarian law and human rights standards.

40. This idea has received wide academic support. See, e.g., Judith Gail Gardam, Proportionality and Force in International Law, 87 Am. J. Int'l L. 391, 392–93 (1993).
II. INDEFINITE DETENTION OF ILLEGAL COMBATANTS

A. WHY DO STATES ENDORSE A POLICY OF INDEFINITE DETENTION?

This practice, which predominantly fits under the law enforcement paradigm, raises important questions in the current fight against terrorism. As a general rule, it is probably fair to say that states detain suspected terrorists for practical or strategic reasons. We must remember that custody over an alleged terrorist might provide a gateway into future arrests, access to intelligence-gathering opportunities, possible dismantling of terrorist cells, etc. Of all the vivid imagery and language emanating from 9/11, the "mosaic" metaphor has proved the most

45. For various considerations on the law enforcement paradigm and related issues, see, for example, Robert M. Chesney, Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique, 101 Mich. L. Rev. 1408 (2003) (reviewing David Cole & James X. Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security (2002); David Cole, Enemy Aliens: Double Standard and Constitutional Freedoms in the War on Terror (2003)); Mary Ellen O'Connell, To Kill or Capture Suspects in the Global War on Terror, 35 Case W. Res. J. Int'l L. 325 (2003); Paul Rosenzweig, Civil Liberty and the Response to Terrorism, 42 Duq. L. Rev. 663, 679-83 (2004); Symposium, America Fights Back: The Legal Issues, 11 Cardozo J. Int'l & Comp. L. 831, 842-50 (2001). With regard to the Guantanamo Bay detainees, consider Joan Fitzpatrick, Sovereigny, Territoriality, and the Rule of Law, 25 Hastings Int'l & Comp. L. Rev. 303, 313 (2002) ("The United States has chosen to abandon the law enforcement paradigm for an armed conflict theory with respect to the Guantánamo captives."). Interestingly, Fitzpatrick writes: "However, it is possible the Bush Administration will ultimately return to the law enforcement model by repatriating captives to their states of origin for prosecution or by transferring some to the ordinary courts in the United States." Id. at 313 n.40.

Within days of the Patriot Act’s enactment, the administration undertook a series of steps that taken together suggest a deliberate decision to abandon the law enforcement paradigm for government investigations of individuals in the United States and to substitute an intelligence paradigm that seeks to secretly gather all information that might turn out to be useful.

Kate Martin, Intelligence, Terrorism, and Civil Liberties, 29 Human Rights 5, 7 (2002)


47. It is no secret that intelligence-gathering has proved difficult after 9/11, thereby raising the need to question or to re-evaluate law enforcement procedures. See, e.g., Walter Pincus, Silence of 4 Terror Probe Suspects Poses Dilemma for FBI, Wash. Post, Oct. 21, 2001, at A6. See generally Philip B. Heymann, Terrorism and America 111 (1998).

48. As most experts on terrorism will argue, infiltrating complex terrorist cells is extremely difficult. Some commentators expound that the key to dismantling terrorist cells lies in the interrogation and detention of suspected terrorists. See, e.g., Stuntz, supra note 46, at 2161–62. Stuntz writes:

Only a very small group of people could penetrate the relevant terrorist networks (or be recruited from within such networks), and finding them is a hard, time-consuming process. The best source of information is likely to be the suspects themselves. If these suspects decide not to talk, agents are likely to want to induce them to change their minds.

Id.

49. Although dealing with restricting access to deportation hearings in special interest cases, one aspect of Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002), seems apposite here. In fact, the government affirms that the restriction of certain liberties in the fight against terror is “akin to the construction of a mosaic,” each individual piece of information being important to the investigation.
recent in this context. For example, the United States and some of its allies will deny freedom to a suspected terrorist because the exercise of administrative captivity might assist them in elucidating other cases or in making further arrests, irrespective of whether criminal charges are ultimately laid on the individual in question. Since investigating terrorism is akin to the construction of a mosaic, "seemingly innocent facts might at some future time turn out to indicate culpability." The argument claiming the existence of terrorist sleeper cells across the globe has also surfaced in the modern war on terror and is rapidly acquiring credence in law enforcement circles: "the fact that a suspicious person has done nothing illegal only underscores his dangerousness; Al Qaeda is said to have 'sleeper' cells around the world, groups of individuals living

Id. at 706 (citations omitted). See also the declaration of FBI Executive Assistant Director Dale Watson in N.J. Media Group, Inc. v. Ashcroft, 308 F.3d 108, 218 (3d Cir. 2002) ("Even minor pieces of evidence that might appear innocuous to us would provide valuable clues to a person within the terrorist network, clues that may allow them to thwart the government's efforts to investigate and prevent future acts of violence."). For a policy comment on judicial review in special interest immigration cases, with some emphasis on the shortcomings of the mosaic metaphor, see Rashad Hussain, Security With Transparency: Judicial Review in "Special Interest" Immigration Proceedings, 113 Yale L.J. 1333 (2004).

50. This practice of indefinite detention has also been used by the United Kingdom in Northern Ireland and by Israel as well. See, e.g., David Bonner, United Kingdom: The United Kingdom Response to Terrorism, in Western Responses to Terrorism 171, 182-83 (Alex P. Schmid & Ronald D. Crelinston eds., 1993); Noemi Gal-Or, Countering Terrorism in Israel, in The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty 154 (David A. Chart ed., 1994).

51. In the context of enemy combatants, the case of Yaser Hamdi constitutes a salient illustration of this practice. After being captured in the company of Taliban fighters in 2001, Hamdi was detained for three years by the United States. He was recently released without any criminal charges having been filed. As part of his release agreement, he had to renounce his American citizenship. For more background on the case of Hamdi, see Joel Brinkley, From Afghanistan to Saudi Arabia, via Guantánamo, N.Y. Times, Oct. 16, 2004, at A4; Joel Brinkley & Eric Lichtblau, U.S. Releases Saudi-American It Had Captured in Afghanistan, N.Y. Times, Oct. 12, 2004, at A15.

The facts surrounding the detention of John Walker Lindh are somewhat similar. In fact, Robert H. Bork speaks to this point after briefly summarizing the United States policy of indefinite detention:

The government's policy is as follows: if a captured unlawful enemy combatant is believed to have further information about terrorism, he can be held without access to legal counsel and without charges being filed. Once the government is satisfied that it has all the relevant information it can obtain, the captive can be held until the end of hostilities, or be released, or be brought up on charges before a criminal court.

The government chose one of these options when it charge John Lindh, an American citizen who fought with the Taliban in Afghanistan. Lindh entered into a plea agreement under which he was sentenced to twenty years in prison.

Robert H. Bork, Civil Liberties After 9/11, Commentary, July 2003, at 32.

On the policy of indefinite detention, absent any corresponding criminal conviction or charge, see generally Thomas F. Powers, When to Hold 'Em: The U.S. Should Detain Suspected Terrorists—Even if It Can't Make a Case Against Them in Court, Legal Aff., Sept./Oct. 2004, at 21. Powers writes that "[p]reventive detention means the holding of American citizens against their will, precisely because authorities do not have sufficient evidence to prove in a court of law that the citizens have committed a crime." Id.


quiet and law-abiding lives, but ready and willing to commit terrorist attacks once they get the call. This position has essentially been juxtaposed to the mosaic rationale in supporting U.S. policy on Guantanamo Bay. In tandem, both arguments have served as an attractive justification for the executive in sustaining preventive detention of suspected terrorists or collaborators. In sum, governments will use indefinite detention of a particular detainee as a “piece of jigsaw puzzle” in order to paint the bigger picture. This type of policy might be difficult to defend from a strictly moral perspective.

It is no secret that the current war on terror is akin to an exercise in risk assessment and that the questions it raises might be philosophically adjacent to some tenets of Kant’s Categorical Imperative. Whether seen through the lens of torture or detention of suspected terrorists, human

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54. Cole, supra note 52, at 963 (citation omitted); see also Viet D. Dinh, Freedom and Security After September 11, 25 HARV. J.L. PUB. POL’Y 399, 400–01 (2002).

55. See Cole, supra note 52, at 963.

These and other cases suggest that the Justice Department policy has been to lock up first, ask questions later, and presume that an alien is dangerous until the FBI has a chance to assure itself that the individual is not. The government has justified its actions with a liberal combination of the “mosaic” argument noted above and the “sleeper” theory. Taken together, the “mosaic” and “sleeper” theories suggest that the absence of evidence of illegal conduct is not a reason to release a “suspicious” person. In practice, they appear to have justified tremendously overbroad detention policies.

Id. 56. Some scholars even express the view that preventive detention without ensuing criminal charges would be justified by the mere endorsement of a terrorist attack. See, e.g., Heymann, supra note 31, at 442 (“We must try to increase our security against major terrorist attacks by some mix of the following ways to prevent attack in the first place . . . (4) detaining, without criminal convictions, those who are more likely to support an act of terrorism.”).

57. In his seminal article, Eyal Benvenisti addressed the moral component of a policy of torture vis-à-vis detained terrorists. See Eyal Benvenisti, The Role of National Courts in Preventing Torture of Suspected Terrorists, 8 EUR. J. INT’L L. no. 4, 1 (1997). In discussing the ticking bomb paradigm, he raised the human rights-based approach to using human beings as tools for the well-being of others, which might be labeled an absolutist stance on balancing human lives.

One position opposes subjecting detainees to physical or mental suffering in order to make them speak because the detainees are then being used as objects to save others from harm. Sacrificing the well-being of some to protect the well-being of others contradicts the basic concept of human dignity, which precludes a utilitarian calculation of net gain in human lives. One person’s life cannot be endangered to save another’s life, neither can one life be traded for the lives of many others: no person may be used as a means to the well-being of other persons. It follows that no person may be subject to torture even in a ticking bomb situation.

Id. at 3–4. This position obviously aligns with an absolute (and universal) ban on torture.

Such a ban has been recognized by international judiciaries. See, e.g., Selimov v. France, 1999–V Eur. Ct. H.R. 149, 181. The universal ban on torture has also received wide support in legal scholarship. See, e.g., Oren Gross, Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience, 88 MINN. L. REV. 1481, 1486–87 (2004). Strauss, supra note 33. Yet, after declaring that the General Security Service’s methods of aggressive interrogation were unlawful, and while still invoking the ticking bomb paradigm, the Supreme Court of Israel declared that interrogators could, under specific circumstances, exculpate themselves ex post facto for acts of torture, via a defense of necessity. H.C. 5100/94, Pub. Comm. Against Torture in Israel v. Israel, 53(4) P.D. 817, paras. 33–38. For more background information on the case, see Jason S. Greenberg, Torture
rights proponents can easily challenge the utilitarian use of human beings for the well-being of others at the outset. To detain individuals solely for the purpose of advancing other cases, or simply to appease the population, might be difficult to countenance morally but is certainly


Others have criticized the rationale of necessity as a means to exonerate the use of torture during interrogations, while placing significant emphasis on its incompatibility with international law. A first and obvious concern lies in the so-called “slippery slope” argument, as this model seems ripe for abuse. See, e.g., Yale Kamisar, Physician-Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case, 88 J. CRIM. L. & CRIMINOLOGY 1121, 1144-45 (1998); Matthew G. St. Amand, Public Committee Against Torture in Israel v. The State of Israel et al: Landmark Human Rights Decision By the Israeli High Court of Justice or Status Quo Maintained?, 25 N.C. J. INT’L & COMP. REG. 655 (2000); Strauss, supra note 33; Joel Greenberg, Israel is Permitting Harsher Interrogation of Muslim Militants, N.Y. TIMES, Nov. 17, 1994, at A6. For a thoughtful review of constitutional constraints on the use of torture in the war on terror, see Seth F. Kreimer, Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror, 6 U. PA. J. CONST. L. 278 (2003).


Now, I say, man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. In all his actions, whether they are directed to himself or to other rational beings, he must always be regarded at the same time as an end.

Id. at 52–54. Some commentators invoke this moral principle, in some way, shape or form, against using human beings as tools for the collective well-being.

Among the most fundamental of all moral principles is the principle of shared humanity: that every human life has a distinct and equal inherent value. This principle is the indispensable premise of the idea of human rights, that is, the rights people have just in virtue of being human, and it is therefore an indispensable premise of an international moral order.

Ronald Dworkin, Terror & the Attack on Civil Liberties, N.Y. REV. BOOKS, Nov. 6, 2003, at 37.

The principle requires respect for the rights of all persons to the necessary conditions of human action, and this includes respect for the persons themselves as having the rational capacity to reflect on their purposes and to control their behaviour in the light of such reflection. The principle hence prohibits using any person merely as a means to the well-being of other persons.


But incarcerating people without any objective evidence of suspicion simply to make the public feel better can be justified, if at all, only on the crudest utilitarian grounds. That justification would violate Kant’s Categorical Imperative, by condoning official treatment of human beings as means rather than ends in themselves. It would also violate more sophisticated versions of utilitarianism, as John Rawls has shown.
not a novel phenomenon nor a practice exclusively linked to the war on terror. However, both from strategic and moral standpoints, indefinite detention might be easier to distinguish from torture and, ultimately, easier to substantiate legally in the context of a new war where the terrorists themselves do not distinguish between civilian and military targets. In fact, certain states such as Israel have implemented a system of administrative detention of suspected terrorists, under which the executive branch can detain individuals for preventive purposes, absent any judicial order permitting the detention. The practical problem with such arrangements is that certain individuals are sometimes detained for purposes of diplomatic or political leverage, thereby evoking the tension between combating terrorism efficiently and respecting inherent human dignity. Moreover, a policy of indefinite detention, coupled with judicial

Id.

60. See, e.g., Issacharoff & Pildes, supra note 17.

61. It has also been argued that the United States executive has been engaging in indefinite detention of suspected terrorists for preventive purposes. See, e.g., Bork, supra note 51, at 33 (stating that “detention is not punishment; its purpose, rather, is to prevent members of enemy forces from causing harm while hostilities are in progress”); Yasmin Naqvi, Doubtful Prisoner-of-War Status, 84 INT’L REV. RED CROSS, 571, 572 (2002) (“[C]aptivity in war is ‘neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.’”) (citation omitted).


63. For example, certain suspected Lebanese terrorists were arrested under the administrative detention scheme of the Israeli Emergency Powers (Detention) Law. However, the facts later revealed that the Lebanese prisoners were being detained as bargaining chips to secure the liberation of Israeli soldiers held captive by terrorist organizations. Although the court concluded that the detention was lawful for reasons of national security, its decision was deplored as being consonant with existing rules of international law. See Orna Ben-Naftali & Sean S. Gleichevitch, Missing in Legal Action: Lebanese Hostage in Israel, 41 HARV. INT’L L.J. 185 (2000). The decision was later overturned and the term “state security” was analyzed through the lens of a judicial test balancing human dignity and national security. See Cr.A. 7048/97 Anonymous v. Minister of Def., 54(1) P.D. 721, 741. Conversely, another Israeli judicial decision went the other way, arguing that the detention of two of the Lebanese prisoners would serve the interests of national security. See H.C. 79498, Sheikh Abd Al-Karim Ubeid v. Minister of Defense, 55(5) P.D. 769. Systematic searches and arrests were also performed in the West Bank in the aftermath of the Israel Defense Force’s “Protective Wall” operation. For more details on this account, see Yuval Shany, Israeli Counter Terrorism Measures: Are They “Kosher” Under International Law?, in TERRORISM AND INTERNATIONAL LAW 96, 110–14 (Michael N. Schmitt & Gian Luca Beruto eds., 2002). The detention of these suspected terrorists has been criticized as being
inaction, muzzled activism, and sometimes-blind deference to the executive, also raises serious concerns regarding the strength and sustainability of the human rights scheme.\textsuperscript{64}

Furthermore, the most important reason for the existence and application of a policy of indefinite detention is readily identifiable: \textit{incommunicado} and indefinite detention is an effective tool to break cases and to gather intelligence. For instance, in the \textit{Padilla} case,\textsuperscript{65} in which an individual was precluded from petitioning the Court because he was being held as an "enemy combatant" for alleged ties with terrorism, the United States expressly recognized that long-term detention without access to counsel or outside contact amounts to an effective means of interrogation.\textsuperscript{66} Therefore, states resort to indefinite detention because it provides them with a practical advantage in advancing investigations, along with effective control over suspects, a sort of neutralizing effect.

In addition, the policy of indefinite detention, coupled with the restriction on access to counsel,\textsuperscript{67} also purports to assist the detaining state in diluting the detainees' obdurate will or in dissuading them from withholding valuable information.\textsuperscript{68}

We must bear in mind that this situation is guided by an overarching tension. On one hand, states feel they need to prosecute alleged terrorists. On the other hand, states are concerned with divulging the evidence adduced in the course of investigations or may lack sufficient


\textsuperscript{66} Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), overruled and remanded by 542 U.S. 426 (2004).

\textsuperscript{67} In a separate opinion, concurring in part, dissenting in part, Judge Wesley wrote:

Sadly, the majority's resolution of this matter fails to address the real weakness of the government's appeal. Padilla presses to have his day in court to rebut the government's factual assertions that he falls within the authority of the Joint Resolution. The government contends that Mr. Padilla can be held incommunicado for 18 months with no serious opportunity to put the government to its proof by an appropriate standard. The government fears that to do otherwise would compromise its ability both to gather important information from Mr. Padilla and to prevent him from communicating with other al Qaeda operatives in the United States.

\textit{Id.}

\textsuperscript{68} Philip B. Heymann speaks to this point:

The detention may be for purposes of interrogation pending trial or simply to incapacitate those individuals for a sustained period of time. The decision of the Attorney General, at least occasionally, to deny detainees private access even to lawyers is a further effort to incapacitate the group. Similar tactics were used by the West German government in the 1970's in an effort to reduce terrorism by the leftist terrorist group, the Red Army Faction, many of whose leaders were already in prison.

Heymann, \textit{supra} note 31, at 448–49.
proof to establish their case persuasively. It must be noted immediately at the outset that a policy of large-scale arrests and detentions without access to counsel might not be a popular option for the executive branch. It will almost invariably lead to a significant outcry by civil libertarians and to increased support or sympathy for the targeted groups, while also alienating a vast portion of the targeted communities.

For instance, recent events in Iraq have solidified support of local insurgents. In order to better ascertain whether such a policy conforms to human rights norms, it is imperative to scrutinize some of the strategies employed in the war on terror by briefly reviewing the major international legal restraints on indefinite detention.

B. INTERNATIONAL LEGAL RESTRAINTS ON INDEFINITE DETENTION

1. Indefinite Detention As Torture

Before enumerating the legal restraints on indefinite detention in international law, a few introductory remarks are relevant. It must be noted that the question of detention is inextricably connected with the issue of torture and inhuman or degrading treatment. Several human rights treaty bodies assert that indefinite or long-term detention, without judicial review or communication, is tantamount to inhuman and/or degrading treatment. This proposition will translate into a crucial concern underlying my discussion: to what extent does indefinite detention, without communication, amount to torture or inhuman and/or degrading treatment, thereby violating Article 7 of the International Covenant on Civil and Political Rights, the Geneva Conventions, and the Convention Against Torture? Under the Covenant, state-parties may derogate from providing certain civil

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For a thoughtful summary of the United States' policy on detention and prosecution of foreign nationals in the war on terror, see K. Elizabeth Dahlstrom, The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay, 21 Berkeley J. Int'l L. 662 (2003).
70. See Heymann, supra note 31, at 449. He writes: The detention strategy itself may be deeply flawed. . . . Such detentions have sometimes proved effective, but they have always had the effect of alienating a much larger group than were originally sympathetic to the terrorists. The additional step of denying private access to lawyers proved the cause of major disruption in Germany, with large numbers of those concerned with civil liberties withdrawing support from government measures against terrorists.

Id.
72. See my comments on Kant, the war on terror, and torture, supra notes 57-59.
73. Covenant, supra note 43. Article 7 reads as follows: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." Id.
74. Geneva Conventions I-IV, supra note 11.
75. Convention Against Torture, supra note 44.
liberties in times of crisis. This derogation scheme does not, however, permit curtailing the prohibition against torture and inhuman or degrading treatment. Although in recent memory there has been a broadening inclusion of various practices under the definition of torture, indefinite detention is not always interpreted as a form of torture. In this regard, the case of Ireland v. The United Kingdom is rather instructive, as it identifies the difference between torture and inhuman and/or degrading treatment: "[T]his distinction derives principally from a difference in the intensity of the suffering inflicted... Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." In sum, the rationale underlying the distinction between both types of treatment is one of degree. It is no secret that long-term incommunicado detention, in itself, engenders devastating psychological damage, which, in turn, may be equated with inhuman and/or degrading treatment. Similarly, the U.S. Immigration and Naturalization Services' Guidelines provide that torture may include prolonged isolation, as long as the suffering inflicted or resulting from the isolation is severe.

76. See Covenant, supra note 43, arts. 4.1 & 4.2; see also James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 50 (2002) ("On the other hand the formulation of international human rights takes into account emergency situations in which the State of nationality may be placed, in particular through the facility of the State to derogate from certain rights in time of public emergency.").

77. The Convention Against Torture does not allow any derogation in times of crisis. See supra note 75, art. 2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").


81. See, e.g., Nicole Fritz & Martin Flaherty, Unjust Order: Malaysia’s Internal Security Act, 26 Fordham Int’l L.J. 1345, 1430 (2003) (discussing the repercussions of indefinite detention under the Malaysian system: “Yet, the prospect of indefinite detention, of not knowing when or if they will be released, of years of similarly impoverished routine, works unimaginable psychological hardship.”). It is also interesting to note that, in adopting the Convention Against Torture, the United States drew particular attention on the issue of mental torture. See, e.g., Deborah E. Anker, Law of Asylum in the United States 215 (3d ed. 1999). After their release, some of the Guantanamo detainees held in solitary confinement have come forward to discuss the devastating mental, emotional and social consequences of incommunicado detention. See, e.g., Brendan O’Neill, After Guantanamo, BBC News (UK Ed.), Jan. 25, 2005.

82. See, e.g., Joan Fitzpatrick, Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond, 25 Loy. LA. Int’l & Comp. L. Rev. 457, 480 (2003) (“Indefinite incommunicado detention itself may contravene human rights norms because of the debilitating psychological effects.”).

83. See, e.g., Miller, supra note 78, at 302, nn.20-22. The proposition that prolonged isolation is tantamount to torture has received academic support. See, e.g., J. Herman Burgers & Hans Danelius,
The determination that Guantanamo Bay detainees and other suspected terrorists detained by the United States are subject to torture, based solely on their indefinite detention, is difficult to make. However, a clear and compelling case that these individuals are subject to inhuman and/or degrading treatment can be established, hinging on two factors. On one hand, "anxiety of the Guantánamo detainees about the uncertainty of their own situation may also be considered as a form of inhuman and degrading treatment." This reality has been confirmed by an acute number of suicide attempts by detainees within the naval base, namely 32 in eighteen months. This factor clearly demonstrates a high level of mental and emotional stress among inmates, more than probably induced by the uncertainty of their fate. Such mental stress may also originate from the realization that detention without trial and access to family members might preclude the detainees' loved ones from undertaking legal or political initiatives on their behalf. On the other hand, the prospect of being sentenced to death, following the circumvention of procedural safeguards usually attributed to a fair trial, will engender considerable mental and emotional hardship. This reality also militates in favor of a determination that Guantanamo detainees are subject to inhuman and/or degrading treatment. This factor could also be deemed to violate Article 6(1) of the Covenant, which consecrates the

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84. Some authors expound that specific conditions in detention and treatment carried out at Guantánamo, such as some physical characteristics of the holding cells, hooding, and involuntary head shaving of prisoners, should be characterized as inhuman and degrading treatment. See, e.g., Daryl A. Mundis, The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts, 96 Am. J. Int'l L. 320, 325 (2002); see also Luigi Condorelli & Pasquale De Sena, The Relevance of the Obligations Flowing From the UN Covenant on Civil and Political Rights to U.S. Courts Dealing with Guantánamo Detainees, 2 J. Int'l Crim. Just. 107, 116 n.34 (2004). For a detailed review of the logistical and human situation within the Guantánamo Bay naval base, see Joseph Lelyveld, "The Least Worst Place": Life in Guantánamo, in The War on Our Freedoms: Civil Liberties in an Age of Terrorism 100-27 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

85. This issue has been raised in legal scholarship. See, e.g., Condorelli & De Sena, supra note 84, at 114 ("Third, there is the issue of whether the treatment of the Guantánamo detainees could be characterized as a breach of the prohibition against torture, inhumane or degrading treatment (Article 7 of the ICCPR."); see also id. at 116.


88. See Condorelli & De Sena, supra note 84, at 116 ("Likewise, it is certain that the conditions of total psychological uncertainty brought about by the attitude of the U.S. authorities has led to a very high number of attempted suicides among detainees.").

89. See, e.g., Fritz & Flaherty, supra note 81, at 1422 (discussing the repercussions of indefinite detention under the Malaysian system). The authors also discuss the consequences of indefinite detention on the detainees' health. Id.

90. Condorelli & De Sena, supra note 84, at 117.
“inherent right to life.”91 In fact, the European Court of Human Rights has recently held that the imposition of the death sentence following an unfair trial will bring about mental anguish, thereby subjecting the sentenced individual to undue inhuman treatment.92 It becomes clear that the foregoing considerations may be integrally transposed to the detainees at Guantanamo.

Aside from the separate issue of torture and inhuman or degrading treatment, one cannot over-emphasize the human rights/due process paradigm, as the distinction between a “prisoner of war” (POW) and a “protected person” will undoubtedly inform the analysis on the level of protection afforded suspected terrorists. It is helpful to note that a distinction between different types of preventive law enforcement activities will also prove necessary in distinguishing between the United States’ and United Kingdom’s attitudes93 vis-à-vis custody over alleged terrorists. In light of current trends and practices in detaining suspected terrorists, three types of situations will prove instrumental to the debate at hand: the detention of non-citizens abroad,94 the detention of citizens

91. Covenant, supra note 43, art. 6(1) (“1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”); see also Condorelli & De Sena, supra note 84, at 117; Fitzpatrick, supra note 15, at 351–52.
   In the Court’s view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment.

Id.

94. See Heymann, supra note 31, at 454 (“Even when American intelligence, law enforcement, or national security officials are deeply involved in requesting an action, non-Americans living abroad do not enjoy the protections of U.S. law.”) In fact, this reasoning, coupled with the holding in Johnson v. Eisentrager, 339 U.S. 763 (1950), has been the driving force behind some judicial reviews of Guantanamo Bay detentions. For example, the court in Coalition of Clergy v. Bush expressed that:
   In all key respects, the Guantanamo detainees are like the petitioners in Johnson: They are aliens; they were enemy combatants; they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of the military; they have not stepped foot on American soil; and there are no legal or judicial precedents entitlement them to pursue a write of habeas corpus in an American civilian court.

Coalition of Clergy v. Bush (Coalition of Clergy I), 189 F. Supp. 2d 1037 (C.D. Cal. 2002). However, the U.S. Court of Appeals for the Ninth Circuit set aside that reasoning in Coalition of Clergy I judging that the case should be resolved exclusively on the issue of standing. Coalition of Clergy v. Bush (Coalition of Clergy II), 310 F.3d 1153, 1164 (9th Cir. 2002). In Rasul v. Bush, the court alluded to Eisentrager and invoked reasoning similar to that of Coalition of Clergy I. Rasul v. Bush, 215 F. Supp. 2d 55, 68 (D.D.C. 2002), aff’d sub nom., Al Odah v. U.S., 321 F.3d 1134 (D.C. Cir. 2003), rev’d
abroad, and the detention of non-citizens inside the territory.

2. Specific International Legal Restraints on Indefinite Detention

a. The Distinction Between POWs and Protected Persons

In terms of international restraints on indefinite detention, the Geneva Conventions act as a first point of reference, as they reflect customary international law. Under Article 5 of Convention III, when a doubt arises as to the status of a prisoner, there is a presumption of POW status until a competent tribunal has determined the status of said suspect. The main advantage of POW status lies in immunity against

\[\text{sub nom.}, \text{Rasul v. Bush}, 542 \text{ U.S. 466 (2004)} \text{("Rather, Eisentrager broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus.")}. \text{In Al Odah v. United States, the court also relied on Eisentrager in stating that the Guantanamo detainees have much in common with the German prisoners in Eisentrager. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in custody of the American military, and they have never had any presence in the United States.} \]

\[321 \text{ F.3d at 1140.} \]

\[\text{Gherebi v. Bush}, 262 \text{ F. Supp. 2d 1064 (C.D. Cal. 2003), also warrants consideration. After expressing its concern over the long-term detention of Guantanamo detainees without access to counsel, the court relied on Eisentrager in deferring to the executive, but not without some regret. Id. at 1073 ("Unfortunately, unless Johnson and the other authorities cited above are either disregarded or rejected, this court lacks the power and the right to provide such a remedy. Perhaps a higher court will find a principled way to do so."). The Ninth Circuit reversed the dismissal, Gherebi v. Bush, 374 F.3d 727 (9th Cir. 2004), and remanded the decision to the District Court of the District of Columbia, which determined that it had jurisdiction to hear the habeas petition. Gherebi v. Bush, 338 F. Supp. 2d 91 (D.D.C. 2004). For a thoughtful review of the relevant legal issues pertaining to the detention of non-citizens at Guantanamo Bay, see Dahlstrom, supra note 69.} \]


96. It is almost implicit that the treatment afforded to illegal aliens within the U.S. will be considerably harsher than with regard to lawful citizens inside the territory. Philip B. Heymann speaks to this point. "The powers over the many who are not legally in the United States are far greater still. They are automatically subject to arrest pending removal proceedings. Release pending departure can be denied. Detention of many months is a result generally available to the government." Heymann, supra note 31, at 449–50. For thoughtful comments on the U.S.' treatment of American citizens in the war on terror, see Irma Alicia Cabrera Ramirez, Unequal Treatment of United States Citizens: Eroding the Constitutional Safeguards, 33 Golden Gate U. L. Rev. 207 (2003); Melysa H. Sperber, John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces, 40 Am. Crim. L. Rev. 159 (2003).

97. For support of this proposition, see Prosecutor v. Dusko Tadic, Case No. IT-94-1 (ICTY App. Ch., 2 Oct. 1995), paras. 79–85.

98. Article 5 of Convention III, supra note 11, reads as follows:

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

See also Luisa Vierucci, Prisoners of War or Protected Persons Qua Unlawful Combatants? The
prosecution for acts committed in combat, the so-called "combatant immunity," but this immunity does not cover crimes falling outside the ambit of the Geneva Conventions. In other words, a military official who clearly disregards the regular chain of command—or goes AWOL—and commits systematic acts of terror or violence against civilian targets will, presumably, not be afforded the protection of POW status. Hence, in the case of Taliban detainees, the benefits of POW status would in no way preclude or jeopardize genuine national prosecutions. "If a few of them are guilty of war crimes or crimes against humanity, they could be prosecuted while remaining POWs." It inevitably follows from this proposition that "[t]hose who commit war crimes should be punished, but their crimes should not be used as an excuse to deprive others of the protections due POWs." This rule also stems from a cardinal principle in the laws of war paradigm, namely that military personnel should always distinguish themselves from civilians. Should they cease to form part of the official military apparatus, whether by blending in with the civilian population to conduct operations or simply by way of civilian disguise, they will subtract themselves from the benefits of POW status.

Judicial Safeguards to Which Guantanamo Bay Detainees Are Entitled, 1 J. INT'L CRIM. JUST. 284, 300 (2003) ("This provision creates a sort of 'temporary protection', equal to that enjoyed by POWs, for all persons who have committed a belligerent act and have fallen into the enemy's hands in case factual evidence leaves doubt as to their belonging to one of the categories of Article 4 GCIII.").


101. Id.

102. This crucial distinction was set forth in Ex parte Quirin, 317 U.S. 1, 30-31 (1942).

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nationals and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.


103. Robert Kogod Goldman offers a thoughtful interpretation of this principle in the context of Iraq.

In my opinion, therefore, the mere use of civilian disguise by a combatant is not a war crime, but, as previously noted, could deprive irregular combatants of POW status. Similarly, the use of the enemy's uniform to penetrate the enemy's lines is permissible, but fighting in that uniform would be illegal. An enemy combatant, clearly identifiable as such, who undertakes a suicide mission against the adversary does not violate the law. However, a combatant disguised as a civilian would be engaging in an illegal attack. While the intentional use of civilians to shield military objectives and operations would be a war crime, responding to enemy fire in self-defense from within crowds of civilians could be lawful.
international obligation, found at Article 4 of *Convention III*, is also mirrored at Article 43 of the *Protocol Additional to the Geneva Conventions*. Conversely, "protected persons," defined at Article 4 of *Convention IV*, are afforded a different protection than POWs. Pursuant to Article 5 of *Convention IV*, they do not enjoy immunity from prosecution for belligerent actions and may forfeit their right to communication when they are suspected of having participated in activities hostile to the security of the state. The fundamental distinction between these two categories of prisoners lies in the length of their detention, a significant detail in the analysis. POWs are released once the hostilities have ceased while "protected persons" may be detained i) as long as they constitute a threat to national security or ii) while they are still serving their sentence following proper prosecution and conviction.

From a legal perspective, the practical problem lies in the novel and indeterminate character of the war on terror. In certain circumstances, the temporal modalities pertaining to the detention of POWs and "protected persons" will be, for all intended purposes, collapsed into one single regime. For example, it is easy to contend that the war on terror is an ongoing effort, given the polymorph and novel threats posed by terrorist networks. As a corollary to that proposition, it may be difficult
or even impossible to pinpoint the exact cessation of hostilities in such a war. Based on that rationale, it then becomes justifiable to detain POWs indefinitely—so long as military operations and personnel are being deployed to thwart terrorist activities around the globe—even though the laws of war traditionally required the detention of POWs to expire at the end of a relatively well-delineated international armed conflict. In that light, the distinction between POWs and "protected persons," as envisioned by the drafters of the Geneva Conventions, becomes somewhat blurred. The repercussions on the human rights scheme are nonetheless deleterious and signal a considerable erosion of the protection regime specifically tailored for POWs. The ramifications of U.S. policy on indefinite detention have had such an impact on preexisting legal schemes that some are labeling Guantanamo a parallel


109. This strategy, along with the possible conducting of more aggressive interrogation techniques vis-à-vis detainees, has been highlighted as a potential red-flag in legal scholarship. See, e.g., Steven W. Becker, “Mirror, Mirror on the Wall . . .”: Assessing the Aftermath of September 11th, 37 VAL. U. L. REV. 563, 571–72 (2003).

Combatants are entitled to POW status, which means that the prisoners have to be released when the conflict ends. This is, in part, why the Administration argues that the Taliban soldiers are not POWs, so that they do not have to be released after the conflict in Afghanistan ends. But probably more important is that under the Geneva Conventions, POWs are only required to give name, rank, serial number (if it exists), and date of birth. This would have defeated the purpose of U.S. interrogation, and that is why it was argued that they were not POWs. Id.; see also links, supra note 99, at 371–72 nn.19 & 20. The granting of POW status has traditionally been construed as an impediment or, at the very least, as an important restriction on the interrogation of detainees. See, e.g., Convention III, supra note 11, arts. 21, 95, 97, 98.

110. The policy of indefinite detention also raises a serious concern relating to the presumption of innocence of suspected terrorists. In H.C. 3239/02, Marab v. IDF Commander in the West Bank, 57(2) P.D. 349, para. 19 [hereinafter Marab], the Israeli Supreme Court spoke to this point, stating that prisoners detained for preventive purposes should still benefit from the presumption of innocence. The Court added that "a person should not be detained merely because he has been detained during warfare." Id. para. 23. The Court further concluded that:

The circumstances of his detention must be such that they raise the suspicion that he—he individually and no one else—presents a danger to security. Such a suspicion may be raised because he was detained in an area of warfare while he was actively fighting or carrying out terrorist activities, or because he is suspect of being involved in warfare or terrorism.

Id. para 23. This proposition, namely that suspected terrorists are entitled to benefit from the presumption of innocence, has received support in international legal scholarship. See, e.g., Emanuel Gross, Trying Terrorists—Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights, 13 IND. INT’L & COMP. L. REV. 1 (2002). It is also important to note that the concept of presumption of innocence is mirrored in international human rights treaties, namely at Article 14(2) of the Covenant, supra note 43.
justice system: “In response to these threats, a ‘parallel system’ of justice has developed wherein the government has claimed the authority to detain indefinitely individuals suspected of terrorist activity, including U.S. citizens, as ‘enemy combatants.’”

The “prisoner of war” banner primarily purports to differentiate between lawful combatants, or individuals who raise a doubt as to their legal status, and the remainder of the population. By detaining POWs indefinitely based on the indeterminate character of the war on terror, the U.S. government is, in fact, subsuming a very specific category of lawful combatants, along with “protected persons,” under one single legal matrix. Like “protected persons” in times of war, the POWs under U.S. custody are actually detained as long as they constitute a threat to national (or international) security: they have essentially been stripped of the benefits of POW status and the very purpose of this area of the laws of war appears to be defeated.

It is also helpful to mention, in passing, that affording POW status to prisoners that are reasonably entitled to such protection—or that raise a doubt as to their legal status—does not, in any way, protect them from prosecution for war crimes or acts that fall outside the ambit of the Geneva Conventions. For example, a member of the Taliban found of having participated or perpetrated acts of terrorism on civilian targets will not be able to rely on his POW status to exculpate himself, provided such protection is granted to him in the first place. If POW status is not afforded to such individual, the whole inquiry becomes somewhat futile or circular, as a “protected person,” such as this particular Taliban member, will never be absolved from prosecution for acts perpetrated in times of war. Hence, the whole object of “combatant immunity” is subverted and the distinction between lawful actions committed during hostilities and war crimes starts to blur indelibly.

To follow this course
of action vis-à-vis Taliban members, who did form the de facto government of the attacked country, Afghanistan, has the effect of short-circuiting the whole rationale of POW protection. Hence, it becomes evident why the U.S. policy of denying POW status to Taliban members has been sharply criticized. I will take issue with more specific unpalatable aspects of this policy in Part II(B)(4).

b. The Fair Trial Requirement

The most important provision for my discussion is found at Article 9 of the Covenant, which protects suspected terrorists against arbitrary detention and, similarly to Article 5 of Convention IV, grants them the right to a fair trial. In this context, it is imperative to consider the wording of Article 2 of the Covenant, which determines the scope of the treaty and reads as follows:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Taking the Guantanamo Bay situation, a first reading of Article 2 of the Covenant would suggest that the military base, while not under U.S. sovereignty, does fall under its jurisdiction. Hence, the territorial scope of the Covenant would extend to those detainees, thereby affording them the protection of Article 9. The claim underlying this argument is that...
the United States has effective control over Guantanamo Bay because it exercises some of its usual public powers and, consequently, jurisdiction over the area. Conversely, a second reading of the same provision implies a dual requirement of both ‘sovereignty’ and ‘jurisdiction,’ which would entail the non-application of the Covenant to the Guantanamo Bay prisoners. It is useful to note that, while placing significant emphasis on the Eisentrager decision, the post-9/11 lower court case law has categorically articulated that the Guantanamo naval base falls outside U.S. sovereignty. As Part II.B.5.c infra discusses, recent Supreme Court decisions have overturned this line of cases. However, setting all judicial pronouncements aside for the moment, it is not so certain whether the Geneva Conventions, for example, would not apply to the Guantanamo Bay situation. In fact, as some authors have


120. For instance, we know from Al Odah v. United States, 321 F.3d 1134, 1143 (D.C. Cir. 2003), rev’d sub nom., Rasul v. Bush, 542 U.S. 466 (2004), that Guantanamo Bay does not fall under U.S. sovereignty. As Part II.B.5.c infra highlights, recent Supreme Court decisions have overturned this line of reasoning. It is helpful to note that, at the time of drafting, the intent behind Article 2(1) of the Covenant, supra note 43, was to expand responsibility of signatory states. For support of this proposition, see Antonio Cassese, Are International Human Rights Treaties and Customary Rules on Torture Binding Upon U.S. Troops in Iraq?, 2 J. Int‘l Crim. Just. 872, 874 (2004) (“The Human Rights Committee has consistently held that, pursuant to Article 2(1) of the Covenant, the rights enshrined in the Covenant must be respected by each Contracting Party in any place (whether or not under their sovereignty, where they wield effective authority and control over individuals.”) (citing abundant Human Rights Committee jurisprudence); see also Timothy D. Rudy, Did We Treaty Away Ker-Frisbie?, 26 St. Mary’s L.J. 791, 833 n.276 (1995) (“In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”) (citing the Human Rights Committee).

121. See Coalition of Clergy I, supra note 94, at 1048; Coalition of Clergy 2, supra note 94 at 1164; Rasul, supra note 94, at 68; Gherebi, supra note 94, at 1065; Al Odah, 321 F.3d at 1143 (distinguishing the notion of control from the principle of sovereignty, which, in the language of the Court, is tantamount to “supreme dominion exercised by a nation”). As Part II.B.5.c infra discusses, recent Supreme Court decisions have reversed this line of cases.
hypothesized, a case could be made that Cuba is actually a party to the conflict, and perhaps even a co-belligerent state, thereby confirming the application of Geneva law to foreign detainees. More importantly, influential scholarly voices opine that a state cannot exempt itself from international human rights obligations merely by encroaching upon those rights on another state’s territory.

From the perspective of international law, it is unclear whether the rights of protected persons under Convention IV and the Covenant would be violated if they were deprived of communication and access to counsel during detention. The essential and pivotal element in making this determination will depend on whether or not these individuals are actually prosecuted. Moreover, the U.S. military is detaining prisoners in Guantanamo Bay, based on the Military Order of November 13, 2001.

On its face, the military order does not contravene the Geneva Conventions or human rights standards, provided the detainees are ultimately tried. International human rights standards impose a requirement of a fair trial within a reasonable time but remain taciturn as to the independence of the deciding court, the presence of a jury, the

122. See, e.g., Jinks, supra note 99, at 420–21.


In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state’s obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state’s obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise.

Id.; see also supra note 120.

124. Many States have implemented restrictions on access to counsel during the detention of suspected terrorists. For example, the Supreme Court of Israel pronounced on the legality of a military order precluding a detainee from communicating with his attorney for a period of thirty-four days, judging that the restriction was reasonable. See Marab, supra note 110.


126. Some commentators endorse this proposition, stating that, even before the implementation of the 1978 Foreign Intelligence Surveillance Act, constitutional guarantees were being curtailed for the purposes of national security.

According to civil libertarians, the constitutional safeguards that normally protect individuals suspected of criminal activity have been destroyed in the case of persons suspected of links with terrorism. This accusation reflects an ignorance both of the Constitution and of long-established limits on the criminal-justice system. Prior to 1978, and dating back at least to World War II, attorneys general of the United States routinely authorized warrantless FBI surveillance, wiretaps, and break-ins for national-security purposes.

Bork, supra note 51, at 31.

127. For example, U.S. military tribunals have been used frequently to prosecute suspected criminals in times of war. For a concise review of this practice, see id. at 33.
applicable rules of evidence, access to counsel, etc. This uncertainty has sometimes been partially redressed in domestic military guidelines. For example, the U.S. Field Manual\textsuperscript{128} specifies that a “competent tribunal” for the purposes of determining POW status of a given prisoner “is a board of not less than three officers acting according to such procedure as may be described for tribunals of this nature.”\textsuperscript{129}

This crucial procedural safeguard, namely that international human rights solely require a trial within a reasonable period, might be further hindered by delays and unforeseen complications,\textsuperscript{130} as engendered by any state of war or international emergency. Similarly, Convention IV explicitly recognizes that protected persons actively engaged in operations hostile to the security of the detaining state, such as Al Qaeda detainees who have avowed intent of attacking the United States if released, may be deemed to have forfeited their right to communication.\textsuperscript{131} Nevertheless, the same treaty, coupled with Article 9 of the Covenant,\textsuperscript{132} also protects the sanctity of the fair trial requirement under human rights law and ensures that prosecution of protected persons must ensue within a reasonable period of time following capture and detention.\textsuperscript{133} When taking the situation of someone like Hamdi,\textsuperscript{134}

\begin{footnotesize}

129. \textit{Id.} art. 71.c.

130. For example, Israel was confronted with logistical problems following its “Protective Wall” operation. Due to the large-scale arrests and detentions of suspected terrorists conducted during that operation, it was argued that prompt interrogations could not be administered because of the staggering amount of prisoners and the lack of interrogators. \textit{See, e.g.}, H.C. 3278/02, Center for Defense of the Individual v. IDF Commander, 57(0) P.D. 385, para. 6, [hereinafter Center for Defense of the Individual]; \textit{Marab, supra note 110, para. 48. However, the Court rejected this position, judging that humanitarian standards had been disregarded. \textit{See, e.g.}, H.C. 5591/02, Halel Yassin v. Commander of Kzio Military Camp, 57(0) P.D. 403, para. 14; Center for Defense of the Individual, para. 26. The compliance with human rights norms will obviously entail an estimation of the costs involved, such as having more judges to conduct frequent reviews of long-term detentions. This reality and the need for more professional interrogators in order to ensure speedy detention reviews were expressly acknowledged in \textit{Marab, supra note 110, paras. 35 and 48.}

131. \textit{See Convention IV, Art. 5, supra note 11.}

Where in the territory of a Party to the conflict, the latter is satisfied than an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention. . . .

\textit{Id.}

132. For the full text of the provision, see supra note 117.

133. \textit{Convention IV, art. 5, supra note 11.}

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present
namely where an individual was detained during a period of three years without being ultimately charged, it is difficult to contend that the United States has been complying with the international fair trial requirement. Although Hamdi’s original citizenship in the United States might have barred the application of international human rights treaties, the very fact that he was American should generate even more outrage in light of his lengthy detention without criminal charge. In addition, several non-American individuals are facing the same situation as Hamdi, as they are being displaced, forcibly transported, and detained at Guantanamo Bay or elsewhere under U.S. custody.

c. Emergency Situations

It is no secret that governments tend to curtail fundamental freedoms and engage in arbitrary detentions in times of turmoil. In fact, “a complex derogation jurisprudence has developed to balance rights against the imperative needs of security,” namely under the aegis of the European Convention on Human Rights (ECHR). Under Article 15 of the ECHR, state-parties may suspend the protection against arbitrary detention and the right to a fair trial in times of national Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Id.; see also Knut Dormann, The Legal Situation of “Unlawful/Unprivileged Combatants,” 85 INT’L REV. RED CROSS 45, 64–66 (2003) (confirming that the right to humane treatment and the right to a fair and regular trial may not be derogated from).

134. See supra note 51. For more background on the Hamdi saga, along with a review of the recent Supreme Court decision, see Jared Perkins, Habeas Corpus in the War Against Terrorism: Hamdi v. Rumsfeld and Citizen Enemy Combatants, 19 BYU JOURNAL OF PUBLIC LAW 437 (2005).

135. Some scholars argue that situations of social or political upheaval usually trigger an over-reaction by the executive in deploying counter-crisis initiatives. For a thoughtful review of the reasons why executive branches sometimes misgauge the security threat at hand, see Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional? 112 YALE L.J. 1011, 1022–42 (2003).


137. Fitzpatrick, supra note 108, at 243. It should be noted, however, that this derogation scheme carries with it the potential for parliamentary supremacy. See Mark Tushnet, New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries, 38 WAKE FOREST L. REV. 813, 827 n.56 (2003) (invoking the British government’s adoption of the Anti-Terrorism, Crime, and Security Act, 2001 c.24 (Eng.), and questioning whether British Courts or the European Court of Human Rights could review the legality of the derogation contained therein).
emergencies or political strife. The problem with transposing this framework to the current war on terror hinges on two particularities of the ECHR. On one hand, most of its derogation jurisprudence tackled internal armed conflict but it "rarely addressed the peculiarities of international armed conflict, real or imagined." On the other hand, while the European Court of Human Rights has equated the term "other public emergency threatening the life of the nation" with "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed," much confusion still surrounds those terms. In circumscribing the concept of "public emergency," the European Court of Human Rights allotted a wide margin of deference to executive organs in determining a state of public emergency and, correspondingly, in derogating from protections found under the ECHR. Regardless of the outcome of this conflict in transposing regional human rights precedents to the war on terror, detainees are nonetheless entitled to procedural guarantees in the context of criminal proceedings.

Some commentators express the view that the war on terror may operate outside the existing legal boundaries, provided a review of executive action takes place after the cessation of the state of emergency, while other scholars opine that counter-terrorism should be consistent with the law. If we were to endorse the first view, detainees designated as POWs may not know when they will be released, as the war on terror is in itself, and similarly to the detention of many suspected

141. See, e.g., McGoldrick, supra note 119, at 392–95.
143. For support of this proposition, see, for example, FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 58–59 (1987).
144. See, e.g., Gross, supra note 135.
145. See, e.g., Wood, supra note 125. Judicaries around the globe have also endorsed this proposition, namely that executive branches should subordinate the war on terror to the rule of law. See, e.g., H.C. 3451/02, Almadani v. The Minister of Defence, 56(3) P.D. 30, para. 9; H.C. 7015/02, Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352, para. 41. In the same spirit, it has also been argued that, given the fact that terrorism is an international problem, international standards should govern domestic counter-terrorism adjudication, be they related to human rights or national security. Amnon Reichman, "When We Sit To Judge We Are Being Judged"—The Israeli GSS Case, Ex Parte Pinochet And Domestic/Global Deliberation, 9 CARDOZO J. INT'L & COMP. L. 41 (2001).
terrorists, indefinite in character.\textsuperscript{146} However, the whole human cry about Guantanamo detainees being held in a legal black hole\textsuperscript{147} may be much ado about nothing, provided that the detained individuals are duly tried or, in the case of POWs, released within a period relatively equivalent to the cessation of major hostilities. Only time will tell if these detentions are carried out in accordance with international human rights law. So far, cases like Hamdi’s are far from encouraging and reflect a profound disregard for human rights standards.

3. Differences Between the United States’ and United Kingdom’s Approaches

In order to better understand the judicial thrust of lower courts in the greater part of the war on terror, it is helpful to briefly contrast the U.S. approach to indefinite detention with the British treatment of human rights vis-à-vis suspected terrorists.

a. Human Rights As Part of the Law of the Land: Abbasi

When contrasting a case like Al Odah\textsuperscript{148} with the Abbasi\textsuperscript{149} decision, a clear difference between U.S. and British legal cultures on what is or should be the proper balance between security and human rights emerges. This difference may appear significant at first sight, as concerns for liberty and democracy permeate British judicial rhetoric. However, upon closer inspection, the difference in legal cultures that drove the initial chasm between U.S. and U.K. attitudes will turn out to be skin-deep. In Abbasi, the British court was willing to include international human rights standards in British law, even though the Covenant is not part of the law of the land. In fact, it must be recalled that the court “was solely concerned with Abbasi’s rights under the domestic law of the United Kingdom.”\textsuperscript{150} Nevertheless, it attributed considerable importance to Article 9 of the Covenant in assessing Abbasi’s detention.\textsuperscript{151} In the

\textsuperscript{146} See supra note 108--9 and accompanying text.

\textsuperscript{147} See, e.g., PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES 143-173 (2005); George P. Flechter, Black Hole in Guantanamo Bay, 2 J. INT’L CRIM. JUST. 121 (2004); David Luban, The War on Terrorism and the End of Human Rights, 22 PHIL. & PUB. POL’Y Q. 9, 9-14 (2002); Johan Steyn, Guantanamo Bay: The Legal Black Hole, 53 INT’L & COMP. L.Q. 1 (2004). In assessing the legality of Guantanamo Bay, other commentators have explored ways to safeguard the reputation of the United States on the international scene. See Gerald L. Neuman, Closing the Guantanamo Loophole, 50 LOYOLA L. REV. 1, 3 (2004) (arguing that “[w]hatever legitimate purposes detention at Guantanamo serves should be attainable in a manner less damaging to the image and the conscience of the United States”).


\textsuperscript{149} Abbasi v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department, [2002] EWCA Civ. 1598.


\textsuperscript{151} Abbasi, para. 63 (“Of the many source documents to which we have been referred, it is enough to cite the International Covenant of Civil and Political Rights, to which the United Kingdom
court's view, when a state signs on to an international treaty, it creates expectations in the general public. The claimants even expounded that, under certain circumstances, international law might give rise to individual rights.\(^5\) The court furthered this reasoning by including some of the above concerns in the "legitimate expectations doctrine" under judicial review.\(^5\) In delivering its judgment, the court inferred that the prisoners in Abbasi's situation held at Guantanamo Bay were detained in a legal black hole\(^5\) and, therefore, embraced a human rights/due process approach, premised on the fact that the detainees had not yet been brought to trial.\(^5\) In sum, the court seemed more preoccupied with the misidentification of innocent people as terrorists\(^5\) than with the actual terrorists, thereby affirming that human rights obligations encompass Guantanamo Bay.

b. *The United States' Approach*

This commitment to human rights is almost antipodal to the U.S. position\(^5\) and illustrates the tension between the human rights paradigm and the United States are parties. Article 9, which affirms 'the right to liberty and security of person'\(\ldots\)\). For the text of Article 9 of the *Covenant*, see supra note 177.

152. Abbasi, para. 39.

Mr Blake embarked with fervour on the task of persuading us that there were good reasons why the court should extend the boundaries of judicial review to embrace decisions as to the exercise of diplomacy where fundamental rights of British subjects were threatened in a foreign country. Public international law governed relations between states. It could not be expected to be in the van in imposing duties on individual States to protect their own subjects against violation of their human rights. There was, however, a growing recognition that international law could and should give rise to individual rights. This country should take the lead in recognising that the government owed a duty to British citizens to take appropriate steps to protect them against violation of their fundamental human rights by other countries.

Id.

153. Id. paras. 81–106.

154. Id. para. 64 ("For these reasons we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'.").

155. Id. para. 66 ("What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.").

156. This concern is readily understandable when one considers Britain's record of indefinite detention, especially in the context of Northern Ireland. For instance, it once proceeded to large-scale detentions of members of the Irish Republican Army when the actual instigators and perpetrators of the terrorist violence under scrutiny belonged to factions of the Provisional Irish Republican Army. For more details on this account, see Bonner, supra note 50, at 174–75.

157. It should be noted, however, that the Court in *Abbasi* ultimately rejected the claimants' application for relief. In doing so, it deferred to the American judiciary, especially in light of *Rasul v. Bush*, 215 F. Supp. 2d 55, 68 (D.D.C. 2002) (since reversed, 542 U.S. 466 (2004)), and declared that the United Kingdom's commitment to human rights is aligned with that of the United States.

The position of detainees at Guantanamo Bay is to be considered further by the appellate courts in the United States. It may be that the anxiety that we have expressed will be drawn to their attention. We wish to make it clear that we are only expressing an anxiety that we believe was felt by the court in *Rasul*. As is clear from our judgment, we believe that the
and the civil rights paradigm. For example, some scholars expound that, since the Geneva Conventions are non-self-executing treaties, “the President has the sole executive authority to interpret and apply the Geneva Conventions on behalf of the nation.” This rationale also guided part of the Fourth Circuit’s holding in Hamdi: it was argued that the benefits of Article 5 of Convention III, which create a presumption of POW status until a competent tribunal has pronounced on the issue, should flow to Guantanamo detainees. The court rejected the argument, judging that Convention III was not self-executing and, impliedly, no private right of action could accrue to Hamdi.

As a direct consequence of the tension between human rights and civil rights, the United States does not attribute protection to human rights standards, which it tends to see as international treaty-derived rights. Instead, the executive favors civil liberties under the U.S. Constitution rather than recognizing human rights. However, one caveat seems apposite here: these constitutional protections apply differently to non-citizen suspects inside the territory, as opposed to U.S. citizens.

United States courts have the same respect for human rights as our own.

Abbasi, para. 107-iii.


159. John Yoo, Transferring Terrorists, 79 Notre Dame Law Review 1183, 1227 (2004); see also John Yoo, Politics as Laws?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation, 89 Cal. L. Rev. 851 (2001); John Yoo, Treaty Interpretation and the False Sirens of Delegation, 90 Cal. L. Rev. 1305 (2002). Other commentators have sharply criticized this view, judging that the President is bound by the Geneva Conventions and that, given the breadth of Congress’ Article I powers, he lacks constitutional authority to breach such treaties. See generally Derek Jinks & David Sloss, Is the President Bound by the Geneva Conventions? 90 Cornell L. Rev. 97 (2004).


161. Id. at 468-70.

162. Consequently, it is not unusual for an international treaty, such as the Covenant, supra note 43, to be ratified by the U.S. but deemed not self-executing. For an application of this principle, see Beazley v. Johnson, 242 F.3d 248, 267-68 (5th Cir. 2001). It follows that a considerable tension between promoting human rights and maintaining national security often permeates legal and political discourse.

Since the birth of the human rights movement in the mid-twentieth century, the promotion of human rights has been seen as competing with or even compromising core issues of national security. Promoting human rights has long been viewed as a luxury, to be pursued when the government has spare diplomatic capacity and national security is not being jeopardized. In the words of a former member of Congress, there is a deeply held belief within the U.S. government that “there will always be a tension between our foreign policy as classically defined in terms of the United States’ economic, political, and strategic interests and our human rights interests.”

inside the territory.163 Moreover, the D.C. Circuit in *Al Odah* confirmed that the U.S. Constitution does not apply to the detainees at Guantanamo Bay.164 It is fair to say that the due process commitment to aliens within U.S. territory is significantly different than the protection afforded to any individual under the human rights system, which tends to lean toward robustness165 and sustainability of rights. Although some American courts have been sympathetic to the situation of Guantanamo detainees,166 whether in reviewing the length of the detention itself or in

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163. For a thoughtful review of these issues, see David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367 (2003). One can invoke the case of *United States v. McVeigh*, 955 F. Supp. 1281 (D. Colo. 1997), where a non-alien terrorist was afforded all of the guarantees provided for in the Constitution. In that case, it is doubtful whether the court would have been as expedient in denying access to the press because such a permission would not play a positive role for the public, as it did in *N.J. Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 218 (3d Cir. 2002). For a thoughtful review of the current administration’s tendency to exclude the media from proceedings pertaining to the war on terror, see John F. Stacks, *Watchdogs on a Leash: Closing Doors on the Media*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 237–55 (Richard C. Leone & Greg Anrig, Jr. eds., Public Affairs 2003).

164. After stating that the detainees under review were not to be designated as “enemy aliens,” the D.C. Circuit concluded that they were not entitled to due process, hinging its reasoning on the fact that the prisoners were in an *Eisenbrager*-like situation. *Al Odah v. United States*, 321 F.3d 1134, 1140–43 (D.C. Cir. 2003), rev’d sub nom., *Rasul v. Bush*, 542 U.S. 466 (2004); see also supra notes 120–21 and accompanying text. Some scholars have rejected this reasoning, stating that Guantanamo detainees are not automatically stripped of procedural guarantees because the Guantanamo naval base extends beyond U.S. sovereignty. See, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1510 (2003). On the non-application of the U.S. Constitution to Guantanamo Bay detainees, see Akash R. Desai, *How We Should Think About the Constitutional Status of the Suspected Terrorist Detainees at Guantanamo Bay: Examining Theories that Interpret the Constitution’s Scope*, 36 VAND. J. TRANSNAT’L L. 1579 (2003).

165. See, e.g., *Jinks*, supra note 99, at 374 ("In fact, careful analysis of the text, structure and history of the Geneva Conventions demonstrates that the Conventions provide a robust rights regime for all war detainees.").

166. Some U.S. courts have been sympathetic to the situation of foreign detainees post-9/11. For instance, we can probably explain the outcome in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), being opposite from the outcome in *N.J. Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), by recognizing that the court embraced a model closer to the human rights paradigm. In fact, it appeared sensitive to the situation of the detainees but was left with limited constitutional language to express its sympathy. Instead, it elected to indirectly protect the remaining rights of the aliens before it, namely by upholding the right of free press.
addressing ancillary concerns, such as access to counsel, the general tendency in the United States has been to defer to the executive. For example, after declaring that "the prospect of the Guantanamo captives being detained indefinitely without access to counsel, without formal notice of charges, and without trial is deeply troubling," the court in *Gherebi v. Bush* specified that it was bound by the *Eisentrager* decision and a philosophically adjacent line of cases. Therefore, like other U.S. judicial decisions, it refrained from interfering with the executive's policy of indefinite and *incommunicado* detention.

4. The Importance of POW Status and Taliban Detainees

a. The U.S. Position on POW Status

In assessing the legal situation of Guantanamo Bay detainees, the United States denies POW status to members of the Taliban because they didn't wear distinctive signs and make them visible so as to distinguish themselves from civilians, and because they failed to comply with the laws of war. At the outset, this posture seems somewhat reminiscent of certain positions or mentalities espoused following the adoption of the *Additional Protocol*: in that context, some commentators expounded that the *Additional Protocol* would actually serve rather than impede international terrorism, while other scholars sharply criticized this view. Influential voices within the Reagan administration

167. Gherebi v. Bush, 262 F. Supp. 2d 1064, 1066 (C.D. Cal. 2003). The court further expressed: "Putting aside whether these captives have a right to be heard in a federal civilian court—indeed, especially because it appears they have no such right—this lengthy delay is not consistent with some of the most basic values our legal system has long embodied." *Id.* at 1073.

168. It should be recalled that, in this case, the brother of a non-U.S. citizen detained incommunicado at Guantanamo Bay filed a petition of habeas corpus before the court. The court ultimately declined the petition, judging that it lacked jurisdiction to intervene in military custody outside U.S. territory. The Ninth Circuit later reversed the dismissal, *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004), and remanded the decision to the District Court of the District of Columbia, which determined that it had jurisdiction to hear the habeas petition. *Gherebi v. Bush*, 338 F. Supp. 2d 91 (D.D.C. 2004).

169. See *supra* note 94, at 1066-69.

170. See White House Fact Sheet, *supra* note 11 ("The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of al Qaeda.").


articulated concerns that the *Additional Protocol* would “let too many terrorists slip through the net”, expounding that making “killing, hostage-taking, or hijacking acceptable when done for a ‘good’ cause would send the international rule system down a slippery slope. *The rules would lose their determinacy.* Every criminal could justify resort[ing] to violence by claiming political, economic, or social grievances.”

Furthermore, the *Additional Protocol* recognizes some situations where the nature of the hostilities make it impossible for combatants to clearly distinguish themselves. Nevertheless, such individuals are entitled to privileged combatant status, as long as they carry their arms openly during each military engagement. This rationale would certainly extend to a majority of insurgents in the current Iraqi conflict and, possibly, to some suspected Al Qaeda members. It is not surprising that the “extension of humanitarian protection to guerillas was among the reasons cited by the United States Government in refusing to ratify the Protocol.”

Regardless of these two schools of thought, it must be reiterated that Article 4.A(2) of *Convention III* clearly sets out 4 distinct requirements that must be fulfilled by members of other militias and members of other volunteer corps, including those of organized resistance movements, in order to attract POW status. In short, such individuals must be: i) “commanded by a person responsible for his subordinates;” ii) “having a fixed distinctive sign recognizable at a distance;” iii) “carrying arms openly;” and iv) “conducting their operations in accordance with the laws and customs of war.” The fact that the U.S. administration has single-handedly characterized all Taliban detainees as not entitled to
POW status, with absolutely no margin for interpretation, is difficult to countenance. Accordingly, two aspects of this legal characterization, which has been labeled "cryptic" by some, seem troubling.

b. Difficulties with the U.S. Position

A first and obvious concern lies in the actual interpretation and application of Article 4.A(2) of Convention III, which clearly requires four distinct elements to be analyzed thoroughly. It is unclear from the White House Fact Sheet how the United States proceeded to strip Taliban detainees of POW status and why, exactly, it decided to hinge its legal characterization solely on two of the four requirements. No accompanying rationale for this selective application of Article 4.A(2) was offered. As mentioned previously, the public record establishes that the Taliban government, at best, provided logistical support to the Al Qaeda network. Although morally reprehensible, this posture is insufficient in and of itself to infer that the Taliban has failed to conduct its operations in accordance with the laws of war. More importantly, it does not support the legal imposition of a blanket denial of POW status to all captured Taliban individuals. It follows that "[a] nation that assists an aggressor thereby commits a wrong, but its armed forces should not, as a consequence, lose their entitlement, if captured, to POW status." In addition, to assert that Taliban members did not arbor distinctive insignia so as to distinguish themselves from civilians—when a case could be made that their beards, black turbans, and clothes satisfy this requirement—unnecessarily engages the legal community in a fruitless

178. For example, Aldrich says:

Without a doubt, the most difficult element to defend of the decisions made by President Bush in February with respect to the status of prisoners taken in Afghanistan is the blanket nature of the decision to deny POW status to the Taliban prisoners. By one sweeping determination, the president ruled that not a single Taliban soldier, presumably not even the army commander, could qualify for POW status under the Geneva Convention. While armed forces in the past doubtless made some decisions related to army units or other groups as a whole, one cannot help but question the all-encompassing nature of this one. Can it possibly exclude any doubt? Moreover, can it legitimately preclude any contest by an individual prisoner?

Aldrich, supra note 100, at 897.

179. Id. at 894.
180. Supra note 11.
181. Aldrich states:

I would suggest that a necessary first step would be for the United States to make public both the basis and the reason for denying POW status to all Taliban prisoners, not simply by asserting that the Taliban armed forces neither distinguished themselves adequately from the civilian population nor conducted their military operations in accordance with the laws of war, but by documenting such assertions and accompanying this evidence with a convincing explanation of the gravity of these matters and some elaboration of the evidently felt need to deprive them of POW status.

Aldrich, supra note 100, at 896.

182. See also Proulx, supra note 8, at nn.113, 238, and accompanying text.
183. Aldrich, supra note 100, at 895.
184. For example, Aldrich also says:
debate, especially in light of the surrounding circumstances which plausibly command the extension of POW status to Taliban detainees. Furthermore, the argument that the Taliban did not conduct its operations in accordance with the laws of war should be discredited on two grounds. On one hand, when faced with members of a party to the conflict, making combatant immunity or POW status unconditionally dependent on the observance of the rules contained at Article 4.A(2) could seriously hinder or endanger armed forces of that party. On the other hand, sustaining such a claim in the present context would signal that we are, in fact, oblivious or willfully blind to several historical accounts where the laws of war were not completely followed by legitimate armed forces.

A second and more intractable legal aspect of U.S. policy lies in its decision to invoke Article 4.A(2) of Convention III vis-à-vis Taliban detainees. Although it is evident that some Al Qaeda terrorists would not attract POW status when duly subjected to the legal test of Article 4.A(2), applying the same provision to Taliban detainees is not equally

While I certainly do not know whether or not some or all of the members of the Taliban's armed forces were distinguishable from civilians, either by wearing black turbans or by some other visible sign, it seems insufficient for the United States merely to assert an absence of distinction without adducing evidence, and it appears most unlikely in any event that all units of the Taliban's armed forces were indistinguishable from civilians.

The resolution of this debate would undoubtedly turn on the degree of visibility required by international law, namely to what extent did Taliban members make their distinctive insignia visible to the enemy. Ultimately, the solution would also hinge on the question of intent, namely to what degree did Taliban members intend on differentiating themselves from the civilian population. This is certainly a complex issue and involves careful and thorough consideration of various elements. For a thoughtful account of the issues involved in this debate in the context of Operation Enduring Freedom, including vis-à-vis U.S. and coalition special forces, see W. Hays Parks, Special Forces' Wear of Non-Standard Uniforms, 4 Cs. J. INT'L L. 493 (2003).

A certain consensus has emerged that Taliban members would likely be entitled to POW status following hearings on the issue. See, e.g., John Mintz, On Detainees, U.S. Faces Legal Quandary, WASH. POST, Jan. 27, 2002, at A22.

For support of both propositions:

There are good reasons to view the Taliban as belonging to the latter category. Requiring from regular armed forces respect of the laws of war as a precondition to obtaining combatant and prisoner of war status could endanger such forces. In all armed conflicts, the enemy is accused of not complying with IHL, and such accusations are all too often accurate. If accusations of IHL violations by regular armed forces were permitted to deprive all their members of their prisoner of war status, independently of whether the individual member to be classified complied with the laws of war, prisoner of war status could frequently have little or no protective effect. Historically, the United States never invoked such an argument concerning the German Wehrmacht, which cannot be claimed to have regularly complied with the laws of war.


It is important to note that the Bush Administration eluded the question whether some Al Qaeda members were actually fighting alongside the Taliban army. Sean D. Murphy, Contemporary Practice of the United States Relating to International Law: Decision Not to Regard Persons Detained in
conclusive. In fact, a different provision altogether should have driven the legal characterization of Taliban detainees, as they simply do not amount to "other militias and members of other volunteer corps, including those of organized resistance movements." Although the United States and the U.N. Security Council did not recognize the Taliban as the legitimate government of Afghanistan on several occasions, it still remained the de facto governing entity throughout most of the country. In addition, Afghanistan being a party to the conflict at hand and a contracting party to the Geneva Conventions, the fact that the United States did not recognize the Taliban as a legitimate government in no way relieved it from the legal implications of its adherence to international humanitarian law. Afghanistan, through the

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Afghanistan As POWs, 96 Am. J. Int’l L. 475, 478 (2002) ("The White House statement did not provide details about whether there were any Al Qaeda forces that were integrated into the regular Taliban army that should also be regarded as covered by the Third Geneva Convention.").

189. Convention III, supra note 11.


191. For support of this proposition:

As the leaders of Al Qaeda and a large part of its membership and facilities were located within the territory of Afghanistan, the Taliban, who controlled all but a small part of that country and were consequently its effective government, were requested to assist in this effort. The Taliban refused to do so and made clear that they would continue to give sanctuary to Al Qaeda. The Taliban, as the effective government of Afghanistan, refused all requests to expel Al Qaeda and instead gave it sanctuary.

Aldrich, supra note 100, at 891–93. Davis Brown also supports this proposition:

[I]t must first be understood that despite the international community’s non-recognition of the Taliban as the legitimate government of Afghanistan, the Taliban was from 1995 to late 2001 the de facto government of that state. Any act, therefore, of the Taliban regime during that period was properly considered in international law to be an act of the Afghan state, making Afghanistan responsible for the Taliban’s actions.


vehicle of its de facto government, was legally bound to uphold the protective scheme of the *Geneva Conventions* and to refrain from using force against other states.\(^9\)

In this light, it becomes apparent that the situation of Taliban members should have been analyzed through the lens of another provision, possibly as "Members of the armed forces of a Party to the conflict, as well as members or volunteer corps forming part of such armed forces".\(^9\) Although there has been some controversy over the scope of this provision,\(^9\) Taliban members would likely surmount its threshold, as they constituted the controlling socio-political entity throughout most of Afghanistan and, consequently, would be assimilated to the armed forces of a party to the conflict.\(^9\) Based on the foregoing considerations, it would have been justified to afford Taliban detainees POW status for the purpose of safeguarding Geneva law alone: "Certainly, the protections of the Convention would be eroded if it were accepted that the armed forces of a government in effective control of a state's territory need not be accorded those protections by another state regime by the U.S. actually permitted it to subtract Guantanamo detainees from the protection of *Convention III*. In sum, this view posits that Afghanistan was no longer a contracting party to *Convention III*. This was one of the positions espoused in the controversial and incendiary Yoo-Delahunty memo, which was subsequently endorsed by the Bush administration in laying out its policy on Guantanamo detainees. See Draft Memorandum from John Yoo, Deputy Assistant Attorney General & Robert J. Delahunty, Special Counsel, U.S. Department of Justice, to William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002).

193. *See* Brown, *supra* note 191, at 6 ("The non-recognition of the Taliban as the legitimate government of Afghanistan had no effect on the duty of the Taliban regime to fulfill the obligations of the state of Afghanistan").


196. *See* George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 768–69 (1981) (stating that only certain "irregular" forces, or guerrilla factions, would be subject to the discipline of Article 4.A(2), while regular and uniformed military forces would be entitled to combatant immunity); *see also* Goldman, *supra* note 103, under heading "The Right to Be a Prisoner of War" ("This article effectively holds members of independent irregular groups to higher standards than those required of members of regular armed forces.").
that declines to recognize that government's legitimacy."

Even though its requirements have been characterized by some as "unworkable conditions", the discussion surrounding the application of Article 4.A(2) is somewhat academic at this juncture. Affording Taliban detainees, suspected Al Qaeda members, and Iraqi insurgents POW status would yield little or no impact on the United States' ability to prosecute such individuals subsequently for war crimes. Terrorism, in all its shapes and forms, ostensibly extends beyond the scope of humanitarian protection and may be prosecuted. Yet, widespread concerns that terrorists may find refuge in multilateral instruments have acquired credence in certain political circles. This line of argument has been advanced before in the context of the possible ratification of the Additional Protocol by the United States, especially vis-à-vis Articles 1(4) and 44. As one commentator notes, it is inaccurate, and possibly erroneous, to maintain that terrorists can seek shelter from punishment under the auspices of international humanitarian law:

Finally, it should be obvious that neither the provisions of Article 1, paragraph 4, nor those of Article 44, nor those of the two in combination provide any solace or support for terrorists. Failure by combatants to distinguish themselves from the civilian population throughout their military operations is a punishable offense. Terrorist acts are all punishable crimes, including attacks on civilians, the taking of hostages, and disguised, perfidious attacks on military personnel, whether committed by combatants or by noncombatants, and whether the perpetrator is entitled to POW status or not. Assertions that ratification of Protocol I would give aid to, or enhance the status of, the PLO or of any terrorist group are totally unfounded. That such assertions should have been made by a President of the United States and those who advised him is regrettable.

Granting suspected terrorists fundamental human rights and due process guarantees does not, in any way, afford them the benefits of impunity in targeting, murdering, or kidnapping civilians. Warranted prosecution for egregious violations of the laws of war will ensue, regardless of the perpetrator's status under the scheme of jus in bello.

c. Presumptive POW Status

The case for affording POW status to Taliban detainees becomes particularly compelling when one considers Article 5(2) of Convention III. The relevance and importance of this provision cannot be overemphasized, as it clearly creates a presumption of POW status and must

197. Aldrich, supra note 100, at 895.
199. See supra notes 171–72.
200. See supra note 174.
202. For the text of the provision, see supra note 98.
be constructed accordingly. In short, when combatants are captured during hostilities under somewhat nebulous circumstances, or when their legal status remains undetermined, they are entitled to a presumption of POW status until otherwise held by a competent tribunal. Under this regime, whenever an individual is caught in the line of fire during wartime, and the surrounding events cast a doubt as to whether this person is legitimately fighting under the aegis of a party to the conflict, the assumption is that this individual is entitled to the protections generally afforded POWs, a protection that is triggered automatically by the application of international humanitarian law. It is interesting to note that this legal device is also mirrored in the U.S. Field Manual, according to which the mere claim of entitlement to POW status by a prisoner sets in motion the presumption of Article 5(2). However, the United States has remained adamant that the situation of Al Qaeda and Taliban detainees does not warrant further examination, as their legal status raises no doubts.

This presumptive provision is essential in upholding the credibility and legitimacy of the underlying tenets of jus in bello. Moreover, it also militates in favor of a sharp distinction between “protected persons” and POWs, at least in terms of semantics and philosophy, thereby rejecting

203. See supra note 98.

204. Some commentators infer from Article 5(2) of Convention III that an individual who raises doubt as to his legal status, “is not a prisoner of war in the interim, but he is to be treated as if he were.” G.L.A.D. Draper, The Status of Combatants and the Question of Guerilla Warfare, 1971 Brtr. Y.B. Int’l L. 198. For a review of the legal issues pertaining to the use of military commissions in wartime, see Curtis Bradley & Jack Goldsmith, Federal Relations Law 225-46 (2003). On the historical treatment of detainees during wartime, including the use of military commissions, see Issacharoff & Pildes, supra note 17. For a comparative study of checks and balances during wartime, see Stephen J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, 102 Mich. L. Rev. 1906 (2004).

205. Article 71.a of the U.S. Field Manual, supra note 128, mirrors Article 5 of Convention III, supra note 11, which reads as follows:

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

206. U.S. Field Manual, supra note 128, Article 71.b reads:

The foregoing provision applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.

Pursuant to Article 73 of the U.S. Field Manual if a prisoner does not fall within any of the POW categories found under Article 4 of Convention III then that prisoner is entitled to “protected person” status.


208. Contrast with Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 4-5 (Jean S. Pictet ed., 1958), which suggests that the legal regime applicable
the theory of protective parity advocated by certain scholars. In other words, Convention III has a built-in mechanism for sorting out POWs from protected persons, another facet of customary international law expressly transposed in U.S. military law. When analyzed through the lens of the current war on terror, the distinction between POWs and "protected persons" remains the linchpin of international humanitarian law and animates the legal debate pertaining to Article 5 of Convention III. In fact, in its ruling of March 12, 2002, the Inter-American Commission on Human Rights cautioned the United States to re-align its policy with the objectives of Article 5 and implored it to "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal".

Article 45 of the Additional Protocol, also creates a presumption of POW status. While some scholars argue that this provision now reflects customary international law, it essentially compels signatories of the Additional Protocol to afford Taliban detainees POW status until a competent tribunal can pronounce on their legal status.

The argument for initial presumptive POW status is particularly...
poignant when one reads Article 71 of the U.S. Field Manual, which also mirrors the application of presumptive POW status until a competent tribunal has pronounced on the issue. In fact, the mere claim by a prisoner that he or she is entitled to POW status is sufficient to trigger the application of presumptive POW status. In addition, it should be noted that the United States’ refusal to grant POW status to Taliban detainees might considerably impede multilateral law enforcement cooperation. For example, even though history has long recognized that countries may transfer POWs to neutral or co-belligerent states, foreign states might be reluctant to turn over captured Al Qaeda or Taliban members to the United States in light of its policy on POW status.

In the context of the modern war on terror, it becomes apparent that the rule embodied in Article 5 of Convention III should become a point of reference or a sort of minimal threshold, as the situations on the ground abroad become increasingly convoluted in light of the participation of insurgents and politically or religiously-driven resistance movements. The line of demarcation between POWs and “protected persons” is not always limpid and, when considering the Afghan experience, for example, where northern rebel groups, terrorists, civilians, and military personnel converged into one battleground, the categorical distinction between two classes of combatants becomes somewhat elusive at first sight. To resolve this discrepancy and to prevent the ever-so-important line of demarcation from fading completely, it is imperative to allow Article 5 to regulate these situations.

215. For the full text of the provision, see supra notes 205–06.
216. See supra note 206.
217. Reference Article 12 of Convention III, supra note 11:
 Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.
219. See, e.g., Jinks, supra note 99, at 371 n.15.
 Because international cooperation is crucial to the effectiveness of U.S. antiterrorism policies, transnational disagreements about the treatment of detainees assume enormous importance. Routine aspects of transnational law enforcement have been complicated by the controversy. For example, some states are reluctant to extradite suspected Al Qaeda (or Taliban) fighters to the United States without assurances that they will not be held at Guantanamo.
Id.
220. Goldman references this under heading “How the Law Applies in Iraq”:
 In light of the array of tactics employed by combatants on the Iraqi side, confusion will inevitably surround the precise legal status of many Iraqi and foreign combatants captured by U.S. and other Coalition forces. Because denial of POW status entails potentially serious consequences for combatants, such determinations must strictly comply with the dictates of
In sum, states forming part of the U.S.-led coalition should approach this legal issue with considerable caution and restraint, while enabling Article 5 of Convention III to fulfill its intended purpose. From the perspective of international law and order, generally, the automatic application of Article 5 in doubtful cases, such as the situation of Taliban detainees, would constitute a welcomed alternative to the naked and blind pursuit of unilateral legal policies. In fact, implementing a policy of indefinite detention and flat-out denial of POW status to detainees not only endangers U.S. military officials stationed across the globe but also significantly hinders the United States’ capability to form reliable alliances.

d. Problems Pertaining to Double Standards, Legitimacy, and Unilateralism

The issue of unilateralism is a crucial one in understanding the present debate over POW status. The current administration has certainly been under trenchant criticism for curtailing fundamental freedoms in an unprecedented fashion. The United States has in fact imposed severe restrictions on civil liberties within its own borders. Even before 9/11, the executive asserted its intent to disregard multilateral initiatives as a means to promote and vindicate U.S. interests. In fact, it
is probably fair to say that, over the past thirty years or so, the United States has often shunned multilateral channels to pursue its own interests. However, we must recall that the war on terror is a truly global campaign, an exercise that can only be conducted successfully through multilateral channels. It follows that "[t]he United States may be the world's only superpower, but even a superpower cannot fight terrorism alone. The increasingly transnational nature of terrorism means that it can only be tackled transnationally, requiring the cooperation of many states, all of whom jealously guard their national sovereignty." Even though the United States may be the world's sole superpower, it still often requires the support of other important states in advancing its own agenda.

The United States' stance on denying POW status to detainees seems far removed from its original reaction to the attacks of 9/11, which has been described as "rhetorically bellicose, but practically cautious" in generating international support and legitimacy. In fact, its initial reaction stemmed from the need to build a viable coalition and to increase and foster multilateral cooperation in combating terrorism. When observed through this lens, it becomes clear that unilateral legal policies have far-reaching effects at home and abroad. The rationale behind the United States' application of the Geneva Conventions may garner approval in a domestic political setting, albeit sometimes through
partisan manifestations of support, but it remains untenable in the international arena where ideologically opposed states must coexist, and the sanctity of human rights protection must be, to the extent possible, upheld in the interests of peace. In fact, there exists a symbiotic relationship between democracy, human rights, and peace.\textsuperscript{231} For that reason, international human rights law dictates that the status of prisoners—such as Taliban detainees—must be ascertained through a judicial mechanism rather than by a unilateral presidential characterization.\textsuperscript{232} It is interesting to note that, historically, American courts have addressed threats analogous to terrorism through a “democratic deliberation-reinforcing approach,”\textsuperscript{3} according to which “the constitutionality of executive action turns on whether the Court concludes there is sufficient congressional authorization for the executive action in question.”\textsuperscript{234}

More importantly, the policy of denying Taliban members POW status not only undermines the objectives of the laws of war but also significantly places the United States, and its allies, at risk. Even though it is fair to state that the legal justification of this practice is flawed, we must also recall that the United States has military personnel stationed all over the world. By foregoing the application of POW protection to the prisoners in its custody, the United States is in fact endangering its own military corps and civilians, as they become increasingly more vulnerable to attack.\textsuperscript{235} This problem, which is a thorny one, actually

\textsuperscript{231} For a thought-provoking discussion of these issues, see Franck, supra note 104, at 136.
\textsuperscript{232} See, e.g., Mundis, supra note 84, at 325.

Article 5 of the Convention provides that persons captured during an international armed conflict are entitled to the protections of the treaty even if their identity as POWs as defined by Article 4 is in doubt, until a competent tribunal has determined their status. Thus, the text of the treaty leads to the conclusion that a competent tribunal—and not the president of the United States acting unilaterally—must determine whether or not anyone captured is a lawful combatant.

\textit{Id.} While invoking the American Constitution, certain commentators ask whether Article I, Section 8, Clause 12, which vests Congress with the authority to “raise and support Armies,” and Clause 14, which vests it with power to “make Rules for the Government and Regulation of the land and naval Forces,” might also be thought to confer on Congress the power to promulgate prisoner of war policy.

John Yoo, Transferring Terrorists, supra note 159, at 1202. Other scholars assert that, given the scope of Congress’ Article I powers, the President is not entitled to violate the Geneva Conventions on a unilateral basis. See Jinks & Sloss, supra note 159.


\textsuperscript{235} To systematically deny POW status to prisoners also engenders deleterious consequences for all prisoners captured in the global fight against terrorism. Ever since the inception of the Geneva Conventions, commentators have expounded that foregoing POW status places prisoners “at the power of the enemy.” See, e.g., Richard R. Baxter, So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs, 1951 BRIT. Y.B. INT’L L. 323, 328.
hinges on a double standard. On one hand, the United States refuses to grant POW status to Taliban members and prisoners who raise a doubt as to their legal status. On the other hand, it is foreseeable that American soldiers will be captured abroad. In fact, American citizens and soldiers have already been captured and executed in Iraq.

It is fair to assume that the American executive will expect its own nationals to be treated in accordance with fundamental principles of humanitarian law. However, this position is hard to countenance when the United States, itself, does not extend the logic of POW status vis-à-vis detainees in its own custody. In addition, there is something deeply arrogant and perhaps even unsettling about the United States' posture regarding the Geneva Conventions: one would be hard pressed to demand exemplary POW treatment of captured Americans abroad when the United States is treating Iraqi prisoners as criminals and, often worse, stripping them of rudimentary human dignity. In light of the poor treatment afforded Taliban detainees, it becomes paradoxical to fathom deploying concerted efforts to ensure that American citizens captured in Iraq or elsewhere receive POW prerogatives.

236. See Becker, supra note 109, at 572.

Although this position is legally erroneous and demonstrates the Administration's lack of sensitivity to the international rule of law, it is placing U.S. military personnel abroad in danger, as we have troops in many parts of the world, and it is reasonable to assume that at some time some of them may be captured. If the same treatment is applied to them, we would be hard put to argue otherwise. Also, significantly, the double standard that we apply to "us" and to "them" has been one of the main reasons why so many in the world oppose our actions.

Id.

237. The administration apparently caught on to this reality and feared retaliation against its own soldiers captured abroad. In what probably amounts to a political artifice, President Bush did indicate that Taliban members might be afforded POW status, while Al Qaeda detainees would not benefit from such protections. See, e.g., Mike Allen & John Mintz, Bush Makes Decision on Detainees: Geneva Convention Applies to Afghan Taliban Fighters, Not Al Qaeda, WASH. POST, Feb. 7, 2002, at A1; John Mintz & Mike Allen, Bush Shifts Position on Detainees; Geneva Conventions to Cover Taliban, but Not Al Qaeda, WASH. POST, Feb. 8, 2002, at A1; John Mintz, Debate Continues on Legal Status of Detainees, WASH. POST, Jan. 28, 2002, at A15. It must be noted, however, that these political statements were induced by significant pressure from outside groups and influential voices within the executive.

238. See, e.g., Luban, supra note 147, at 12–13.

To declare that Americans can fight enemies with the latitude of warriors, but if the enemies fight back they are not warriors but criminals, amounts to a kind of heads-I-win-tails-you-lose international morality in which whatever it takes to reduce American risk, no matter what the cost to others, turns out to be justified.

Id. For more accounts on the presence of double standards in U.S. foreign policy, see Jamie Fellner, Double Standards, INT'L HERALD TRIB., Mar. 31, 2003; Amnesty International, United States of America: The Threat of a Bad Example: Undermining International Standards as "War on Terror" Detentions Continue (Aug. 19, 2003).

239. See Roberts, supra note 119, at 731.

U.S. attempts to protect the rights of its citizens abroad sometimes result in palpable double standards. For example, the United States insisted that Iraq honour the Geneva Conventions and complained that televised displays of captured American soldiers violated the laws of war because states are not meant to parade or humiliate prisoners of war. Yet the United States refused to apply the Geneva Conventions to the Guantanamo Bay
This reality is further exacerbated by the recent abuse and torture scandals perpetrated by U.S. military officials at Abu Ghraib prison.\textsuperscript{240} These abuses, among other things, certainly cast a doubtful light on the United States' claim that it is treating all detainees at Guantanamo Bay "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949."\textsuperscript{241} In fact, one of the main lessons gleaned from the situation in Northern Ireland is that long-term and \textit{incommunicado} detention is potentially ripe for abuse, while offering no possibility of monitoring the detainees' condition and treatment.\textsuperscript{242} When taken in the

detainees and even released pictures of them arriving wearing handcuffs, blacked out goggles and surgical masks. More recently, the United States showed pictures of Saddam Hussein being checked for lice and having his DNA sampled.\textsuperscript{Id.} Koh, \textit{supra} note 164, at 1509 ("even while the United States has been holding Taliban detainees in the exceptional legal category of 'enemy combatants' without Geneva Convention hearings, it has been ferociously protesting the denial of Geneva Convention rights to American prisoners of war captured during the Iraq war"). It is interesting to note that, prior to the Abu Ghraib prison scandal, allegations of double standards were proclaimed in the print media. See, e.g., \textit{President Bush Is Right to Condemn Iraq's Treatment of Captured Soldiers—But His Outrage Rings Hollow}, \textit{THE INDEPENDENT}, Mar. 25, 2003, at 20.\textsuperscript{240} For a detailed account of human rights violations surrounding the Abu Ghraib prison scandal, see Amnesty International, \textit{United States of America: Human Dignity Denied: Torture and Accountability in the "War on Terror"} (Nov. 3, 2004); see also Sean D. Murphy, \textit{U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison}, 98 \textit{Am. J. Int'l L.} 591 (2004); Tim Reid, \textit{Abuse of Prisoners "Widespread"}, \textit{THE TIMES}, May 27, 2004. For an application of relevant human rights norms to the recent torture scandal in Iraq, see Cassese, \textit{supra} note 120. Other sources indicate that, in some cases, the United States' treatment of prisoners led to the death of inmates. See, e.g., Tim Golden et al., \textit{In U.S. Report, Brutal Details Of 2 Afghan Inmates' Deaths}, \textit{N.Y. TIMES}, May 20, 2005, at A1.\textsuperscript{241} White House Fact Sheet, \textit{supra} note 11; see also Neil A. Lewis, \textit{Red Cross Finds Detainee Abuse in Guantánamo}, \textit{N.Y. TIMES}, Nov. 30, 2004, at A1; Roberts, \textit{supra} note 119, at 741 ("However, such treatment would be given as a matter of discretion rather than as a matter of right, and the recent controversy over prisoner abuse in Iraq has caused many to question whether the United States is complying with such standards in practice."). On the questionable treatment afforded prisoners in the war on terror, see generally Sands, \textit{supra} note 147, at 204–22. It is interesting to note that certain prisoners released from Guantánamo Bay have come forward to denounce the perpetration of inhumane treatment and torture by American authorities on the military base. Raymond Bonner, \textit{Detainee Says He Was Tortured While in U.S. Custody}, \textit{N.Y. TIMES}, Feb. 13, 2005, at A1; Rod McGuirk, \textit{Aussie Terror Suspect Says He Was Beaten}, \textit{ASSOCIATED PRESS}, Feb. 13, 2005.\textsuperscript{242} See Michael P. O'Connor & Celia M. Rumann, \textit{Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland}, 24 \textit{CARDOZO L. REV.} 1657, 1734–35 (2003). One of the concerns with the \textit{incommunicado} nature of their detention revolves around the recently raised specter of employing coercive interrogation techniques and torture. Because there is no way to monitor the treatment these citizens are receiving, there is no way to ensure that talk has not turned into improper action in this area. In Northern Ireland, the rules permitting detention and denial of counsel led to flagrant abuse by the police force. Studies on this issue in Northern Ireland have concluded that "[a]n essential safeguard in preventing the use of torture of persons in detention is for lawyers to have immediate access to their client, including during any period of interrogation." There is nothing to suggest this safeguard is any less essential in the United States.\textsuperscript{Id.} In the context of Northern Ireland, a policy of internment was also implemented, a policy that shared many similar characteristics with the situation at Guantánamo Bay. See, e.g., Mark Elliott, \textit{United Kingdom}, 1 \textit{Int'l J. Const. L.} 334, 337 (2003); Ela Grdinic, \textit{Application of the Elements of...
aggregate, these continuous breaches of international humanitarian law and human rights law will place the United States at a significant disadvantage, both in terms of national and individual security, and also from the perspective of legitimate international relations. Sovereign states usually "comply with humanitarian law primarily because of expectations of reciprocity."\textsuperscript{243} This logic of reciprocity also permeates the broader scheme of \textit{jus ad bellum},\textsuperscript{244} while the "tit for tat" principle animates most of the debates surrounding the modern use of force in international law.\textsuperscript{245} No pretension of reciprocity may be asserted here: the United States has exempted itself from applying protections it has vehemently defended for the past fifty years.\textsuperscript{246} In addition to exhibiting a flagrant double standard in the treatment of prisoners, a reality that breeds contempt and attracts disapproval from around the globe, the United States has also significantly eroded its own reputation and

\textit{Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence, 23 Hastings Int'l \\& Comp. L. Rev. 217, 222 (2000).} This policy of internment was eventually rejected as being incongruent with the ECHR in Ireland v. United Kingdom, No. (5310/71), 1 Eur. Ct. H.R. (1978); see also supra note 50. Certain critics argue that indefinite detentions being carried out in the U.K., based on immigration policy, are similar in nature and scope to internment. Christopher Harding, \textit{International Terrorism: The British Response, 2002 SING. J. LEGAL STUD. 16 n.17} (2002).

\textsuperscript{243.} Kenneth W. Abbott, \textit{International Relations Theory, International Law, and the Regime Governing Atrocities in International Conflicts, 93 Am. J. Int'l L. 351, 356 (1999); see also Sands, supra note 147, at 205 (arguing for the principle of reciprocity through the lens of torture: "There are two sets of international rules governing torture and interrogation practices: a first set prohibits torture; a second set provides that torture cannot be used against terrorists, whether they are combatants or criminals. The governing principle must be: \textit{do unto others as you would have them do unto you."")(emphasis added).

\textsuperscript{244.} See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, \textit{The Law and Economics of Humanitarian Law Violations in Internal Conflict, 93 Am. J. Int'l L. 394, 403 (1999)} (speaking of the Geneva Conventions in the context of international conflict: "This reciprocity continues \textit{ex post} when states have the power, if not the legal authority, to withdraw protections in tit-for-tat response to their opponent's breaches."). For a thoughtful background discussion on the concept of reciprocity, see Provost, \textit{supra} note 42, at 211-238.

\textsuperscript{245.} See Abbott, \textit{supra} note 243, at 370; Dunoff & Trachtman, \textit{supra} note 244, at 403; cf. Richard A. Falk, \textit{What Future for the UN Charter System of War Prevention? 97 Am. J. Int'l L. 590, 594 (2003)} ("International law in the area of the use of force cannot by itself induce consistent compliance because of sovereignty-oriented political attitudes combined with the gross disparities in power that prevent the logic of reciprocity and the benefits of mutuality from operating with respect to the security agenda of states.").

\textsuperscript{246.} See, e.g., Harold Hongju Koh, \textit{Jefferson Memorial Lecture Transnational Legal Process After September 11th, 22 Berkeley J. Int'l L. 337, 348-49 (2004)}: Turning to the United States, the final member of the "axis of disobedience," our greatest surprise should be how quickly after September 11th we turned the story from the non-compliance of others with international law, to our own non-compliance. Examples abound . . . second, the U.S. attitude towards the Geneva Conventions—including its actions in Abu Ghraib, its decision to create zones in Guantanamo in which people are being held without Geneva Convention rights as well as to designate certain U.S. citizens within the United States as enemy combatants . . . What we are witnessing is nothing less than an assault by our government on the transnational legal process that we created after World War II in our own perceived national interest.

\textit{See also} Sands, \textit{supra} note 147, at 21-22.
legitimacy on the international scene.\textsuperscript{247} Only in aligning its policies with accepted human rights standards will the United States attract a warranted and, hopefully, reciprocal protection of its own citizens.\textsuperscript{248}

In the same spirit of unilateralism, it is obvious that the United States has created a sort of temporary legal vacuum at Guantanamo Bay,\textsuperscript{249} which has generated criticism and concern from organizations such as Amnesty International\textsuperscript{250} and the Organization of American States.\textsuperscript{251} However, it is not so clear whether the United States would emphatically approve a similar policy if it were to emanate from a foreign state.\textsuperscript{252} Similarly, even though its own policy of incommunicado

\textsuperscript{247} Koh describes the Bush Administration's shift to a policy of "Strategic Unilateralism and Tactical Multilateralism":

If this is the emerging approach, what is wrong with it? First, instead of promoting universal values, the United States has promoted double standards by which other nations are held accountable to human rights standards from which the United States exempts itself. The recent horrors at Abu Ghraib show that the United States is now reaping the whirlwind of its strategy of condoning wide-scale departures from traditional prisoner-of-war protections. By treating these legal regimes as a nuisance to be disregarded in the war against terrorism, the Bush administration forgot the critical role that these legal protections play both in protecting our troops from violations and in protecting our country from needless humiliation by conduct that most Americans find abhorrent. Second, by engaging in this unilateralism, the United States has diminished its standing in the international regimes in which it takes part, limiting its "soft power" or its power to persuade in the global arena. We see this diminished standing in our mounting incapacity to mobilize other countries to help us in the daunting task of rebuilding Iraq. Third and most sadly, this strategy has converted us from the major supporter of the post-war global legal exoskeleton into the most visible outlier trying to break free of the very legal framework we created and supported for half a century.

\textsuperscript{248} See, e.g., Cole, supra note 52, at 1004.

As a pragmatic matter, reliance on double standards reduces the legitimacy of our struggle, and that legitimacy may be our most valuable asset, both at home and abroad. To paraphrase John Ashcroft himself: "To those who pit Americans against immigrants and citizens against non-citizens ... my message is this: Your tactics only aid terrorism." And as a matter of self-interest, what we do to aliens today may well pave the way for what will be done to citizens tomorrow. In the end, however, it is principle that should drive us: the justice of our response should be judged by how we treat those who have no voice in the political process. Thus far, we have performed predictably, but not well.

\textsuperscript{249} See, e.g., Fitzpatrick, supra note 108, at 242.

The attacks of September 11 and the ensuing "war against terrorism" test the limits of the legalist approach, leaving human rights advocates baffled and marginalized. Governments that style themselves as champions of the rule of law against the absolutism or nihilism of terrorists have, at least temporarily, constructed "rights-free zones".


\textsuperscript{252} Harold Hongju Koh speaks to this point, supra note 164, at 1509 ("Although the United States may want its own exceptional 'rights-free zone' on Guantanamo, it surely does not want the Russians to create a similar offshore facility for their Chechen terrorists or the Chinese to erect offshore prisons for their Uighur Muslims.").
and long-term detention of suspected terrorists is highly problematic constitutionally, the United States would certainly deplore any identical foreign practice as constituting an affront to human rights law. Such postures, which are ostensibly grounded in double standards, are difficult to reconcile with the objectives of international humanitarian law and human rights protections.

e. Resisting Protective Parity: Upholding the Rule of Distinction

Throughout this Article, ample reference has been made to the deleterious effects of U.S. policy on the laws of war and human rights, generally. Some commentators, including myself, expound that the current policy of indefinite detention of suspected terrorists not only undermines international humanitarian law, but also places the United States and its allies at a significant risk abroad. Conversely, some authors argue that the gap between the protections afforded POWs and "protected persons" is, in fact, narrowing, and that legal policies pertaining to the war on terror underscore a paradigmatic shift towards protective parity between both classes of traditional subjects under Geneva law. Many arguments have been advanced in assessing the


But we cannot completely rule out the possibility that after many months (or years) of isolation, a suspect might eventually reveal something useful. The problem with that argument is the Constitution—not just its fine points but the very idea of a government under law. If the mere possibility of a useful interrogation is enough to support indefinite detention incommunicado, then no rights and no checks and balances are available at all, except when the executive chooses to grant them. If a ruler in any other country claimed unilateral powers of this sort, Americans would be quick to recognize the affront to the most basic of human rights.

Id.


255. See, e.g., Mofidi & Eckert, supra note 13, at 90.

Not only does the U.S. Administration's conduct fall outside the guidelines of the Geneva Conventions, but it also establishes a dangerous precedent. Every time the community of nations is forced to contend with flagrant aggression, such as that unleashed by the 9/11 attacks, the de facto response leaves normative (de jure) footprints in its wake.

Interpolating unrecognized exceptions into the contours of prisoner of war status, particularly when done by the world's leading military superpower, undermines the Geneva Conventions as a whole. That would hardly be in the interest of the United States, for it is all too easy to imagine how that precedent will boomerang to haunt U.S. or allied forces: enemy forces that might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying prisoner of war status. By flouting international law at home, the United States risks undermining its own authority to demand implementation of international law abroad.

Id.

256. For instance, Professor Derek Jinks delivered a provocative account on this issue. See Jinks, supra note 99, at 375 ("Moreover, several recent developments in humanitarian law and policy suggest that this minimal protective gap is closing. The trajectory of international humanitarian law reflects an emerging "protective parity" across combatant status categories. This protective parity recasts debates
United States' treatment and detention of suspected terrorists. The most persuasive and influential concern voiced by human rights proponents is readily identifiable: the United States should be a leader in upholding well-established principles of human rights rather than disregarding fundamental legal protections in wartime and short-circuiting the application of the Geneva Conventions. In sum, it should rely upon its economic and political influence to disseminate the ideology of liberal democracies.\[257\]

The U.S. policy places the United States and its allies in a precarious situation at home and abroad, as anti-West sentiments grow stronger by the minute.\[258\] Some have argued that denying POW status to suspected terrorists or supporters of terrorist activities is tantamount to depriving human beings of fundamental human protection. Others, through more nuanced interpretations of international human rights standards, have inferred that the official characterization of Guantanamo and Iraqi detainees yields no practical difference with the protection afforded POWs. The objective here is not to resolve the academic debate surrounding the current POW controversy.\[259\] Nor is it to engage in minute legal contortions relating to the laws of war so as to subscribe to one of the two possible theories pertaining to detainees in the war on terror. The purpose of this article is animated by a simple, yet resolute stance on detaining suspected terrorists, an approach that is grounded in principle.

Even though security has permeated legal rhetoric and political speech since 9/11, we must resist the merger of human rights by the human and national security agendas.\[260\] Surely, the case for denying suspected terrorists POW status seems more attractive when one considers that terrorists themselves do not differentiate between civilian and military targets in carrying out their operations. However, isn’t it also true that the war on terror is a war of principle, an exercise in affirming human dignity, a clear demarcation between good and evil,
and, most importantly, the rule of law? The truth is that nothing in the international legal order is so simple, forthright, and limpid. Several conflicting variables and unknowns cloud the equation. All we can hope and fight for is the promotion of human rights, which have an impact on our own societies at home and abroad. If the war on terror is truly an international campaign, punctuated by “make no mistake about it”s and concerted efforts to forestall future terrorist actions, then we must also weigh human dignity and respect equally in the balance. The reign of “security” as a god-like, overarching, and overriding concept, irrespective of other equally relevant considerations, significantly threatens to erode and supplant essential cleavages in international law, such as reciprocity, the promotion of equality, the protection of civilian life, etc. The war on terror certainly must take a step forward in redefining international law in light of current events. However, for every successful step forward, it must also avoid taking two steps backwards by subtracting human beings from fundamental legal protections.

I maintain that the war on terrorism, now more than ever, requires a sharp distinction between “protected persons” and POWs. An opposite stance would signal a failure of the human rights project and, most importantly, indicate that we, as allied nations and united military fronts, sink down to the level of common terrorists by repudiating all that is noble and human about human rights law. Reciprocity is still the guiding principle here: the United States will still have to entertain and cultivate legal and political relationships with state entities, irrespective of whether a war can legally be waged against an international terrorist organization. The argument reaches further than simple legal or political rhetoric: it relies on a question of principle and legitimacy. How can we substantiate an international crusade against destroyers and oppressors of freedom by unconditionally curtailing the very liberties we are seeking to promote?

It becomes apparent from the foregoing considerations that POW status carries with it an inherent badge of honor. A combatant caught in

262. For a discussion of human rights as a matter of international concern, see Peter Malanczuk, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 220–21 (7th rev. ed., Routledge 1997).
263. A similar argument can be made in the context of targeted killing of suspected terrorists, which is addressed infra Part III; see also Matthew C. Wiebe, Comment, Assassination in Domestic and International Law: The Central Intelligence Agency, State-Sponsored Terrorism, and the Right of Self-Defense, 11 TULSA J. COMP. & INT’L L. 363, 402-03 (2003) (“When the United States assassinates individuals before they stand trial and hides to avoid responsibility, there is no difference between the United States and the terrorists.”).
264. On the legality of the war on terror, see supra note 1.
the crossfire who is afforded POW status is entitled to make a powerful, yet simple claim: "I fight by the rules." The importance of such a claim cannot be over-emphasized in an era where rules are being disregarded and subverted by terrorists. There is certainly something deeply oxymoronic about the expression "laws of war," namely the idea of upholding rules in a context where destruction of enemy targets remains a primary objective. Yet, rules and order are what distinguish us from primitive beings. Legal and military symmetry will never be attained in international conflict: the best objective is to provide detainees under our own custody with the treatment we would expect vis-à-vis our own nationals, should they fall in the arms of the enemy. It is evident that upholding a firm scheme of human rights protection generates the right impetus for inducing governments to play by the rules. However, barbaric actions emanating from terrorist factions do not give us a blank check to adopt similar tactics:

No military force will ever conduct its operations in perfect concord with IHL—quite simply, there are “limits to the amount of humanitarian observance that desperately fighting flesh and blood can stand,” and no soldier or state in extremis is ever likely to privilege compliance with IHL over survival. Nonetheless, the general observance of IHL by honorable soldiers fighting in defense of civilization is the behavioral variable which most clearly distinguishes civilized peoples from modern-day barbarians, a venal and intractable assemblage hors de loi (“outside the law”) that inhabits an utterly incompatible moral universe and that, by deliberately targeting innocent civilians permanently dislocates itself, along with its barbarian, piratical, and outlawed progenitors, from the ranks of the civilized. One need not embrace the ancient ordination of territory into civilized and barbarian spheres to defend the assertions that morality, even during war, should march in step with law, that the premeditated murder of innocents is ethically and juridically distinct from their unintentional killing, and that rather than accord terrorists enhanced status under the law defenders of civilization should withdraw the protections of the law they shun. Nor need one lump all enemies together under the barbarian rubric: simply stated, barbarians are those who deliberately attack civilians to advance the destruction of a civilization based upon liberty, law, and respect for individual human rights and dignity.265

It is clear that human rights proponents are not fighting for the right of Guantanamo detainees to purchase soap and cigarettes at the prison canteen. Moderate observers understand and agree that certain precautionary measures should be implemented in times of crisis. In the process, certain freedoms we take for granted will be slightly curtailed or momentarily suspended.266 The widespread objection to Guantanamo

266. This reality has also been acknowledged by British courts. See, e.g., Lord Denning in Reg. v.
Bay does not purport to vindicate every single rule and right in the book. Rather, it aims at safeguarding the validity and legitimacy of international human rights; it promotes important values and principles. When an individual is detained for a period of three years without access to counsel or outside communication, the system has failed. The so-called "war" on terror becomes a blanket to arrest and detain indiscriminately, and human beings become means to the collective well-being, much to the dismay of Kant. Therefore, we must uphold this distinction between POWs and "protected persons" so as to ensure a uniform and, to the extent possible, just application of the Geneva Conventions and of the Covenant.

In addition, ample reference has already been made to the fact that contemporary battlefields harbor theaters of large-scale violence, unconventional weaponry, and convoluted scenarios of situational fighting. It is no easy task to differentiate lawful combatants from unprivileged combatants at first sight and, for all intended purposes, such an endeavor should not be undertaken until a formal military tribunal has been convened, pursuant to Article 5 of Convention III. In fact, this provision may be the last bastion available to detainees in challenging their detention,267 as international humanitarian law does not offer a panoply of avenues of recourse and appeal vis-à-vis state action.268 Consequently, until an official determination of illegality has been pronounced by a competent tribunal, the presumption of POW status should accrue to prisoners, along with all of the benefits and immunities thereunto appertaining.

5. The Situation of Suspected Al Qaeda Terrorists

A few considerations on the status of suspected Al Qaeda members also warrant consideration.

a. Difficulties with the U.S. Position

With regard to members of Al Qaeda, the United States entertains a more radical claim, namely that they are not entitled to any protection

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Home Sec'y, ex. Parte Hosenball, 1 W.L.R. 766, 778 (1977) ("It is a case in which national security is involved; and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place."). For an application of this notion to modern reality, see Conor Gearty, Reflections on Human Rights and Civil Liberties in Light of the United Kingdom's Human Rights Act 1998, 35 U. RICH. L. REV. 1, 17 (2001).

267. See, e.g., Aldrich, supra note 100, at 897.

In my view, international humanitarian law provides all too few opportunities for individuals to challenge state action, but one of those few is the right of access to a tribunal granted by Article 5. It would be regrettable if in practice this right proves to have been effectively negated for Taliban prisoners.

Id.

under the *Geneva Conventions* because they are international outlaws. This assertion hinges on the fact that the Al Qaeda network is not a signatory to the *Geneva Conventions* and, in the view of the executive, eludes the protection of Geneva law. In crafting this legal characterization, the United States effectively suggests that there exists a third category of persons in international law, thereby eroding the distinction between POW and "protected person". Before the response to 9/11, international human rights discourse had only entertained and recognized two categories of persons under the protective scheme of the *Geneva Conventions*: POWs and protected persons. Furthermore, international humanitarian law has always protected unconventional fighters through the mechanism of *Convention IV*, even in its treatment of unlawful or unprivileged combatants, such as current suspected Al Qaeda members. Even the International Criminal Tribunal for the Former Yugoslavia has recognized that unprivileged combatants are entitled to protection. It should be recalled that "protected person" status is a mechanism activated *ipso facto* and *ipso jure*. It follows that "it is not even necessary for the adversary in whose hands a protected person finds himself to recognize that the person is entitled to the protection." In other words, unprivileged combatants have traditionally

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269. For academic support of this proposition, see Paust, *Attacks on the Laws of War*, supra note 1, at 326–27.

270. See supra note 16.


273. See supra note 16.

274. Kittichaisaree, supra note 16, at 139 (discussing the protection scheme for protected persons
been afforded the same protection as civilians under *Convention IV*, while being denied POW status under *Convention III*. This argument is being advanced by different voices in the context of Guantanamo detainees.\(^{275}\) It logically follows from this proposition that "no one can fall in between the two Conventions and therefore be protected by neither of the two."\(^{276}\) This statement has also been endorsed by Amnesty International\(^{277}\) and Human Rights Watch.\(^{278}\)

Aside from signaling a marked departure from the traditional application of the laws of war, denying suspected Al Qaeda members any protection under the *Geneva Conventions* also places all "protected persons" under *Convention IV* at a significant risk. Endorsing a policy of widespread denial of fundamental rights to a group of individuals attracts a corresponding downward thrust in the protection of all civilians. This line of argument is reminiscent of the allegations of double standard in the context of POW status but becomes particularly poignant when considering the recent torture and abuse scandals in Iraq.

A true and honest understanding of the laws of war centers on the distinction between POWs and "protected persons":

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention.\(^{276}\)

It inexorably follows from this idea that every individual not falling within the ambit of POW protection is, intrinsically, a "protected person".\(^{280}\) In tandem, these statements clearly indicate that a "protected person" could as well be a sophisticated terrorist or an innocent child.\(^{281}\)


\(^{276}\) Sassòli, *Use and Abuse*, supra note 187, at 207.


\(^{279}\) Sassòli, *Use and Abuse*, supra note 187, at 207-08.

\(^{280}\) See, e.g., FRANCK, supra note 104, at 277 ("If they do not qualify as combatants they are entitled to be treated as protected civilian persons under the Fourth Convention, although this leaves them liable to punishment for all acts of armed resistance.").

\(^{281}\) For confirmation of this principle, see Prosecutor v. Zejin Delalic, Case No. IT-96-21-T (ICTY Trial Ch., 16 Nov. 1998), para. 272 ("This position is confirmed by article 50 of Additional Protocol I which regards as civilians all persons who are not combatants as defined in article 4(A) (1), (2), (3) and (6) of the Third Geneva Convention, and article 43 of the Protocol itself.").
The task of international humanitarian law is not to differentiate or distinguish them, based on moral or legal considerations. Rather, the objective of Geneva law is to offer them rudimentary initial protection, based on one common characteristic: they are both human. While they are fundamentally different beings, and one has voluntarily engaged in wrongful acts, the aim of Geneva law is to recognize that human beings, guilty or innocent, are entitled to initial protection. The subsequent duty to bring the terrorist to justice will rest with either domestic or international justice systems, but the Geneva Conventions, or non-application thereof, should not be invoked to make an initial legal determination as to the culpability of “protected persons.”

In other words, international humanitarian law should not be used as a mere screening device by the detaining power, so as to take away human rights from a class of protected persons. The laws of war do not support the creation of a new category of persons: there “is no intermediate status; nobody in enemy hands can be outside the law.”  

Contemporary war crime tribunals have also confirmed this statement ad nauseam. Even unilateral executive characterization of an individual as an “enemy combatant” cannot subtract that person from the protection of the Geneva Conventions: “the term ‘unlawful combatant’ is merely descriptive and is by no means intended to create a third status between those of combatant and civilian.” It follows that civilians actively engaged in hostilities “are ‘protected persons’ under the Fourth Geneva Convention but forfeit immunity from attack and become lawful targets for the duration of their engagement in hostilities.” Some commentators argue that this rule is now part of customary international law, thereby imposing a binding obligation on all states involved in international armed conflict, including non parties to the Additional Protocol. This proposition has also been endorsed by the Appeals Chamber of the International Criminal Tribunal for the former

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282. Sassòli, Use and Abuse, supra note 187, at 208; see International Committee of the Red Cross, Commentary to the Fourth Geneva Convention, Geneva, 1958, at 51; see also Kittichaisaree, supra note 16, at 139; Marco Sassòli, La “guerre contre le terrorisme”, le droit international humanitaire et le statut de prisonnier de guerre, 39 CAN. Y.B. INT’L L. 211 (2001).

283. See, e.g., Delalic, Case No. IT-96-21-T, para. 271; Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T (ICTY Trial Ch., 3 Mar. 2000), para. 147.

284. Antonio Cassese, Expert Opinion On Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law, at p. 3 (unpublished manuscript, on file with the author); see also Kittichaisaree, supra note 16.


286. Article 51(3) of the Additional Protocol, supra note 38, at 26 provides that civilians “shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”

Yugoslavia. 288

The protection of belligerent civilians can also be semantically transposed to domestic criminal law. Although the McVeighs of this world commit crimes that are inherently repugnant to humanity, they are nevertheless afforded fundamental due process guarantees: they may confer with their attorneys and they may present a full defense. 289 We grant such individuals those rights because they are human; we do not first adjudicate their moral fiber and then proceed to granting or denying them rights. This is consistent with the logic underlying Convention IV. Based on that rationale, there is no reason to strip human beings of similar rights on the international scene. 290

With this in mind, several commentators assert that fundamental human rights should not be afforded on the basis of status. 291 Yet, by "applying different standards to citizens and non-citizens, the United States appears to be endorsing the idea that certain fundamental rights are tied to one’s status as a citizen rather than one’s status as a human being." 292 This very notion challenges the most rudimentary human need, namely the desire to coexist in a society of law, in a cohesive structure underpinned by respect and dignity. 293


The ultimate human right, which is also an ultimate human need, is to be a member of societies under the law. In that way only can human beings, endowed with the capacity to will and act in consciousness, constantly create themselves in accordance with their purposes. Such a right, and such a need, is the human right and human need in every form of society, from the society of a particular family to the international society of the whole human race, and including all intermediate societies.

Id.
b. Resisting the Creation of a Third Category by Reference to "International Outlaws" and "Unlawful Combatants"

Although the concept of international outlawry is not novel,294 to apply a blanket label of this kind across a group of individuals not only significantly decreases the level of protection afforded all "protected persons," be they terrorists or innocent civilians, but it also frustrates the very purpose of international humanitarian law. The validity of this legal characterization must be called into question: "Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder." Fortunately, we no longer live in the Far West, where the rule of the quickest draw prevails. We coexist in a system of nation-states underpinned by the rule of law, where justice systems, and due process guarantees are tailored to promote the ideals of liberal democracy. The purpose of the war on terror should not only aim at deterring and punishing terrorists. Multilateral cooperation on the suppression of terrorist activities should disseminate democratic ideals and promote human rights, while also calling into question processes and policies lacking transparency or legitimacy within our own societies.295 To label suspected Al Qaeda members "international outlaws" is inconsistent with the second objective. The difficulty with the executive's unilateral characterization of Al Qaeda members has been eloquently summarized by a commentator, as follows:

Equally inapt is the frequent analogy to Al Qaeda as "outlaws."


Although the concept of human rights is not unique to European societies, I argue here that the specific philosophy on which the current "universal" and "official" human rights corpus is based is essentially European. This exclusivity and cultural specificity necessarily deny the concept universality. The fact that human rights are violated in liberal democracies is of little consequence to my argument and does not distinguish the human rights corpus and the ideology of Western liberalism; rather, it emphasizes the contradictions and imperfections of liberalism.

Id.
Outlaws inhabit a twilight space outside the legal order, and they are subject to being shot at will. The idea of killing enemy soldiers on the spot is compatible neither with the pursuit of justice nor with the laws of war. The outlaw is subhuman, undeserving of minimally decent treatment. I do not think we really want to make that claim about terrorists. Nor does it make sense to flatter terrorists by associating them with romantic outlaws who retreat from society to live, metaphorically, with Robin Hood in Sherwood Forest. The purpose of thinking legally about the events of September 11 should be to help describe the danger we confront and to provide a justification, so far as possible, for the shared sentiment that the use of force is an acceptable response.\textsuperscript{297}

In addition, the historical treatment of the laws of war simply does not countenance the addition of a third category of persons in times of war.

The legitimacy of this new category is widely debated in legal scholarship. Some commentators have endorsed it, or, at least have recognized that terrorists are tantamount to international outlaws or are not covered by \textit{Convention IV},\textsuperscript{298} while others have questioned its validity under the existing framework of \textit{jus in bello}.\textsuperscript{299} Others have resolved this discrepancy by suggesting that the current war against international terrorists be guided by the rules of “noninternational armed conflicts” so as to ensure protective parity across the board: under this scheme, enemy combatants, whether privileged or unlawful, and innocent civilians would be treated on an equal footing.\textsuperscript{300} Interestingly enough, it has been argued that the United States should have adopted a law enforcement posture vis-à-vis members of Al Qaeda, thereby signaling that suspected terrorists should be treated as criminals rather than as unlawful combatants.\textsuperscript{301}

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\begin{itemize}
\begin{quote}
The author suggests that, under international law, modern day terrorists are \textit{hostes humani generis}—common enemies of humankind. In the fashion of pirates, who were said by Vattel, “to be hanged by the first person into whose hands they fell.” Equally, terrorists are international outlaws and must fall within the scope of this universal jurisdiction.
\end{quote}
\item \textsuperscript{299} See, e.g., Roberts, supra note 119, at 740–42; Sassoli, \textit{Use and Abuse}, supra note 187.
c. "Unlawful Combatants" and Judicial Deference in Post-9/11 U.S. Jurisprudence

Under the U.S. civil rights paradigm, it inevitably follows that an American citizen accused of terrorism should enjoy all of the constitutional guarantees within the U.S. territory, at least in theory. However, the current administration considers the possible application of constitutional safeguards to suspected American terrorists as a considerable impediment to its counter-terrorism efforts. In fact, even though he was captured in Afghanistan while carrying an AK-47, Yaser Esam Hamdi did invoke the benefits of the Constitution, hinging his petition for habeas corpus on the Fifth and Fourteenth Amendments. In order to respond to this challenge and to justify an indefinite detention in "John Walker Lindh"-like situations, the U.S. government redesignated the U.S. citizen an "unlawful enemy combatant." In doing so, it could then proceed to treat and detain the individual as though he was an enemy alien, thereby stripping him of significant due process guarantees.

RESOL. 263 (2003). Other commentators argue that the war rhetoric is misplaced, as the U.S. is in fact facing a temporary state of emergency. See generally Bruce Ackerman, This Is Not A War, 113 YALE L.J. 1871 (2004).

302. See my comments on the case of John Walker Lindh, supra note 51. It must be noted that the original presidential order providing for the implementation of military commissions to prosecute unlawful combatants and suspected terrorists did not purport to encompass American civilians. In fact, it would appear that the presidential document, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001), only extended to alien combatants. These commissions apparently were intended primarily for use in trying so-called unlawful combatants captured during military operations in Afghanistan or elsewhere abroad. At least as initially drafted, the order granted no jurisdiction over American citizens, and there was no attempt to invoke it to divest the civilian courts in the cases of either John Walker Lindh, an American captured in Afghanistan, or Zacarias Moussaoui, a French national who is the only alleged September 11 conspirator so far apprehended in the United States.

SCHULHOFER, supra note 17, at 4-5.


304. This idea stems from the decision in Ex Parte Quirin, 317 U.S. 1 (1942).

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.

Id at 37-38; see also Schulhofer, supra note 253, at 96 ("That finding of enemy-combatant status, in turn, is enough in the administration's view to support detention for the long duration of this conflict, without any trial at all.").
In addition, some authors expound that the use of the undefined term “enemy combatant” allows the United States to forego some protections found in the Geneva Conventions.305 Others argue that the “rights of political freedom, due process, and equal protection belong to every person subject to United States legal obligations, irrespective of citizenship.”306 After detaining Hamdi for a period of three years, the United States finally released him without laying formal criminal charges.307 As part of his release agreement, Hamdi was compelled to renounce his American citizenship, a requirement that is highly problematic under U.S. constitutional principles and, arguably, unenforceable legally.308 In sum, the holding in Hamdi indicated that the President has authority to detain an American citizen on foreign soil indefinitely, albeit by designating him an enemy combatant.309 Conversely, in Padilla310 the Court held that the President did not have authority to detain an American citizen indefinitely as an enemy combatant on American soil.311

However, it should be noted that labeling someone an “enemy

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306. Cole, supra note 52, at 1004.

307. For more background on the case of Yaser Hamdi, see supra note 51.


311. Id. at 718–24.
combatant” does not exempt the United States from the application of the Geneva Conventions to such an individual. Furthermore, although such individual may not qualify under the protective scheme of POW status, he or she is still entitled to exercise the rights afforded POWs until convicted of unlawful acts by a military tribunal.

In the Hamdi case, the Court of Appeals for the Fourth Circuit found Hamdi to be an enemy combatant, thereby triggering a certain tendency or attitude of deference to executive decision-making in the war on terror. The court expressed the view that such review should be “deferential” and allow a wide margin of appreciation to the executive. In endorsing the government’s characterization of Hamdi as an “enemy combatant,” the court exposed its own reasoning:

The detention of enemy combatants serves at least two vital purposes. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies. In this respect, “captivity is neither a punishment nor an act of vengeance,” but rather “a simple war measure.”

Second, detention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe. As the Supreme Court has recognized [in Johnson v. Eisentrager (1950)], “it would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defense at home.”

312. Koh, supra note 164, at 1509.
313. Schulhofer speaks to this point in the context of the Padilla case. In principle, the administration should be force to elect whether to treat Padilla as a lawful or unlawful enemy combatant. A lawful combatant can indeed be detained without trial, as a prisoner of war, for the duration of hostilities. But prisoners of war must be granted numerous rights relating to decent treatment, contact with outsiders, and freedom from interrogation. The Bush administration clearly regards Padilla as an unlawful combatant entitled to none of those rights. But even an admitted enemy combatant cannot be considered an unlawful combatant, and cannot be stripped of the rights or an ordinary prisoner of war, until he is tried by a military tribunal and found guilty of unlawful acts. In effect the administration seeks to confine Padilla to legal limbo, entitled neither to the privileges of a prisoner of war, nor to trial as an unlawful combatant.

317. Hamdi, 316 F.3d at 465–66. This reasoning seems partially aligned with the holding in In re Territo, 156 F.2d 142, 145 (9th Cir. 1946) (“The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as
The effect of the court's characterization of Hamdi as an "enemy combatant" is clear: the United States can treat him as an alien and strip him of fundamental constitutional guarantees, although even non-citizens are supposedly entitled to some basic procedural safeguards.\textsuperscript{318} However, it is interesting to note that, in \textit{Padilla}, the court inferred that the executive power lacked authority "to detain American citizens seized on American soil and not actively engaged in combat."\textsuperscript{319} It must be stressed that, historically, both U.S. and U.K. judiciaries have deferred to the executive vis-à-vis national security matters.\textsuperscript{320}

In sum, the United States has not complied with the \textit{Geneva Conventions} or the \textit{Covenant} with regard to some prisoners: several Guantanamo Bay detainees have not been brought to trial. In most cases, they are isolated from family and counsel, although they have received visits from Red Cross officials\textsuperscript{321} and are allowed to have a Muslim imam\textsuperscript{322} within the facility. In addition, military tribunals have recently been established for detainees in response to the ever-increasing criticism of U.S. policy on indefinite detention.\textsuperscript{323} According to this procedure, prisoners are allowed to plead their case before a panel of three individuals.\textsuperscript{324} Furthermore, certain war crimes trials are being practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released."). Compare the holding in \textit{Hamdi} with Judge Wesley's dissenting opinion in \textit{Padilla v. Rumsfeld}, 352 F.3d 695, 726 (2d Cir. 2003) (arguing that the executive has the power to detain unlawful combatants in the interest of national security, even if they are American citizens), rev'd, 542 U.S. 426 (2004).

\textsuperscript{318} See, e.g., Heymann, \textit{supra} note 31, at 449.

While non-citizens—both resident aliens and visitors from other countries and even illegal entrants—are entitled to the familiar constitutional protections given to crime suspects by the Bill of Rights, they remain subject to arrest, detention, and questioning for any violation of the immigration laws that can lead to removal from the United States (what we used to call deportation). When held simply for removal, non-citizens do not have a right to be furnished a lawyer at state expense, and their failure to speak can be used against them. Id.

\textsuperscript{319} See \textit{Padilla}, 352 F.3d at 722 (Parker & Pooler, JJ.).


\textsuperscript{321} See, e.g., Saito, \textit{supra} note 291, at 11; Elizabeth Becker, \textit{Red Cross Man in Guantánamo: A "Busybody," but Not Unwelcome}, \textit{N.Y. Times}, Feb. 20, 2002, at A10. An interesting parallel with the Israeli experience can be drawn here. As discussed earlier, \textit{supra} note 63, two suspected Lebanese terrorists were detained under the Israeli Emergency Powers (Detention) Law by virtue of the same rationale many Guantanamo detainees are being held captive: they represented a threat to national security. Based on the same logic of national security, the Lebanese detainees had been systematically denied visits from Red Cross officials. Stating that the humanitarian interests outweighed national security, coupled with the length of the detention, the reviewing court decided that the detainees were, in fact, entitled to have visits from the Red Cross. HC 794/98, Sheikh Abed El Karim Ubeid v. Minister of Defence, 55(5) P.D. 769.

\textsuperscript{322} See Murphy, \textit{supra} note 188, at 476, 478.


initiated before military commissions, while others have been postponed.\textsuperscript{325} Interestingly, at the time of writing, some federal courts are denouncing the situation in Guantanamo Bay, stating that the mechanism of military commissions is flawed.\textsuperscript{326}

Such is the case of Salim Ahmed Hamdan, a driver and collaborator of Osama bin Laden from 1996–2001, who was, up until now, facing war crimes charges. However, the United States District Court in Washington halted his war crimes trial, judging among other things that the application of Article 5 of \textit{Convention III} had been disregarded, and that the proceeding before the military commission lacked fundamental elements of a fair trial.\textsuperscript{327} The court ruled that “President Bush had both overstepped his constitutional bounds and improperly brushed aside the Geneva Conventions in establishing military commissions to try detainees at the United States naval base.”\textsuperscript{328} Nevertheless, and even despite this warning by the United States District Court, it seems that U.S. authorities are carrying on with the hearings before military tribunals.\textsuperscript{329} This posture is difficult to defend, especially in light of recent U.S. Supreme Court jurisprudence. Following widespread outrage, political pressure, and heated debates over the situation at Guantanamo Bay and, with the input of prominent human rights proponents,\textsuperscript{330} the Supreme Court ruled on the legality of indefinite detention following 9/11. In a series of cases,\textsuperscript{331} the Supreme Court held that American citizens could not be detained indefinitely by unilateral presidential

\textsuperscript{325}. For example, such was the case of David Hicks, an Australian national detained at Guantanamo. See Neil Lewis, \textit{National Briefing: Washington: War Crimes Trial Postponed}, \textit{N.Y. Times}, Nov. 4, 2004, at A23.


\textsuperscript{331}. Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Padilla, 542 U.S. 426. A British House of Lords decision rejecting indefinite detention without criminal charge or due process was also rendered recently, thereby signaling that the British judiciary is aligning its view on indefinite detention with that of the U.S. Supreme Court. \textit{See} A (FC) and others (FC) v. Sec’y of State for the Home Dep’t, U.K.H.L. 56 (2004).
order, without access to counsel or judicial review, and that the United States could not forcibly displace non-American citizens to Guantanamo, while simultaneously denying them access to U.S. courts to challenge their detention. It remains to be seen how the executive will respond to the Supreme Court’s reaffirmation of the balance of power in this period of national and international unrest.


The U.K. proudly brandished the torch of international human rights on behalf of its own nationals in Guantanamo. In fact, it claimed that, regardless of the outcome of the debate over the application of the Geneva Conventions, Guantanamo detainees were certainly protected under customary international law. Unfortunately, we cannot say the same about the treatment of alien suspects within its territory. In fact, the A, X and Y decision indicates that the U.K.’s domestic situation is far from human rights oriented. In that decision, the British government subordinated authority to detain suspected terrorists to the right to expel aliens from the country. The court crafted a somewhat nebulous distinction between nationals and non-nationals, which may be summarized as follows: nationals have a right of abode while aliens have the right not to be deported to countries where they could face torture or inhuman and/or degrading treatment. Hence, based on a logic of immigration, namely that the state can expel the suspects by virtue of its inherent sovereign authority, the court held that these aliens could be detained indefinitely.

In many regards, this decision is similar to the Fourth Circuit Court of Appeals’ holding in Hamdi, in that the British Court of Appeal conferred a wide margin of appreciation and decision-making upon the

334. Id. para. 39.
335. Id. paras. 39–64.
336. Heymann, infra note 31, at 448, raises an important and related point when addressing indefinite detention in the U.S.

[W]e can try to prevent a terrorist attack, especially at a time when we have received some warning, by detaining aliens illegally in the United States or removable for cause (or on the basis of the new detention power claimed in President Bush’s “military order”) who are in some way associated with those of have been identified in connection with prior terrorist events. To whatever extent the number detained is adequate to create a significant chance of interference with the terrorist plan, the tactic will be effective. In each case, the government would be acting within its ordinary powers to deal with the aliens who may be removable, although not for the immigration purposes that explain granting the power to detain an alien illegally in the United States (or someone needed for testimony at a later trial).

Id. For a thoughtful review of the legal implications of administrative detention, see Wilsher, infra note 138.
This outcome is difficult to grasp, given the Abbasi decision on one hand, but also considering Lord Brooke’s separate opinion and particular reliance on Justice Jackson’s famous dissent in Shaughnessy v. United States. In crafting his judgment, Lord Brooke summarized the impact of international efforts against terrorism on the detention of non-nationals: while the doctrine of the inherent power of the state to determine applicable treatment of non-nationals within its territory is being set aside, considerable emphasis is now placed on international human rights norms and, therefore, any restriction on individual liberty must be grounded in law and necessity. Proportionality between the ends and the means also guides the analysis in that the “state’s power to detain must be related to a recognised object and purpose”. Finally, Lord Brooke pointed out that “both customary international law and the international treaties by which this country is bound expressly reserve the power of a state in time of war or similar public emergency to detain aliens on grounds of national security when it would not necessarily detain its own nationals on those grounds.” Interestingly enough, the Court in Abbasi adopted this portion of Lord Brooke's reasoning verbatim.

Two conclusions can be drawn from this development in British jurisprudence. First, the Court’s attitude dissimulates a normal and understandable double standard: it was adamant about having its own nationals repatriated from Guantanamo Bay, declaring that the U.S. naval base was tantamount to a legal black hole. Yet, in the same sweeping opinion, it also endorsed Lord Brooke’s judgment and held that non-nationals may be held indefinitely. Second, in relying on this rationale, the Court has in fact ensured that post-9/11 policy on indefinite detention has come full circle. Hence, it is now fair to assume that U.K.

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337. Compare A, X and Y, with Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003). The court in A, X and Y stated:

> Decisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference to the Secretary of State because he is better qualified to make an assessment as to what action is called for,

A, X and Y, para. 40.


> Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed or exiled save by the judgment of his peers or by the law of the land.

Id. at 218. For endorsement of this proposition by Lord Brooke, see A, X and Y, at para. 84.


340. Id.

341. Id.

policy on indefinite detention closely mirrors that of the United States, albeit through different means, channels, and legal justifications.\footnote{343} 

III. TARGETED KILLING OF SUSPECTED TERRORISTS

It is no secret that both the United States and Israel have been engaging in a policy of targeted killing of terrorists.\footnote{344} This policy has been sharply criticized as an impediment to peaceful relations and other initiatives conducive to stability, especially in the case of Israel.\footnote{345} In 2002, the High Court of Justice of Israel unanimously refused to intervene in the state's policy of targeted killing,\footnote{346} which it saw as a non-justiciable issue.\footnote{347} Under this policy, the military identifies a particular terrorist and proceeds to remove that person through an aerial strike\footnote{348} or other means of assassination.\footnote{349} Because this type of practice is incompatible with international law, which categorically prohibits extra-judicial executions, governments often dissimulate their actions.\footnote{350} Such is the case in Israel,
where the death sentence has only been judicially imposed once, in the trial of Adolf Eichmann. Nevertheless, senior Israeli officials have admitted that targeted killing is often used to thwart future terrorist attacks, to punish suspected terrorists, and to deter further terrorist activity. Some scholars argue that Great Britain, too, although not resorting to capital punishment of suspected terrorists through judicial channels, might have engaged in extra-judicial execution of individuals involved in activities hostile to the security of the state.

The policy of targeted killing shares an intimate connection with the policy of indefinite detention, in that both practices have a significant impact on human rights and due process. However, there is one significant difference between the policies, hinging on the range of consequences on the international human rights scheme. Under indefinite detention, the rights of the detainee are suspended temporarily, while the reintegration of the individual in society is still possible. Conversely, under the targeted killing practice, such prospect does not exist: the whole objective of the policy is to assassinate the target. This objective inherently carries with it significant circumvention of usual due process and constitutional safeguards with no possibility of appealing the decision nor of presenting a defense against the adversary’s finding of culpability. Aside from the separate issue of torture, which partially falls under the question of indefinite detention, these two policies are the most important and troublesome practices in the war on terror. In assessing their validity, one common thread must act as a point of reference: international human right standards.


352. See, e.g., Suzanne Goldenberg, Israel Accused of Policy of Murder: Palestinians Say Barak is Giving the Military a Free Hand for Assassinations, THE GUARDIAN, Jan. 11, 2001 ("I can tell you unequivocally what the policy is," the deputy defence minister, Ephraim Sneh, told Israel Radio last week. "If anyone has committed or is planning to carry out terrorist attacks, he has to be hit. It is effective, precise, and just."). The state of Israel has also claimed responsibility for specific killings. Chibli Mallat, The Original Sin: "Terrorism" or "Crime Against Humanity"?, 34 Case W. Res. J. Int'l L. 245, 245 (2002) ("Arab uneasiness is shared by governments and peoples, who hear the current Prime Minister of Israel rave on the one hand about the self-righteousness of ‘targeted killings.’").

353. See, e.g., TIM PAT COOGAN, THE IRA 575-82 (2002); see also For the Sake of Democracy, Britain’s “Dirty War” Must be Investigated, IRISH TIMES, May 21, 2003, at 14.

354. In the context of Israel, it has been advanced that a policy of targeted killing enables the Israeli military to better control the territory. Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 Am. J. Int'l L. 1, 21 n.162 (2004). The issue of control is raised in the following quote by a senior Israeli official regarding the policy of “targeted killing”:

“Targeted killing is not only very valuable,” Maj. Gen. Giora Eiland, chief of planning and policy in the Israeli military and one [of] its most senior officers, said in a recent interview. “If we could not use this method in areas like Gaza, where we do not control the territory…we could not fight effectively against terrorist groups.”

A. ARGUMENTS FOR AND AGAINST TARGETED KILLING

Much has been written on the issue of targeted killing, both in favor and against such a policy.\(^{355}\) Many compelling arguments have been advanced in legal scholarship. For example, several commentators expound that, under certain circumstances, targeted killing may be interpreted as a legitimate exercise of the inherent right to self-defense under international law.\(^{356}\) Although it is fair to assert that targeted killing can, at best, only be reconciled tenuously with the extant international framework,\(^{357}\) it has been argued that a logic of anticipatory self-defense could also justify such practice.\(^{358}\) In this spirit, it has sometimes been advocated that targeted killing is the most attractive remedy in forestalling terrorist activities.\(^{359}\) Even though the conceptual difference between “targeted killing” and “assassination” has engendered confusion,\(^{360}\) influential voices argue that killing terrorists is a lawful exercise of military activity, as opposed to assassination, which necessarily entails removing civilian political leaders for political purposes.\(^{361}\) In fact, several American presidents have endorsed the idea of targeted killing and, consequently, enticed the Department of Defense to develop a guiding policy on this issue.\(^{362}\) For instance, President


\(^{362}\) See, e.g., Alan Einisman, *Ineffectiveness at Its Best: Fighting Terrorism with Economic
Clinton reportedly vetted Osama bin Laden's capture or death.\textsuperscript{363} The response to 9/11 is no exception.\textsuperscript{364} After that day, President Bush apparently authorized the Central Intelligence Agency (CIA) to "pursue an intense effort to end bin Laden's leadership of Al Qaeda."\textsuperscript{365}

From the foregoing considerations, it is clear that the driving force behind these arguments is prevention. Traditionally, the main arguments militating in favor of an acceptable policy of assassination of terrorists were summarized as follows:

Assassination may preclude greater evil \ldots produces fewer casualties than retaliation with conventional weapons \ldots would be aimed at the persons directly responsible for terrorist attacks \ldots Assassination of terrorist leaders would disrupt terrorist groups more than any other form of attack; and \ldots leaves no prisoners to become causes for further terrorist attacks.\textsuperscript{366}

Interestingly, some authors attempt to discredit the moral argument against targeted killing, stating that advocating against such a policy is tantamount to opposing any removal of individuals, be they combatants or non-combatants, in the context of "traditional" war.\textsuperscript{367}

Conversely, some commentators assert that we must uphold the existing scheme of \textit{jus ad bellum}, while placing particular emphasis on the fact that the \textit{Bush Doctrine} is subverting the "immediacy of the threat posed"\textsuperscript{368} element under use of force law.\textsuperscript{369} These human rights proponents expound that a policy of targeted killing will not shake the foundations of terrorism but rather will only attract retaliation,\textsuperscript{370} thereby

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\textsuperscript{363} Sean D. Murphy, \textit{Terrorist Attacks on World Trade Center and Pentagon}, 96 AM. J. INT'L L. 237, 249 n.91 (2002).


\textsuperscript{366} Pickard, \textit{supra} note 297, at 31–32.


\textsuperscript{368} It is interesting to note that the three requirements found under the famous \textit{Caroline} incident, namely necessity, imminence, and proportionality, also govern the exercise of preemptive self-defense. See, e.g., Brunde and Toope, \textit{supra} note 6, at 251; Robert Y. Jennings, \textit{The Caroline and McLeod Cases}, AM. J. INT'L L. 32, 82 (1978); Michael Byers, \textit{Letting the Exception Prove the Rule}, under heading "Self-Defense and Weapons of Mass Destruction" (Carnegie Council on Ethics and International Affairs), at http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/852 (last visited May 1, 2004).


widening the gap between Arab and Western societies and confirming that Islam is being singled out, scrutinized, and targeted. Fiercer voices vehemently condemn the practice of targeted killing under international law—with some emphasis on foreign policy and diplomatic considerations—regardless of the circumstances. The most attractive argument against a policy of targeted killing relies predominantly upon due process concerns and procedural safeguards. In addition, not only is targeted killing incompatible with due process, but it also eludes the traditional war paradigm, while being inconsonant with the United States' obligations toward Iraqi and Afghani nationals on their respective territories. More importantly, such a policy impedes stability and peace-building, while placing collateral or by-standing civilians at significant risk: “Targeted killings shrink institutional repertoire by decreasing the stake of each side in peaceful means of dispute resolution. They also undermine inclusion, because they tend to affect not only specifically intended targets, but also civilians from the same communities who happen to be in the way.” As mentioned, not only do targeted killings engender collateral damage in the form of unnecessary civilian death, but they also have a deleterious effect on democratic due process, regardless of whether terrorist organizations may be targeted with military force. By assassinating a suspected terrorist, we are in fact stripping that person of all the procedural guarantees surrounding a fair trial and usually


374. See, e.g., O'Connell, supra note 45.


376. See supra note 5 and accompanying text.


The “targeted killing” or assassination of suspected practitioners of violence by government, including the Israeli government’s killing of Hamas leaders, suffers from the same flaws as killings carried out by transnational oppositional organizations. Such summary measures do not comfortably fit within the procedural safeguards of law enforcement, the temporal and geographic bounds of most wars, or the obligations to a civilian population undertaken by an occupying power.

Id. at 411; see also supra note 33.

378. On the issue of whether terrorists may be targeted with military force, see Brown, supra note 191, at 24–25 (“If a non-state actor such as a terrorist organization commits aggression against a state, and the aggression is of sufficient scale and effect to amount to an armed attack, then the terrorist organization itself—notwithstanding its non-combatant status—has committed an armed attack against the state.”).
afforded any accused under domestic criminal law or human rights law. In short, we are depriving that individual of the right to a fair trial, a cognizable and irreconcilable affront to international human rights norm. The objective here is not to weigh every possible argument for and against targeted killing, nor is it to resolve the debate surrounding such a policy. Rather, my analysis purports to briefly canvass the major international legal restraints on targeted killing, in order to demonstrate that, similar to indefinite detention, this practice is morally and legally unpalatable under the current scheme of international law. Furthermore, carrying out a shoot-to-kill policy when apprehension of a given suspect is reasonably feasible would clearly violate the Fourth Amendment.

B. INTERNATIONAL LEGAL RERAINTS ON TARGETED KILLING

Belonging primarily to the armed conflict paradigm, the policy of targeted killing engenders a myriad of moral dilemmas in the war on
terror. The focal point is easily decipherable: to what extent is the targeted killing of suspected terrorists justifiable under international law? Although an analysis of the legality of this practice will ineluctably require the international community to engage in profound moral introspection, targeted killing, like indefinite detention, does not exist in a legal vacuum. In fact, international law is sufficiently defined and circumscribed to condemn such a policy. The primary reason behind the illegality of such practice lies in the very purpose underlying the laws of war and international humanitarian law: the protection of innocent civilians. Furthermore, the distinction between combatants and non-combatants, including unprivileged belligerents, will undoubtedly inform the analysis.

In a broader sense, from the perspective of international law and order, condoning the targeted killing of human beings, without any form of legal or judicial adjudication, regardless of the crimes involved, would be tantamount to an aberration. Unlike forcible displacement or abduction of suspected terrorists, where the objective is to neutralize, relocate, and prosecute certain individuals under domestic law, the very purpose of targeted killing is to eliminate a human being without detention or interrogation. The policy of targeted killing inherently entails greater stakes and, correspondingly, moral objection to it should be heightened.

Articles 48 and 51(1)(2) of the Additional Protocol indicate that civilians may not be targeted for an attack. As discussed above, this rule is now part of customary international law. As a corollary, only

385. See, e.g., Naftali & Michaeli, supra note 347, at 369–70 ("Targeted state killings do not take place in a vacuum; they reflect an administrative decision, a deliberate choice of means of warfare in response to attacks against Israelis in the context of the al-Aqsa Intifada.").

386. See supra note 9.

387. On this rule of distinction, see Jinks, supra note 99, at 378–79.

388. In fact, I harbored similar resistance vis-à-vis a policy of forcible abduction of suspected terrorists, namely when confronted with a Yunis-like situation. Vincent-Joël Proulx, Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?, 19 AM. U. INT’L L. REV. 1009, 1017 (2004). In sum, the thrust of my policy argument was that it is difficult to promote a system where transnational bounty hunters abound, where legal institutions may lose part of their institutional structure or impact, and where law enforcement agencies are free to concoct elaborate and deceitful schemes, such as "buy and bust operations." This type of situation seems too reminiscent of the Far West to fit under a global framework where human dignity and protection of the individual should prevail.

389. See, e.g., Imseis, supra note 350, at 108 (speaking of a "a deliberate government policy carried out under government orders").

390. Additional Protocol, supra note 38, arts. 48, 51(1)–(2). The definition of “civilian” is found at Article 50 of the Additional Protocol.


392. See also Military Prosecutor v. Omar Mahmud Kassem, 42 INT’L L. REP. 470, 483 (Israeli Mil. Ct. 1971) ("Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.").
military targets are traditionally permissible under this regime. Like under Article 44(3) of the Additional Protocol and Article 4.A(2)(b) of Geneva Convention III, members of military forces have an obligation to distinguish themselves from the civilian population. This reasoning is also consonant with the U.S. Supreme Court's holding in Ex Parte Quirin. Furthermore, Article 51(4)(5) of the Additional Protocol specifies that indiscriminate attacks are not permitted, while the methods of warfare used should not inflict superfluous or unnecessary injury, pursuant to Article 35(1)(2). In order to attain this objective, Article 57 of the Additional Protocol enumerates several precautionary measures tailored to minimize possible damage to civilian life. This requirement is also philosophically adjacent with the International Court of Justice's Advisory Opinion on the use of Nuclear Weapons, where the Court identified two cardinal principles of humanitarian law: the protection of the civilian population, premised on the distinction between combatants and non-combatants, and the prohibition on causing unnecessary suffering to combatants. It is interesting to note that the U.S. Field Manual also mirrors these fundamental postulates of international humanitarian law:

The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:

a. Protecting both combatants and noncombatants from unnecessary suffering;

b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and

c. Facilitating the restoration of peace.

From this legal framework, it is clear that the protection of civilians is sacrosanct and is the uncontested cornerstone of international

393. Additional Protocol, supra note 38, art. 48.
394. Supra note 174.
395. Supra note 177.
397. Additional Protocol, supra note 38, arts. 51(4)–(5).
398. In its decision regarding targeted killing, H.C. 5872/01, Barakeh v. Prime Minister, 56(3) P.D. 1, the High Court of Justice of Israel initially declined to address the issue of state-sponsored assassinations due to the nature of the means of warfare chosen by the state. See Naftali and Michaeli, supra note 347, at 369 (translating the relevant portion of the judgment: “The choice of means of warfare, used by the Respondents to preempt murderous terrorist attacks, is not the kind of issue the Court would see fit to intervene in.”).
399. Additional Protocol, supra note 38, arts. 35(1)–(2).
400. Id. art. 57.
humanitarian law. However, when faced with sophisticated terrorist organizations such as Al Qaeda, well-defined theoretical guidelines tend to blur. We know for certain from Article 51(3) of the Additional Protocol that civilians who take part in hostilities are lawful targets. A contrary policy would entail perverse results: members of military forces could disguise themselves as civilians in order to deceive and to fulfill military objectives. Many jurisdictions have confirmed the validity of this statement, including in the case of Mohamed Ali. An interesting parallel may be drawn here between terrorists and mercenaries. It is fair to assume that both these classes of irregular combatants will usually not be afforded POW status, primarily because they do not conduct their operations in accordance with the laws of war. Even if we were to accept that these types of fighters do not raise a doubt as to their status and, correspondingly, attract less protection than regular combatants, they would nevertheless be entitled to a fair trial, along with all the guarantees found at Article 75 of the Additional Protocol.

There is no doubt that the majority of Al Qaeda members actively engaged in belligerent activities would fall within the purview of Article 51(3), thereby facing two major consequences for being unprivileged combatants taking part in the hostilities. On one hand, they would not be entitled to POW status. On the other hand, and as a corollary to the first consequence, such individuals who have become lawful military targets as a result of their belligerency, are not immune from prosecution for their acts. It logically follows that civilians not actively participating

403. Additional Protocol, supra note 38, art. 51(3). For academic support of this proposition, see, for example, Watkin, supra note 354, at 16. See also supra notes 282–88.
404. This reasoning is consonant with the holding in Ex Parte Quirin. We also saw the condemnation of this practice in the post-Geneva Convention era, namely in Mohamed Ali and Another v. Public Prosecutor, 42 Int'l L. Rep. 458 (Malay., Judicial Comm. of the Privy Council, 1968).
406. See, e.g., Draper, supra note 204, at 173 (concluding that irregular combatants do not comply with one or more requirements found in Article 4 of Convention III). For a practical application of this concept to members of Al Qaeda, see, for example, Vierucci, supra note 98, at 294 ("Finally, Al Qaeda has certainly also contravened the requirement of conducting its operations in accordance with the laws and customs of war.").
407. Additional Protocol, supra note 38, art. 75; see also Kittichaisaree, supra note 16, at 140 n.63.
Since mercenaries are not considered by customary international law to be combatants, they would presumably be civilians, but since they take a direct or active part in the hostilities, the scope of their protection is relatively more limited than that of civilians taking no active part in the hostilities. They would, for example, be entitled to the right to a fair trial and the fundamental guarantees under Art. 75 of AP I...

Id.
408. Article 50(1) of the Additional Protocol establishes who is entitled to POW status via a renvoi back to Article 4A of Convention III. See my comments on Article 4 of Convention III, supra Part II.B.4.b.
409. See Cassese, supra note 284, at 3.
Civilians who take a direct part in hostilities are "protected persons" under the Fourth
in the hostilities retain their "protected person" status, pursuant to Article 5 of Convention IV.\textsuperscript{410} Furthermore, "when civilians taking a direct part in hostilities lay down their arms, they re-acquire non-combatant immunity and may not be made object of attack although they are amenable to prosecution for unlawfully participating in hostilities (war crimes)."\textsuperscript{411} Hence, we may draw an important question from these considerations: are the U.S. and Israeli armies complying with international law when they target individuals who, if captured, would not attract POW status? In order to pronounce on the legality of such a policy, it is imperative to briefly analyze to what extent the rules of \textit{jus in bello} prohibit targeting lawful combatants, before moving on to the more delicate question of targeting non-combatants.

1. \textbf{Targeting Lawful Combatants Versus Non-Combatants}

As a general rule, the Geneva Conventions do not apply to targeted killing, as they remain silent on who constitutes a lawful target.\textsuperscript{412} Thus, to examine targeted killing of individuals who are not in the hands of the enemy, we must rely on Article 23 of the Hague Regulations\textsuperscript{413} and the Additional Protocol. Article 23(b) of the Hague Regulations provides that it is "especially forbidden" to "kill or wound treacherously." In fact, the "term 'treacherously' means that an act is carried out through a breach of confidence",\textsuperscript{414} thereby militating in favor of a sharp distinction between combatants and non-combatants.\textsuperscript{415} We could envision a

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\item[410.] \textit{Convention IV,} supra note 11, art. 5.
\item[411.] Cassese, \textit{supra} note 284, at 3; see also Yoram Dinstein, \textit{The Distinction Between Unlawful Combatants and War Criminals, in International Law at a Time of Perplexity} 102, 112 (Yoram Dinstein ed., 1989).
\item[412.] This is not to say that the \textit{Geneva Conventions} will be excised altogether from the equation of targeted killing. In fact, the \textit{Conventions} will have relevant applications in some circumstances. A case in point is the famous example of Navy Captain Shelly Young's legal advice. In October 2001, the U.S. military identified a Taliban convoy, which reportedly carried wanted Taliban leader Mullah Mohammed Omar. The military asked permission to strike the convoy. Upon Captain Shelly Young's advice, it refrained from carrying out the strike, fearing, among other things, that women and children were also being carried in the convoy. One of the main concerns in disapproving the proposed strike relied upon the prohibition of state-sponsored assassination, as found in the Geneva Conventions. Esther Schrader, \textit{Who's Pulling the Trigger? Combat Often Conducted on the Advice of Counsel,} \textit{Miami Herald,} Feb. 24, 2002.
\item[413.] \textit{Hague Regulations,} supra note 39.
\item[414.] Cassese, \textit{supra} note 284, at 7.
\item[415.] See, e.g., Lieutenant Colonel (s) Joseph P. "Dutch" Bialke, \textit{Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict,} 55 A.F. L. REV. 1, 23 n.27 (citing \textit{Handbook of Humanitarian Law in Armed Conflicts} 471 (Dieter Fleck ed.,
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situation where members of a mission purporting to “take out” a target would resort to deceitful tactics and violate the laws of war to achieve the objective. For instance, if the attackers were to infiltrate a community, wearing civilian clothing, in order to remove the target, this would clearly contravene to the Hague Regulations. In canvassing these provisions, we automatically see a connection with Article 37 of the Additional Protocol, which prohibits killing through perfidy or through the usurpation of the opponent’s confidence. However, these arguments are far from dispositive, as aerial attacks on individuals do not, per se, involve the use of deceitful tactics.

One of the most persuasive legal restraints on targeted killing of individuals lies in Article 23(c) of the Hague Regulations and Article 40 of the Additional Protocol, which unequivocally create an obligation on the targeting force to provide quarter. The explanation usually invoked to paraphrase the obligation to provide quarter has taken on many forms in history. In short, this obligation may be encapsulated as follows: in combat, no one is ever entitled to state “kill them all” or “take no prisoners,” and is thereby forbidden from conducting operations aiming to fulfill these statements.

Two divergent positions on the proper reading of the provisions warrant consideration. Firstly, one could opine that, when engaged in hostilities, an attacking force is entitled to kill any individual who belongs to the enemy army. If a combatant decides to lay down arms and surrender, then he will be entitled to claim POW status. This necessarily places the onus to manifest the intention of becoming a POW or laying down arms on the individual combatant and, correspondingly, implies that the opposing side must be receptive to the notification. Therefore, based on that reading of the provisions, the prohibition on

\[\text{Id.}\]

\[416.\text{Additional Protocol, supra note 38, art. 37. On the notion of perfidy during wartime, see Joshua Rozenberg, The Perils of Perfidy in Wartime, THE DAILY TELEGRAPH, Apr. 3, 2003; see also The Iraq Conflict: Laws of War, Prisoners of War, THE INDEPENDENT, Apr. 1, 2003.}\]

\[417.\text{Hague Regulations, supra note 39, art. 23(c) (“Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden... (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion”).}\]

\[418.\text{Additional Protocol, supra note 38, art. 40 (“It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”).}\]

\[419. \text{See Cassese, supra note 284, at 3.}\]
not giving quarter would not be applicable to targeted killing.

Conversely, one could also advocate that the provision on quarter governs the targeted killing issue, and rightly so. Although, in the past, these provisions have sometimes been understood through the lens of the first reading, I contend that targeted killing amounts to a violation of customary international law. When the United States or Israel proceeds to aerial attacks, they are effectively stripping the target of his right to claim POW status,\(^\text{420}\) which is in direct violation of Articles 4 and 5 of Convention III.\(^\text{421}\) Similarly, another legal restraint on targeted killing resides in Article 41 of the Additional Protocol,\(^\text{422}\) which grants immunity from attack to soldiers who are *hors de combat*.\(^\text{423}\) It follows that, when soldiers are not *hors de combat*, they remain lawful targets, provided the attack is carried out using weapons that discriminate between combatants and non-combatants to the extent possible. The language in this provision clearly indicates the intention of its drafters to regulate the conduct of hostilities. Even ordinary combatants who are entitled to POW status are not unconditionally lawful targets or invariably subject to attacks. This only reinforces the proposition that unprivileged combatants, who are deprived of POW status, should have the opportunity to surrender or lay down arms.\(^\text{424}\) Hence, a policy of targeted killing seems intractable under any circumstance, even if applied to regular combatants. There is a more than subtle distinction between situational fighting, where combatants have the opportunity to abdicate or to waive a white flag ostentatiously, and a willful plan to carry out an assassination without providing the human target the opportunity to surrender. I maintain that this distinction is authoritative.

The final legal restraint is found at article 51(5)(b) of the Additional Protocol\(^\text{425}\) and brings us to the legality of targeting unprivileged

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420. Also, the practice of targeted killing does not afford the targeted individual the possibility to surrender, regardless of whether that person would have been entitled to POW status or not. Hence, the obligation to provide quarter is defeated. See, e.g., O'Connell, *supra* note 45.

421. See my discussion on the importance of POW status, *supra* Part II.B.4.

422. See Additional Protocol, *supra* note 38, art. 41.

423. *Id.* It is interesting to note that, similarly to combatants who lay down arms, terrorists who are planning an attack may not be targeted if they are not actively participating in hostilities. They are, however, subject to prosecution for planning terrorist activities. Terrorists who plan or prepare, or somehow aid and abet in the planning or preparation of an attack, may not be targeted as long as they are not engaging in a military operation on the battlefield. Also those terrorists who, after committing an hostile act, lay down arms, may not be made object of attack. However, they may be arrested and brought to trial. The trial must afford the relevant internationally recognised judicial safeguards. Cassese, *supra* note 284, at 13.

424. It must be stressed that when they do lay down arms, these individuals will be amenable to prosecution for their belligerent acts. See *supra* note 409; *Law Reports of Trials of War Criminals, United Nations War Crimes Commission*, vol. VIII at 58 and vol. XII at 86 (1949).

425. Article 51(5)(b) of the Additional Protocol states:

5. Among others, the following types of attacks are to be considered as indiscriminate: ...
combatants, namely individuals who do not enjoy the benefits of POW status. This provision prohibits an attack that may be expected to cause incidental loss of civilian life or injury to civilians and which would be excessive in relation to the concrete and direct military advantage anticipated. When it ratified the Additional Protocol, the U.K. specified its interpretation of this text, stating that the commander in charge, with the knowledge he had at the time of the attack, has the authority to make the decision on targeted killing. According to this position, we should not benefit from the hindsight of the judge in applying the inherent standard of excessiveness. Rather the ultimate determination is made on a moral basis. This scheme inherently entails a wide margin of appreciation and discretion for the state conducting military operations aiming to eliminate terrorists, especially vis-à-vis the question of proportionality. I do not purport to review this standard but do contend that it should be addressed on a case-by-case basis, as different circumstances attract different degrees of morality.

2. Assessing the Legality of Targeted Killing

Professor Cassese suggests a test for gauging the exercise of targeted killing which can be summarized as follows: only when an individual is wearing civilian clothing and is manifestly carrying weapons or bombs may that person be targeted. To some people, it may be synonymous

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(b) An attack 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 the concrete and direct military advantage anticipated.

Additional Protocol, supra note 38, art. 51(5)(b).

426. It must be recalled that these individuals do not comply with the laws of war and fail to observe the criteria found in Article 4 of Convention III, supra note 11. Certain scholars infer that terrorists may be lawfully targeted for extra-judicial killing by virtue of their status as “combatants.” See, e.g., Alan Dershowitz, They Don’t Have to Wear Combats to Be a Fair Target, The Times, Apr. 22, 2004 (applying this reasoning to Shia cleric Moqtada al-Sadr: “It does not matter whether the combatant is a cook or bombmaker, a private or a general. Nor does it matter whether he wears an army uniform, a three-piece suit or a kaffiyeh. So long as he is in the chain of command, he is an appropriate target regardless of whether he is actually engaged in combat at the time that he is killed or is fast asleep.”).

427. Similarly, Article 35 of the Additional Protocol also constitutes a restraint on any attack that would cause superfluous or unnecessary injury.

428. In fact, the drafting history of this provision was punctuated by confusion and controversy, as it entailed serious considerations pertaining to the issue of proportionality. See, e.g., Thomas Michael McDonnell, Cluster Bombs Over Kosovo: A Violation of International Law?, 44 Ariz. L. Rev. 31, 79-85 (2002).


The rule of proportionality is a classic example of an instance where a wide measure of discretion is left to the state. The rule requires that, in the course of military operations, attacks shall be prohibited if civilian loss of life or damage to civilian objects would be “excessive in relation to the concrete and direct military advantage anticipated.” The compromise here is between human suffering and military utility.

Id. (discussing Article 51(5)(b) of the Additional Protocol).

430. Cassese, supra note 284, at 6.
with absurd to target Osama bin Laden only if those conditions are met. However, I maintain that this type of reasoning leads to a series of problems in the identification of terrorists, a concern sometimes labeled as “the slippery slope” argument. “By participating in assassination, a government places itself on a slippery slope. If the assassination of one leader is acceptable, then the assassinations of other leaders are tolerated, and if assassination is not condemned, then any troublesome individual may be subject to assassination by the United States.”

If we open the door to this type of measure, can the executive target anyone suspected of being a terrorist or can it remove someone who constitutes a mere inconvenience? This policy is obviously conducive to countless abuses or even honest mistakes. Moreover, if there is no doubt as to whether the targeted person is a terrorist and that—in carrying out the attack, the targeting military does not injure civilians—they are still acting on the assumption that the adversary accepts their determination that the targeted individual was involved in hostilities against the targeting power. We must recall that the laws of war are based on the concept of reciprocity, regardless of whether Al Qaeda is respectful of civilian life or not. It follows that protection “of the civilian population must always be the overriding consideration.”

Some may argue that if the military has no internal mechanism to review decision-making, then it engages in indiscriminate attacks. In response to this concern, we could envision a system where the judiciary would review the discretion of the attacker and intervene in real time. However, in addition to being burdened by logistical impediments, such arrangement would raise serious evidentiary problems, pertaining, among other things, to the applicable burden of proof, the protection of confidential sources, the legitimacy of ex parte proceedings when the objective is to kill a human being, etc. In order to dissipate some of the legal uncertainty surrounding the war on terror, some commentators suggest that the role of lawyers in assisting armed forces with making split-second decisions in real time should be enhanced. In fact, I alluded to the case of Navy Captain Shelly Young, whose advice resulted in the decision not to strike a convoy reportedly carrying Taliban leader

431. Wiebe, supra note 263, at 403.
432. See, e.g., Dexter Filkins, Flaws in U.S. Air War Left Hundreds of Civilians Dead, N.Y. TIMES, July 21, 2002, at A1; see also supra note 33.
Mullah Mohammed Omar.436

The scenario of the unmanned drone has emerged from these legal considerations and yields important questions, both from hypothetical and realistic perspectives.437 In fact, the United States has taken the position that anyone suspected of being part of the Al Qaeda network may be legitimately targeted using an unmanned drone, a device capable of locating and eliminating a human being.438 Among other concerns, this practice poses significant challenges to traditional law enforcement. For example, it could reasonably be argued that the United States has a duty to attempt to arrest suspected terrorists rather than to kill them, using lethal force only as a solution of last resort.439 To remove a suspected terrorist with an unmanned drone excises the possibility of arrest, detention, and interrogation altogether from the equation.440 As a corollary, the targeted killing of a suspected terrorist essentially translates into an extra-judicial execution, a practice categorically proscribed by human rights law.441 If endorsed, the full extent of a U.S.

436. See supra note 409. Although counsel by international legal experts in the war on terror is desirable, the executive has often brushed aside pertinent legal advice. On the issues of torture and indefinite detention, see Suzanne Goldenberg, Guantánamo: Bush Ignored Pentagon Lawyers Over Tactics in War on Terror: No Consultation on Detention Without Charge, THE GUARDIAN, June 9, 2004, at 4.

437. See, e.g., O’Connell, supra note 45, at 327.

So those killing as part of an armed conflict, taking action against others understood to be enemy combatants, will not generally be prosecuted for the deaths they cause. In these conditions, suspected members of Al Qaeda who do not surrender may be killed without warning. Whether they may be killed through the use of an unmanned drone is, however, still controversial.

Id.

438. See, e.g., id. at 326.

One of the dangerous effects of the U.S. characterization of the “war on terrorism” as a single global international armed conflict is that, if correct, such classification makes deliberate attacks upon members of the “enemy armed forces” lawful worldwide. The United States considers any member of a terrorist group as an “enemy combatant” who may be attacked. Thus, the United States justified an unmanned missile strike that hit and killed suspected members of Al-Qaeda in Yemen.

Sassbli, Use and Abuse, supra note 187, at 212.


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

Id.

440. See, e.g., O’Connell, supra note 45, at 330. To arrest and detain suspected terrorists also serves the function of advancing other cases and pending prosecutions. Hence, arresting a suspected terrorist could prove more helpful to U.S. investigations than eliminating the individual. Id.

441. See, e.g., Sassbli, Use and Abuse, supra note 187, at 212–13. It has been argued that certain governments, namely the U.S., Israel, and the U.K., engage in a policy of extra-judicial executions
policy of targeted killing would empower law enforcement officials to forcibly remove individuals within the United States or Canada. "[T]his theory would have justified, subject to the principle of proportionality, an ambush attack on José Padilla when he left his plane at a Chicago airport or at his grandmother's birthday party."447

Moreover, the fact that CIA operatives are most likely to coordinate targeted killings using the drone is also problematic. Since these operatives themselves do not conform to the laws of war, by failing to wear distinctive insignia and by not carrying arms openly,448 they may be subject to prosecution for war crimes.449

More importantly, the policy of targeted killing generates two unpalatable results under international law. Although the assassination of a suspected terrorist might be executed with precision in certain circumstances, the margin for error and abuse is simply too great to ignore. To carry out a targeted killing when civilian deaths will likely ensue—or when the target has not clearly been identified—is morally irresponsible and in clear violation of the laws of war.450 In many regards446 the practice of targeted killing is often an indiscriminate attack by definition.447 This type of policy frequently engenders the loss of civilian life, or "collateral damage."448

Often, the targeting government does not fully or adequately assess

through the targeting killing of suspected terrorists. See supra note 350–353.

442. Sassoli, Use and Abuse, supra note 187, at 213.

443. The Israeli Military Court sitting in Ramallah was quite instructive on this issue. Military Prosecutor v. Omar Mahmoud Kassem, 42 INT’L L. REP. 470, 479 (Israeli Mil. Ct. 1971) ("The phrase ‘carrying arms openly’ is not to be understood to mean carrying arms in places where the arms and the persons carrying them cannot be seen.").


Another problem with using the drone concerns the people operating it in the Afghan and Yemen cases. The CIA is not part of the regular U.S. armed forces. Its members might still qualify as lawful combatants if they could be characterized as a militia under the Geneva Conventions, in other words, if they have a commander, wear insignia, carry their weapons openly and conduct operations in accordance with the laws and customs of war. Sometimes CIA members do, in fact, wear uniforms with insignia. They sometimes operate in an organization under a commander and are understood to be committed to law of war. But operating a drone remotely hardly constitutes carrying weapons openly. This last factor is the most important of all in distinguishing combatants from civilians. Civilians may not be intentionally killed in combat, thus the imperative need for distinguishing them. If the use of the drone does not constitute carrying weapons openly, then the CIA may have committed violations of the law of war . . . .

Id.


447. See, e.g., supra notes 33–34 and accompanying text.

448. See, e.g., Bilsky, supra note 347, at 147; Margulies, supra note 375, at 411; see also supra note 33.
the potential harm to civilians when preparing a targeted strike against a suspected terrorist. The argument claiming that the military can readily identify a single terrorist and remove that person, without any ripple effects might seem attractive at first sight. However, the legal and moral implications of this practice are further compounded when the military is, for example, targeting a warehouse full of civilians and insurgents to eliminate a single person. In addition, the targeting power may be acting on unreliable intelligence reports or without assurances that the given individual is in fact at the targeted location, and within the expected timeframe of the strike.

The ticking bomb paradigm has sometimes been invoked to vindicate a policy of targeted killing. Yet, when armed forces are in fact pursuing a plan to eradicate a suspected terrorist through covert or surreptitious means, the case for the ticking bomb argument is disabled. In such instances, the admitted objective, whether grounded in pre-emption or reaction, is not to prevent a future attack. Rather, it is to remove the person for reasons of convenience or to circumvent any subsequent judicial proceeding involving the targeted individual. Hence, the threat, which was the very existence of the suspected terrorist, has been eliminated without any genuine efforts to prosecute the targeted individual through legitimate channels. This troublesome practice offers all the convenience, practicality, and peace of mind of sentencing a criminal to death, but without the initial finding of culpability.

This leads us to the most compelling argument against a policy of targeted killing: The lack of due process resulting from this practice. When armed forces proceed to aerial attacks without warning, they are actually curtailing due process, violating the audi alteram partem principle, preventing the target from contesting the determination that he or she is a terrorist, and imposing a unilateral death penalty. In this

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449. A case in point is Israel. It is doubtful whether Israel has properly evaluated the risks of harming civilians in carrying out targeted killings. See generally Kathleen A. Cavanaugh, Selective Justice: The Case of Israel and the Occupied Territories, 26 FORDHAM INT'L L.J. 934, 943–44 (2003).

450. See supra notes 33–34, and accompanying text.


The “ticking bomb” scenario refers to a hypothetical situation where a bomb has been activated and the only person who may have information to prevent or minimize the potential damage from an explosion of the bomb is the suspect, who refuses to disclose this information.

Id.


453. See, e.g., Margulies, supra note 375, at 411–12.

454. The practice of targeted killing is also a flagrant violation of Article 75(4) of the Additional Protocol, supra note 38 (“No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction
way, the very purpose of international human rights is defeated, whether through the violation of the right to a fair trial,\textsuperscript{455} the absolute circumvention of the right to liberty,\textsuperscript{456} or the disregard of the inherent right to life.\textsuperscript{457} The targeted individual is not afforded the opportunity to surrender\textsuperscript{458} nor to claim POW status. Unlike indefinite detention, where the suspected terrorist is temporarily deprived of personal freedom, targeted killing entails far greater consequences with absolutely no margin for judicial review, appeals, or any kind of procedural or substantive safeguards for the targeted individual. In this light, it becomes accurate, and perhaps trite, to state that targeted individuals are stuck in a legal black hole. In any given case, endorsing a policy of targeted killing essentially means that a single bullet will be prosecutor, judge, and executioner all at once. On that basis alone, the international community should categorically deplore and condemn targeted killing under international law, as it challenges fundamental notions of law and dignity.

This discussion requires a final word on the issue of proportionality.\textsuperscript{459} In this analysis, we cannot forget the Caroline doctrine,\textsuperscript{460} as the United States and Israel overtly violate the U.N. Charter's prohibition on the use of force, pursuant to Article 2(4).\textsuperscript{461} In

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\textsuperscript{455} See, e.g., Covenant, supra note 43, art. 9. It must be stressed that the right to a fair and regular trial may not be derogated from in the context of armed conflict. See, e.g., Dormann, supra note 133, at 64-66.

\textsuperscript{456} Covenant, supra note 43, art. 9.

\textsuperscript{457} Id. art. 6(1). For the full text of the provision, see supra note 91.

\textsuperscript{458} See, e.g., O'Connell, supra note 45.

\textsuperscript{459} See also supra notes 428 and 442.

\textsuperscript{460} The 1837 Caroline incident set out the classic parameters of self-defense. "The Caroline doctrine stands for the proposition that, in order for a country to strike before being attacked, they will have 'to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation.'" Raines, supra note 344, at 237-38. Furthermore, in Military and Paramilitary Activities in and Against Nicaragua (Nicar v. U.S.), 1986 I.C.J. 14, at 94 & 122-23, the I.C.J. specified that the force used must be necessary, immediate, and proportional to the seriousness of the armed attack. See also Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks 67 (Cambridge University Press 2002); Timothy Kearley, Raising the Caroline, 17 Wis. Int'l L.J. 325, 328 (1999).

\end{footnotesize}
justifying the policy of targeted killing, states and scholars invoke the right to self-defense under Article 51, which is also subject to the holding in the Caroline incident. Although all the elements of the self-defense doctrine warrant proper consideration, the vital aspect remains the proportionality of the response, which is characterized by the targeted killing. The practical problem with applying the U.N. Charter's notion of self-defense to targeted killing lies in the fact that the concept of self-defense, itself, remains largely undefined, whether seen through a preemptive or defensive light.

It is interesting to note that, the European Court of Human Rights has developed a legal test in assessing the legality of targeting suspected terrorists. In laying out the parameters for using lethal force against terrorists, the Court emphasized three major requirements: i) there must be a very strict and compelling test of necessity; ii) there must be proportionality between the targeting state's response and the threat; and iii) the targeting state must also take into account alternatives to the use of lethal force. It follows that symmetry is not required but the response should nonetheless be proportionate to the original attack. This determination is hard to make in the abstract and will undoubtedly be addressed on a case-by-case basis. However, it would appear that, given the violations of due process and the seriousness of the consequences of such tactics, namely death of possible innocent civilians or unnecessary suffering, targeted killing does not meet the proportionality threshold. In sum, the margin of error is too high and endorsement of such a policy would undermine the inherent purpose of the laws of war, namely protection of civilian life.

462. See supra note 350, 352-353.
463. U.N. Charter, supra note 461, art. 51.
467. On this issue, I refer to the dissenting opinions of Judges Higgins and Schwebel of the International Court of Justice in their advisory opinion on nuclear weapons. See Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 839, 934 (Advisory Opinion of July 8, 1996).
IV. LIBERTY VS. SECURITY: A QUESTION OF REASONABLENESS

A. ADDITIONAL RESTRAINTS AND NEXT STEPS

In this article, I have attempted to enumerate and discuss the most important international legal restraints on indefinite detention and targeted killing of suspected terrorists. The objective was not to deliver an exhaustive review of legal impediments to such practices. It was rather to present a principled approach to upholding international human rights norms in resistance to recent arguments purporting to subsume legally insulated aspects of the war on terror into one overriding security discourse, and to refute claims that the significance of the distinction between POWs and protected persons has begun to fade. However, many additional restraints come to mind. When addressing the question of indefinite detention, for instance, one could envision a regime that would impose frequent judicial reviews of the detentions and, correspondingly, reduce the language of deference to executive decision-making. This judicial mechanism would ensure and extend a legitimating function on the courts, while also ascertaining their institutional structure. However, the practical problem with this approach is readily discernible: domestic courts are notoriously reluctant to apply norms of international law and, when they do, they tend to defer to the executive’s own interpretation of the relevant international rules. Countries could also implement commissions of inquiry that would proceed to ex post facto reviews of executive decision-making and action, based on the logic of the McShane decision. Whatever the checks and balances mechanism may be, indefinite detention offers the opportunity to review and scrutinize executive action in real time, as custody over prisoners is ongoing.

Such is not the case with a policy of targeted killing: once the executive action is carried out, the individual is removed with no chance to appeal his situation or to contest the legality of the unilateral decision. Surely, the case for targeted killing of suspected terrorists becomes attractive when one considers that terrorists themselves do not distinguish between civilians and military targets in perpetrating attacks. In such cases, the parameters of the Caroline doctrine may appear to be fulfilled and a reprisal may be justified, at least on a prima facie basis.


471. See, e.g., Wiebe, supra note 263, at 406 (“It is difficult to believe that international law would
Although few people will convincingly advocate that the perpetrators of 9/11 deserved to perish,\textsuperscript{472} it is probably fair to assume that even fewer would mourn the passing of Osama bin Laden. However, there is a distinct possibility that a policy of targeted killing might engender the adverse effect of hoisting a targeted terrorist to the rank of martyr.\textsuperscript{472} If such eventuality was to materialize, namely if an influential terrorist or insurgent leader was removed, anti-West sentiment might increase and renewed support for the terrorist's agenda might ultimately transform that individual's quest into a crusade. As a result, the rationale of prevention and deterrence underlying the targeted killing of such individual would be defeated from the outset. Furthermore, eliminating some of Al Qaeda's senior leadership would only temporarily displace the problem: there are several other groups willing to commit widespread acts of murder. Therefore, the objective should not be to kill terrorists but rather to reorganize society so as to understand and prevent acts of terrorism.\textsuperscript{474} In addition, based on the considerations in Part III of this article, targeted killing is untenable (and undesirable) in terms of policy, international legitimacy, and law.

Finally, we must entertain the claim that certain governments are, in fact, engaged in extra-judicial killings. In such cases, those governments' only apparent concern becomes how well they cover up their operations.\textsuperscript{475} A possible legal restraint on this practice lies in the

\textsuperscript{472} See, e.g., \textit{id. at 405.}

\textsuperscript{473} See, e.g., McDonnell, \textit{supra} note 351, at 358 ("Might the death penalty help create martyrs rather than discourage similar attacks? Could our imposing the death penalty increase support in the Islamic world for al Qaeda and other extremist groups?"); \textit{see also} \textit{id. at 400-11} (arguing that killing or executing members of repressed political groups has historically advanced their cause and transposing this reasoning to the case of Al Qaeda members). For more background on the underlying rationales of holy martyrdom, see Roxanne L. Euben, \textit{Killing (For) Politics: Jihad, Martyrdom and Political Action}, \textit{30 Pol. Theory} 4-35 (2002); Feinstein, \textit{supra} note 365, at 233-43.

\textsuperscript{474} See, e.g., Donald A. Dripps, \textit{Terror and Tolerance: Criminal Justice for the New Age of Anxiety}, \textit{1 Ohio St. J. Crim. L.} 9, 10 (2003).

The current focus on a single source of terrorism—Islamic fundamentalism—however urgent, is a rather distorted vision. The ability of committed fanatics to kill mass numbers is now a fact of life (and death). The question is not whether this is so, or whether this fact can be made to go away by killing the al Qaeda membership, root and branch, if that be possible. The question is how to reorganize civil society so as to prevent—and this is an important adverb—absolutely—mass murder. Al Qaeda is not the only group extant prepared to commit mass murder for supposed causes; and there are more such groups in the offing.

\textit{Id.}

\textsuperscript{475} See, e.g., \textit{supra} notes 350, 352-53 and accompanying text. For a detailed account of U.S. cover-ups of military operations in the war on terror and in historical settings, as well, see Stanley Cloud, \textit{The Fog of War: Covering the War on Terrorism}, in \textit{The War on Our Freedoms: Civil Liberties in an Age of Terrorism} 256-75 (Richard C. Leone & Greg Anrig, Jr. eds., Century Foundation 2003).
increased use of lawyers to advise military personnel in combat and on a real-time basis. The objective of this additional legal constraint is to make split-second decisions consonant with international law, to the extent possible. Another prospective mitigating solution to this controversial policy would be to promote an absolute ban on targeted killing. Consequently, a targeted killing would always be condemned, by definition. However, the individuals carrying out the killing could attempt to exculpate themselves ex post facto, based on the reasoning of the High Court of Justice of Israel in the famous Torture case. This justification would hinge on a logic of necessity, with particular emphasis on the issue of proportionality. However, to adequately ensure that this model diminishes abuse and honest mistakes, while also tackling the slippery slope concern, it is imperative that the exercise of targeted killing automatically trigger a prima facie finding of illegality. Under this structure, the burden of proving necessity inherently rests with the targeting entity or official. Nevertheless, it should again be stressed that this type of model is ripe for retribution, misjudgment, and overreaction.

B. FALLACIES AND INACCURACIES OF THE BALANCING METAPHOR

A final word should be written on the balance between human rights and security in the war on terror. Ample reference has been made throughout this article to the balancing act both the executive branch and the judiciary are called upon to perform in the war on terror. This type of legal and moral exercise inexorably reverts back to the struggle between collective rights and individual rights. Certain moral objections to employing a human being for the well-being of others, such as Kant's Categorical Imperative, have been canvassed and discussed. Moreover, several accounts have been considered, both in favor and against a reduction of civil liberties or human rights in the post-9/11 era. Regardless of one's stance on the role and importance of human rights post-9/11, it is clear that the United States has initiated an important shift in policy, characterized by exceptionalism reminiscent of the Cold War era, strategic unilateralism, and double standards. This problem is
further compounded by the lack of input and control by Congress and the judiciary.\textsuperscript{483} In fact, there has been little to no judicial or congressional oversight of unilateral policies following 9/11. Some argue that “[t]ransnational networks of norm entrepreneurs have emerged where traditional avenues for foreign policymaking in the United States have failed to create a space for meaningful consideration of human rights in the rights/security balance.”\textsuperscript{484}

In assessing executive action, particular attention should be paid to the actual justification behind restricting rights in the name of the fight on terror. More precisely, we should scrutinize the commonly used expression “a new balance between liberty and security”. As discussed abundantly, international human rights norms consecrate the right to a regular and fair trial.\textsuperscript{485} However, claiming that the detention of Guantanamo prisoners is the result of a balancing act is unpalatable. These individuals have been stripped of international human rights, especially the right to a fair trial.\textsuperscript{486} Furthermore, neutralizing and detaining all Guantanamo detainees might have fulfilled a limited and short-term security objective, but it might also have alienated the very community from which the United States could have drawn intelligence gains and other advantages.\textsuperscript{487} Certain commentators resolve this issue by reference to the existence of purported checks and balances within the executive.\textsuperscript{488}

Nevertheless, the most intractable aspect of weighing human rights against security concerns pertains to the validity of the balancing metaphor. In fact, I take issue with this commonly used device and join

\textsuperscript{482} See, e.g., supra notes 236, 247–48, 254 and accompanying text.


\textsuperscript{484} Powell, supra note 468, at 48.

\textsuperscript{485} For a thoughtful account of the requirement of a fair trial under international human rights norms, especially the \textit{Covenant}, see Ana D. Bostan, \textit{The Right to a Fair Trial: Balancing Safety and Civil Liberties}, 12 Cardozo J. Int'l. & Comp. L. 1 (2004).

\textsuperscript{486} For a thoughtful account of these legal issues, see Anthony Lewis, \textit{Security and Liberty: Preserving the Values of Freedom, in The War on Our Freedoms: Civil Liberties in an Age of Terrorism} 47–73 (Richard C. Leone & Greg Anrig, Jr. eds., Century Foundation 2003) (arguing that the U.S. population usually regrets curtailing fundamental rights after a period of crisis, and that terrorism is even riper than other historical events for abuses and restrictions on personal liberty in the name of security).


\textsuperscript{488} See generally Issacharoff & Pildes, supra note 17; Issacharoff & Pildes, supra note 234.
several commentators who share this concern, especially Professor Dworkin who has carried the torch eloquently and graciously. In short, it has been advanced that, when we balance security interests against civil liberty, we tend to oppose our overall interest to the rights of others. The metaphor of balancing interests is questionable because the institution or person actually performing the test is never impartial. As discussed, the executive is afforded wide discretion and considerable deference in the war on terror. In addition, when confronted with the balancing of these interests, courts have often tipped the scale on the side of security. As a society, we must question the morality behind these policies. For example, many Americans would hastily, almost blindly, accept a reduction in civil liberties in the name of security, when the question is posed in the abstract. Yet, in practice, few would assent to a two-month detention for a minor infraction, such as not wearing a seatbelt. "In other words, we have imposed on foreign citizens widespread human rights deprivations that we would not tolerate if imposed on ourselves."

When presented in this light, this scenario clearly constitutes an affront to our fundamental freedoms, security or no security. This type of excessive and unfettered law enforcement behavior would characterize most police States, an undesirable designation for America. Yet, such scenarios are unfolding regularly since 9/11.

This is why we must always examine whom or what the balancer actually is, what is its affiliation. Most importantly, we must ask ourselves to what extent can the balancer internalize the consequences of the risk being evaluated. It is imperative to remind ourselves that this whole

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489. See, e.g., Dworkin, supra note 58.
490. See generally Cole, supra note 254.
491. See, e.g., Benvenisti, supra note 468, at 1 (discussing the balancing of rights versus security threats “This process is prone to partial attitudes by decision-makers whether in the bureaucracy or in the judiciary, as they are influenced by public opinion that is not particularly sensitive to minority rights and concerns.”).

Most Americans would never consent to a rule that permitted the police to incarcerate them for months because of mere suspicions of a terrorist connection, nor would they consent to be tried in secret trials. Nor would they trade their liberty for security if it meant that they could be detained for months without trial on some trivial charge such as not wearing a seat belt while the FBI investigates whether they are terrorists. Hundreds of resident aliens have indeed been subjected to such practices after September 11.

Id.

494. Lobel, supra note 483, at 778–79.

A handful are being held as material witnesses. The rest of the over 1,200 detainees were either not charged with any violation, charged with minor immigration offenses for which they normally would not have been jailed, or charged with violations of federal law unconnected to terrorism such as lying to the FBI. Many of these detainees have been held in solitary confinement in which they are kept in their cells 23 hours a day. They are held virtually incommunicado, being allowed one call a week. Some were shifted from prison to prison to avoid their lawyers, family or friends from contacting them.

Id.
campaign is an exercise in risk assessment and management. Furthermore, while performing this exercise, a human being will inexorably tend to under-emphasize the rights of others in order to protect his or her own rights. In that proposition lies the essential driving force of the argument: when we engage in such a balancing act, we evaluate the rights of others, of a group of persons that share extraneous qualities outside our own reality, whether they are related to culture, race or background. One commentator notes:

First, as Professor David Cole and Professor Ronald Dworkin have argued, by reserving the most draconian measures for aliens suspected of some connection to terrorism, we are not balancing fairly. We are not deciding upon how to weigh our liberties against our security, but instead are balancing others' liberties for our security.

It follows that, in the war on terror the rights of people of Middle-Eastern descent are being placed in the balance or, more accurately, on the chopping block. “Indeed, such restrictive policies seem virtually costless when the threatened societies can single out ‘others’—foreigners, non-citizens, members of suspect minority groups—as the only targets of liberties-depriving policies.” In fact, non-Arab Americans have little to no chance of being subjected to these types of arbitrary detentions or of seeing their fundamental rights curtailed. We have seen this attitude in post-9/11 jurisprudence—where courts are resorting to legal rhetoric to re-designate American citizens—in order to distance themselves from the individuals that are associated with the lighter (or sometimes weightless) side of the balance. It is evidently easier for a court to internalize a risk when operating in a legal system that readily distinguishes between citizens who are entitled to basic rights, and other persons that have rights of lesser value or protection.

Any attempt at reconciling or resolving these difficult issues would be futile. Expecting the balancing metaphor to be a reliable tool would be tantamount to stating that the human being is infallible. What we can hope for in any balancer of rights is an inherent sense of reasonableness

495. See, e.g., Benvenisti, supra note 468, at 28 (“Balancing rights versus threats is a constant exercise in risk-management. It involves the appraisal of opposite uncertainties that affect fundamental human rights.”); see also supra notes 8, 57–59 and accompanying text.


498. Lobel, supra note 483, at 770.

499. Benvenisti, supra note 468, at 1.

500. “Racial profiling of people of Middle-Eastern descent for purposes of interrogations and searches, expulsion without judicial oversight of non-citizen residents, indefinite administrative detention of suspected terrorists, are only some examples of reactions taken in the wake of September 11 and under the shadow of the new war.” Id.
in weighing realities that may be extrinsic to him or her. More importantly, in addressing these difficult issues, we should acknowledge and rely upon the legal safety net offered by international human rights norms, which serve as a minimal threshold of reasonableness. In this light, it is clear that indefinite detention and targeted killing of suspected terrorists are both deplorable practices under international law. In addition to circumventing crucial due process safeguards, they both erode the legitimacy of states subscribing to such policies. There is no denying that the post-9/11 legal reality is all about tradeoffs. We must not only invoke the human rights project to vindicate our own rights whenever convenient, but we must also aim to promote the international human rights scheme as a truly enforceable mechanism across the board. As Professor Thomas Franck notes: "The increase in individuals' human rights is inevitably accompanied by an increase in their responsibility for human wrongs, even when committed under the color of state authority." Hence, this global campaign against terrorism should not lose sight of human rights and fundamental rules of humanitarian law. It is undeniable that a delicate balance between security and human liberty must be struck. However, we must not forget that human beings form an integral part of the equation.

CONCLUSION
I have attempted to highlight and discuss some of the main human rights stakes involved in assessing U.S. policy in the war on terror. We now live in an era dominated by security concerns, while chasing a threat that is new and polymorph. Whether obscured by intricate information networks, new technologies like the Internet, the sophisticated cellular structure of organizations like Al Qaeda, complex financial systems, or convoluted political realities, certain legal protections have begun to blur indelibly. In the upcoming years, executive branches and judiciaries


But freedom from executive detention is, I think, arguably the most fundamental right of all: for if a person is detained by the executive for an indefinite period, perhaps in circumstances of great secrecy, without notice to relatives or friends, and held incommunicado, he may suffer all manner of ill-treatment, and may even "disappear", without his fate becoming known for years, if at all; and his right to a fair trial is of no value if he is to have no trial.

Id.


504. For a thoughtful overview of the main arguments advanced under U.S. constitutional law and international law against the legal treatment of prisoners in the war on terror, see Laura A. Dickinson, Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals and the Rule of Law, 75 S. CAL. L. REV. 1407 (2002).
across the globe will engage in balancing acts in an attempt to balance security and liberty. With this in mind, we must remember that no balancer can ever be completely impartial: we all carry some forms of prejudice, life experience, and baggage. At the same time, we must also stress that the war on terror cannot operate in a legal or conceptual vacuum; it must absolutely be co-extensive with a set of international norms and values underpinned by the rule of law. If we fail to adequately promote and enforce the international human rights scheme, we will continue to witness results similar to the aftermath of 9/11: deleterious consequences on the social, economical, and political levels, unnecessary civilian casualties, indiscriminate and irrational violence or counter-attacks, a widening of the gap between Western and Arab societies, a recrudescence of anti-Semitic, anti-Muslim, and anti-West sentiments, an explosion of guerrilla warfare as currently seen in Iraq, and human rights abuses across the board. It is no secret that international human rights norms embody the “common interest of all humanity” and that their aim is to generate the right incentives so that individual behaviour conforms with the law.

505. See, e.g., Becker, supra note 109, at 563-64.
For example, our present treatment of foreign prisoners of war (“POWs”) will surely have serious consequences if American POWs fall into the hands of a foreign power. Similarly, our double standards in the treatment of Arab and Muslim Americans is bound to have a like impact upon the way U.S. citizens are dealt with by populations in other countries. Also, significantly, our unyielding support for Israeli terrorism against the Palestinians, while at the same time undertaking a worldwide “crusade” against Muslim terrorism, will only lead to increased terrorist attacks against the United States, either on our own soil or against our citizens and installations abroad. Therefore, an objective assessment of the strengths and failings of our present policies, absent the red, white, and blue sheen given to such measures by their purveyors, is required.

506. Steven W. Becker speaks to these issues when addressing the U.S.’ lack of sympathy and compassion in assessing Islamic culture.
In the United States, understanding the culture, religion, and reactions of Arabs and Muslims, and they are different, is done under Washington’s lamplight where all concerned can see what they want. That it has little to do with what is going on in that unlit part of the world blissfully escapes these observers. It is not because this country lacks experts on these cultures and societies, but because these views, if different from Washington’s wisdom, are not wanted. The foreign policy establishment, political spinners, and the media have their way of seeing and doing things. Their list of Washington and New York sages on Islam and Arab affairs seldom includes experts from such ethnic backgrounds. Even congressional hearings draw on that same list. Their explanations are always the same: Arabs and Muslims are violent, intolerant, ignorant, anti-Western, against modernity, and anti-Jewish. Nothing is said about the reasons: U.S. double standards, the plight of these societies at the hands of corrupt and undemocratic regimes supported by the United States, and the injustice suffered by the Palestinians with the U.S.’ unflinching support of Israel.

507. See Allott, supra note 503, at 400.
It is precisely this blueprint of the law-machine which must come to be our blueprint of the international-law-machine—incorporating the common interest of all humanity in legal form, then disaggregating that common interest through the law-conforming behavior of all
Surely detaining Guantanamo prisoners might have achieved a short-term, and limited, security objective. However, it has also alienated a vast portion of the targeted communities, while essentially rendering human rights norms toothless in the war on terror. Legal scholarship is only one medium through which we can address and, hopefully, rectify the mistreatment of Arabs, Muslims, and South Asians. Fortunately, the judiciary, the press, and citizens are following suit in voicing their outrage toward unilateral policies post-9/11.508 One of these manifestations, which was also central in this article, is the widespread condemnation of indefinite detentions on U.S. soil and abroad. For instance, denying members of the Taliban POW status is difficult to countenance both on humanitarian and moral grounds. Similarly, endorsing a policy of targeted killing of suspected terrorists is untenable in international law, as it completely undermines the very protections that came out of World War II. To accept that a human being can be summarily shot, while circumventing all of the guarantees surrounding a regular and fair trial, would mean taking an enormous step backwards. In this light, the human rights project purports to take a step forward, to suppress discrimination, and to treat every human being as equal, without making initial distinctions between belligerent civilians and ordinary civilians.

The prosecution of terrorists and war criminals can be successfully pursued through normal judicial channels, be they national or international,509 without using the Geneva Conventions as a screening device to selectively or unilaterally confer protection upon prisoners, while also stripping countless innocent civilians of their fundamental rights. It follows that prisoners and captives in the war on terror should be afforded fundamental international protections, not based on their particular membership to a given group, belief system, or nation, but rather as an irreducible acknowledgement of their status as human beings.

human beings and all subordinate human societies, so that the private interest of each human being and each human society is reconciled with the common interest of all humanity.

Id.

508. "There are some encouraging signs suggesting that governmental mistreatment of Arabs, Muslims, and South Asians (particularly via indefinite detention and denial of access to counsel) may finally be coming under meaningful scrutiny by the courts, the press, and the public." Muneer I. Ahmad, A Rage Shared by Law: Post-September 11 Racial Violence As Crimes of Passion, 92 CAL. L. REV. 1259, 1328 (2004); see also supra note 331. The U.S. Defense Department is also currently entertaining options to strengthen detainee rights. See Tim Golden, U.S. Is Examining a Plan to Bolster the Rights of Detainees, N.Y. TIMES, Mar. 27, 2005, at A1.

509. For a detailed account on whether acts of terrorism qualify as crimes against humanity, thereby falling under the jurisdiction of the International Criminal Court, see generally Proulx, supra note 388.