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Like Playing Whack-A-Mole Without a Mallet? Allowing the State to Rebut the Civilian Presumption

Some might argue that further innovations in the laws of war are unlikely. But the international rules that are now taken for granted—say, the right of wounded soldiers to receive aid from neutral humanitarians on the battlefield—once seemed just as far-fetched.[1]

Introduction

When a new enlistee starts his journey in the U.S. military to become a professional warrior, he learns from the first day when he can use lethal force. It is the most important aspect of being a trained and disciplined soldier. "Lethality, if you will, is the foundation on which everything we do must be built, but lethality brings with it incredible obligations and responsibility."[2] Lethal force, as a centerpiece for every warrior, is delineated into two concepts: the right of self-defense and the right to engage a hostile force as declared by a superior authority.

The right of self-defense is broadly defined by the U.S. military as "the authority and obligation to use all necessary means available and to take all appropriate actions to defend th[e] . . . unit and other U.S. forces in the vicinity

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[1] Charli Carpenter, "Fighting the Laws of War: Protecting Civilians in Asymmetric Conflict," *Foreign Affairs* (March/April 2011), p. 152.

[2] An Interview with Martin E. Dempsey, Prism 2, No. 1 (December 2010), p. 154. General Dempsey will become the 37th Chief of Staff of the U.S. Army in the summer of 2011.

from a hostile act or demonstration of hostile intent."[3] Self-defense for the American soldier hinges on the actions of others; it is based on *conduct*. It is subjective: the actions of the perceived hostile force might be benign, but from the perspective of the soldier, the action is viewed as a demonstration of hostile intent. If the soldier is reasonable in his response, then his response is justified and legal.

Contrast this right of self-defense with the right to engage enemy forces that have been declared hostile. Once declared hostile, enemy forces can be engaged and the soldier does *not* need to "observe a hostile act or a demonstration of hostile intent before engaging that force."[4] The declared hostile force can be engaged without the trigger of a hostile act or intent; in other words, the declared hostile force is based on *status*. It is objective: the soldier is justified and legally permitted to engage and kill the hostile force without regard to whether the lethality is reasonable.

Clearly, the delineation between conduct and status is crucial in deciding what lethal measures the soldier may take in response. In the wake of the terrorist attack on the United States on September 11, 2001 ('9/11'), and the ensuing armed conflict with terrorism, the U.S. vision on this very delineation soldiers are indoctrinated in – conduct vice status – has been stood on its head.

[3] The Chairman of the Joint Chiefs of Staff Instruction, Standing Rules of Engagement for U.S. Forces, CJCSI 3121.01A, 15 January 2000, p. A-3.
[4] *Ibid*, p. A-5.

This is because terrorists[5] do not play by the rules imposed upon the State by the Geneva Conventions and the law of war.[6] Terrorists are an asymmetric enemy: they do not wear uniforms or identifiable insignia to distinguish themselves from civilians, and, in fact, they eschew distinction between themselves and civilians. Eschewing distinction by the terrorist is intentional: terrorists know that if the United States can positively identify an individual as a terrorist, then its ability to target that individual with precision and accuracy is quite impressive. Indeed, terrorists purposely blend into the civilian population, using the population as protection, because the United States will not target a terrorist if the cost to civilians is too high. In sum, terrorists seek to look like innocent civilians and garner those protections.

The difficulty with combating an asymmetric enemy has pushed the United States toward a policy of targeted killing. Legal scholars define targeted killing as the use of lethal force by a State[7] or its agents with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.[8] In layman's terms, targeted

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[5] The term terrorist as used in this paper has four characteristics: "a fundamentally political nature, the symbolic use of violence, purposeful targeting of noncombatants, [and] carried out by nonstate actors." Audrey Cronin, How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns (Princeton, NJ: Princeton University Press 2009), p. 7.

[6] In this paper, the author uses the term law of war, but other commentators use the law of armed conflict or International Humanitarian Law. The author chooses law of war because this is the terminology used in the U.S. military.

[7] State is a technical and legal term meaning a land mass recognized by the United Nations Charter as a member State.

[8] Philip Alston, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," Human Rights Council, 28 May 2010 (A/HRC/14/24/Add.6), p. 3. See Nils Melzer, Targeted Killing in International Law 5 (Oxford, UK; Oxford Press 2009)("the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.").

killing is used to eliminate individuals they view as a danger.[9] The U.S. policy of targeted killing has led to criticism by members of the international community because of the perception that the United States is killing civilians.

Although U.S. presidents have reserved the right to use targeted killings in unique circumstances, making this option a favored method of combating terrorists raises the risk that, unless targeted killing is adroitly structured to certain situations, the law of war could be driven in a direction that is unwise for its long-term health.

Roadmap

This article outlines how the law of war regarding targeted killing can be tailored to combat international terrorism. To accomplish this, this article grapples with the principal legal question raised by the targeting terrorists: how can a State determine that an individual is a belligerent, vice a civilian, and therefore a legitimate target under the law of war, just as a combatant is a legitimate target because of his status as a member of an armed force?

The article first explains the history of targeted killing from a U.S. perspective. The paper will explain how terrorism has traditionally been handled as a domestic law enforcement action and how this approach limits the U.S. government's ability to combat terrorism. With the events of 9/11, the United States departed from this law-enforcement paradigm and handled

[9] Eben Kaplan, "Targeted Killings," Council on Foreign Relations Background Paper (March 2, 2006), p. 1.

certain terrorist organizations, like al Qaeda and associated forces, under a law of war paradigm; that is, declaring war against these terrorist organizations.

While this novel policy is not ill-conceived given the global nature of al Qaeda, there are limitations under the law of war on *how* individuals can be targeted. The law of war requires that civilians not directly taking part in hostilities be protected. The key is the *status* – in an armed conflict context, are they civilian or combatant? – an individual takes when he or she is a member of an organized armed group like al Qaeda. Embedded in this question is the effect human rights norms have had upon this status debate and whether these ever-expanding norms are helpful or harmful in combating terrorism.

The article then explains the U.S. position that certain terrorists hold a different status than the civilian population. This position has been met with resistance from those who posit that terrorists are civilians who are taking a direct part in hostilities against the State and can be targeted only for such time as they do so.[10] This article then outlines a new approach within the law of war to categorize individuals as either civilians, who are not targetable, or an individual who is targetable because of status. This approach will further the cause of States in effectively combating terrorism.

This article concludes that while status is paramount in targeting decisions, the status of a targeted individual should be tempered and informed

[10] Michael H. Hoffman, "Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction With Implications for the Future of International Humanitarian Law," 34 *Case Western Reserve Journal of International Law*, 227, 228 (Fall 2002).

by the individual's pattern of conduct that rebuts the State's presumption of protection afforded by civilian status.

History of Targeted Killing

During the Cold War, the United States used covert operations to target certain political leaders with deadly force.[11] These covert operations, like assassination plots against Fidel Castro of Cuba and President Ngo Dinh Diem of South Vietnam, came to public light in the waning days of the Nixon Administration in 1974. In response to the public outrage at this tactic, the U.S. Senate created a select committee in 1975, chaired by Senator Frank Church of Idaho, to "Study Government Operations with Respect to Intelligence Activities."[12] This committee, which took the name of its chairman, harshly condemned such targeting, referred to in the report as 'assassination': "we condemn assassination and reject it as an instrument of American policy."[13]

In response to the Church Committee's findings, President Ford issued an executive order in 1976 prohibiting assassinations: "No employee of the United States Government shall engage in, or conspire to engage in political assassination."[14] The executive order, which is still in force today as Executive Order 12333, "was issued primarily to preempt pending congressional

[11] Tyler Harder, "Time to Repeal the Assassination Ban of Executive Order 12333: A Small Step in Clarifying Current Law," *Military Law Review*, Vol. 172 (Sumer 2002), p. 12.
[12] United States Senate, Report No. 94-465, "Alleged Assassination Plots Involving Foreign Leaders," Washington, D.C.: U.S. Government Printing Office, November 1975, p. 282.
[13] Matthew J. Machon, "Targeted Killing as an Element of U.S. Foreign Policy in the War on Terror," Monograph for the School of Advanced Military Studies, Fort Leavenworth, KS (AY 2005-06), p. 18.
[14] Executive Order 11905 (February 18, 1976).

legislation banning political assassination."[15] President Ford did not want legislation that would impinge upon his unilateral ability as Commander in Chief to decide on the measures that were necessary for national security. [16] In the end, no legislation on assassinations was passed; national security remained under the President's purview. Congress did mandate, however, that the President submit findings to select members of Congress before a covert operation commences or in a timely fashion afterwards.[17] This requirement remains to this day.

Targeted killings have again come to center stage with the Obama Administration's extraordinary step of acknowledging the targeting of the radical Muslim cleric Anwar al-Awlaki.[18] Mr. al-Awlaki is a U.S. citizen who lives in Yemen and is a member of an Islamic terrorist organization, al Qaeda in the Arabian Peninsula.[19] He became a spiritual confidant to and had frequent e-mail correspondence with Major Nidal Hasan, an Army psychiatrist who allegedly killed 13 people and wounded 31 more, most of whom were U.S. soldiers, during a shooting rampage on Fort Hood, Texas, in November 2009.[20]

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[15] Machon, p. 20. The word "political" has been removed from the executive order and now there is simply a ban on assassinations.

[16] Nathan Canastaro, "American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo," *Boston College International and Comparative Review*, Vol. 26, No. 1 (Winter 2003), p. 11-13.

[17] The Hughes-Ryan Amendment of 1974, Pub. L. No. 93-559, Sec. 32, 88 Stat. 1804 (1974).

[18] Scott Shane, "U.S. Approves Targeted Killing of American Cleric," *The New York Times*, April 6, 2010, p. 6A.

[19] Shaykh Anwar Al-Awlaki, "The New Mardin Declaration: An Attempt at Justifying the New World," *Inspire*, Fall 1431 (2010), Issue 2, p. 3. *See* Declaration of Professor Bernard Haykel, Nasser Al-Aulaqi v. Obama, No. 10-cv-01469 (JDB), United States District Court for the District of Columbia (Oct. 7, 2010), p. 3. This paper will not discuss if Mr. al-Awlaki can be targeted since he is in Yemen and a U.S. citizen. The proposals of this paper will be layered on existing international law.

[20] Sudarsan Raghavan, "Cleric Says He Was Confidant to Hasan," *Washington Post*, November 16, 2009, p. A3.

Mr. al-Awlaki also played a significant role in an attempted airliner attack conducted by Umar Farouk Abdulmutallab, the Nigerian Muslim who attempted to blow up a Northwest Airlines flight bound for Detroit on Christmas Day, 2009.[21] Mr. al-Awlaki, according to U.S. officials, is no longer merely encouraging terrorist activities against the United States; now he is "acting for or on behalf of al-Qaeda in the Arabian Peninsula (AQAP) . . . and [] providing financial, material or technological support for . . . acts of terrorism."[22] Al-Awlaki's involvement in these activities, according to the United States, makes him a belligerent and therefore a legitimate target.

The context of the fierce debates in the 1970s is different from the al-Awlaki debate. The targeted killing of an individual for a political purpose – assassination – as investigated by the Church Committee was the use of lethal force during *peacetime,* not during an armed conflict.[23] During war, the use of targeted killing is quite expansive.[24] But in peacetime, the use of *any* lethal force is highly governed and limited by both domestic law and international legal norms. The presumption is that, in peacetime, all use of force by the State, especially lethal force, must be necessary.

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[21] Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, Nasser Al-Aulaqi v. Obama, Civ. A. No. 10-cv-1469, U.S. District Court for the District of Columbia, filed September 24, 2010, p. 8 (quoting the director of the National Counterterrorism Center, Michael Leiter before the Senate Homeland Security and Government Affairs Committee on September 22, 2010.).

[22] Designation of Anwar Al-Aulaqi as a Specially Designated Global Terrorist, pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Federal Register 43233, 43234 9July 23, 2010).

[23] This is why the Church Committee focused on intelligence organizations and not the armed forces. In this paper, war and armed conflict are synonymous.

[24] W. Hays Parks, Memorandum on Executive Order 12333 and Assassination, p. 8 (on file with author).

The Law-Enforcement Paradigm

Before 9/11, the United States treated terrorists under the law-enforcement paradigm; that is, as suspected criminals.[25] This meant that a terrorist was protected from lethal force so long as his or her conduct did not require the State to respond to a threat or the indication of a threat. The law-enforcement paradigm assumes that the preference is not to use lethal force but rather to arrest the terrorist and then to investigate and try him before a court of law.[26] The presumption during peacetime is that the use of lethal force by a State is not justified unless necessary. Necessity assumes that "only the amount of force required to meet the threat and restore the status quo ante may be employed against [the] source of the threat, thereby limiting the force that may be lawfully applied by the state actor."[27] The taking of life in peacetime is only justified "when lesser means for reducing the threat were ineffective."[28]

Under both domestic and international law, the civilian population has the right to be free from arbitrary deprivation of life.[29] Professor Geoff Corn makes this point by highlighting that a law enforcement officer could *not* use

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[25] Greg Travalio and John Altenburg, "Terrorism, State Responsibility, and the Use of Military Force," *Chicago Journal of International Law*, Vol. 4, No. 1 (Spring 2003), p. 109.
[26] Judgment, Public Committee Against Torture in Israel v. Israel, HCJ 769/02, [2005] ISrSC, at para. 22.
[27] Geoff Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict," 1 *Journal of International Humanitarian Legal Studies* 52, 85 (2010) [herein, Corn's Human Rights Article].
[28] *Ibid.*, p. 78.
[29] The Fourth Amendment to the Bill of Rights which states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ." U.S. Constitution. *See* The International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 999 U.N.T.S. 171, entered into force 23 March 1976, article 6.

deadly force "against suspected criminals based solely on a determination an individual was a member of a criminal group."[30] Under the law-enforcement paradigm, "a country cannot target any individual in its own territory unless there is no other way to avert a great danger."[31] It is the individual's *conduct* at the time of the threat that gives the State the right to respond with lethal force.

The State's responding force must be *reasonable* given the situation known at the time. This reasonableness standard is a "commonsense evaluation of what an objectively reasonable officer might have done in the same circumstances."[32] The U.S. Supreme Court has opined that this reasonableness is subjective: "[t]he calculus of reasonableness must embody allowances for the fact that police officers often are forced to make split-second judgments. . . . about the amount of force that is necessary in a particular situation."[33]

The law-enforcement paradigm attempts to "minimize the use of lethal force to the extent feasible in the circumstances."[34] This approach is the starting point for many commentators when discussing targeted killing: "it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception,

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[30] Corn's Human Rights Article, p. 77.
[31] Gabriella Blum and Philip Heymann, Law and Policy of Targeted Killing, Laws, Outlaws, and Terrorists: Lesson from the War on Terrorism (Boston, MIT Press 2010), p. 10.
[32] Thomas D. Petrowski, "Use-of-Force Policies and Training: A Reasoned Approach," 71 *F.B.I. Law Enforcement Bulletin*, No. 10 (Oct. 2002), p.26.
[33] Graham v. Conner, 490 U.S. 386, 396-97 (1989)
[34] Philip Alston, "Report of the Special Repporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings," UN General Assembly, Human Rights Council, 28 May 2010, p. 23 [herein, Alston UN Report].

should not be to kill."[35] The presumption is that intentional killing is unlawful by the State unless it was necessary for self-defense or defense of others.[36] Like the soldier who acts under the authority of self-defense, if one acts reasonably based on the nature of the threat, the action is justified and legal.

What the law-enforcement paradigm never contemplates is a terrorist who works outside the State and cannot be arrested. These terrorists nest in areas of the world where law enforcement is weak or nonexistent. The events of 9/11 forced the United States to rethink its paradigm.

The Law of War Paradigm

In the wake of 9/11, President Bush requested Congress give him authorization to go to war with the architects of these attacks, namely al Qaeda. The Congress, seven days after these horrific events, gave the President the Authorization for the Use of Military Force (AUMF) to use all military force against those:

> nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations organizations or persons.[37]

For the first time in modern U.S. history, the country was engaged in an armed conflict with members of an organization, al Qaeda, vice a State. The United State's legal justification to use force, which includes targeted killings, against

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[35] *Ibid.,* p. 5.

[36] Alston states that a "State killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life (making lethal force *necessary*)." *Ibid*., p. 11.

[37] Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001), sec. 2(a).

al-Qaeda, the Taliban, and associated forces is two-fold: the law of war and self-defense.[38]

In armed conflict, the rules of when an individual can be killed are starkly different than in peacetime. Now designated terrorists may be targeted and killed because of their *status* as enemy belligerents. That status is determined by the President under the AUMF. Unlike the law-enforcement paradigm, the law of war requires neither a certain conduct nor a reasonable amount of force analysis to engage belligerents. In armed conflict, it is wholly permissible to inflict "death on enemy personnel irrespective of the actual risk they present."[39] Killing enemy belligerents is legal unless specifically prohibited, e.g., enemy personnel out of combat like the wounded, the sick, or the shipwrecked.[40] It negates the law-enforcement presumption that lethal force against an individual is justified only when necessary. If an individual is an enemy, then "soldiers are not constrained by the law of war from applying the full range of lawful weapons. . . ."[41] Now the soldier is told by the State that an enemy is hostile and may engage that individual without any consideration of the threat currently posed. The enemy is declared hostile; the

[38] The Obama Administration has addressed this justification in two forums: filings in federal court in the case of Al-Aulaqi v. Obama, Civil Action No. cv 10-1469 (Dec. 7, 2010) (this civil case brought by the father of American cleric Anwar al-Awlaki's (spelled Al-Aulaqi in court filings) was dismissed for lack of standing, among other rationale, but included the position of U.S. Government to target Mr. al-Aulaqi's son is premised in the concept of self-defense.) and the statements of Administration officials. (Harold Koh, Legal Advisor to the Department of State, "The Obama Administration and International Law," Keynote Speech at the Annual Meeting of the American Society of International Law (March 24, 2010)).

[39] Corn at footnote 97.

[40] Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

[41] W. Hays Parks, "Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect," *New York University Journal of International Law and Politics*, Vol. 42 (Spring 2010), p. 780.

enemy is now targetable. But this assumes the target is not a civilian who is specifically protected.

The Development of the Law of War

At the center of the Geneva Conventions and its Additional Protocols is its "cardinal"[42] rule, the concept of distinction: "The parties to the conflict must at all times distinguish between civilians and combatants."[43] This principle is "the balancing point between the State's military need and the other side's combatants and military objectives is not the same as the balancing point between the [S]tate's military need and the other side's civilians and civilian objectives."[44]

Under the law of war, attacks against civilians are prohibited. [45] Civilians are defined in the negative as "all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities."[46] A civilian has the greatest protection under the law of war. Because of the protections granted

[42] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226, 257.
[43] The Public Committee Against Torture in Israel v. Israel, Judgment of the Supreme Court, A. Barak for the Court (December 11, 2005), para. 23.
[44] *Ibid.*
[45] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art 51(2), Dec. 12, 1977, 1125 U.N.T.S. 3 [herein Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art 13(2), Dec. 12, 1977, 1125 U.N.T.S. 609 [herein Protocol II]. The additional protocols have not been ratified by the United States, but the articles discussed in this paper are considered customary international law.
[46] Nils Melzer, International Committee on the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, adopted on February 26, 2009, International Review of the Red Cross, Vol. 90, Number 872 (December 2008), p. 1002. [ICRC Guidance].

civilians—States are obligated to never make civilians the object of attack[47]—States' use of lethality is restricted.

In international armed conflict, the only other status (other than civilian) is combatant. Combatant is defined in Article 43 of the First Protocol on International Armed Conflict as "[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party of the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party."[48] The commentary to Article 43 emphasizes that only members of the armed forces are combatants: "all members of the armed forces are combatants, and only members of the armed forces are combatants."[49] Combatants are granted the right to directly participate in hostilities.[50] The combatant can be targeted and killed as a measure of first resort.

A further governor on lethal force is precision: the requirement that the killing be as precise as militarily possible. Optimally, the combatant is the only one harmed. Precision is predicated on this principle of distinction where civilians are immune from direct attack.[51] But distinction is blurred when non-State actors conduct asymmetric warfare against a State.[52] When a belligerent—some who is taking hostilities against the State—is not wearing

[47] ICJ Use of Nuclear Weapons, p. 257.
[48] Protocol I, art. 43(1).
[49] Commentary to Additional Protocol I, at 515.
[50] Protocol I, art. 43(2).
[51] Protocol I, art. 51(1).
[52] M. Cherif Bassiouni, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors," 98 *Criminal Law* 711 (2009).

insignia or uniform and is also blending into the civilian population, then precision becomes exceedingly difficult. The *obligation* of a belligerent during international armed conflict is to "comply with the rules of international law applicable in armed conflict . . . ."[53] If the combatant, like a terrorist, fails to comply with these rules, then he could forfeit the protections of combatant immunity; that is, a person immune from his war-like acts before capture.[54] But the targeting of a belligerent assumes the State knows that the belligerent, who looks like a civilian, is hostile. The price a belligerent pays for non-compliance is simply a loss of immunity; the State, on the other hand, must now track a threat in an asymmetrical environment where the protection of the civilian population, which is the State's obligation, is in the balance.

The development and increasingly common use of precision weaponry produces – or at least the intent is – a direct benefit of reducing collateral civilian deaths related to such attacks. When such attacks occur outside an area of traditional combat operations, like an urban area, this reduction of civilian deaths has evolved into an expectation: the capability to use precision munitions produces a presumption that doing so is to "clearly discriminate[] between military and civilian targets and that [are] intended to limit civilian casualties."[55] Precision enhances the protection of civilians. Modern weaponry and targeting capabilities continue to push States towards an end state with no

[53] Protocol I, art. 44(2).
[54] *Ibid*., art. 44(4).
[55] Anthony H. Cordesman, "The Gaza War: A Strategic Analysis, Center for Strategic and International Studies," Feb. 2009, available at http://www.csfs.org/files/media/csis/pubs/090101_gaza_war.pdf.

collateral damage. But this push is unrealistic if either there is no delineation between innocent civilians and the individual doing the State harm, or the delineation is not grounded in a legal structure that allows the State to target those who are doing it harm. Precision relies on the vibrancy of distinction.

Non-International Armed Conflict and Civilians Taking a Direct Part in Hostilities

In non-international armed conflicts, the principle of distinction is in doubt because the definitional delineation between combatants and civilians is absent in the Second Protocol of the Geneva Conventions, which governs the protection of victims of non-international armed conflicts.[56] In fact, the term 'combatant' does not appear. Some commentators take the view that if a conflict is not international in character, then "there is no such thing as a 'combatant.'"[57] According to this logic, since no other status exists, everyone is a civilian in non-international conflicts.

During the 1974-77 Diplomatic Conference of the Second Protocol, there was a draft definition of who takes the status of being a civilian: "anyone who is not a member of the armed forces or of an organized armed group."[58] This definition, however, "was discarded along with most other provisions on the conduct of hostilities in the last minute effort to 'simplify' the Protocol. . . ."[59] The principle of distinction is in effect eviscerated without delineation between

[56] Although, as noted by Professor Geoff Corn, the term 'combatant' does appear in the commentary of Article 13.
[57] Alston UN Report, p. 19.
[58] Draft Art. 25(1). O.R., Vol. XV, p. 320, CDDH/215/Rev. 1).
[59] ICRC Guidance, p. 1003-04.

civilians and belligerents who are conducting hostilities in non-international armed conflicts.[60]

If 'no delineation' is the starting place, it follows then that States are obligated to give every individual the protection of a civilian. If the only status that exists is that of a civilian, States must presume that every individual "shall not be the object of attack."[61] The State can only target and kill civilians "for such time as they take a direct part in hostilities."[62]

Under this theory, civilians can be targeted by the State under limited or specific circumstances, but two important requirements must be met. First, the ability to target civilians is restricted by a specific time constraint of "for such time;" that is, while the civilian is taking a direct part in hostilities. Second, the targeting is based on *conduct*; that is, only if the civilian is taking "a direct part in hostilities." For a soldier, non-international armed conflict is a perpetual world of self-defense where the soldier is responding to hostile intent or a hostile act. In this world, no individual can be declared *per se* hostile by the State and thereby targeted because of *who* they are; instead, because the only status is that of a civilian, an individual can be targeted only for a particular duration because of his *acts*.

A third requirement that is gaining traction within the international community is proportionality. Since all individuals hold the status of civilian,

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[60] Geoff Corn, Two Sides of the Combatant COIN: Untangling DPH from Belligerent Status in Non-International Armed Conflict (forthcoming)(unpublished manuscript on file with author) [Corn COIN].
[61] Protocol II, art. 13(2).
[62] Ibid., art. 13(3).

other than those then directly participating in hostilities, this third requirement is the obligation of honoring the principle of proportionality regarding the targeted individual. Put in terms of the individual: "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed."[63]

As for the second requirement, "States tend to address direct participation issues in a case-by-case fashion."[64] The Israeli Supreme Court did exactly that – in the words of Professor Schmitt, "tending towards exemplification rather than explication" – in its seminal case of The Public Committee against Torture in Israel v. the Government of Israel [hereafter, the Targeted Killing Case]:

> Against the background of these considerations, the following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence in the army, . . .; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may.[65]

During the time window requirement, the same ambiguity is present when a civilian can be targeted. The Israeli Supreme Court noted that "[w]ith no consensus regarding the interpretation of the wording 'for such time,' there

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[63] Targeted Killing Case, para. 40.
[64] Michael N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements," 42 *New York University Journal of International Law and Policy* 697, 705 (Spring 2010).
[65] Targeted Killing Case, para. 35.

is no choice but to proceed from case to case."[66] Again, it discussed examples of what constituted 'for such time:'

> On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity is entitled to protection from attack. . . . On the other hand, a civilian who has joined a terrorist organization which has become his 'home', and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack 'for such time' as he is committing the chain of acts.[67]

This ambiguity makes combating terrorists extremely complex. It puts a premium on actionable intelligence. The State must collect evidence in a timely fashion proving that a certain civilian is performing or intending to perform a hostile act that could allow him to be targeted.[68] The level of proof needed to determine what qualifies as a lawful military objective, like a civilian taking a direct part in hostilities, must be reasonable."[69] In the State's targeting process, the central question is: does the intelligence support targeting this person?[70]

If the targeted civilian was a combatant, then "no attempt to capture the enemy or warn the enemy in advance is necessary before shooting to kill."[71] Simply put, there is no proportionality test required for a combatant. In the

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[66] *Ibid.*, para. 39.
[67] *Ibid.*, para. 39.
[68] Blum and Heymann, p. 7.
[69] Geoff Corn, "Targeting, the Reasonable Commander, and the Missing Quantum of Proof Component," p. 5 (pending publication).
[70] Declaration of Jonathan Manes, The Joint Targeting Definitions and Process, Nasser Al-Aulaqi v. Obama, No. 10-cv-1469 (JBD)(Oct. 8, 2010), p. 10.
[71] Blum and Heymann, p. 7.

words of law of war scholar W. Hays Parks, "soldiers are not constrained by the law of war from applying the full range of lawful weapons against enemy combatants. . . ."[72]

Yet since a terrorist holds the status of a civilian in a non-international armed conflict, there are commentators that contend an additional layer of complexity exists, namely, that proportional force is required vis-à-vis the targeted terrorist; that is, "the weapon which could be expected to employ the least injury ought to be employed."[73] Proportionality in this regard was addressed by the European Court of Human Rights in 1995.[74] The *McCann* Case stems from British agents intentionally killing three Irish Republican Army (IRA) terrorist in Gibraltar. The British authorities had a shoot-to-kill policy when it came to certain IRA operatives. The *McCann* Court "held that the counter-terrorist operation had not been planned and controlled so as to minimize, to the greatest extent possible, recourse to lethal force and, therefore, amounted to a violation" of the right to life.[75] The Israeli Supreme Court cited and followed this proportionality rule in its own Targeted Killing Case.

The Israeli opinion is arguably more narrow and thereby does not impose a rule of proportionality when handling all civilians taking a direct part in hostilities because the military operations before the Court were limited to

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[72] Hays Parks, p. 780.
[73] *Ibid.*, p. 786 (citing Pictet's argument during the 1974-1977 Diplomatic Conference).
[74] European Court of Human Rights, McCann and Others v. the United Kingdom, ECHR 385 (1995).
[75] Nils Melzer, Targeted Killing in International Law (Oxford: Oxford Press 2009), p. 23 (citing ECtHR, McCann Case, Secs. 150, 194, 213f).

threats within Israel and the territories immediately proximate to Israel, e.g., Judea, Samaria, and the Gaza Strip (referred to as the *area*).[76] Therefore, any ruling could be read through the lens of being confined to the laws of belligerent occupation. Under this legal regime, with the army controlling an area of operation, "arrest, investigation, and trial are at times realizable possibilities."[77] Like the *McCann* case, proportionality is embedded into this legal landscape since the option of capture or less lethal means is possible, given that the area of operation is controlled by the State. The Israeli Supreme Court, however, does not qualify its ruling to only occupied territories. The Court does exactly the opposite: it explicitly expands the ruling beyond the laws of belligerent occupation to encompass all international armed conflicts:

> [T]he international law regarding international armed conflict. . . . includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character – in other words, on that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *iue in bello*.[78]

The Targeted Killing Case does not explicitly address non-international armed conflict, because the Court found the conflict in the *area* to be international in flavor. The reality is that the Court's holding holds equal weight in the non-international context. The reasons are simple: to argue that civilians in non-international armed conflict are entitled to less protection than

[76] Parks, p. 789.
[77] Targeted Killing Case, para. 22.
[78] *Ibid*., para. 18.

those in an international conflict, from a legal perspective, is counter to the weight of authority, and from a commonsense perspective, would be difficult to fathom.

This added requirement of proportionality makes targeting a terrorist all the more difficult. Assuming the Israeli holding is now the legal standard, then to target a terrorist, regardless of where the terrorist poses a threat, the State must do three separate but intertwined analyses: Whether the civilian is taking a direct part in hostilities; whether it is for such time as the civilian is taking a direct part in hostilities; and whether lesser means like capture are viable. This added requirement of using the least force possible makes combating terrorism, regardless of what a State calls it, look very similar to the law-enforcement paradigm. It is the terrorist's *actions* at the time of the threat that give the State the right to respond with force. And the responding force, if lethal, must be reasonable; that is, lesser force or capture is not feasible. This means any armed conflict where the actors are not combatants converts into a law-enforcement action.

This was the position advanced recently by the International Committee of the Red Cross (ICRC) in its Interpretive Guidance on the Direct Participation in Hostilities. The ICRC articulates a use-of-force continuum[79] view of engaging belligerents: "the kind and degree of force which is permissible

[79] This is Hays Park's interpretation of what the Interpretive Guidance does, taking from Jean S. Pictet's theoretical use-of-force continuum articulated during the negotiations of the additional protocols: "Humanity demands capture rather than wounds, and wounds rather than death; that non-combatants shall be spared as much as possible; that wounds shall be inflicted as lightly as circumstances permit, in order that the wounded may be healed as painlessly as possible; and that captivity shall be made as bearable as possible." Parks, p. 785.

against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."[80] Hence, "the object of the state violence is protected from the use of force in excess of that necessary to reduce the threat the individual poses."[81]

In his critique of this position, Parks concludes that this theoretical continuum is not grounded in treaty law, State practice, or domestic or international law. And to rely on the holdings of the Israeli Supreme Court, as the ICRC does, although instructive, is not conclusive because it grapples with "one of the most uncommon situations in the world."[82] But the reality is that the international trend is to extend concepts of human-rights law, like the law of humanity and rule of proportionality vis-à-vis the targeted individual, into the law of war. The concept of *lex specialis* that the specialized law of war trumps the most general law of human rights in the area of armed conflict is now being challenged.[83] The assault is not a frontal one in which human-rights law is being touted as the superior law. Instead, it is an assault around the edges: where the law of war is disputed or unclear, then human-rights law is given greater weight. The result is that the principles embedded within the

[80] ICRC Guidance, p. 1040.
[81] Corn COIN, p. 3.
[82] Parks, p. 829.
[83] This concept, lex specialis, "stems from a Roman principle of interpretation, according to which in situations especially regulated by a rule, this rule would displace the more general rule. . . ." C. Droege, "The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, 40 Israel Law Review 310, 338 (2007). See also Parks, p. 797-8.

law of war cede ground to human-rights law.[84] Philip Alston, in his UN report on targeted killing, makes this position clear:

> Both [the law of war] and human rights law apply in the context of armed conflict; whether a particular killing is legal is determined by the applicable *lex specialis*. To the extent that [the law of war] does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by [law of war] principles, it is appropriate to draw guidance from human rights law.[85]

This erosion in the law of war is pursued for the best of intentions: humanity. The erosion is greatest in the area of non-international armed conflict because the law of war is least developed in this area. Using concepts of human-rights law might seem noble, but, as articulated by Professor Solis, "[t]he idea of war as indiscriminate violence suggests violence as an end in itself, and that is antithetical to the fact that war is a goal-oriented activity directed to attaining political objectives."[86] Under the law-enforcement paradigm, which incorporates human-rights law, the use of force is exceptional; under the law of war paradigm, lethal force is authorized by the State but for its political objectives. There are limits to this authorization, but the starting place is the authorization to use force against what the State defines as a military objective. Human-rights law centers on the individual; law of war centers on the State.

Professor Corn articulates the tension between these two bodies of law:

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[84] Corn's Human Rights Article, p. 78.
[85] Alston UN Report, para. 29.
[86] Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War (New York: Cambridge University Press 2010), p. 7.

> Because th[e human rights law] presumption is inconsistent with the underlying presumptions related to the use of force against operational opponents that qualify as lawful military objectives, human rights standards for the employment of force cannot be relied upon to define what constitutes an arbitrary deprivation of life inflicted upon such opponents.[87]

The problem with the conflation between the law of war and human-rights law is that the burden to target belligerents is now permanently shifted to the State: the rules on force, as constrained by the law-enforcement paradigm, only apply to the State. The civilian who directly participates in armed conflict can be hostile at one moment and then expect to regain protections as a civilian the next. Such a result undermines the protection of civilians because it stands the law of war framework on its head. The soldier (and the State) can only respond, as in self-defense, to a hostile act or intent and then is restricted to use the minimum force possible. The State is constrained to only responding to the indiscriminate violence perpetuated by the terrorist who are able to go in and out of protection.

This situation is analogous to the game Whack-a-Mole, but with an additional layer of rules. In this game, if the mole (the terrorist) does not pop up its head (take a direct part in hostilities), then the State may not respond. When the mole does pop up, the amount of force the State can use via its mallet is limited to the minimum force required. And instead of whacking the mole with the mallet, if the State can catch the mole, it must. Nice in theory, but with modern-day lethality, and the technology that can be leveraged to

[87] Corn at footnote 152.

orchestrate an attack instantaneously, the mole has been given an enormous advantage. To make matters worse for the State, the mole operates in places where arrest is remote because governance is weak or nonexistent. The law-enforcement paradigm assumes some control over the space in which the State is conducting operations. Little to no control over that space exists in places like Yemen.[88] The game can be played under this paradigm, but the winner is assured: the mole.

Unlawful Combatants

In response to this modern-day difficulty of combating terrorism under a law-enforcement paradigm, the governments of the United States and Israel attempted to create a third status: unlawful combatant. This status melds two concepts together: first, 'unlawful combatants,' like traditional combatants, can be targeted with lethal force as an enemy and there is no proportionality requirement to resort to lesser means; and second, 'unlawful combatants,' unlike the traditional combatants, are not given combatant immunity if captured for their war-like acts before capture.[89] Terrorist are combatants that are 'unlawful' because "they do not differentiate themselves from the civilian population, and since they do not obey the laws of war."[90] Yet when targeting the 'unlawful combatant,' like a traditional combatant, the State must still adhere to the bedrock principles embedded in the law of war, which are

[88] World Bank ranks Yemen in the bottom 10% of States in the world for degree of governance. See http://www.info.worldbank.org/governance/wg/yemen.
[89] U.S Department of Defense, Manual for Military Commissions Sec. 6(a)(13)(d)(2009).
[90] Targeted Killing Case, para. 27.

distinction, military necessity ("those measures not prohibited by international law which are indispensable for securing the complete submission of the enemy as soon as possible")[91]; and preventing unnecessary suffering ("an attack which may be expected to cause incidental loss of civilian life, injury to civilians . . . which would be excessive in relation to the concrete and direct military advantage anticipated.")[92]

The term 'unlawful combatant' first gained currency in the 1942 Supreme Court case of *Ex Parte Quirin*.[93] During World War II, President Roosevelt created a military commission to try eight German soldier saboteurs who illegally entered the United States by submarine, shed their military uniforms, and conspired to commit acts of sabotage and espionage and to use explosives on targets within the United States.[94] The U.S. Supreme Court upheld President Roosevelt's actions and a majority of the saboteurs were put to death. [95] In the Court's per curium Opinion, the delineation between lawful and unlawful combatants is made clear:

> By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations 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 force. Unlawful

[91] U.S. Department of the Army Field Manual, 27-10, The Law of Land Warfare 4 (18 June 1956)(C6, 15 July 1976).
[92] Protocol I, art. 51(b)(6). This referred to as proportionality, as well, but the author does not use the term in this paper because it might confuse the reader. The author, instead, uses the term unnecessary suffering because it the proportionality of force that must be considered vis-à-vis civilians.
[93] *Ex Parte Quirin*, 317 U.S. 1 (1942).
[94] Glenn Sulmasy, The National Security Court System: A Natural Evolution of Justice in an Age of Terror 56-58 (Oxford University Press 2009).
[95] *Ex Parte Quirin*, pp. 45-46.

> combatants are 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.[96]

In the aftermath of 9/11, the Bush Administration categorized al Qaeda, Taliban, and associated terrorist members as unlawful combatants.[97] This categorization received much criticism, regardless of the U.S. Supreme Court's pronouncements, because a 'third' status under international law had not yet developed.[98] Although the United States has moved away from the terminology 'unlawful combatant,' in lieu of 'unprivileged belligerent,' the net effect remains the same: it is a third status that is targetable and given fewer protections than the law-enforcement paradigm would provide.[99] For example, the State does not have to capture the belligerent even if possible.[100]

The status of 'unlawful combatant' status was supported by the State of Israel during the Targeted Killing Case. The Israeli Supreme Court, however, did not add this status to the other two – combatant and civilian. This 'third category' – the term the Court used instead of 'unlawful combatant' – had not gained currency: "[i]t does not appear to us that we were presented with data

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[96] Ibid. at 30-31.

[97] Norman G. Printer, Jr., "The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen," 8 *UCLA Journal of International Law and Foreign Affairs* 331, 363-69 (Fall 2003)(defining unlawful combatant as a "person who takes up arms, without authority, in defiance of the law of war. Because an unlawful combatant use force without legal justification, he or she may be held liable for the unlawful use of force.")

[98] Antonio Cassese, International Law 409 (2nd ed. 2005). There is also the policy argument that the "criminalization of belligerency creates perverse incentives for the unlawful combatants: because their very participation in the hostilities subjects them to criminal prosecution upon capture, they have no incentive to comply with the law of war." Derek Jinks, "The Declining Significance of POW Status," 45 *Harvard International Law Journal* 367, 438 (2004).

[99] U.S Department of Defense, Manual for Military Commissions Sec. 6(a)(13)(d)(2009).

[100] Blum and Heymann, p. 7.

sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law."[101] The Court did not foreclose the prospect that this status would gain acceptance in the international community. The Court acknowledged that their fight against terrorism required a "new reality," and therefore the law "must take on a dynamic interpretation."[102] In the words of Professors Blum and Heymann, the Court "chose [the law of war paradigm] as its point of departure, but then, in consideration of the unique nature of the war on terrorism, added limitations and constraints on the government's war powers . . . . "[103]

Since the conflict in the *area* was governed by the law of war, the Court categorized these terrorist as civilians taking a direct part in hostilities, or in the words of the Court, "civilians who constitute unlawful combatants."[104] The Court acknowledges a new framework—the transnational nature and lethality of terrorist—but given the international legal tools at its disposal, it chooses the framework, the law of war paradigm, which gives Israel the most protection possible. Yet no matter how robust the law of war paradigm is vice the more restrictive law-enforcement paradigm, the targeting analysis still lies within the realm of self-defense (conduct).

The United States has not taken this tack. Instead, certain terrorists are treated as unlawful combatants or unprivileged belligerents who can be

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[101] Targeted Killing Case, para. 28.
[102] *Ibid.*
[103] Blum and Heymann, p. 8.
[104] Targeted Killing Case, p. 28.

targeted based on their status. This approach, however, has been robustly criticized for not giving terrorists (civilians) more protections. The gap seems wide: does another status in between exist? The answer, perhaps ironically, is in the International Committee of the Red Cross' Interpretive Guidance on the Direct Participation in Hostilities [herein the Guidance], and the answer is yes: the status is being a member of an organized armed group.

The International Committee of the Red Cross' Interpretive Guidance on the Direct Participation in Hostilities

After 9/11, the complexion of warfare changed and a gap developed between what the state of the law is and the need of what the law should be. For the first time, the United States, the leading military power in the world, was involved in a novel type of warfare.[105] It was not an armed conflict involving another State, as envisioned by the First Protocol of Geneva on the protection of victims in international armed conflict, nor was it an armed conflict only involving belligerents within the affected State's borders, as envisioned by the Second Protocol of Geneva on the protection of victims in non-international armed conflict. The belligerent actors in this armed conflict were not members of a State; the motivation of the belligerents was not only to overthrow the internal governance of the State where the belligerents reside but to perform hostilities against a third State. This armed conflict, as categorized

[105] Laura M. Olson, "Guantanamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards?," 22 *Case Western Reserve Journal of International Law* 197, 212 (2010). Olson does an excellent job of how the D.C. District Courts have interpreted membership in the fighting forces of the enemy.

by the U.S. Supreme Court, was a non-international armed conflict.[106] The question of targeting individuals in this unique type of non-international armed conflict was one of the catalysts for the International Committee of the Red Cross (ICRC) to convene in 2003. The result was a study written by ICRC's legal advisor, Nils Melzer. The Guidance, adopted by the ICRC in 2009, attempts to tackle the legal contours of what it means to take a "direct part in hostilities."

As General Watkins, the former Judge Advocate General of the Canadian Forces, in writing a critique of the Guidance, aptly surmises, "[t]he decision in 2003 to attempt to define this 25-year-old phrase was undoubtedly influenced by the significant publicity surrounding the use of air power to conduct targeted killing in Yemen, the Occupied Territories, and Iraq."[107] According to Watkins, however, the Guidance "falls short of the mark."[108] It fails to crystallize the law in the much-neglected area of targeting in non-international armed conflict. The ICRC lost an opportunity to provide "workable and practical guidance regarding this longstanding complex problem."[109] On the other hand, the Guidance did provide a roadmap for advancing the position that a status of individuals exists in non-international armed conflict that is separate and distinct from both combatants and civilians, as well as the subset of civilians who are taking a direct part in hostilities. The trend to treat

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[106] Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006)("conflict not of an international character").
[107] Kenneth Watkins, "Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretative Guidance," 42 *New York Journal of International Law and Politics* 641, 642 (Spring 2010).
[108] *Ibid.*, p. 643.
[109] *Ibid*., p. 645.

everyone in a non-international armed conflict as a civilian – some of whom are uninvolved with the conflict and others who are taking a direct part – is simply rejected by the Guidance.[110]

By treating everyone in a non-international armed conflict as a civilian, the principle of distinction becomes weakened, if not irrelevant. This led the ICRC to posit that "[i]n non-international armed conflict, *organized armed groups* constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities."[111] The ICRC Guidance acknowledges the historic ambiguity of how to treat non-State actors who are a group, organized, and armed:

> While it is generally recognized that members of State armed forces in non-international armed conflict do not qualify as civilians, treaty law, State practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-State parties to an armed conflict).[112]

Given this ambiguity, the Guidance does not lump all actors within an armed conflict within the category of civilians even though "it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities."[113] This would "create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population."[114] Instead, the Guidance boldly concludes that "[a]s

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[110] Corn COIN, p. 1.
[111] ICRC Guidance, p. 1002.
[112] *Ibid*.
[113] *Ibid.*
[114] *Ibid*., pp. 1002-03.

the wording and logic of Article 3 G[eneva] C[onventions] I-IV *and* Additional Protocol II [] reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict." A status—members of an organized armed group—is crystallized.

The Guidance bifurcates organized armed groups into dissident armed forces and other organized armed groups. The dissident armed forces are former members of the State's armed forces who have turned against their State.[115] The other organized armed groups, which could include non-State terrorist organizations, "recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces."[116] The Guidance narrowly defines what constitutes a member of any organized armed group; the term "refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense."[117] This armed wing can be targeted like the armed forces of a State in an armed conflict because the armed wing's purpose is to conduct hostilities.[118] The crux of distinguishing whether an individual is a member of an organized armed group or a civilian,

[115] *Ibid*. p. 1006.
[116] *Ibid*.
[117] *Ibid*.
[118] Corn COIN, p. 8.

which includes a civilian participating in hostilities, is whether the person performs a continuous combat function.[119]

Therefore, two requirements manifest themselves – membership in a group and the conduct of that group – before an individual can be considered a member of an organized armed group and thereby targeted because of his or her status. First, the individual must be a member of an organized group because the "[c]ontinuous combat function requires lasting integration into an organized armed group."[120] Second, the organized group must be conducting hostilities. If these two requirements are met, then this translates into a status that means the non-State actor, a belligerent, can be targeted without regard to current or future conduct. Therefore, under this two-part analysis:

> [a]n individual recruited, trained, and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.[121]

The Guidance, however, incorporates an additional requirement: the belligerent – regardless of the group – must take a direct part in hostilities. This last hurdle places an additional burden on the State More perplexing, it eliminates any real difference between the status of being a member of an organized armed group and that of being a civilian who directly participates in hostilities. The example in the Guidance that highlights this additional threshold is an improvised explosive device (IED) maker:

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[119] ICRC Guidance, p. 1007.
[120] *Ibid*.
[121] *Ibid*.

> the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do *not* cause that harm directly.[122]

Therefore, according to the Guidance, the IED maker cannot be targeted, even if he is a member of a hostile organized armed group, because the conduct of the individual – vice the conduct of the group at large – is not direct. And by direct, the Guidance means "that the harm in question must be brought about in one causal step."[123] The Guidance first establishes a status but then tethers it back to the direct participation in hostilities of the *member* of the organized armed group. It makes direct participation in hostilities the acid test for being a member of an armed organized group: "Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of [the law of war]."[124] This additional hurdle "effectively renders all non-state actors civilians who consistently benefit from the presumption of protection from attack."[125]

Under the Guidance's definition, for example, it is questionable whether Mr. al-Awlaki is a member of an organized armed group due to the factual question of whether he has taken a direct part in hostilities. The United States maintains that he plays an operational rule in al-Qaeda in the Arabian

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[122] *Ibid*., p. 1022.
[123] *Ibid*., p. 1021.
[124] *Ibid*., p. 1008.
[125] Corn COIN, p. 13.

Peninsula and as such, took an integral part in planning the destruction of the Northwest flight on Christmas Day.[126] But planning alone might not trigger direct participation. The State must look to the "direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part."[127] But the Commentary to the First Protocol notes, when talking about civilians taking part in hostilities, that "[h]ostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the *armed forces*."[128] The Christmas Day attack was not harm against the armed forces. In addition, if an IED maker does not constitute a civilian taking a direct part in hostiles, then someone who instigates another to use violence seems at the least questionable.

The ICRC's response to the criticism that all non-State actors are civilians, written eloquently by Nils Melzer, centers on choices and Melzer outlines two. On the one hand, members of an organized armed group "can be overextended to include all persons accompanying or supporting that group (i.e., regardless of their function); an excessively wide approach which would completely discard the distinction between 'direct' and 'indirect' participation in hostilities. . ."[129] The State, under this theory, overextends the pool of

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[126] Press Release, U.S. Department of State, Listing of Al-Qaeda in the Arabian Peninsula (July 20, 2010).
[127] ICRC Guidance, p. 1019 (defining direct causation).
[128] Commentary to Protocol I, para. 1942.
[129] Nils Melzer, "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities," 42 *New York Journal of International Law and Politics*, 831, 850 (Spring 2010).

individuals who it can use force against as a measure of first resort. On the other hand, and the choice Melzer adopts, is that "the notion of 'organized armed group' can be limited to those persons who represent the functional equivalent of 'combatants' in the regular armed conflict."[130] Hence, if an individual is a member of the State's armed forces, then his function is assumed to take a direct participation in hostilities and he can be targeted. Melzer's limitation is equating the non-State actor's function with direct participation of hostilities. If an individual is a member of an organized armed group, then his function within that group must first be established and the required proof is his direct participation in hostilities. For a member of the U.S. armed forces, that function is assumed.

The Guidance is critical to the debate of non-international armed conflict because it acknowledges that the legal authority to target members of an armed organized group is "based on a fundamentally different presumption than that applicable to civilians directly participating in hostilities."[131] The Guidance has built a structure, much like in international armed conflict, where there are two statuses – civilians and members of an organized armed group. The issue is who should populate each status.

Unlike Melzer, General Watkins' test for who is a member of an organized armed group does not begin with direct participation. Instead, he starts with the individual's combat function, which would include "combat, combat

[130] *Ibid.*
[131] Corn COIN, p. 13.

support, and combat service support functions, carrying arms openly, exercising command over the armed group, carrying out planning related to the conduct of hostilities , or other activities indicative of membership in an armed group."[132] He highlights that a central factor is whether the organization maintains a command structure; that is, does the organization fight like a group?[133]

Melzer's concern focuses on the individual; if the status is overextended, the civilian who helps the organized armed group on a "spontaneous, sporadic, or unorganized basis"[134] may lose his presumption of protected status. Yet what is missing from Melzer's analysis is the reality that additional facts may lead to a reasonable and compelling conclusion that the individual in question is: 1) a member of an organized armed group; 2) performing a combat function within the group; and 3) the *group* needs that member's combat function to perform hostilities.

But Melzer's limited focus only on the individual and not the organized armed group is flawed. A greater focus must be on the organized armed group that is conducting hostilities against the State, and the individuals who fill its ranks. Imagine that an individual, a non-State actor, is an actual member of an armed group whose combat function has inflicted great loss on the State. The State can prove the individual's membership in the organized armed group, but since the individual has not taken direct part in hostilities, the State is

[132] Watkins, p. 691.
[133] *Ibid*.
[134] ICRC Guidance, p. 1007.

obligated not to target that member of the organized armed group. In essence, the threshold to trigger the targetable status of membership in an organized armed group is extremely high and exceedingly narrow. So the IED builder, who is proven to be a member of an organized armed group, and regardless of the destruction his devices cause, continues to hold civilian protections. Yet the lone gunman who performs one ambush in combat is targetable. This result is simply not consistent or logical and it puts U.S. soldiers at grave risk.

Another shortfall of Melzer's analysis is that he takes the term 'direct participation in hostilities' – a term that originates from the status of being a civilian in both the First and Second Protocols – and applies it to a new status of belligerents. Like the armed forces of a State, an organized armed group fights like a group; that is, it has a command structure. The individual civilian does not. That is the rationale of why the trigger for a civilian to become targetable is the overt act of direct participation in hostilities; it is the danger then presented. If the civilian stops directly participating in hostilities, then there is no way to link his acts of violence to an overarching design or plan.

A New Approach to Combat Novel Warfare

This linkage, however, does exist for members of an organized armed group. Like a member of an armed force (a soldier), the member of the armed group is part of a structure whose aim is to inflict violence upon the State. A soldier might never take a direct part in hostilities (many soldiers, in fact, do not), but the soldier holds the status of someone who can be targeted because

of his membership in an organization whose function is to perform hostilities. The test for status must be the *threat* posed by the group and the member's course of conduct which allows that threat to persist. This danger-centric approach is echoed by the Commentary to the Second Protocol:

> Those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, *as he no longer presents any danger for the adversary*, he may not be attacked; moreover, in case of doubt regarding the status of an individual, he is presumed to be a civilian.[135]

Non-State actors can be targeted only if membership in the organized armed group can be positively established by the State though a pattern of conduct demonstrating a military function. [136] This logic would make it analogous to the soldier: the soldier is a danger and presents one continuously because of his status. Once a State demonstrates membership in an organized armed group, then the members should be presumed to be a continuous danger as well.

If the focus is only on the member's direct hostile acts, then organized armed groups will inevitably compartmentalize their operations. The armed group will section off its base of training and preparation from its warfighters – thereby separating the two as not to trigger the causal step – because the former is protected.

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[135] Commentary to Protocol II, para. 4789.
[136] Watkins, p. 692.

This approach or interpretation runs the risk of being overbroad, however. Merely because an individual *supports* an organized armed group, such as a villager who serves as a lookout for the armed group but is not a member of the group, does not mean that the individual loses his status as a civilian. To avoid this risk but still provide the State with the flexibility to combat terrorism, the law of war must evolve and innovate to delineate between the civilian taking direct part in hostilities and the member of the organized armed group.

Redefining 'Member of an Organized Armed Group'

To retake the initiative in combating terrorism, the law of war must focus on the middle ground, looking at *both* the organized armed group and the *conduct* of the individual within that group to reach a reasoned conclusion that the individual a member of the group. Therefore, the steps the State should take to reach the conclusion that an individual is targetable based on his status as a member of an organized armed group are threefold. First, the State must determine whether the group that is combating the State is organized and armed. Second, the State must demonstrate that the individual is a member of that group as evidenced by a pattern of conduct which demonstrates a military function. And third, the State must ensure that the protections of the surrounding civilians are honored when the member of the organized armed group, now a belligerent, is targeted.

To accomplish that goal, the test of whether a civilian in a non-international armed conflict has lost his protection and is now a targetable belligerent based on status should read:

> For purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals who are members of the group. Membership is established by a pattern of conduct showing that the member is performing a military function on behalf of the group.

Step One: Is it an Armed Organized Group?

In deciding if the group targeting the State is an organized armed group, the State must first determine if a group exists. A group is an "assemblage of persons . . . regarded as a unit because of their comparative segregation from others."[137] This is likely evidenced by its proclamations and recruitment efforts. Second, is the group armed? Intelligence and self-pronouncements can decipher if lethal means are used by the group. Some groups are hostile to the State's interest but use only political means to accomplish their ends.[138] Third, and most important in the global war against transnational terrorism, is the armed group organized? The question asked by General Watkins is central to this determination: is there a command structure? This must be

[137] Webster's New International Dictionary (Springfield, MA: G & C. Merriam Company 1960 (2d ed.)), p. 1107
[138] E.g., the Mothers of the Plaza de Mayo of Argentina protesting the 'disappeared' children of the Dirty Wars. John Charles Chasteen, Born in Blood & Fire: A Concise History of Latin America (New York: W.W. Norton and Company 2006), p. 290.

established by intelligence and the group's practices. The group's coherence does not need to be robust but it must meet the threshold tests of whether 1) there is a level of leadership, and 2) that leadership exercises command and control over its members. These tests address whether the organization can direct its lethality toward the State.[139]

Step Two: Who fills the ranks of the organized armed group?

If the group is organized and armed, then the State must determine who constitutes its members. In this step, membership is earned, and civilian protection is lost, if the individual engages in a 'combat function.' This function is established by a pattern of conduct. While General Watkins ties organized armed group status to the *individual*'s direct participation in hostilities ("[a]fter the first involvement, any subsequent act demonstrating direct participation would start to provide that basis to believe that there is the beginning of a pattern of conduct that reflects an intention to regularly engage in the hostilities."),[140] the individual's direct participation in hostilities should be but one indicia, albeit a significant one, among many to establish the non-State actor's intention to be a part of the armed group. In other words, the military functions performed by the actor, when taken as a whole, must establish a reasonable conclusion that the individual is a member of the organized armed group. The military functions include combat—taking a direct

[139] It is the opinion of the author that all of these are low threshold issues to meet, given the ease to broadcast (to create the group), the speed to communicate (to organize the group); and the lack of expense to acquire weapons (to arm the group). But the analysis must be done by the State.
[140] Watkins, p. 692.

part in hostilities—, combat support—intelligence, communication, and engineering--, and combat service support—logistics. Other indicia would be carrying arms openly, carrying out planning related to the conduct of hostilities,[141] and "whether the individual functions or participates within or under the command structure of the organization—*i.e.,* whether receives and executes orders or directions. . . ."[142]

This approach would require a case-by-case analysis because the enemy in the war on terrorism does not wear a distinctive uniform or insignia. This makes determining those who are belligerents and civilians difficult and intelligence will be crucial in deciphering one from the other. But if a non-State actor is building IEDs that the group then uses to inflict damage upon the State, then a 'combat support' function, which is a subset of a military function, is established, which, in turn, supports the State's evidence that he is a belligerent (member of an organized armed group) and therefore can be targeted. Once established, the burden is now on the belligerent to show that he has disengaged from the group and, until such time, lethal force against him is authorized.[143]

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[141] *Ibid*., p. 691.

[142] Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. Mary 19, 2009)(citing Gherebi v. Obama, 609 F. Supp. 2d 43, 68-69 (D.D.C. Apr. 22, 2009)).

[143] Watkins, p. 693. How a non-State actor shifts the burden back on the State is by showing he is no longer a member of the organized armed group. Although not fully discussed in this article, the author believes a starting place of analysis would be analogous to the defense of withdrawal within the law of conspiracy. In order to decide that a person has withdrew from a conspiracy the person must have taken an affirmative action to disavow the purpose of the conspiracy (ceased his military function) and he must have taken such action before he or any other member of the scheme had committed any overt act (ceased taking part in hostilities). United States v. Read, 658

Step Three: Minimizing Civilian Casualties

The third step is that when a State determines that a member of an armed group is targetable, it must also establish that the risk of civilian casualties will not exceed the concrete and direct military advantage anticipated.[144] This effort to drive down civilian casualties also drives the State to use munitions that are as precise as possible. Because distinction is grounded on the premise that only those who the State demonstrates are performing a military function can be targeted based on their status, the result will be to structure (and limit) targeted killings to the danger faced by the State. These limits will ensure that there will be fewer civilian deaths; when the State ensures that civilian deaths are limited, the support of the people is more likely.[145] The driving force of any law must be to target those who pose a threat—members of the organized armed group—and not to harm those who are truly civilians.

There is a danger that the State's analysis could be overbroad, but to militate against this, the State must begin from the perspective that everyone is a civilian. The burden is on the State to establish membership by a pattern of conduct that the individual is performing a military function. The villager previously mentioned is assumed to be a protected civilian. If the facts reveal, however, that the villager's lookout function is continuous, that intelligence

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F.2d 1225 (7th Cir. Ill. 1981). The best articulation of this principle is the Israeli Supreme Court's definition of what constitutes 'for such time.' See Supra pp. 18-20.

[144] AP I, art. 51(5)(b).
[145] Tactical Directive, Headquarters International Security Assistance Force (2 July 2009).

shows he not only holds allegiance to the armed group but also informs the armed group of the location of the State's armed force, and that he receives instructions from the armed group on what to do next, then the State can make the case that he is a member of the organized armed group. To not allow the State to establish a case for membership in an armed group, such as the villager providing integral intelligence to the armed group, means the State can never target him absent direct hostile participation. Instead, the only option for the State is to resort to the law-enforcement paradigm, where the burden is again upon the State to return the situation back to the status quo so the villager can be arrested and potentially tried. This course of action not only affords the armed groups protections they have not earned because of their flagrant disregard for the law of war, it also gives the armed groups the time and space to redirect their lethality on others within the State. The State is relegated to using law-enforcement norms, which are intended to prioritize the protections afforded an individual, in an armed-conflict setting. In other words, the terrorists' violations accrue to their benefit.

If the civilized world is to retake the upper hand in combating terrorism, it will not be done using law enforcement norms during an armed conflict, especially in States with weak governance, in which only one side has to follow the rules, and the other is allowed to be armed with few limits. Terrorists are given an enormous strategic advantage in the present scheme. Instead, the

established law of war must evolve to combat this ever-evolving warfare against States.

Mr. al-Awlaki's Status?

Al-Awlaki's status would most likely be different under the revised definition of what entails a member of an organized armed group; his pattern of conduct that he is performing a military function would give him the status of being a member of the group. He is now targetable. This pattern would need to be established through facts that show a military function. Establishing the facts are the obligation of the State, in this case, the United States: Mr. al-Awlaki's degree of involvement in the Fort Hood rampage; the degree of support and aid he gave to Abdulutallab in the attempted Christmas Day airliner attack; and his other attempts to use violence against the United States and his function within those efforts. The U.S. has taken the position that his pattern of conduct justifies his targeting but again, the case-by-case analysis must be done.

Conclusion

The Soldier is trained from day one to know the difference between conduct and status. The difference is profound: One puts the responsibility upon the Soldier, the other upon the State. In the current asymmetric warfare environment, everyone, including the terrorist, is assumed to be a protected civilian. This gives terrorists the advantage. But the law of war already gives the State a means to develop criteria to categorize individuals as belligerents;

now the law of war must be moved forward to give the State an advantage over the terrorists (or at least level the playing field). The current state of affairs is that the terrorists are waging armed conflict against the State, while the State is relegated to using law enforcement against the terrorists. The next evolution of the law of war must make sense in the context of the ongoing armed conflict and not be so onerous that it makes categorizing individuals as belligerents virtually impossible. Tethering a non-State actor's action to how it supports an organized armed group, through a military function that is evidenced by a pattern of conduct, does that. It protects the individual who is a civilian, because the presumption is that everyone is a civilian, but allows the State to establish belligerency by identifiable criteria and structure. Once this criterion is met, the State can legally and justifiably use force against an actual danger.

In sum, the civilian who eschews taking part in the armed conflict has greater protection than ever before in history because States must use precision to minimize civilian harm. But this protection should extend only to civilians worthy of this status; members of organized armed groups should lose that status. The civilian who participates in armed conflict by performing a combat function for an armed organized group cannot be hostile at one moment and then expect to regain his civilian status protections the next. Such a result would undermine the protection of civilians because it stands the law of war framework on its head: States will put less of a premium on precision because distinction is either unrealistic or nonexistent. Status is

paramount, but the distinction equation should be tempered and informed by a pattern of conduct that can rebut the presumption that a non-State actor is a civilian. This equation will push members of organized armed groups to know that they, like soldiers, will be targeted and their efforts to hide in the civilian population will not be enabled by the law of war. The conduct of a member of an organized armed group should result in a corresponding appropriate status. The U.S. soldier understands the profound significance of status; the time has come for States to follow suit.