TARGETING CO-BELLIGERENTS

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INTRODUCTION

The current debate about targeted killings has revolved around the central divide between *jus ad bellum* and *jus in bello*. Either the launching of a drone strike is considered a defensive use of force to be evaluated under the traditional rules of self-defense under Article 51 of the UN Charter, or the drone strike is to be evaluated under the rules of warfare codified in international humanitarian law.[1] The prohibition against the killing of civilians is of particular concern here. Of course, the two issues are not mutually exclusive. One can coherently claim that drone strikes satisfy the demands of *jus ad bellum* but fail to live up to the requirements of *jus in bello*, and are therefore illegal.[2] The reverse is possible as well. One might conclude that targeted killings do not run afoul of international humanitarian law but violate the core *ad bellum* prohibition against the unlawful use of force codified in the UN Charter. These are all logical permutations of the argument.

At a conceptual level, international law is deeply conflicted about how to handle targeted killings. The issue falls between the state-based system of public international law and the individualized system of domestic criminal law. The former contemplates armed conflicts between combatants who open themselves up to the reciprocal risk of killing; the latter contemplates killings in self-defense only when the traditional progression of arrest-trial-punishment is unavailable. Because the terrorist is a non-state actor who falls between these two categories, the current law has difficulty not only providing a positive rule regarding to the legality of targeted killings, but also definitively choosing the correct paradigm. Even the application of traditional rules of international humanitarian law (IHL) to the activity remains contested, since such an application presupposes that one paradigm has been

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[1] See, e.g., Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009, in* Shooting to Kill: The Law Governing Lethal Force in Context (Simon Bronitt ed., 2010) (concluding that targeted killings violate both spheres of the law of war); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution: Study on Targeted Killings*, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

[2] Cf. Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. Transnational L. & Pol'y 237 (2010) (concluding that drone strikes are a valid exercise of self-defense).

selected over the other.[3] It may even be the case that no positive rule of customary international law has crystallized to govern the practice.[4]

I. THE PROBLEM OF LINKING

Regardless of which paradigm is selected, there is inevitably a deep conceptual puzzle that straddles both sides of the fundamental divide between *jus ad bellum* and *jus in bello*. In both cases, it is unlikely that the single individual who is targeted—in isolation—satisfies the demands of either argument. The individual must be linked to a larger collective—a larger belligerent force—that explains the relevancy of the single individual. This linking requirement is a function of both the *jus ad bellum* and *jus in bello* analysis, e.g. one cannot simply avoid the linking issue by switching from *jus ad bellum* to *jus in bello* or vice versa.

Within the context of *jus ad bellum*, the traditional argument for a drone attack relies on the international doctrine of self-defense, recognized in Article 51 of the UN Charter but also certainly recognized in customary law as well as the just war tradition.[5] The United States has argued publicly that their drone attacks in Yemen, Pakistan, and elsewhere are supported by the doctrine of self-defense.[6] However, under any version of the principle of self-defense—whether expounded by public international lawyers or legal philosophers—the target of the defensive counter-attack must constitute a threat to the United States or its allies.[7] The underlying threat makes the defensive force "necessary"—a universally recognized constraint on the use of force in self-defense under either basic principles of criminal law or interna-

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[3] See Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 Harv. Nat'l Sec. J. 145 (2010) (comparing two paradigms: war and exceptional peacetime operations).

[4] See S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18.

[5] Compare Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (*Advisory Opinion on the Wall*) 2004 I.C.J. 136, 189, 194 (July 9) (no international right of self-defense against non-state actors), with Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 222-26 (Dec. 19). See also Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 Case W. Res. J. Int'l L. 349 (2004).

[6] See Harold H. Koh, U.S. Department of State, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law, Washington, DC (Mar. 25, 2010), available at http://www.state.gov/s/l/releases-/remarks/139119.htm.

[7] See Ian Brownlie, *Principles of Public International Law* 732-33 (7th Ed., 2008).

tional law.[8] The notion that self-defense is a necessary response to a threat is part of the universal structure of self-defense arguments in any legal or moral context.[9]

My point here is not to advocate for any particular version of what constitutes a "threat"—nor what makes a defensive response to it "necessary". These are sticky theoretical questions that form the center of most debates about self-defense. Rather, the issue I want to explore is one-level deeper. Regardless of one's assessment of what constitutes a threat to a state's interests—territorial integrity, political independence, etc.—it is unlikely that a single individual, by himself or herself, can constitute a threat against a state. It is *theoretically* possible to imagine a hypothetical terrorist who works alone, secretly plotting a devastating attack against a state by procuring weapons and then deploying them without any assistance whatsoever. The Unabomber is one such example, and it is the exception that proves the rule.[10]

The more common situation involves the existence of a terrorist organization or militia that constitutes a threat by plotting and implementing terrorist or military attacks against a particular state. In such cases, the *collective* constitutes the threat against the national interest, thus generating the right of self-defense. Furthermore, the individual stands in a certain relationship with the collective, either by belonging to the terrorist organization, contributing to the collective endeavor, or some other mode of participation in the collective group.[11] For the moment we must postpone consideration of which linking principle is most appropriate. The point here is simply that individuals acting alone almost never constitute a national threat. Within the War on Terror and the asymmetrical use of targeted killings against non-state actors, an even stronger conclusion is warranted: single individuals *never* constitute a threat to the United States. The threat comes from organized groups with political or ideological objectives that they seek to

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8 Id. at 734 (citing *Caroline* case).

9 On the structural similarity of the necessity prong in both national and individual self-defense, see G.P Fletcher and J.D. Ohlin, *Defending Humanity: When Force is Justified and Why* 91-96 (2008).

10 Indeed, for some theorists the isolated and individualistic nature of the Unabomber's criminal activities precludes applying to him the label of terrorist, a term usually reserved for organizational efforts. See, e.g., George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 J. Int'l Crim. Just. 894, 907-08 (2006) (organization as one element of the family-resemblance concept of terrorism).

11 For a discussion of participation in collective endeavors, see generally Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press, 2000).

bring about by launching attacks against civilians. This is the raison d'être of global terrorism and jihadism.

Shifting the focus to *jus in bello* does not relieve us of the obligation to find an appropriate linking principle. If terrorists are simply enemy civilians, without any relationship to a larger collective, then no operative principle of IHL permits their summary killing.[12] It is only when their relationship to a larger collective is considered that the use of force against them may be permissible. Under traditional rules of IHL, combatants may be killed to the extent that they belong to an armed fighting force that is engaged in an armed conflict with the United States.[13] Indeed, it is the collective's engaging of the armed conflict with the United States that triggers the operation of the IHL norm allowing combatants to be killed. But it is an open question whether IHL recognizes the existence of an armed conflict with a non-state actor, and whether this is best described as an international armed conflict triggering the Geneva Conventions, a non-international armed conflict triggering Common Article 3 of the same, or neither, thus generating conflict regarding the appropriate default rule in the absence of any governing Geneva Convention regime.[14]

In this context, there are multiple problems associated with linking an individual to the larger terrorist organization that is engaged in an armed conflict with the United States. First, the United States is currently engaged in an armed conflict (international or non-international) with al-Qaeda, but the individuals targeted by US drones may or may not be card-carrying members of al-Qaeda.[15] Indeed, although al-Qaeda may once have been a defined and tightly-knit organization controlled by Osama Bin Laden, the organization has morphed into an amorphous network of terrorist organiza-

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12 See Dieter Fleck, *The Handbook of International Humanitarian Law* 46 (Oxford University Press, 2nd ed. 2008) ("The outbreak of an armed conflict between two states will lead to many of the rules of ordinary law of peace being superseded, as between the parties to the conflict, by the rules of humanitarian law.").

13 Id. at 82. See also Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 32 Cardozo L. Rev. 405, 416 (2009).

14 See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (conflict with al-Qaeda is a non-international armed conflict falling under Common Article 3). For a discussion, see D. Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. Int'l L.J. 55, 60 (2006) ("Recognizing that the terrorism conflict does not fit particularly well with traditional classifications of either 'international' or 'non-international' armed conflict, it concludes that this war is instead best defined as 'transnational.' ").

15 See O'Connell, supra note 1, at *10-11.

tions operating under the common banner of al-Qaeda.[16] In rare instances, various local terrorist organizations operating under the name al-Qaeda may share operational or financial support from their parent organization, and may even respond to hierarchical commands issued by bin Laden himself or his commanders. In most cases, however, terrorist organizations operating under the banner of al-Qaeda in some form are part of a much looser confederacy of co-sympathetic jihadists who share common inspiration and rhetoric without sharing a common command structure or operational command. They are distinct terrorist organizations linked together by a common cause. It is therefore unclear if the existence of an armed conflict with one al-Qaeda organization can translate into an armed conflict with another sympathetic al-Qaeda organization.[17] In some instances, both organizations may be sufficiently well developed that each, on its own terms, meets the appropriate standard for being engaged in an armed conflict with the United States. In other contexts, however, the over-arching umbrella between the organizations may be crucial for our legal determination of an armed conflict with the United States. This is particularly true in cases where one terrorist organization is well developed and clearly engaged in an armed conflict, but the second organization is a nascent and burgeoning endeavor that has not yet launched significant attacks yet.

The preceding analysis suggests that both the *jus ad bellum* and the *jus in bello* analyses suffer from a deeper confusion about how to relate the individual terrorist with the larger collective. Attacking the problem in this manner will help expose the deeper question of how to integrate the non-state actor—and the individual terrorist—into the inherently collective nature of public international law and the laws of war that arise from it. We should therefore consider all of the possible linking principles and consider which best describes the particular role and function of the individual terrorist. The possible linking principles include: direct participation in an armed conflict, military membership, co-belligerency, control, complicity, and conspiracy.[18] A comparative evaluation of the linking principles will cut across the *jus ad bellum-jus in bello* divide.

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[16] 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, 82 (2003)

[17] For a discussion, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2112 (2005).

[18] The list of linking principles is not meant to be exhaustive, but rather to include a representative cross-section of the relevant types.

II. FIVE POSSIBLE LINKING PRINCIPLES

1. *Direct Participation in an Armed Conflict*

Under a standard *jus in bello* analysis, civilians are generally protected from the reciprocal risk of killing that governs the relations of enemy soldiers.[19] Obviously, though, this protection can be opportunistically exploited by civilians who use their protected status to pursue attacks without subjecting themselves to reciprocal risk.[20] Such a system of perfidy would create a perverse incentive: soldiers would have no incentive to identify themselves as soldiers—the only consequence of their identification would be one of exposure. Consequently, traditional rules of *jus in bello* deny protected status to civilians who directly participate in the armed conflict.[21] The functional justification for this rule is obvious: civilians who engage in combatancy are functionally equivalent to traditional combatants and ought to be treated similarly, i.e. ought to be subject to attack. This rule is now codified in Article 51(3) of Additional Protocol 1, which states that "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[22]

The concept of "direct participation" links the individual to the collective fighting force that is engaged in hostilities. The protection is not lost simply by virtue of holding a gun.[23] If the linking principle merely required the use of weapons, it would have stated that. Rather, the linking principle establishes a quasi-causal relation between the non-protected civilian and the larger armed conflict. Unfortunately, though, nobody knows what constitutes "direct participation" in the armed conflict. The term is undefined in the Optional Protocol and there is little case law on the subject. The International Committee of the Red Cross concedes that: "It is clear that the lawfulness of an attack on a civilian depends on what exactly constitutes direct participa-

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19 See Fleck, supra note 12, at 96-97, 237-38.

20 Id. at 80.

21 See International Committee of the Red Cross, *Customary International Humanitarian Law*, vol. I, at 19-24 (Cambridge University Press, 2005) (hereinafter cited as *ICRC Commentary*).

22 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), adopted June 8, 1977, art. 51(3), 1125 U.N.T.S. 3.

23 Even civilians retain the right of individual self-defense, which might be one reason to retain small arms even in a conflict zone. This complicates the ascription of combatancy to individuals carrying weapons—a particular problem during the recent fighting in Libya. See, e.g., Thom Shanker & Charlie Savage, *NATO Warns Libyan Rebels Against Attacking Civilians*, New York Times (March 31, 2011).

tion in hostilities and, related thereto, when direct participation begins and when it ends… [but] the meaning of direct participation in hostilities has not yet been clarified," noting that a precise definition of the term does not exist.[24] The ICRC Commentary cites the Inter-American Commission on Human Rights for the proposition that the concept of "direct participation" in hostilities means "acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and material."[25] Although this interpretation of the concept has some intuitive appeal, it reduces it to a causal criterion—not an inherently objectionable result, although the *type* and *closeness* of causal relation is left similarly undefined. As any good lawyer knows, the real issue is never whether causation is present or not, but rather what type of causation (but-for, proximate, etc.) and whether the causation between the act in question and the desired consequence is close enough to meet the applicable standard. Many genuinely civilian actions that patriotically support a nation's interest would eventually and predictably cause some harm to enemy personnel, but no one would ever suggest that they constitute direct participation in hostilities.[26]

One can imagine a spectrum of participatory acts. On one end of the spectrum are acts that unquestionably represent acts of combatancy, such as firing a weapon at the enemy. No one doubts that this constitutes direct participation. At the other end of the spectrum, one might place activities such as a civilian seamstress who sews uniforms in a civilian factory that will one day be worn by soldiers. Or consider the cook who resides far from the battlefield and makes frozen food, some of which will be sold to the military for inclusion in MREs (Meals Ready to Eat). This clearly does not rise to the level of direct participation. In the middle of the spectrum are the hard cases: the civilian contractor who repairs a tank on the battlefield, or the civilian defense department employee who helps design or deploy a new weapons system. Do these constitute direct participation in hostilities?[27]

One way to get a handle on direct participation is to compare it with indirect participation. The ICRC commentary cites the Inter-American Commission on Human Rights for the proposition that "mere support" of the military effort by civilian personnel—including commercial sales and "expressing sympathy for the cause of one of the parties"—constitutes *indirect*

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[24] See *ICRC Commentary*, supra note 21, vol. 1 at 21.

[25] Id., vol. II, at 114.

[26] Cf. Michael Walzer, *Just and Unjust Wars* 146 (3d ed. 2000).

[27] The United States Naval Handbook states that guards, lookouts, and intelligence acts all meet the direct participation standard. See *ICRC Commentary*, supra note 21, vol. 1 at 22.

participation.[28] The asserted rationale for this conclusion is that these forms of participation do not involve "acts of violence which pose an immediate threat of actual harm to the adverse party."[29] The concept of immediacy appears to be doing all of the work here, though it is unclear if immediacy is as significant as the Inter-American Commission believes it to be. Similarly, the ICRC notes that a draft statute for the future International Criminal Court described participating in hostilities to include scouting, spying, and sabotage, but excluded food deliveries and household domestic staff "in an officer's married accommodation."[30]

At Nuremberg, Streicher, Goebels, and others who ran the Nazi propaganda machine were believed to be responsible for aiding the Nazi war machine.[31] Indeed, Streicher was charged with criminal responsibility for his writings, which in today's legal climate would have been described as direct and public incitement to commit genocide, in the words of the Rome Statute.[32] When NATO bombed Serb positions in order to pressure Serbia to withdraw forces from Kosovo, the targets included Serbian state television and other elements of the state's communications regime.[33] Although reasonable persons can disagree over the permissibility of these attacks, I take it that the disagreement stems more from the civilian nature of the employees at the state television station, rather than the indirect nature of their causal contribution to the war effort. In many of these situations, the causal role played by the non-military civilians is quite substantial and might even be described as direct.[34] Perhaps this is the reason that the US Naval Hand-

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28 Id., vol. II at 114 (citing Third Report on Human Rights in Columbia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, Feb. 26, 1999, para. 53-56).

29 Id.

30 *ICRC Commentary*, supra note 21, vol. II at 116.

31 Reifenstahl might also be included in that list, though she was never prosecuted for her films.

32 See Judgment, Streicher, International Military Tribunal at Nuremberg; D.F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 American University Int'l L. Rev. (2006) 557, at 582–3.

33 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257 (2000).

34 Cf. Sandoz, Swinarski & Zimmerman, *Commentary on the Additional Protocols* 619 (Martinus Nijhoff Publishers, 1987) (discussing distinction between direct participation in hostilities and the more general participation in the war effort and noting that "even the morale of the population plays a role in this context, but concluding that without a distinction between direct and general participation "international humanitarian law could become meaningless").

book simply concludes that the direct participation standard "must be judged on a case-by-case basis."[35]

The direct participation standard is difficult to apply to terrorists, and there is currently no uniform state practice that would shed light on the content of the customary norm. On the one hand, some nations take a purely causal approach to the notion, whereby any civilian who contributes to the armed conflict looses protected status. For example, India believes that any person who "contributes towards the furtherance of armed conflict" is no longer a protected civilian.[36] On the other hand, some countries conclude that "persons who merely provided support to the enemy… for example those who supplied it with weapons, food or medicine," do not loose their protected status.[37] In between, some nations recognize the inherent ambiguity and lack of clarity in the standard. For example, Israeli practice notes that the carrying of arms is not a sufficient condition for losing protected status, since in many locations (e.g. Lebanon), civilians routinely carry firearms even though they have nothing to do with the hostilities, though the Israel report notes that "when returning fire, it is extremely difficult (and probably unwise from a military viewpoint) to differentiate between those individuals actually firing their firearms and those just carrying them."[38]

The ambiguity becomes clearer when one considers another linking principle that is often applied to terrorists: providing material support to terrorists. The United States considers this to be a war crime and a violation of both federal and international law.[39] Does providing material support for terrorism constitute direct participation in hostilities? Did Hamdan "directly participate" in the hostilities because he was driving Osama bin Laden?[40] The thing about providing material support is that it rests squarely on the shoulders of a causal contribution to the larger effort. If the individual's actions make a terrorist attack more likely—e.g. if he aids or abets the larger effort—then the individual has provided material support to terrorism.[41]

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35 See *ICRC Commentary*, supra note 21, vol. I at 24. However, the US Air Force handbook offers additional examples: civilian ground observers that report the approach of hostile aircraft and rescuers of downed military airmen. See id., vol. II at 117.

36 Id., vol. II at 109.

37 Id., vol. II at 121.

38 Id., vol. II at 120-21. See also Shanker & Savage, supra note 23.

39 18 U.S.C. §§ 2339A and 2339B.

40 Cf. George P. Fletcher, *On the Crimes Subject to Prosecution in Military Commissions*, 5 J. Int'l Crim. Just. 39 (2007).

41 Id. ("Virtually any aid or assistance to an organization labeled terrorist would be sufficient to trigger liability. Under these provisions, Bin Laden's driver would

Consequently, providing financial support or engaging in advocacy on behalf of a terrorist cause can constitute material support, since terrorist activities require far more than just brute operational support.[42] Many other forms of support are required to bring a terrorist plan to fruition. But providing financial support or ideological advocacy is a far cry from a *direct* participation in hostilities. What is missing is not a causal link, but the *right kind* of causal link.

Direct participation would appear to require the right kind of causal link as understood by the concept of directness. But distinguishing between a direct and indirect causal contribution is far from easy. One gloss on directness is that the causal contribution must be operational and on the battlefield, while indirect contributions take place off the battlefield and emanate from beyond the confines of the military. But this is not so obvious. Directness appeals to the closeness of the causal route, which may or may not accord with a battlefield movement. It is, for example, possible to envision a close financial connection as well as a remote battlefield connection. Each of these possibilities puts pressure on our intuition that the concept of directness correlates essentially with prototypical battlefield activity.

2. *Co-Belligerency under the Law of Neutrality*

Another solution to this problem is to employ the doctrine of co-belligerency from the well-travelled law of neutrality.[43] Under this doctrine, states engaged in an international armed conflict are allowed to consider third-party states as co-belligerents of the enemy and thus subject to attack. However, third-party states must first be given the opportunity to declare their neutrality in the conflict, and only if they refuse to remain neutral can they be declared co-belligerents of the enemy and thereby subject to lawful attack.[44] The application of this doctrine can be quite controversial, in particular whether a state can feign neutrality and yet offer limited assistance to an ally and yet remain free from attack.[45] This can be referred to as a form of benevolent neutrality, or the idea that a state may "discriminate" against one

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clearly be guilty for providing 'transportation'. Anyone who contributes money to terrorist organizations (or one so denominated) is guilty.").

42 Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2720 (2010).

43 See Fleck, supra note 21, at 576-77.

44 Id.

45 W. Heintschel von Heinegg '"Benevolent" Third States in International Armed Conflict' in M. Schmitt and J. Pejic, *International Law and Armed Conflict: Exploring the Faultlines* 543–568 (Nijhoff Leiden, 2007).

side of the conflict without necessarily becoming a full co-belligerent in the conflict.[46]

The deeper problem with the doctrine of co-belligerency is whether it can be successfully transplanted from the original state-based system of public international law into the new realm of non-state actors like al-Qaeda. Bradley and Goldsmith have argued that terrorists who are "co-belligerents" of al-Qaeda are by extension engaged in an armed conflict with the United States by virtue of their status as co-belligerents.[47] However, in *Al-Bihani*, a U.S. federal court rejected application of the doctrine to the war against al-Qaeda, concluding that the doctrine was rooted in traditional public international law notions of state sovereignty and that any "attempt to apply the rules of co-belligerency to such a force would be folly, akin to this court ascribing powers of national sovereignty to a local chapter of the Freemasons."[48] Indeed, the law of neutrality is based on the idea that states have a duty to declare themselves either officially neutral in a conflict or throw their lot in with one side of the conflict over the other—thus sharing the advantages of victory but also sharing the burdens of defeat. In the words of Francis Lieber, they advance and retrograde together.[49] The problem is that irregular fighting forces are not similarly situated with their enemies in an analogous fashion to states within the global Westphalian system.[50] All states in the Westphalian system enjoy the sovereignty associated with the formal equality of nation-states; one expression of this sovereignty is the ability to form strategic alliances, declare war, engage in armed conflict, sign peace treaties, and return to peaceful relations with an enemy state. Non-state actors are neither sovereign entities nor do they enjoy the capacities that flow directly from their sovereignty. Nonetheless, Posner and Goldsmith have argued that the U.S. president is permitted to target individual terrorists who are co-belligerents of al-Qaeda.[51] The invocation of the concept of co-belligerency allows them to connect the individual terrorist with a fighting force that is currently engaged in an international armed conflict with the United States. They invoke this rationale to demonstrate that such targeted

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46 Id.

47 See Bradley & Goldsmith, supra note 17, at 2112.

48 Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010). The issue is also discussed by Kevin Jon Heller, *D.C. Circuit Rejected "Co-Belligerency" in Al-Bihani*, opiniojuris.org (Oct. 17, 2010), available at http://opiniojuris.org/2010/10/17/dc-circuit-rejects-co-belligerency/.

49 US General Order No. 100, 24 April 1863 (the Lieber Code), art. 20.

50 See also 2 L. Oppenheim, *International Law: A Treatise* § 74 (1906).

51 Posner & Goldsmith, supra note 17, at 2113.

killings comply with the congressional authorization that was provided to the president in the AUMF passed after the September 11 attacks.[52]

The concept of co-belligerency is built around the notion that combatants fighting against a common enemy—even if they are not fighting on a unified front—can be linked together simply by virtue of their common enemy. The old adage that the enemy of my enemy is my friend best expresses the principle. Simply by virtue of standing in the common relationship of belligerency against the same enemy, two entities become co-belligerents.

The key thing to remember about the doctrine of co-belligerency, as it exists in the law of neutrality, is that it is built around the notion of publicity. Co-belligerents are not defined simply around their actions on the battlefield. Rather, third-party states must be allowed the opportunity to publicly declare their neutrality in the conflict, and only if they forgo this opportunity may they be labeled co-belligerents and subject to attack. This publicity criterion works well for sovereign entities such as states that are capable of exercising foreign relations. It is more unclear how this translates into the domain of individual terrorists who are defined as co-belligerents of al-Qaeda. They are not given the formal opportunity to declare their neutrality, nor are they given a conventional form of notice that they are being declared a co-belligerent of al-Qaeda, except in the generic sense that the United States has publicly declare that *all* militants are subject to attack unless they foreswear allegiance to al-Qaeda or the Taliban. But this certainly does not meet the formal requirements of the law of neutrality, nor does it capture its underlying spirit of publicity.

3. *Military Membership*

The traditional rules of IHL implicitly rely on a principle of membership in order to link an individual combatant with a larger fighting force. The basic criteria for the fighting force—the wearing of a military uniform, the display of a fixed emblem recognizable at a distance, the carrying of arms openly—defines the collective fighting force as a military organization that deserves the protection of IHL.[53] However, the basic criteria also help define the *individuals* who belong to the organization. Determining membership is based on the fact that individuals in the military wear uniforms, display fixed emblems, and carry their arms openly (to the extent that they use weapons);

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[52] Id.

[53] See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

this in turn publicly signals to the world that the individual is part of the fighting force.

Membership is important because it provides a public criterion that is easy to establish. The link is established simply by virtue of signing up with the military, being drafted, or donning a uniform. No deeper investigation is required. Indeed, it does not even matter if the combatant actually *engages* in combatancy. His status as a combatant is established simply by virtue of his joining the military organization, regardless of whether he actually fires his weapon and kills an enemy soldier.[54] The link is easily administered, public, and clear for both sides of a conflict to identify the relevant individuals. There is comparatively little ambiguity about membership in a military organization.

Unfortunately, membership in a terrorist organization does not demonstrate any of the hallmarks that IHL typically assigns to membership in a military organization. Terrorists do not wear uniforms or display fixed emblems, nor do they carry arms openly. Perfidy and deception are essential tools that allow the terrorist to complete his deadly craft. It may be the case that membership in a terrorist organization may have other essential attributes, but they are undeniably not the same attributes that IHL assigns to military organizations. The standard IHL categories were specifically designed to link the individual soldier with warring collectives that are the traditional subjects of public international law (i.e. nation-states), and to provide a first gloss on Lieber's assumption that individual soldiers are linked to the collective such that they advance and retrograde together. With these criteria, however, the terrorist remains in limbo.

4. *Control*

One might connect an individual terrorist with al Qaeda—and the armed conflict between al Qaeda and the US—with a control test. Under this view, the individual is linked to the collective if al-Qaeda "controls" the actions of the individual. This principle has its genesis in public international law and the standard that the ICJ imposed in the *Nicaragua* case to determine whether the actions of an armed group could be attributed to a state for purposes of assigning state responsibility for the group's actions.[55] The court concluded that state responsibility existed in cases of effective control of the

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[54] But see Fleck, supra note 21, at 80 (concluding that members of the armed forces who do not take direct part in hostilities are non-combatants).

[55] Military and Paramilitary Activities in and against Nicaragua (Nicaraguav. United States), 27 June 1986, ICJ Reports (1986).

group's actions. In *Nicaragua*, the US was found not be in control of the contras because, although the US was found to be involved in "planning, direction and support" of the contras' paramilitary activities, there was insufficient evidence that the US "*directed* or *enforced* the perpetuation of the acts contrary to human rights and humanitarian law alleged by the applicant State."[56]

There are other versions of the control principle. The ICTY famously rejected the ICJ's effective control test and formulated a different standard based on overall control.[57] Under this new standard, control by the state requires more than mere financing or providing military equipment, but the standard stops short of the strict standard imposed by the ICJ. The overall control standard is met by the planning and supervision of military activities in general, without requiring that the planning or oversight extend down to the level of specific military attacks.[58] A more general level of planning or supervision can constitute overall control of the paramilitary organization even in the absence of specifically directing the organization's military operations.

The problem with borrowing either of these control principles and applying them to the War on Terror is that many of the individuals who are targeted by the administration are not controlled by al-Qaeda, even under the looser version of the standard articulated by the ICTY. In some cases, to be sure, the individual's activities may indeed be directed by al-Qaeda. In other situations, however, the individual will be affiliated with a regional terrorist organization with very loose ties to the al-Qaeda parent group. Originally, al-Qaeda represented a defined organization with specific individuals committed to a particular political objective. But the organization has now transformed into a looser confederation of like-minded fellow travelers, many of whom are fighting separate armed conflicts in different regions of the globe. These conflicts include different enemies, different objectives, and different techniques, though they might share an overarching ideological commitment to violent jihadism. Consequently, in many situations, the parent organization may provide ideological and rhetorical support but no direct or even general operational control over the local terrorist organization.

One solution to this problem is to redefine the armed conflict as not against al-Qaeda per se but rather the long list of more local organizations

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56 Id. at 64-65 (emphasis added).

57 See Judgment, Prosecutor v. Tadic, ICTY Appeals Chamber, Case No. IT-94-1-A, para. 137.

58 Id.

that are engaged in terrorist activities.[59] This might alleviate the need to use the control principle in the first place, but the strategy can only be imperfectly applied. To the extent that a pre-existing local organization is involved in a bona fide international armed conflict with the United States, the strategy works. However, many of these sub-groups might be so localized that they could not be said to be engaged in a declared armed conflict with the United States. Furthermore, some of these local groups might be so loosely organized that even the local group does not "control"—either effectively or overall—the actions of the individual terrorist.

5. *Complicity & Conspiracy*

Another solution is to import the doctrine of complicity from the domain of criminal law as a way of linking the individual terrorist to a larger group engaged in armed conflict with the United States. The doctrine of complicity implicitly relies on a causal notion, in the sense that complicity liability is generated by an individual's contribution (or attempted contribution) to a criminal endeavor, just as long as the contribution makes the completion of the crime more likely.[60] This broad notion of complicity has increasingly been used as a paradigm to understand an individual's contribution to a national collective endeavor of war-making.[61] The importation of a criminal law notion into the domain of public international law may, at first glance, appear strange, but the concept's intuitive appeal is undeniable. The only difference between the classical criminal law situation and the situation of a national armed struggle is the size of the collective endeavor to which the contribution is made.[62] The other side of the equation—the individual, as well as his relationship to the collective—remains the same. Furthermore, the case under consideration here (the individual contributing to the collective terrorist organization) stands in between the classical criminal law paradigm and the state-based paradigm of international conflicts inherent in pub-

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[59] The concept of the "War on Terror" represents an even wider solution, where the enemy is terrorism itself. However, this is just as nonsensical as declaring a War on War or a War on Enemies, with the opponent being defined as anyone who threatens aggressive action. This eviscerates the notion of an armed conflict against a defined enemy.

[60] Compare Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Calif. L. Rev. 323, 343 (1985) and John Gardner, *Complicity and Causality*, I Crim. L. & Phil. 127 (2007), with Christopher Kutz, *Causeless Complicity*, I Crim. L. & Phil. 289 (2007).

[61] See, e.g., Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and the Law of War*, 33 Phil. & Pub. Aff. 148 (2005).

[62] Cf. id. at 153.

lic international law. This broad notion of complicity in a collective endeavor is also encoded in Article 25(3)(d) of the Rome Statute, which scholars have interpreted as criminalizing a form of residual complicity in a collective criminal endeavor.[63] Although terrorism is not a discrete international crime under the Rome Statute, the mode of liability codified in Article 25(3)(d) represents a similar invocation of the concept of complicity in group action. The federal crime of providing material support for terrorism is also built around the notion of complicity.[64]

The causal element of criminal complicity picks up quite nicely the causal interpretation of directly participating in hostilities. Under this view, it makes sense to target individual terrorists who are complicit in the larger collective conflict (whether one defines the conflict as a criminal conflict or a war) because complicity represents a form of *participation.* In criminal law, this point is purely definitional; complicity is defined as a form of participation.[65] A party to an armed conflict has every reason to target an individual whose actions contribute to—or were aimed at contributing to—their eventual defeat.

The question, however, is whether the causal element of criminal complicity is sufficiently *direct* as a linking principle to adequately serve as a gloss on the notion of directly participating in hostilities. Indeed, criminal law scholars often describe aiders and abettors—and other form of accomplices—as having engaged in a form of indirect commission of the crime.[66] True, at least some accomplices could be described as direct participants in the endeavor, but the criterion of complicity is notoriously wide and meant to capture a wider scope of participation that plays some causal role in the criminal endeavor, even if that causal role is somewhat attenuated. Even in criminal law, though, the causal role cannot be too attenuated, otherwise criminal liability is usually denied as inappropriate. But even still, the criminal law notion may capture a whole host of individuals whose indirect contributions to the endeavor make them criminally culpable (and hence subject to punishment) but perhaps not subject to the immediate and summary killing implicit in traditional combatancy under the standard rules of IHL.

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63 *Lubanga*, ¶ 337.

64 See Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. of Nat. Security L. & Pol'y 5(2005).

65 See George P. Fletcher, *Complicity*, 30 Israel Law Review 140 (1996).

66 This is also sometimes described as perpetration-by-means. See Rome Statute, article 25(3)(a). See also MPC §2.06. For a discussion, see F. Jessberger, *On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at The Hague?*, 6 J. Int'l Crim. Just. 853 (2008).

One might attempt to tighten the complicity link by switching to the concept of conspiracy. Conspiracy as a mode of liability is arguably stricter than complicity, because it requires an underlying agreement between the individual and the associated individuals.[67] As applied to the terrorist, he would be linked to the terrorist organization because he has jointly agreed with other terrorists to pursue an armed struggle against the United States. Individuals who merely contribute to the cause, without an underlying agreement for joint action, would not be linked to the collective under the conspiracy doctrine.[68]

It makes sense to view terrorism through the lens of conspiracy. Terrorists pursue an unlawful objective through conspiratorial means: agreeing to a course of action, collective pursuit of common goals, secret and underground deliberations.[69] Moreover, the entire rationale of the conspiracy doctrine was to create an inchoate offence of preparation for criminality that allows the authorities to intervene quickly in a burgeoning criminal endeavor. Whatever public policy rationale exists for intervening in domestic criminal conspiracies applies with equal or greater force to transnational conspiracies to commit acts of terrorism.

III. A COMPARATIVE EVALUATION OF THE LINKING PRINCIPLES

When can an individual be linked to a collective group for purposes of being selected for a targeted killing? A comparative analysis of the linking principles reveals that an individual can be linked either through status alone or by virtue of a more discrete action. So membership in a military organization, by virtue of wearing a uniform or displaying a fixed symbol, confers a status on the individual that links him to the collective fighting force. Similarly, the concept of co-belligerency from the law of neutrality involves a status-like element by virtue of a belligerent's refusal to declare itself neutral in a conflict.

It should come as no surprise that IHL relies on the linking principle of membership in a military organization, given how much is at stake. If individuals are linked for purposes of IHL, they gain the privilege of combatant immunity as well as open themselves to the risk of reciprocal killing. Individuals who meet these criteria *know* that they meet these criteria, and moreover, their enemies know this as well. In fact, the public nature of the

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67 18 U.S.C. §371.

68 However, they would be guilty of providing material support.

69 On this point, see J.D. Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. Crim. L. & Criminology 147 (2007).

linking principle is internal to the principal itself, because the link is built around the criteria of uniforms, fixed emblems, and weaponry—all of which are designed to publicly convey to one's enemy that the linking principle is fulfilled. When so much is at stake, it makes sense for the linking principle to be self-publicizing and self-applying.

In contrast, the criminal law notions of conspiracy and complicity are causal criteria that are far less public. The individual's actions that link him to the collective are hardly public at all, because the actions of the terrorist are usually conducted covertly, far from the preying eyes of the enemy. Terrorists are more like spies than traditional combatants. Furthermore, the criteria for conspiracy or complicity are usually very complicated and require the testing and fact-finding process that dominates the criminal trial. Allowing criminal law concepts to function as a linking principle cuts against the underlying nature of IHL, which necessarily relies on easy-to-administer criteria in the absence of a judicial system.

We are therefore caught between two types of linking principles. The traditional IHL linking principles are both self-applying and public. The traditional criminal law linking principles are neither self-applying nor public, since they require a comparatively larger degree of fact-finding to determine if their standards are met. On which end of the spectrum should we place targeted killings? Should targeted individuals be linked with the underlying principles of IHL or the criminal law?

Functionally, targeted killings are much closer to the summary killings that are inherent to IHL on the battlefield. Although the criminal law concepts of conspiracy and complicity cast a wide net, this looseness is mitigated by the fact that the criminal law system affords defendants a chance to contest the causal linkage before a neutral decision-maker.[70] No such right exists on the battlefield, which is precisely why the linking principles used by the IHL are much narrower.[71] Although many individuals might be causally responsible for helping the war effort, the rules of IHL limit automatic killing to soldiers in uniform (and civilians directly participating in hostilities). Although this classification might be seriously under-broad, the whole structure of IHL is built around the notion that the reciprocal risk of killing should be underbroad rather than overbroad, precisely because there is no opportunity to contest a determination on the battlefield. The uniformed soldier on the

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[70] See generally Larry May, *Global Justice and Due Process* 117 (Cambridge Univ. Press, 2011).

[71] See, e.g., Richard Murphy & Afsheen John Radsan, *Due Process and the Targeted Killing of Terrorists*, 31 Cardozo L. Rev. 405 (2009); Larry May, supra note 70, at 154.

battlefield cannot complain that he was killed before he could contest his status, because he was wearing a uniform.

Targeted killings represent the same kind of summary killing that traditional combatants face on the battlefield. While conspiracy and complicity are strict enough for a system with a criminal process, they are not appropriate for summary execution outside of the judicial process. This suggests that however we link individuals to a collective for purposes of targeted killing, it ought to be with a linking principle that is closer to the IHL linking principles rather than criminal law linking principles. The correct linking principle would represent a functional equivalent to the IHL linking principle that governs targeting of traditional combatants. The difference would be that the functional equivalent ought to be specifically tailored for the specifics of the situation: a non-state group composed of individuals who pursue terrorism without a uniform.

Although it is difficult to sketch out the exact contours of this hypothetical linking principle, it ought to lie somewhere between the doctrine of co-belligerency and membership in a military organization. The doctrine of co-belligerency, as understood by the law of neutrality, has the advantage that it is based on both publicity and self-declared consent; the co-belligerent nation publicly refuses to affirm its neutrality and is therefore declared a co-belligerent. The very same publicity and self-declared consent is performed by the individual soldier who dons a uniform. Both are then subject to summary attack under the laws of war, though one norm flows from *jus ad bellum* and the other flows from *jus in bello*. But the structure of both is remarkably similar.

The functional equivalent in cases of targeted killings would link the individual to the collective terrorist group if the individual is a card-carrying member of a terrorist organization or a self-declared enemy of the United States. Membership might be established in a number of ways, not simply by attending an al-Qaeda training camp.[72] We are therefore left with the following linking principle: voluntary membership in an organization engaged in an international armed conflict with the United States. This linking principle might at first glance sound too narrow, because terrorists might opportunistically avoid declaring their allegiances in order to avoid being targeted—an example of lawfare to be sure. But the anxiety is misplaced. The very concept of terrorism hinges on publicity—publicity for a cause and a political ob-

[72] Although in many cases, prosecution is based precisely on attendance at a training camp. See, e.g., *United States v. Hassoun*, 2007 U.S. Dist. LEXIS 85684 (D. Fla. 2007).

jective, neither of which can be easily disowned without doing damage to the theater of violence implicit in terrorist attacks.[73]

This conclusion is more than just normative-philosophical. It is also a legal conclusion, in the sense that it can be understood as a gloss on the concept of direct participation in hostilities, the original requirement of *jus in bello* that explains when a civilian looses his or her protected status under IHL. On this point, one might object that this understanding—direct participation in hostilities in terms of self-declared membership in an organization engaged in an international armed conflict with the United States—conflicts with another aspect of the "direct participation" linking principle. The Optional Protocol withdraws protection from civilians "for such time" as they are directly participating in hostilities.[74] The flexible and temporal work performed by the concept of "for such time" suggests that the associated status (protected civilian vs. unprotected combatant) shifts constantly depending on the actions of the particular individual. He can fall in and out of protection at each moment in time, depending on his conduct—without a reified status that endures throughout the individual's existence. This certainly was the approach taken by the Israeli Supreme Court in their Targeted Killings decision.[75]

Is this transitory requirement of the Optional Protocol consistent with membership in an organization engaged in an international armed conflict with the United States? Or is the latter far too status-oriented—i.e. not sufficiently transitory and flexible—to accord with the "for such time" standard? It strikes me that the notion of self-declared membership is, in fact, consistent with the transitory nature of the "for such time" standard. Individuals join and leave organizations all the time—just as they join and leave criminal conspiracies—and such decisions are both legally and morally significant. The individual terrorist is subject to the risk of killing "for such time" as he is a member of al-Qaeda, though he regains the core protections of IHL if and when he permanently leaves al-Qaeda. At that moment in time he becomes a subject of the criminal process again. This solution avoids some of the most perverse aspects of the Israeli Supreme Court decision, which runs the risk that terrorists will launch terrorist attacks but fall back into civilian status to shield themselves from the enemy.[76] If the "for such time" criterion

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73 Fletcher, supra note 10, at 909.

74 See Additional Protocol I, supra note 22, article 51(3).

75 Public Committee Against Torture v. Israel ("Targeted Killings Case"), HCJ 769/02 (2005).

76 Id. at para. 40 (discussing problem of revolving door and citing 1 Kings 1:50 and Numbers 35:11).

is linked to membership in the organization, such opportunistic shifts are dramatically more difficult.

How could this standard be administered? One might object that it is difficult—if not impossible—to prove that any given individual is truly a member of a terrorist organization engaged in an armed conflict with the United States. After a targeted killing, who is to say that the killing did not live up to this standard? There are two important answers here. Such problems of proof are endemic to all IHL norms governing civilians, and the current problem will be comparatively easier to administer when compared against the more transitory scheme suggested by the Israeli Supreme Court. Second, the concept of joining and leaving a criminal organization is well worked out in the literature and case law on conspiracies, which imposes stringent requirements on individuals seeking to leave a criminal organization and escape the consequences of their membership.[77] These standards often require a public repudiation of the enterprise—either to the leaders of the enterprise or to the relevant authorities.[78] This is a high standard to meet, and appropriately so. Applied to terrorists, the standard would require a public declaration repudiating the armed conflict against the United States before they could regain their protected status. It is unlikely that any jihadist terrorist would opportunistically exploit this standard in order falsely gain protected status.

CONCLUSION

This new standard has the virtue that it avoids the absurd consequences of the Barak solution from the Israeli Supreme Court decision. The standard is more permanent than the transitory standard offered by Justice Barak, yet it is not so permanent that it runs afoul of the "for such time" requirement of the Optional Protocol. The linking principle is easy to administer, self-applying, and based on semi-public criteria, which makes it a functional equivalent to being a member of a military organization. True, this new linking principle is not as easy to administer as the traditional IHL linking principle of being a member of a military organization, but it is certainly easier to apply than the criminal law notions of conspiracy and complicity that require intensive fact-based determinations by a neutral decision-maker. The linking principle is consistent with the underlying legal principles embedded in the laws of war, as well as the legal instruments that codify them. Although the linking principle may not be as permissive as some govern-

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[77] Compare *Hyde v. United States*, 225 U.S. 347 (1912) with *United States v. U.S. Gypsum Co.,* 438 U.S. 422, 464 (1978).

[78] See, e.g., *Eldredge v. United States*, 62 F.2d 449, 451 (10th Cir. 1932).

ments would wish, it is better to utilize a narrow linking principle that is legally and philosophically justified, rather than a looser linking principle that accords with current practice but cannot be justified.