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# The Status of State and Nonstate Actors in Postwar Hostilities: Restoring the Rule of Law to US Targeted Killing Operations

Claire Finkelstein \*

## ABSTRACT

*With the killing of Iranian general Qassim Soleimani, the United States crossed a new frontier in the use of extrajudicial lethal operations outside of armed conflict. As a state actor, Soleimani once would have been entirely off-limits as a target outside the context of a formal armed conflict between the United States and Iran. The Trump administration's choice to conduct a one-off strike on a state military leader indicates that conflicts among state adversaries are increasingly fought using the hybridized tools of the war on terror. This Article will argue that the increasing use of such techniques and the perceived relaxation of the constraints of international law in conflicts among states is a regrettable, but foreseeable, result of a certain conception of violent nonstate actors that immediately followed the 9/11 attacks. Greater clarity about the legal boundaries governing the use of Bush-era interrogation methods and President Obama's dramatic increase in the use of extrajudicial killing against nonstate actors might have forestalled this development.*

*This Article focuses on the decision to treat violent nonstate actors in the war on terror as "unlawful combatants,"—a framework that deprives them of the traditional protections of both the Law of Armed Conflict (LOAC) and the constitutional guarantees ordinarily extended to criminal defendants. This ambiguity provided legal impunity for abuse, the impossibility of achieving convictions at trial for those detained, and an uncertain legal basis for those who are targeted rather than captured. The question of status now arises with urgency for violent state actors like Qassim Soleimani, who was killed by a US drone strike in January of 2020. This Article will argue that violent nonstate actors are more properly thought of as civilians*

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*than combatants but that this approach should not be permitted to affect the treatment of state actors like Soleimani, whose status as a state actor implies that he can only be targeted as a state combatant and then only if in the context of armed conflict.*

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### I. INTRODUCTION

With the extrajudicial killing of Qassim Soleimani, an Iranian major general in the Islamic Revolutionary Guard Corps and the commander of Iran's Quds Force, the United States ushered in a new era in the extended war on terror: the use of targeted killing against state actors outside the context of war. At first, the Trump administration attempted to justify the killing as valid under the Law of Armed Conflict (LOAC). The explanations offered, however, were inconsistent and contradictory.<sup>1</sup> Former Secretary of State Mike Pompeo, for example, claimed that the killing was in response to imminent threats to American lives.<sup>2</sup> But the administration never produced any evidence of the imminent attack it supposedly anticipated. Indeed, Pompeo himself admitted that “[w]e don’t know precisely when and we don’t know precisely where,”<sup>3</sup> though President Trump claimed in a news conference that they were looking to blow up

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1. See Chris Cameron & Helene Cooper, *The Trump Administration’s Fluctuating Explanations for the Soleimani Strikes*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/01/12/us/politics/trump-suleimani-explanations.html> [https://perma.cc/8ZBC-JCMT] (archived Sept. 17, 2021).

2. See Aaron Rugar, *Pompeo’s Shifting Reasons for Killing Soleimani Puts the Strike on Shaky Legal Ground*, VOX (Jan. 7, 2020) <https://www.vox.com/2020/1/7/21054913/pompeo-soleimani-strike-imminent-threat-shifting-rationale> [https://perma.cc/QF9B-DDLS] (archived Sept. 17, 2021).

3. Peter Baker & Thomas Gibbons-Neff, *Esper Says He Saw No Evidence Iran Targeted 4 Embassies, as Story Shifts Again*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/us/politics/esper-iran-trump-embassies.html> [https://perma.cc/R6F3-NWY3] (archived Sept. 17, 2021).

our embassy.<sup>4</sup> Later, Trump claimed that he thought it could have been four embassies, military bases, or a lot of other things, but that it was imminent.<sup>5</sup> Secretary of Defense Mark Esper, however, admitted that he saw no specific evidence to back up Trump's claims.<sup>6</sup> Thereafter, talk of imminence as a justification for the strike died away quickly.

While no longer in the administration at the time of the Soleimani strike, former National Security Advisor General H.R. McMaster's remarks on this topic may have better reflected the Trump administration's thinking on Soleimani. McMaster argued that the killing was justified because it was "the righteous use of violence."<sup>7</sup> For this reason, McMaster claimed, imminence was not required. But scholars and public policy experts have failed to offer any explanation that would justify the killing under the LOAC.<sup>8</sup>

Since the Soleimani killing, there have been other strikes on state actors. In November 2020, Iran's top nuclear scientist, Mohsen Fakhrizadeh, was killed in an Israeli ambush.<sup>9</sup> According to recent reporting, Fakhrizadeh was killed with the use of an A.I.-based machine gun that fired at his vehicle from another car.<sup>10</sup> It is also now clear that the Trump administration was not only fully read into the intended strike, but President Trump himself, along with Secretary of State Mike Pompeo and CIA Director Gina Haspel, had participated in its planning since 2019.<sup>11</sup> Indeed, reporting indicated that the two strikes were related: the United States and Israel were encouraged by the rather tepid response to the killing of Soleimani to think that a hit on Fakhrizadeh might be politically feasible.<sup>12</sup>

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4. *See id.*

5. *See id.*

6. *See id.*

7. Erin Woo, *I Don't Really Care What International Law Said: H.R. McMaster Debates Soleimani Killing, Iran*, STANFORD DAILY (Mar. 5, 2020), <https://www.stanforddaily.com/2020/03/05/i-dont-really-care-what-international-law-said-h-r-mcmaster-debates-soleimani-killing-iran/> [https://perma.cc/9ZXY-DJBJ] (archived Sept. 17, 2021).

8. *See* Ned Temko, *State-Sponsored Assassination: New Tools, Old Questions*, CHRISTIAN SCI. MONITOR (Dec. 10, 2020), <https://www.csmonitor.com/World/2020/1210/State-sponsored-assassination-New-tools-old-questions> [https://perma.cc/R8ZY-THBL] (archived Sept. 17, 2021).

9. *See* Farnaz Fassihi, David E. Sanger, Eric Schmitt, & Ronen Bergman, *Iran's Top Nuclear Scientist Killed in Ambush, State Media Say*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/11/27/world/middleeast/iran-nuclear-scientist-assassinated-mohsen-fakhrizadeh.html> [https://perma.cc/4FTT-JX8T] (archived Sept. 17, 2021).

10. Ronen Bergman & Farnaz Fassihi, *The Scientist and the A.I.-Assisted, Remote-Control Killing Machine*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/09/18/world/middleeast/iran-nuclear-fakhrizadeh-assassination-israel.html> [https://perma.cc/KA3U-GAB9] (archived Nov. 4, 2021); Zoe Kleinman, *Mohsen Fakhrizadeh: Machine-gun with AI Used to Kill Iran Scientist*, BBC (Dec. 7, 2020), <https://www.bbc.com/news/world-middle-east-55214359> [https://perma.cc/8GEJ-Y8UM] (archived Sept. 17, 2021).

11. Bergman & Fassihi, *supra* note 10.

12. *Id.*

Unless the United States is at war or has a basis for waging war on Iran, attacking a high-ranking military official is a clear *jus ad bellum* violation. How did US military and national security officials come to justify such actions? The seeds of acts of war such as these were sown almost two decades earlier in the approach taken by Bush-administration lawyers as well as military and intelligence officials to a different problem: the status of violent nonstate actors in Iraq and Afghanistan who took part in highly militarized terrorist organizations. Instead of classifying them as either combatants or civilians, as the principle of distinction requires, the Bush administration created a *sui generis* category variously called “unlawful combatants,” “enemy combatants,” or “unprivileged enemy belligerents.”<sup>13</sup> Obama- and then Trump-administration lawyers largely maintained this same legal structure, presumably in order to facilitate the legal justification of targeted killing without a prior need to attempt capture. Under the US approach to this category, so-called unlawful combatants lack the rights that attach to combatants under the laws of war.<sup>14</sup> Operating in this “no man’s land” between two legal regimes—the laws of war and the criminal law—has spawned confusion and damaged the rule of law.

This Article will focus on the transition from the Bush-era concept of unlawful combatancy,<sup>15</sup> which served to justify the torture of detainees captured in Iraq and Afghanistan, to the use of that concept in justifying targeted killing of nonstate and, ultimately, state actors under Presidents Obama and Trump. Although the United States has formally ended its engagement in Afghanistan, it will continue to fight terror through direct action and intelligence operations, an approach now rendered particularly complex given Taliban rule. In this new phase of the war on terror, the focus will inevitably shift from nonstate actors to state actors who commit acts of terror or sponsor terrorism. The United States has grappled with the threat posed by state sponsors of terror in the past with respect to Iran, Syria, Saudi Arabia, North Korea and other nations, but America confronts this threat with fresh urgency: How will the United States and its allies address acts of terror that are either directly committed by or sponsored by the reigning state power?<sup>16</sup> Here is where the lasting impact of the post-9/11 notion of unlawful combatancy lies: the same techniques that were justified by the unlawful combatancy framework have now proven

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13. HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB 4 (June 2004) <https://www.hrw.org/reports/2004/usa0604/usa0604.pdf> (last visited Sept. 17, 2021) [<https://perma.cc/595P-794B>] (archived Sept. 17, 2021).

14. *See id.*

15. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600; Military Commissions Act of 2009, Pub. L. No. 111–84, 123 Stat. 2574.

16. *See generally* DIANNE E. RENNACK, CONG. RSCH. SERV., R43835, STATE SPONSORS OF ACTS OF INTERNATIONAL TERRORISM—LEGISLATIVE PARAMETERS: IN BRIEF (2021).

useful in operations against state actors, such as in the case of Qassim Soleimani. If the international community comes to recognize the Taliban in Afghanistan as the representative of the Afghan government, the problem of state-sponsored terrorism will be particularly stark.<sup>17</sup> The absence of a clear legal framework for the use of targeted killing, particularly remote killing by unmanned aerial vehicles (UAVs), has left the United States and its allies largely at sea with regard to the legality of targeted killing operations more generally.

The legal ambiguity of US targeted killing operations against nonstate actors has thus spawned a comparable ambiguity with regard to state actors, a development that in retrospect seems inevitable given the dramatic increase in the number of targeted killings over the past three administrations. Overall, since 2010, the United States has killed upwards of 16,900 people by drone strike, of which at least 2,200 people were civilians.<sup>18</sup> Despite the fact that lethal drone technology has been in use almost since 9/11, the United States still has not established a clear and unequivocal legal framework for assessing the conformity of drone strikes to the confines of International Humanitarian Law (IHL). A practice that is premised on a vague or uncertain legal foundation will naturally tend to spread, taking its legal uncertainty with it.<sup>19</sup> For this reason, legal ambiguity in one area of legal practice seeps over into adjacent areas of practice. Where war is concerned, this legal ambiguity poses a threat to national security and to the rule of law. Nor will the current difficulties stop at the boundaries of war. US policy has not only effaced the distinction between state and nonstate actors, but it has weakened the distinction between war and crime as well. If the United States continues down this path, it will weaken not only the law of war, but the constitutional guarantees protecting domestic criminal suspects as well.

Where targeted killing is concerned, the latter point is amply demonstrated by the case of Anwar al-Awlaki, an American citizen who

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17. Note that in the case of the Taliban in Afghanistan, this question will be particularly tricky, given that their accession to power was the result of a military takeover. Whether the US and its allies will consider the Taliban the legitimate sovereign of Afghanistan, and whether it will recognize the newly-former Islamic Emirate of Afghanistan, remains to be seen. See Joshua Keating, *No One Wants to Be the First Country to Recognize the Taliban*, SLATE (Aug. 18, 2021, 11:42 AM) <https://slate.com/news-and-politics/2021/08/afghanistan-taliban-international-recognition-united-nations.html> [https://perma.cc/BT6B-WEJ3] (archived Sept. 17, 2021).

18. SARA TOTH STUB, CQ PRESS, TARGETED KILLINGS 3 <http://library.cqpress.com/cqresearcher/document.php?action=print&id=cqresrre2021040900> (last visited Sept. 17, 2021) [https://perma.cc/E42Q-3F3V] (archived Sept. 17, 2021).

19. See generally Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne, & Thompson Chengeta, *The International Law Framework Regulating the Use of Armed Drones*, 65 ICLQ 791 (2016).

was killed by a US drone strike in Yemen in 2011.<sup>20</sup> In seeking to justify al-Awlaki's killing, the Office of Legal Counsel (OLC) provided a problematic legal analysis across several classified memos, arguing that geography was not a constraint and that the requirement of "imminence" could be satisfied even when the timeframe was highly attenuated.<sup>21</sup> The point of these memos was to establish a basis for national self-defense under Article 51 of the UN Charter, despite the fact that al-Awlaki was an American citizen and that imminence in any traditional sense was almost surely lacking.<sup>22</sup> The OLC memo also insisted that the decision regarding al-Awlaki's fate was not reviewable in an Article III court, a proposition shockingly embraced by the federal district court itself when presented with a petition from al-Awlaki's father.<sup>23</sup>

It is now time to rethink the Bush-era legal framework from the post-9/11 period and seek to harmonize US policy and domestic law with basic principles of International Humanitarian Law (IHL). The United States must also, however, harmonize national security law and practice with constitutional principles of domestic criminal law, most importantly the concept of due process. It is critical for the United States to undertake this work now, before the next significant foreign or domestic threat emerges. Grappling with normative questions relating to military engagement or law enforcement becomes impossible in the heat of battle. At a moment when our military presence overseas, specifically in the Middle East, has been nearly eliminated and the United States is entering a period of reduced kinetic engagement, the United States can afford to reconsider the legal framework needed to justify military engagement with violent foreign extremists.

Surveying the available options, there is an array of possible legal frameworks available for this purpose, distributed along what could be thought of as a "combatancy scale." On one end of the scale, the United States could accord full combatancy status, such as would normally attach to members of a government-controlled state military. On the other end are domestic criminal suspects, who are normally protected from wrongful deprivations of liberty and other punishment through constitutional guarantees that protect their right to due process in US courts. In between is a series of hybrid options, which includes Bush

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20. See generally SCOTT SHANE, *OBJECTIVE TROY: A TERRORIST, A PRESIDENT, AND THE RISE OF THE DRONE* (2016).

21. See generally U.S. DEP'T OF JUST., OFFICE OF THE ASSISTANT ATT'Y GEN., MEMORANDUM REGARDING APPLICABILITY OF FEDERAL CRIMINAL LAWS AND THE CONSTITUTION TO CONTEMPLATED LETHAL OPERATION AGAINST SHAYKH ANWAR AL-AWLAKI (July 16, 2010) [https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16\\_olc\\_aaga\\_barron\\_al-aulaqi.pdf](https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_olc_aaga_barron_al-aulaqi.pdf) [https://perma.cc/EL5J-LQ2P] (archived Sept. 17, 2021).

22. See *id.*

23. *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 81–82 (D.D.C. 2014).

“unlawful combatancy” doctrine. Other hybrid options can be located somewhere in the middle of the continuum.

This Article will argue in favor of a hybrid approach that is different from the problematic doctrine of unlawful combatancy and that resides closer to the civilian criminal law model. The position defended here will differentiate more clearly between state and nonstate actors and thus would do more to preserve the distinction between war and crime. On the model for which this Article will argue, nonstate military operations, whether in or out of armed conflict, can be considered international criminal conspiracies, bringing the status of violent nonstate actors more into line with the way the United States has approached drug lords and other illegal international traffickers. On the proposed approach, the United States would be better able to distinguish a nonstate actor like Anwar al-Awlaki from a state actor like Qassim Soleimani since nonstate actors would be assessed according to a civilian legal framework by which state actors, like Soleimani, would be immune outside of combatancy. Under the approach proposed here, the full combatancy model would be reserved for state actors in times of war, leaving nonstate actors like Anwar al-Awlaki on the side of agents of domestic terror rather than on the side of state military organizations, such as Iran’s Quds Force, despite the fact that al-Qaeda and ISIS have amassed sufficient force to require a military-level response.

The discussion will begin by exploring the traditional concept of combatancy and explaining why violent state actors are, but nonstate actors are not, “combatants” in any meaningful sense of that term. The Article will then turn to the Bush administration’s use of the concept of “unlawful combatancy” and consider both the conceptual and practical difficulties with that notion. The Article will then attempt to sketch an alternative conceptual framework to the problem of state sponsors of terrorism, drawing a sharp contrast with the hybrid approach proposed to nonstate actors.

## II. THE TRADITIONAL NOTION OF COMBATANCY

Traditionally, armed conflict took place solely between the militaries of different international states, with soldiers wearing identifiable uniforms, on a clearly demarcated battlefield, carrying their arms openly. In recent years, the traditional parameters of armed conflict have changed dramatically. Most of the wars of the twenty-first century have not been fought between one state and another but between states and violent nonstate actors, usually fighting without uniforms and basing their operations on subterfuge rather than open combat.<sup>24</sup> From the standpoint of the traditional law of war, it is

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24. See Wendy Pearlman & Kathleen Gallagher Cunningham, *Nonstate Actors, Fragmentation, and Conflict Processes*, 56(i) J. CONFLICT RES. 3, 3 (2012).

difficult to characterize their operations. What is the status of individuals connected in a variety of ways with large, nonstate militaristic organizations who are bent on the destruction of life and property? How should state governments approach such nonstate militias, and what legal frameworks should govern our operations against them? Critically, for present purposes, how should the United States draw the line between state and nonstate actors, and what implications does this distinction have for the LOAC and US policy? The answer adopted by the Bush administration in the immediate aftermath of 9/11 has had a profound impact on the law of armed conflict, including with regard to state actors and the perceived permissibility of extrajudicial killing. It has threatened to erode the distinction between state and nonstate actors and in time may ultimately do damage to domestic criminal law rights as well.

Prior to 9/11, the assumption had always been that anyone connected in certain ways with a state military operation would fall under the LOAC and therefore under the Geneva Conventions as well. If they were members of a foreign governmental military organization, they were “combatants,” and their treatment was governed by the LOAC. This body of international law determined the treatment of foreign combatants with respect to detention and interrogation, as well as with respect to targeted killing operations. Under the LOAC, combatants’ status provides rights, privileges, and protections.<sup>25</sup> Their status, however, also puts them at risk: combatants are targetable 24/7 because of the special role they occupy relative to the state.<sup>26</sup> They are not targetable because of their activity or the danger they present in a given moment. A combatant can be targeted when he is sleeping, watching a movie, taking a shower, etc., as long as he retains his status as a combatant. If he loses that combatant status because he is *hors de combat*, he will no longer be targetable.<sup>27</sup> If he is taken prisoner, he acquires prisoner-of-war (POW) status, which protects him under the Geneva Conventions against abusive treatment.<sup>28</sup> Once the war ends, he must be repatriated to his country of origin.<sup>29</sup>

Much of the law of war was based originally on the concept of reciprocity, a notion that is often referred to in the just war literature under the heading of “the moral equality of soldiers,” or “the moral equality thesis.”<sup>30</sup> This thesis maintains that all individuals having the

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25. See Claire Finkelstein, *Killing in War and the Moral Equality Thesis*, 32 (2) SOC. PHIL. & POL’Y 184, 198 (2016).

26. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES 164 (Cambridge Univ. Press 2005).

27. See Finkelstein, *supra* note 25, at 196; *id.*

28. See Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949.

29. See *id.* at art. 118.

30. See Finkelstein, *supra* note 25, at 185; MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 34, 37, 41 (4th ed. 2006).

status of combatants in an armed conflict possess an equal right to kill.<sup>31</sup> This is so regardless of the justice of the cause for which they are fighting. A German soldier fighting for Hitler's army during the Second World War has the same right to kill a French soldier that the latter has to kill him, even though the Frenchman, whose country is under unlawful occupation, is fighting a just war, and the German, whose country is unlawfully occupying other sovereign nations, is not. The fact that Germany is in violation of international law does not mean that the German soldier is himself violating the law of war. In invading France, the German soldier participates in an action that is illegal under international law, yet despite that fact, he is within his rights as a combatant when he kills. What gives the soldier "combatant immunity" is the fact that he acts on behalf of a state from which he derives his authority and his orders.<sup>32</sup> By contrast with orders from a criminal organization, the orders from military superiors immunize him in most cases from liability.

The question of who is a combatant is one of the most critical in the LOAC. It is one that defines the application of the most important of the principles of the law of war, namely the principle of distinction.<sup>33</sup> Because the principle of distinction maintains that combatants may be targeted at any time but that civilians may never be targeted, barring active assistance to enemy forces, the permissibility of the use of force in armed conflict will depend on the ability to identify clearly the parameters of combatancy and to articulate its implications.

The traditional elements of combatancy are usually identified as follows: (1) combatants must be commanded by a responsible person who wields authority over his subordinates, (2) they must have a fixed distinctive emblem recognizable at a distance, (3) they must carry their arms openly, and (4) they must conduct their operations in accordance with the laws and customs of war.<sup>34</sup> These principles are best understood as indications of combatancy, rather than conditions by which combatancy can be established.<sup>35</sup> Thus, the command structure mentioned in the first of the four elements above can only be established by the relevant state authority. The significance of the

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31. See Finkelstein, *supra* note 25, at 185.

32. See Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL'Y REV. 253, 256 (2011).

33. See generally Claire Finkelstein, *Responsibility for Acts of War and the Moral Equality Thesis*, 32 SOC. PHIL. & POL'Y 184 (2016).

34. See *Convention (ii) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, INT'L COMM. RED CROSS (July 29, 1899), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D> [<https://perma.cc/7TGC-NTYD>] (archived Sept. 19, 2021) (hereinafter Hague Convention 1899); see also Christopher Kutz, *The Difference that Uniforms Make*, 33(2) PHIL. & PUB. AFFS. 148, 148–80 (2005).

35. See generally Kutz, *supra* note 34.

uniform, then, is that it indicates membership in the state's command structure.

Arguably, combatancy status has depended traditionally on rather clear lines of demarcation between war and not-war: the ability to distinguish combatants from civilians depends on a prior ability to identify a battlefield as well as to know temporally when wars begin and when they end. In contemporary armed conflict, where the geographical location of war is ill-defined and the temporal identity of war seems to be attenuated, it is difficult to identify temporal and geographic boundaries on war. Unsurprisingly, then, the identification of combatancy remains hazy.

The problem of definition has arisen acutely since 9/11 with respect to nonstate actors, particularly those outside the formal arena of hostilities. While the Bush and Obama administrations struggled with the question of the extent of presidential war-making authority with respect to such actors, the legal frameworks they adopted came up short in various ways. The Bush administration's efforts during the war on terror to establish the status of nonstate actors in a way that the US government saw to its advantage, whatever its merits, have now permanently impacted official thinking about the legal status of state actors who engage in terroristic activities, thus weakening the sovereignty norms that have traditionally kept war within "civilized" bounds.

Most state actors, even those who resort to violence outside the context of war, satisfy at least the first three of the above indices of combatancy. Violent nonstate actors, however, do not usually fit these criteria since they do not operate in a state-based command structure. They usually do not wear a uniform or other distinctive insignia or carry arms openly, and they do not typically conduct their operations in accordance with the laws and customs of war. The Taliban likely did not count as combatants in the traditional sense at the time of the 9/11 attacks, though the point can be debated, given that they were the reigning power in Afghanistan at the time and operated in a hierarchical structure of authority. In the wake of their takeover of Afghanistan in 2021, however, it will be particularly challenging to deny state-actor status to the Taliban and, hence, to acknowledge combatancy status for any future military conflicts. But, as with al-Qaeda, the Taliban often fail to carry arms openly or wear uniforms or other distinctive insignia, and they most certainly refuse to abide by the laws and customs of war. In the absence of greater legal clarity surrounding the identity of both state and nonstate actors, US operations and those of allied nations will continue to operate in a no-man's-land of legal and moral uncertainty—a situation that creates confusion about the legitimacy of US operations abroad and, risk for US troops and national security.

### III. UNLAWFUL COMBATANCY AND THE BUSH DOCTRINE

The question of the relationship of nonstate actors to the notion of combatancy is strictly speaking not a new one. During Vietnam, the United States confronted this very question. Though trained and funded by the North Vietnamese government, the Vietcong were nonstate actors who engaged in terroristic activity outside the normal framework of war.<sup>36</sup> Unlike al-Qaeda, however, the Vietcong fought alongside and on behalf of a clearly identified state entity. Was the category of “unlawful combatancy” necessary to meet the demands of the new asymmetric warfare, or would the traditional concepts of “combatant” and “civilian” have been adequate to accommodate the range of roles required to articulate the rights and responsibilities of those involved in armed conflict? It would be difficult to exaggerate the impact of the decision to create the hybrid designation on the law of armed conflict in the United States over the course of the past twenty years. The concept has been passed down from the early days immediately following the attacks on 9/11 to four presidents, without any serious dissention or doubt on the part of the national security professionals who advise the Oval Office. The notion of unlawful combatancy has now come to impact not only the legal status of nonstate actors in the law of armed conflict but also the status of state actors who sponsor terrorism. Clarifying this hybrid category is now urgent.

In 2002, then-Defense Secretary Donald Rumsfeld announced that captured members of the Taliban and al-Qaeda would henceforth be considered “unlawful combatants” and that, as such, they were not entitled to POW status or other specific protections under Common Article III of the Geneva Conventions.<sup>37</sup> POW status would have meant that the detainees had the right to refuse to answer questions, the right to counsel of their choosing, and the right to repatriation following the cessation of hostilities, all entitlements the United States saw as threatening to its efforts to win the war on terror.

Domestically, the Bush administration felt it had the full faith of the American people, given the broad grant of authority it had received from Congress under the 2001 and 2002 Authorizations for the Use of Military Force (AUMFs). These grants of authority, particularly the former, were the ultimate blank checks from Congress. They specified no sunset date and no geographical limitations on the use of force. Thus, the designation of the category of unlawful combatancy seemed a minor assertion of presidential power in the face of an apparently

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36. See STEPHEN BIDDLE, *NONSTATE WARFARE: THE MILITARY METHODS OF GUERRILLAS, WARLORDS, AND MILITIAS* Ch. 9 (Princeton University Press, 2021).

37. Donald Rumsfeld & Peter Pace, *Defense Department Briefing*, C-SPAN (Jan. 22, 2002), <https://www.c-span.org/video/?168309-1/defense-department-briefing> [https://perma.cc/3TRC-XPEZ] (archived Nov. 5, 2021).

limitless authorization to take all necessary and proper steps to combat terrorism.<sup>38</sup>

It later emerged, however, that these legal machinations were in all likelihood part of an effort to justify the use of torture and the application of other harsh techniques in interrogation in the application of what was known as the Rendition, Detention and Interrogation (RDI) program.<sup>39</sup> Justifying such techniques from a legal standpoint posed a profound challenge, especially given the numerous sources of law, both domestic and international, that condemned the RDI program as illegal. According members of al-Qaeda and the Taliban full combatant status would have made the application of harsh interrogation techniques illegal under international law, under both the Geneva Conventions and the Convention on Torture.<sup>40</sup> Even more worrisome for the Bush administration was the existence of domestic federal law that would potentially provide a basis for subjecting all those involved in the RDI program to criminal liability.<sup>41</sup> The concept of “unlawful combatancy” was intended to situate the RDI program firmly on the war powers side of the war/crime distinction, which would give the administration both greater latitude and greater secrecy with regard to the treatment of detainees. But this strategy ran a risk on the other side, namely that there would be pressure to apply the traditional concept of combatancy and that the RDI program would be seen as a war crime. Thus, the Bush administration had the complex task of fending off civil law-enforcement protections and protocol on the one hand, at the same time that it needed to keep law of war concepts at bay.

In declaring members of al-Qaeda and the Taliban unlawful combatants, the Bush administration made it more difficult to reconcile the status of violent nonstate actors with both domestic and international law. The identification of this category was result driven: it was intended to combine legal features—such as targetability

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38. The broadest grant of authority took place under the “associated forces” doctrine in the 2001 AUMF, a phrase that has been used to extend Congressional authorization from Al-Qaeda and the Taliban to ISIS, many years after it was written and to broaden the administration’s military mandate from the original domain of Afghanistan to Syria, Yemen and other surrounding areas. Some scholars have argued, however, that Congress never intended this phrase to import such a broad grant of authority, and that the authorization was always intended to be limited to the original terror groups the United States undertook to fight in the immediate aftermath of 9/11.

39. See S. SELECT COMM. ON INTEL., S. REP. NO. 113-288, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, 20 (2014) <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf> (last visited Sept. 17, 2021) [<https://perma.cc/H2U7-D4NS>] (archived Sept. 15, 2021).

40. Geneva Convention III, Art. 17, ¶ 4.

41. For a more detailed discussion of accountability for torture, see Claire Finkelstein & Stephen Xenakis, *Repairing the Damage from Illegal Acts of State: The Costs of Failed Accountability for Torture in INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY* 499–502 (Steven Barela, Mark Fallon, Gloria Gaggioli, & Jens David Ohlin, Oxford Univ. Press 2020).

without combatant immunity and POW status—that the Bush administration believed it needed to wage the war on terror. This designation, or one of its synonyms, such as “unprivileged enemy belligerents,” has remained ever since and has been endorsed by Congress as well as by subsequent administrations, in dealing with nonstate actors.<sup>42</sup>

While a general consensus existed that members of terrorist organizations like al-Qaeda, arguably the Taliban, and later ISIS were not combatants in the traditional sense, there has been no general agreement among experts about the use of the designation “unlawful combatants” or “unprivileged belligerent,” or what precisely those labels should be taken to mean.<sup>43</sup> There was little precedent for the Bush administration’s particular use of that expression, but they nevertheless drew support from *Ex Parte Quirin*, a World War II-era case involving non-uniformed German U-boat operators who turned up off the coast of Long Island.<sup>44</sup> Following their capture and arrest, the United States had to decide how to handle the German officers, a task rendered particularly complex given that two of the defendants were United States citizens.<sup>45</sup> Nevertheless, the Supreme Court not only denied the defendants the right to criminal trials but also denied them the right to POW status on the ground that as spies they were illicit saboteurs, rather than combatants, and were therefore violating the rules of war. All eight defendants were convicted of treason and espionage, and six out of the eight were executed.<sup>46</sup> The *Quirin* case was controversial at the time, given its use of the “unlawful combatancy” label, but its impact was limited to the fairly specialized circumstances under which the arrests took place.<sup>47</sup> The concept did not reappear after that until Donald Rumsfeld’s 2002 announcement that the same label was being adopted for al-Qaeda and Taliban fighters.<sup>48</sup>

Unlike in 1942, the Bush administration’s use of the unlawful combatancy designation took root in common parlance and official legal

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42. The expression “unprivileged enemy belligerent” was used in the 2006 Military Commissions Act, H.R. 2647-385, §948(a)(7), and retained even when that Act was revised in 2009.

43. John Bellinger, *Unlawful Enemy Combatants*, OPINION JURIS (Jan. 17, 2007), <http://opiniojuris.org/2007/01/17/unlawful-enemy-combatants/> [<https://perma.cc/NYN3-EGWC>] (archived Sept. 15, 2021).

44. See LIBR. OF CONG.: MIL. LEGAL RES, NAZI SABOTEURS TRIAL (Aug. 15, 2014) [https://www.loc.gov/rr/frd/Military\\_Law/nazi-saboteurs-trial.html](https://www.loc.gov/rr/frd/Military_Law/nazi-saboteurs-trial.html) [<https://perma.cc/M7RF-QCXX>] (archived Sept. 15, 2021).

45. See *Ex Parte Quinn v. Cox*, Provost Marshal 317 U.S. 1, 20 (1946).

46. See LIBR. OF CONG., *supra* note 44.

47. See Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. R. 153 (2013); Donald Rumsfeld & Richard B. Myers, *Defense Department Briefing*, C-SPAN (Jan. 11, 2002), <https://www.c-span.org/video/?168158-1/defense-department-briefing> [<https://perma.cc/46UM-732F>] (archived Nov. 29, 2021).

48. Rumsfeld & Pace, *supra* note 37.

reasoning about the legality of our practices, and despite criticism of many aspects of Bush-era counterterrorism policy, few commentators seriously questioned its usage. Echoing the infamous August 1, 2002, OLC memo's defense of post-9/11 detention and interrogation practices,<sup>49</sup> the public appears to have accepted the view that the laws of war are not binding when dealing with an enemy who himself refuses to be bound by those laws. The argument that Bush-administration lawyers pressed implicitly, although not formally, was that since the enemy is totally uncivilized, and knows no law of any sort, the United States is legally and morally permitted to ignore the law of war in defending against them. As then-Vice President Cheney said in a famous television interview in 2005:

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.<sup>50</sup>

Cheney saw this as an opportunity to push the outer boundaries of presidential war power, and he viewed any restriction on that authority as an infringement on the executive branch. Specifically, the philosophy he pushed to justify exempting detainees in the war on terror from the reach of Common Article III of the Geneva Conventions was based on the idea that the enemy forfeits all protection under international law as soon as it is found to reject the laws of war themselves. This might be aptly dubbed the "Forfeiture Theory" of common international legal obligations.

The Forfeiture Theory reflects a combination of realism in international relations, legal realism about jurisprudential concepts, and an unrelentingly skeptical view of the provisions of international law. Law professors Jack Goldsmith and Eric Posner, for example, have offered a sustained defense of this position.<sup>51</sup> On the Goldsmith-Posner view, international law is a coordination game, which each state enters into for the sake of maximizing its own welfare.<sup>52</sup> As Goldsmith and Posner argue, the lack of robust enforcement in international law means that the only true obligations nations have

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49. See OFF. LEGAL COUNSEL, MEMORANDUM FOR ALBERTO R. GONZALES COUNSEL OF THE PRESIDENT RE: STANDARDS OF CONDUCT OF INTERROGATION UNDER 18 U.S.C. §§ 2340-2340A (2002).

50. Dan Fromkin, *Cheney's 'Dark Side' is Showing*, WASH. POST (Nov. 7, 2005), <https://www.washingtonpost.com/wp-dyn/content/blog/2005/11/07/BL2005110700793.html> [<https://perma.cc/8N4W-8LN4>] (archived Sept. 15, 2021).

51. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (1st ed. 2005).

52. Rumsfeld & Pace, *supra* note 37.

towards one another are those that are self-imposed for mutual gain.<sup>53</sup> This skeptical view rejects the idea of *jus cogens* as a basis for duties under international law—namely duties that apply regardless of whether they are voluntarily accepted by treaty or another vehicle that is subject to agreement. The Forfeiture Theory depends on this skepticism.<sup>54</sup>

In fact, the duty to abide by the law of war is nonreciprocal, meaning that it is not dependent on the willingness of other states to abide by the laws of war themselves. While reciprocity may account for the origins of just war theory—namely that it is mutually beneficial for all parties if states abide by the law of war generally—it is a great leap from that to the conclusion that if a state fails to follow the laws of war, other states are thereby excused from doing so. The Forfeiture Theory thus depends on a confusion of level: from the fact that a practice emerged because participants in the practice saw themselves as better off if all parties commit to that practice, it does not follow that any state can exempt itself from its obligations under the practice in the future.

The Bush Doctrine eventually began to soften with respect to forfeiture and the need to adhere to international law. While the Bush administration was never willing to pronounce the applicability of the Geneva Conventions to detainees in the war on terror, the Obama administration did bring its policies somewhat more into line with international law. Even the latter administration, however, substantially retained the concept of unlawful combatancy as unchanged from the Bush era, despite eliminating the term and distancing itself from the Bush-era associations of it with the RDI program.<sup>55</sup> The failure on the part of the Obama administration to repudiate and dismantle the legal structure that had been used to justify torture, however, set the United States on a profoundly destructive path with regard to the rule of law. The lack of clarity in this area of the law, combined with a dangerous expansion of presidential war-making authority in the United States and quiescence on the part of Congress, has resulted in the near-complete disregard of legal constraints when it comes to fighting violent nonstate actors abroad.

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53. *Id.*

54. It is important to distinguish here between the Geneva Conventions and the traditional Law of Armed Conflict. The former is a treaty, and as such is not binding unless it is specifically accepted and ratified. The latter, however, contains provisions that rest on an even more secure foundation than the Geneva Conventions, which, in principle, is a set of universally binding doctrines that do not require agreement or ratification to impose obligations on all nations. It is these non-delegable aspects of the Law of Armed Conflict that render the Forfeiture Theory inapplicable.

55. The RDI program ended in 2009 per executive order. See Scott Shane, Mark Mazzetti, & Helene Cooper, *Obama Reverses Key Bush Security Policies*, N.Y. TIMES (Jan. 22, 2009), <https://www.nytimes.com/2009/01/23/us/politics/23obama.html> [<https://perma.cc/2T2A-VDAR>] (archived Sept. 15, 2021).

## IV. OBAMA AND THE TARGETING OF NONSTATE ACTORS

Under the Obama administration, the Forfeiture Theory morphed into a somewhat more moderate hybrid approach for dealing with violent nonstate actors, one that purported to conform more fully to international law. Surprisingly, the Obama administration did not alter the fundamental treatment of the notion of combatancy, which remained largely the same apart from some slight modifications. On the plus side, in a 2009 Department of Justice (DOJ) memo dealing with recent habeas petitions that had been filed by Guantanamo prisoners, the DOJ rejected the term “enemy combatant” and all preceding variants of that expression and, in addition, restricted detention of members of al-Qaeda and the Taliban to those who had given “substantial” support to the belligerency.<sup>56</sup> Additionally, there was a shift of rationale: the new account did not rely on the president’s commander-in-chief authority, independent of congressional authorization. Instead, it relied entirely on the 2001 AUMF.<sup>57</sup> The government’s reply brief stated:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.<sup>58</sup>

On the minus side, however, the DOJ maintained that “the particular facts and circumstances justifying detention will vary from case to case and may require the identification and analysis of various analogues from traditional international armed conflicts.”<sup>59</sup> The Obama administration thus partially solved its conceptual challenge by resisting all efforts to systematize its legal approach in this area and insisting on approaching matters on a case-by-case basis. The

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56. See DEPT OF JUST., PRESS RELEASE NO. 09-232, DEPARTMENT OF JUSTICE WITHDRAWS ENEMY COMBATANT DEFINITION FOR GUANTANAMO DETAINEES (2009) <https://www.justice.gov/opa/pr/departement-justice-withdraws-enemy-combatant-definition-guantanamo-detainees> (last visited Sept. 17, 2021) [<https://perma.cc/FN8S-6H8K>] (archived Sept. 16, 2021); Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In Re Guantanamo Bay Litig.*, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009).

57. See Politico Staff, *DOJ Withdraws ‘Enemy Combatant’ Definition*, POLITICO (Mar. 13, 2008), <https://www.politico.com/story/2009/03/doj-withdraws-enemy-combatant-definition-019985> [<https://perma.cc/Q5J7-KU75>] (archived Sept. 16, 2021).

58. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In Re Guantanamo Bay Litig.*, Misc. No. 08-442 (TFH).

59. *Id.*

purpose of this approach was presumably to leave the administration maximum latitude in its dealings with nonstate actors.

Of particular relevance is the Obama DOJ's rejection of the position that Guantanamo detainees should be treated as "civilians directly participating in hostilities" and that the United States may only detain individuals who belong to that category.<sup>60</sup> The government argued that under the law of war, the United States was not limited to that category of persons and that "a contrary conclusion would improperly reward an enemy that violates the laws of war by operating as a loose network and camouflaging its forces as civilians."<sup>61</sup> As explained below, it is not clear that relying on the "direct participation" standard would have reduced the Obama administration's authority to pursue al-Qaeda and the Taliban significantly, and meanwhile it would have helped to protect the integrity of the law of war, as well as guard against detainee mistreatment.

Under both the Bush and the Obama administrations' approaches to violent nonstate actors, the United States saw itself as involved in an armed conflict with highly organized, non-governmental forces who controlled significant territory which they used to carry out sustained military operations. They distinguished military campaigns in these areas from operations in places like Yemen, Syria, and Somalia, where many of the more controversial targeted killing strikes were carried out.<sup>62</sup> Recognizing this distinction, the Obama administration regarded the latter areas as governed not by the LOAC, but rather by Presidential Policy Guidance (PPG), which assesses the permissibility of using lethal force according to a legal framework that more resembles a civilian law-enforcement model than a LOAC model.<sup>63</sup> In so doing, the Obama administration was able to avoid having to characterize individuals within the zone of armed conflict as "civilians," which was presumably something it urgently wanted to avoid.

In combat in which violent nonstate actors are sufficiently organized and the level of violence sufficiently intense, nonstate actors can still be understood as "civilians directly participating" in hostilities, but they are civilians participating in a form of war that is difficult to characterize. It cannot be characterized as a non-

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60. *Id.* at 8.

61. *Id.* at 1.

62. See ACLU, *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, ACLU (May 22, 2013) [https://www.aclu.org/sites/default/files/field\\_document/presidential\\_policy\\_guidance\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance_0.pdf) [<https://perma.cc/MX2G-CSJ3>] (archived Sept. 16, 2021); see generally Rita Siemion, *Presidential Policy Guidance: Procedures for Approving Direct Action Against Terrorist Targets Located Outside The United States and Areas of Active Hostilities*, 56 INTERNATIONAL LEGAL MATERIALS 1209 (2017).

63. *Id.*

international armed conflict (NIAC)<sup>64</sup> because it does not remain within the boundaries of a single state. And it is not an international armed conflict (IAC), since it does not involve one state fighting another. The detainability and targetability of individuals in such a conflict would seem to follow, which still leaves them protected under international law against inhumane treatment. There would be no requirement of capture prior to targeting since their conduct would suggest that they are what the International Committee of the Red Cross has called individuals serving a “continuous combat function.” That would make them continuously targetable as well, though they had full combatant status.<sup>65</sup>

Outside the zone of armed conflict, however, matters would be different, and it is here that the PPG becomes relevant. Despite having conducted hundreds of direct action strikes in the previous four years, Obama did not introduce a legal framework for targeted killing until May of 2013, toward the end of his first term in office.<sup>66</sup> Even then, the resulting legal framework left much to be desired. Under the PPG, targeted killing is only permissible when capture is infeasible and there is “near certainty” that no civilians will be harmed.<sup>67</sup> Unlike a law of war framework, which makes it permissible to target combatants 24/7 based on their status and imposes no duty to attempt capture, nonstate actors under the PPG are considered civilians who are assisting in the violent operations of their military counterparts. Outside of zones of armed conflict, the test for targetability approaches a civilian law-enforcement model, which permits targeting only if the individual poses an imminent risk of harm based on his or her current or anticipated activity. When this standard was actually operationalized, however, the treatment of nonstate actors in the domain of the PPG did not match the theory terribly well, and the resulting military operations ended up looking a great deal more like the former Bush unlawful combatancy standard.

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64. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. [hereinafter Additional Protocol I]; see also *Direct Participation in Hostilities*, HOW DOES LAW PROTECT IN WAR?, <https://casebook.icrc.org/glossary/direct-participation-hostilities#:~:text=In%20international%20humanitarian%20law%20the,dangers%20arising%20from%20military%20operations> (last visited Sept. 17, 2021) [<https://perma.cc/8NVE-KQAK>] (archived Sept. 17, 2021).

65. See Sabrina Henry, *Exploring the “Continuous Combat Function” Concept in Armed Conflicts: Time for an Extended Application?*, INT’L R. RED CROSS 267, 270–72 (2018), <https://international-review.icrc.org/articles/exploring-continuous-combat-function-concept-armed-conflicts-time-extended-application> (last visited Sept. 22, 2021) [<https://perma.cc/QD9W-BL7R>] (archived on Sept. 22, 2021).

66. See ACLU, *supra* note 62.

67. See Heather Brandon, *Will Obama’s Targeted Killing Policy Say What “Areas of Active Hostilities” Means?*, LAWFARE (May 5, 2016, 6:31 AM), <https://www.lawfareblog.com/will-obamas-targeted-killing-policy-say-what-areas-active-hostilities-means> [<https://perma.cc/429U-SNUJ>] (archived Sept. 16, 2021).

Anwar al-Awlaki, for example, was in theory entitled to treatment under the PPG according to the civilian framework appropriate for law enforcement.<sup>68</sup> Yet the formal parameters of the PPG were left to interpretation by the Office of Legal Counsel,<sup>69</sup> which found that the operation against al-Awlaki in Yemen was “part of the non-international armed conflict with al-Qaida.”<sup>70</sup> Nevertheless, the OLC memo concluded that the targeted killing of al-Awlaki would fall within the reach of the law of armed conflict as recognized by the Supreme Court in *Hamdi v. Rumsfeld*,<sup>71</sup> which held that US citizenship was not a bar to detention in war.<sup>72</sup> As in *Hamdi*, the intentional targeting of an American citizen would be covered by the “public authority” justification, based on the fact that there was a national security imperative for engaging in direct action abroad. In other words, under the OLC memo interpreting the PPG, and despite his American citizenship, al-Awlaki’s activities were treated as an extension of the conflict in Iraq and Afghanistan, which made al-Awlaki targetable without prior attempt to capture.<sup>73</sup>

In a gesture to the PPG, the OLC memo briefly dealt with the duty to capture by saying that both the Department of Defense and the Central Intelligence Agency (CIA), who were to conduct the operation jointly, “represented that they intend to capture rather than target al-Awlaki if feasible; yet we also understand that an operation by either agency to capture al-Awlaki in Yemen would be infeasible at this time.”<sup>74</sup> In this way, the Obama administration essentially continued the “unlawful combatancy” framework established by the Bush administration under another name: Instead of treating nonstate actors as “unlawful combatants,” they paid lip service to the distinction between combatants and civilians. But they ended up mirroring the Bush solution both by treating nonstate actors as part of a NIAC, even if these actors were outside the formal areas of hostilities, and by casually declaring capture “infeasible,” without offering a detailed analysis of that concept.<sup>75</sup>

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68. See *Al-Aulaqi v. Obama*, 727 F.Supp. 2d 1, 10 (D.D.C. 2010).

69. See OFF. OF LEGAL COUNSEL, U.S. DEP’T OF JUST., MEMORANDUM FOR THE ATTORNEY GENERAL RE: APPLICABILITY OF FEDERAL CRIMINAL LAWS AND THE CONSTITUTION TO CONTEMPLATED LETHAL OPERATIONS AGAINST SHAYKH ANWAR AL-AULAQI 12–14 (2010).

70. *Id.* at 24.

71. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–24 (2004) (authorizing military to treat American citizen as ‘enemy belligerent’ under the law of war despite citizenship status).

72. *Id.* at 519.

73. See OFF. OF LEGAL COUNSEL, *supra* note 69, at 23–24.

74. *Id.* at 40.

75. The OLC memo also used an expanded conception of “imminence” in order to reach the conclusion that Anwar Al-Awlaki posed an “imminent” threat of harm, and that therefore the U.S. could not safely wait for an opportune moment to effectuate capture. See *id.* at 39–40.

Despite the fact that the PPG was intended to provide an alternate legal framework to the LOAC, one appropriate for dealing with civilians outside the context of war, the interpretation of the Obama Justice Department and the Department of Defense of doctrines like imminence and feasibility of capture, effectively stripped the PPG of its civilian characteristics. The basic distinction between war and not-war is not sustainable if individuals are treated outside of zones of armed conflict as targetable without prior attempts to capture and without affording them an opportunity to surrender.

The only justification for targeted killing outside of war can be self-defense, whether national self-defense, under Article 51 of the UN Charter, or individual self-defense, based on a threat to an individual in the territory from which the threat emanates. If it is viewed as legal to kill summarily, as part of what is essentially a law-enforcement operation within a sovereign nation that is unwilling or unable to exercise control over the source of the threat themselves, the United States will not only have ignored the *in bello* rules for conducting war, but it will also have given short shrift to the concept of state sovereignty, a bedrock *ad bellum* principle in international law. Whenever legal distinctions are effaced, there will be a resulting lack of clarity on both sides of the line. In the case of the interpretation of the PPG, the rules for civilian capture and the use of legal force outside of war were distorted on Obama's watch. Ultimately that damages both the law of war and the rules for civilian engagement.

By contrast, under this Article's approach, violent, nonstate actors are best regarded as civilians outside of identifiable zones of armed conflict engaged in criminal activity. When there is a war to which their efforts are attached, they should be considered civilians participating in hostilities who thereby acquire an activity-based targetability outside zones of armed conflict—but only when capture is truly infeasible and the threat they pose is imminent. Within domains of active hostilities, they are also targetable based on their activities, but these activities make them continuously targetable without prior need for capture. Part VI will explore this taxonomy in greater detail. This Article will first turn, however, to the next chapter in the war on terror, namely the use of targeted killing by the Trump administration and the expansion of the Bush doctrine to the case of state actors who engage in, or otherwise support, acts of terror.

## V. TRUMP AND THE EXTRAJUDICIAL KILLING OF STATE ACTORS

The use of targeted killing reached a fever pitch under the Trump administration. Reporting puts the number of drone strikes in Yemen, Pakistan and Somalia in Trump's first two years in office at 238, as compared with 186 by the Obama administration in 2009 to 2010, the

first two years of the Obama administration.<sup>76</sup> In Somalia alone, the Trump administration engaged in 192 drone strikes across the four years of that administration, a significant increase from the Obama administration's forty-three in the same region.<sup>77</sup> And indeed, the numbers of drone strikes during the Trump administration may be substantially higher, given the increasing lack of transparency of the US government on its use of remote aerial vehicles. President Trump, for example, revoked an order put in place by President Obama requiring reporting of civilian deaths from US drone strikes.<sup>78</sup> Until the killing of Qassim Soleimani, the Trump administration appeared to be simply continuing the pattern Obama had inherited from the Bush administration, but with greater intensity. The Soleimani killing, however, took the US targeted killing program to a new level.

Long considered dangerous to US forces abroad and part of the Iranian mechanism for state-sponsored terrorism, Soleimani had been in the sights of both the Obama and Bush administrations, but foreign policy and military experts from those administrations had uniformly agreed that a strike on Soleimani would create a dangerous escalation and was unacceptably risky.<sup>79</sup> What both administrations understood was that taking out a high-ranking military leader could be regarded as an act of war and might entitle Iran to retaliate in self-defense. Needless to say, neither administration had asked Congress for authorization to engage in targeted killing operations, even when these occurred outside of zones of armed conflict, which no doubt would have focused merely on the question of congressional authorization under the 2001 and 2002 AUMFs.<sup>80</sup>

History bears witness to the fact that a single assassination of a state actor can precipitate an international armed conflict. The killing of Archduke Franz Ferdinand and his wife in 1914 was the spark that ignited the First World War, given that the Austro-Hungarian Empire blamed the killing on the Serbian government, and the complex network of alliances quickly produced a descent into international

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76. Spencer Ackerman, *Trump Ramped Up Drone Strikes in America's Shadow Wars*, DAILY BEAST (Nov. 26, 2018, 10:38AM), <https://www.thedailybeast.com/trump-ramped-up-drone-strikes-in-americas-shadow-wars> [https://perma.cc/55V8-ZK4N] (archived Nov. 29, 2021).

77. See Sara Toth Stub, *Targeted Killings*, 31 CQ RESEARCHER 1, 5 (2021), <http://library.cqpress.com/cqresearcher/document.php?action=print&id=cqresrre2021040900> (last visited Sept. 13, 2021) [https://perma.cc/2YLD-Z4AV] (archived Sept. 13, 2021).

78. Charlie Savage, *Trump Revokes Obama-Era Rule on Disclosing Civilian Casualties From U.S. Airstrikes Outside War Zones*, N.Y. TIMES (March 6, 2019), <https://www.nytimes.com/2019/03/06/us/politics/trump-civilian-casualties-rule-revoked.html> [https://perma.cc/QKZ7-CA9J] (archived Nov. 29, 2021).

79. See Gordon Adams, *The Iran Long Game: Bush v. Obama*, FOREIGN POL'Y (April 14, 2015, 3:04 PM), <https://foreignpolicy.com/2015/04/14/the-iran-long-game-bush-vs-obama-nukes/> [https://perma.cc/D64X-6XK9] (archived Sept. 13, 2021).

80. See Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

military conflict. Yet, while the ingredients were present for Soleimani's killing to produce a comparable conflagration, the only immediate consequence was an Iranian attack on two US air bases in Iraq, resulting in traumatic brain injuries for over one hundred servicemen but no fatalities.<sup>81</sup> Although Iran labeled the killing of Soleimani "an act of war,"<sup>82</sup> and other world leaders appeared to have sympathy with that characterization,<sup>83</sup> the United States did not thereby catapult itself, Iran, and their respective allies into an international conflagration. Unlike the response of the Austro-Hungarian Empire in 1914, Iran's response was ultimately tepid and the price the United States paid mostly diplomatic.

The critical question Trump introduced, and one that was not clearly answered after the Soleimani strike, is whether targeted killing of state actors is ever permissible outside a theater of war, and if so, under what theory it can be justified. From the above discussion, it should be clear that where state agency exists, targeting is normally permissible only when in a state of armed conflict with the target nation. If no such state of war exists, there must be a legitimate *casus belli* to start a war, such as that the other country has engaged in a significant violation of the sovereignty rights of the country seeking to use force, or that there is a violation of the rights of a third party nation. In short, the legality of the action must be judged by considerations drawn from the domain of the *jus ad bellum*.<sup>84</sup> With the exception of the rare instances in which the use of preemptive force may be used in anticipation of the need for immediate defensive action, a first strike on a sovereign nation is not permissible under international law. This is clearly articulated in Article 51 of the UN Charter, the basic provision that governs the use of force among nations.

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81. David Martin, *Inside the Attack That Almost Sent the U.S. to War with Iran*, CBS NEWS (August 8, 2021), <https://www.cbsnews.com/news/iran-missile-strike-al-asad-airbase-60-minutes-2021-08-08/> [<https://perma.cc/NY5Q-6Q49>] (archived Sept. 13, 2021); Diana Stancy Correll, *109 US Troops Diagnosed with TBI After Iran Missile Barrage Says Pentagon in Latest Update*, MIL. TIMES (Feb. 10, 2020), <https://www.militarytimes.com/news/your-military/2020/02/10/more-than-100-us-troops-diagnosed-with-tbi-after-irans-attack-at-al-asad-report/> [<https://perma.cc/GHU3-7TEG>] (archived Sept. 13, 2021).

82. *World Reacts to Killing of Iran's Qassem Soleimani*, EURONEWS (Mar. 1, 2020), <https://www.euronews.com/2020/01/03/a-declaration-of-war-and-an-escalation-the-world-reacts-to-soleimani-killing> [<https://perma.cc/M29V-E2J3>] (archived Sept. 13, 2021).

83. See Loveday Morris & Michael Birnbaum, *U.S. Killing of Iran's top Commander Unnerves Allies, Dims Hopes Iran Nuclear Deal Can Be Saved*, WASH. POST (Jan. 3, 2020), [https://www.washingtonpost.com/world/us-killing-of-irans-top-commander-rattles-european-allies/2020/01/03/0012822e-2e19-11ea-bffe-020c88b3f120\\_story.html](https://www.washingtonpost.com/world/us-killing-of-irans-top-commander-rattles-european-allies/2020/01/03/0012822e-2e19-11ea-bffe-020c88b3f120_story.html) [<https://perma.cc/DKS4-T5XF>] (archived Sept. 22, 2021).

84. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 21 (4th ed. 2006); see Claire Finkelstein, *Targeted Killing as Preemptive Action*, in *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* 156, 160 (Claire Finkelstein, Jens David Ohlin, & Andrew Altman, eds., 2012).

A critical question, then, is whether it is legitimate to adopt the doctrine of national self-defense to justify the strike on Soleimani. This in turn raises the thorny question of the permissible scope of preemptive or anticipatory self-defense under Article 51.<sup>85</sup> On the face of that provision, it does not seem necessary for an actual kinetic strike to have occurred in order for the United States to invoke its inherent right of self-defense. The concept of “anticipatory self-defense” goes back at least to 1837 and the *Caroline* Affair, which arguably established the doctrine of pre-emptive war in international law.<sup>86</sup> The crisis arose when an expedition of Canadian rebels crossed over into US territory to escape British forces. They boarded the ship *Caroline*, where they were attacked by British forces on the American side of the Niagara River.<sup>87</sup> The British party lit the *Caroline* ablaze and untied it from its moorings, whereupon it was promptly lost when it went over Niagara Falls.<sup>88</sup> The question arose whether the destruction of the ship fell within the legitimate purview of the Canadian right of self-defense. In an exchange of letters on the case, Daniel Webster and Alexander Baring appeared to agree that anticipatory self-defense is part of the law of self-defense. However, as Webster expressed it, self-defense could only be established if the state could show “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>89</sup> This was the first case to clearly state the need for states to satisfy the imminence requirement in the context of international relations and the law of armed conflict. But the case also had the effect of affirming the permissibility of preemptive self-defense in an international armed conflict.

The concept of preemptive self-defense was confirmed as a part of IHL in the landmark case of *Nicaragua v. United States*,<sup>90</sup> which came before the International Court of Justice in 1984, regarding military and paramilitary activities on the part of the United States in El Salvador to foment violence against Nicaragua. Without admitting to the alleged conduct, the United States claimed to be acting in defense of its right of “collective self-defense” on behalf of El Salvador and,

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85. See Alex Potcovaru, *The International Law of Anticipatory Self-Defense and U.S. Options in North Korea*, LAWFARE (Aug. 8, 2017, 1:56 PM), <https://www.lawfareblog.com/international-law-anticipatory-self-defense-and-us-options-north-korea> [https://perma.cc/PMA5-9S2Q] (archived Sept. 13, 2021) (analyzing the validity of self-defense under international law).

86. See Matthew C. Waxman, *Self-Defensive Force against Cyber Attacks: Legal, Strategic and Political Dimensions*, 89 INT'L L. STUD. 109, 111 (2013) (“A strict reading ‘armed attack’ would confine its meaning to kinetic violence . . . but it is difficult to square with the treatment of chemical or biological weapons attacks . . .”).

87. See Matthew Waxman, *The ‘Caroline’ Affair in the Evolving International Law of Self-Defense*, LAWFARE (Aug. 28, 2018, 2:26 PM), <https://www.lawfareblog.com/caroline-affair> [https://perma.cc/ME3P-UN5M] (archived Sept. 13, 2021).

88. See *id.*

89. See *id.*

90. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. 392, ¶ 91 (November 26).

thus, to be asserting as third-party defense the right of El Salvador to act in anticipatory self-defense.<sup>91</sup> The alleged activities involved in acting on this claim of self-defense were based on CIA covert operations in assistance of El Salvador, such as the mining of Nicaraguan harbors, attacks on Nicaraguan airports and shipping ports, and attacks on oil storage facilities as well as on helicopters and boats.<sup>92</sup> The ICJ affirmed the principle of anticipatory self-defense but placed limits on the scope of that doctrine.<sup>93</sup> It held in this case that the United States had exceeded the bounds of any reasonable right to self-defense, given the lack of any assertion of imminence in El Salvador's self-defense claim.<sup>94</sup>

In Soleimani's case, the American public does not have access to the intelligence that would be required to make a full assessment of the danger Soleimani posed and whether his killing would indeed forestall the risk of harm to US persons. While it cannot be doubted that Soleimani had hostile intentions towards the United States and had fomented violence over the years against the United States and other Western powers, retribution for past wrongs is not a valid basis for exercising the *jus ad bellum* right to engage in a military strike against a sovereign nation. The question, therefore, must hinge entirely on the danger Soleimani posed prospectively, the imminence of that danger, and the effectiveness of the proposed military means of forestalling it. From the evidence that was presented before Congress and in news reports to the American people, as well as the decision of the two previous administrations—one Democratic, one Republican—not to strike Soleimani, it seems most likely that the evidence would not support a claim of imminence, and thus the argument from preemption would likely fail.

A second argument, however, might seem to show greater promise. The argument is that insofar as Soleimani was planning terroristic activities against the United States by making use of his Quds Force and a network of terrorists with whom they are connected, he should be thought of as wearing two hats, meaning that he functioned both as a state and nonstate actor. As such, the analysis used with respect to nonstate actors generally can be applied here. The question then arises: How should international states treat individuals who occupy multiple categories in international law? That question has no established answer as of yet. But this Article asserts that the

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91. *Id.*

92. James P. Rowles, *U.S. Covert Operations Against Nicaragua and Their Legality Under Conventional and Customary International Law*, 17, U. MIA. INTER-AMERICAN L. REV. 407, 439–50 (1986).

93. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment 1986 I.C.J. 119, ¶ 229 (June 27) (discussing the inherent right of self defense).

94. *Id.* at 120–21, ¶ 233.

identification of an individual as a state actor should take precedence over any other identification he may have.

One of the arguments for “dual hattedness” goes back to the criteria for combatancy discussed in Part II, namely the condition that valid state combatants must respect the laws of war. If respecting the laws of war is a criterion for combatancy, then failure to respect those laws would automatically result in a forfeiture of immunity. It would follow that dealing with “dual hatted” state actors would absolve other countries of adherence to the laws of war, and thus eliminate the concept of war crimes for both sides, thus exempting any state that conducts terroristic activities from the strictures of the law of war. It would follow that no state could violate the laws of war in such a case.

Rather than exempting Soleimani from the domain of state agency given his willingness to violate the terms of international law, the attribution should instead run the other way: insofar as Iran allowed Soleimani to retain his official position as leader of the Quds Force, as well as other official state functions, any actions in which he engaged that violated international law can be attributed to the state. This is consistent, for example, with the *Tadic* case, in which the International Criminal Tribunal for the Former Yugoslavia held that it is permissible to ascribe the conduct of organized armed groups to states if that state exercises “overall control” over those groups.<sup>95</sup> This suggests that even in an unconventional, asymmetric conflict there is no reason to exempt the analysis of the threat posed by a state actor from the general laws of war. Thus, if Soleimani were to plan an unprovoked attack against American citizens and did so repeatedly, his actions could be attributed to the sovereign nation of Iran, and Iran must in turn bear responsibility for his conduct.

While the logic of dual hattedness is clear, it cannot be used to justify a kinetic strike against a state actor since state-actor status must override nonstate-actor designation under IHL. Moreover, the dual-hatted argument is a dangerous one to make. The argument would contribute most significantly to the erosion of the rule of law in armed conflict as it would permit a host country like Iran to avoid responsibility for the acts of its officials and to intentionally disclaim its duty to discipline Soleimani on the grounds that he was not acting in his official capacity when he fomented or planned violence against other nations.

This approach clearly poses a significant obstacle to the use of force against a state actor, insofar as it requires any attack on such an individual to be justified under *jus ad bellum* analysis. But the imposition of this hurdle is fully appropriate. It should not be easy to justify the use of force against a leader of a foreign sovereign nation, but if a state actor does engage or is about to engage in a kinetic strike

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95. See Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 120 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

on US persons, the state must bear the responsibility for his actions in most instances. And indeed, in view of the official Section 1264 report to Congress regarding the Soleimani strike, where he is described as the “leader of Iran’s Islamic Revolutionary Guard Corps-Quds Force,” and the purpose of the strike is identified as “to deter Iran,” “degrade Iran’s and Quds Force-based militias’ ability to conduct attacks,” and “end Iran’s strategic escalation of attacks,”<sup>96</sup> there is a clear implication that the target was, from the start, conceived as the independent sovereign nation of Iran.

## VI. PRESERVING THE DISTINCTION BETWEEN WAR AND CRIME

What should be clear from the above discussion is that the nature of warfare has changed dramatically over the course of the past fifty years, starting at least with Vietnam and continuing with the war on terror. The evolving nature of warfare, however, does not require a wholesale revision of the legal concepts used to understand war and to establish rules for the treatment of both combatants and civilians within it. The biggest legal challenge post-9/11 in the domain of war has been determining the status of violent nonstate actors organized into large militia-like hierarchies. Distinguishing state from nonstate actors in conflict without effacing the line between armed conflict and civilian law enforcement has been a central challenge. There are, in effect, four categories that emerge from these two critical distinctions:

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96. NOTICE ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 1 (2020), <https://s3.documentcloud.org/documents/6776446/Section-1264-NDAA-Notice.pdf> (last visited Sept. 16, 2021) [<https://perma.cc/6XCH-VBWA>] (archived Sept. 16, 2021).

Table 1

	Military Hostilities	Law Enforcement
United States Fights State Actor	International Armed Conflict/ Status-based combatancy, POW status if captured under the LOAC	Immunity for state actors or possible criminal liability— governed by <i>jus ad bellum</i> and criminal law
United States Fights Nonstate Actor	Civilian immunity or civilians engaged in hostilities, Activity-based or continuous combat functional status	Criminal law/extradition/capture mission/targeting in self-defense if capture infeasible, Activity-based assessment

Since 9/11, the most important and yet the most difficult domain to categorize is the bottom-left corner of Table 1, namely the category of violent nonstate actors who are engaged in a military-style conflict of high intensity with a hierarchically organized group possessing a command and control structure. This is the group the Bush administration dubbed “unlawful combatants,” thus using a hybrid categorization to justify indefinite detention and interrogation without extending POW status. As the foregoing discussion indicates, this solution is highly problematic from the standpoint of the law of war.

A number of commentators have suggested that this category should be treated as “functionally” equivalent to traditional combatants, as a way of resurrecting the idea of a status-based assessment of the targeting decision. Jens Ohlin, for example, has argued that if an individual functions within an organization in the way that traditional combatants do in the state military hierarchy, that person should count as a full-blown combatant from the standpoint of the LOAC.<sup>97</sup> He writes: “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.”<sup>98</sup> He goes on to explain that an individual terrorist bears the right relationship to the terrorist organization for purposes of combatancy if the organization is hierarchically organized, the individual in question is

97. For a more detailed discussion of accountability for torture, see Claire Finkelstein and Stephen Xenakis, *Repairing the Damage from Illegal Acts of State: The Costs of Failed Accountability for Torture*, in INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY 493, 493–517 (Steven Barela, Mark Fallon, Gloria Gaggioli, & Jens David Ohlin eds., Oxford Univ. Press 2020).

98. Jens David Ohlin, *Targeting Co-Belligerents*, in TARGETED KILLINGS IN ASYMMETRICAL WAR 60, 80 (Claire Finkelstein, Jens David Ohlin, & Andrew Altman, eds., Oxford Univ. Press 2012).

given orders or instructions to act on behalf of that organization, and there is a common ideology or group that unites the members of that organization and makes them into a single entity.<sup>99</sup>

The Obama administration appears to have taken just such a functional approach, as it made clear in its response to a habeas petition it filed in 2009:

Under a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself. Such activities may also constitute the type of substantial support that, in analogous circumstances in a traditional international armed conflict, is sufficient to justify detention.<sup>100</sup>

But the government's brief does not explain why the fact that serving the same function in an international armed conflict (IAC) would justify the parallel conclusion with regard to al-Qaeda in this very different context (which the Obama administration characterized as a NIAC), the conclusion being that an individual who renders material support is a member of al-Qaeda and thus counts as a combatant. The missing analysis seems particularly important given that the status of al-Qaeda is itself unclear under the LOAC. Thus, establishing membership in al-Qaeda on the basis of material support may not justify the conclusion that such individuals are "combatants," though it seems one can draw that same conclusion from the fact of material support alone under some circumstances.

Convenient as this middle ground would be for the ability of the law of war to absorb the nonstate terrorist into its jurisprudence, the functionalist approach arguably misses the point of the traditional concept of combatancy, which has to do with the relationship of the combatant to the identity of the state. The point is not that the concept of combatancy identifies individuals who act as part of a group, any group, as long as that group is sufficiently large, hierarchically organized, and the actions of its members reflect the ideology of the group. If this were the criteria for combatancy, it would be difficult to distinguish drug lords from foreign militaries, with the result that the meaning of the combatant status would be significantly altered.

Instead, there is a way to bring the view of the Obama administration within the fold of the traditional law of war: one can say that violent nonstate actors are targetable within traditional zones of hostility, because they are combatants, but that they must be captured rather than killed outside of such zones, assuming that capture is feasible. The functionalist category of "unlawful combatancy" or its equivalent is not necessary to justify lethal

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99. *Id.* at 86.

100. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 7, *In Re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, (D.D.C. Mar. 13, 2009).

operations in such cases. This is to say that members of al-Qaeda and the Taliban, and later ISIS, were “civilians directly participating in hostilities,” a category that is well accepted under the LOAC.<sup>101</sup> It might then be argued that in Northern Iraq and Afghanistan, the level of intensity of the fighting was so great that such civilians “directly participating” can be considered civilian-combatants under international law, given that they serve “a continuous combat function.”<sup>102</sup> In other words, within zones of armed combat, such as in Northern Iraq and Afghanistan, civilians directly participating in hostilities might be thought of as participants in a NIAC, yet these same individuals revert to their civilian status outside this context.

There is no contradiction in saying both that nonstate actors are “civilians” and that they are “directly participating in hostilities.” Indeed, the Obama administration’s designation of the war on terror as a NIAC contemplates precisely this, despite the fact that it was not limited to a single state, as would normally be part of the concept of a NIAC. In theory, to say someone is a participant in an IAC means he is a state actor, and that automatically makes him a combatant in the full, status-based sense of the term.<sup>103</sup> It also means he has combatant immunity, and if captured, he has full POW status under the Geneva Conventions, provided that he properly distinguishes himself from the civilian population.<sup>104</sup> Participants in an irregular conflict, by contrast, do not have the same status, and if captured, they do not have full POW protection.<sup>105</sup> They are targetable, however, but not as a function of status, in contrast to the approach of the Bush and Obama administrations,<sup>106</sup> but rather because of the dangerousness of their activities. For nonstate actors to be continuously targetable, however, is another matter. Hostilities must reach a certain level of intensity and the non-governmental armed forces involved must be hierarchically organized according to a formal command structure.<sup>107</sup>

In addition to receiving some protections under the Geneva Conventions,<sup>108</sup> participants in an irregular conflict receive protection

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101. *Direct Participation in Hostilities*, *supra* note 64.

102. *See* Ohlin, *supra* note 98, at 82–85.

103. *See* INT’L COMM. RED CROSS, HOW IS THE TERM “ARMED CONFLICT DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 2 (March 2008), <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> [https://perma.cc/AG2A-HHEK] (archived Sept. 17, 2021).

104. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. RED CROSS, STUDY ON CUSTOMARY INT’L HUMANITARIAN L. RULE 106 (Cambridge Univ. Press 2005), [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule106](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule106) (last visited Sept. 17, 2021) [https://perma.cc/GZA8-89AM] (archived Sept. 17, 2021).

105. *See* Non-International Armed Conflict, *How Does Law Protect in War?*, <https://casebook.icrc.org/glossary/non-international-armed-conflict> (last visited Sept. 17, 2021) [https://perma.cc/4MGX-ANSA] (archived Sept. 17, 2021).

106. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628–31 (2006).

107. *See* Non-International Armed Conflict, *supra* note 105.

108. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135.

from Additional Protocol I.<sup>109</sup> For example, combatant protection for POWs is clearly articulated under Article 44 of Additional Protocol I, which extends protection even to those who have violated some of the rules of international law in armed conflict under most conditions.<sup>110</sup> Additional Protocol I provides that those who fall captive while failing to observe the obligation to wear arms openly “shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol.”<sup>111</sup> In other words, even those who, like members of al-Qaeda and the Taliban, violate the most basic laws of war must be treated as humanely as official POWs.

The approach offered above appears to be comparable to that of the Israeli Supreme Court, which articulated a framework based on a traditional model of civilian engagement in hostilities.<sup>112</sup> The court vigorously rejected the Bush administration’s device of calling violent nonstate actors “unlawful combatants,” maintaining that this category had not been recognized in customary international law.<sup>113</sup> Chief Justice Barak found that the Palestinian militants targeted by Israel were not combatants of any sort, but rather civilians who had in some cases forfeited their protected status by choosing to take part in hostilities.<sup>114</sup> The court found support for its approach in IHL under Article 51(3) of Additional Protocol I, which provides that “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities,”<sup>115</sup> a position that the court recognized as consistent with customary international law.<sup>116</sup> The question, then, becomes under what conditions a civilian can be considered to have “directly participated in hostilities”? How far back is the engagement of those who organize and support an attack behind the scenes traced? The court took a reasonably broad view of this question, against the position of the plaintiffs who argued for a narrow approach. The court thought that civilians who finance and support

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109. Additional Protocol I, art. 44.

110. *See id.* (identifying as an exception an individual who fails to carry his arms openly during military engagements).

111. *Id.*

112. *See generally* HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, (2) IsrLR 459, 499 (2006), (Isr.) <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel.pdf> (last visited Sept. 17, 2021) [<https://perma.cc/2SF8-C2JL>] (archived Sept. 17, 2021) (disallowing Israeli interrogators from using physical means against suspects because suspects must be free from torture and cruel and inhuman treatment).

113. *Id.* ¶ 28.

114. *Id.* ¶ 29.

115. *Id.* ¶ 30 (citing Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 44, June 8, 1977, 1125 U.N.T.S. 3.).

116. *Id.*

those in active hostilities could be considered civilians directly participating.<sup>117</sup>

For present purposes, the exact line of demarcation between protected civilians and civilians engaging in hostilities is not what is most critical, though that is a question that must be solved in a fuller account of this type of approach. What is of greater importance is whether a hybrid approach can be integrated into the traditional law of war. Treating violent nonstate actors as civilians seems like the right approach, but it is also one that requires an account of how and when such civilians make themselves targetable. The general approach of the Israeli Supreme Court is to regard civilians as targetable when they engage in conduct that would trigger the right of self-defense under Article 51 of the UN Charter on the part of state actors. Once civilians conduct themselves in ways that threaten the lives of state actors, they forfeit their protected status.

Normally, civilians who become targetable would regain that protection as soon as they cease to pose a threat. The Israeli Supreme Court, however, said that a civilian who is a member of a terrorist organization and whose role is to regularly participate in a chain of hostilities, “with short periods of rest between them,” effectively may be targeted at any time, since “the rest between hostilities is nothing other than preparation for the next hostility.”<sup>118</sup> An individual who fits this description is not a combatant, but the requirement under Additional Protocol I that they may be targeted “for such time” as they are engaged in hostilities is applicable to them.<sup>119</sup> The ICRC reaches a comparable conclusion, but characterizes such a person as a nonstate combatant.<sup>120</sup> The ICRC says that once that conduct amounts to a sufficiently high level of intensity, it is reasonable to think the nonstate actors are serving a “continuous combat function,” meaning that they are targetable continuously, thus mimicking the liability of state actors who are targetable on the basis of status.

In the case of civilians directly participating in hostilities, the permissibility of targeting will depend on the self-defense framework that applies in the context of law enforcement. Thus, in order for it to be permissible to target a civilian, even one engaged in hostilities, that person must pose a threat of imminent harm, or alternatively, it must be necessary to act preemptively to forestall the harm, even if the harm

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117. *Id.* ¶¶ 34–37.

118. *Id.* ¶ 39.

119. *See id.* ¶¶ 39–40; Additional Protocol I, 51(3).

120. *See* Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 2009 INT’L COMM. RED CROSS 51, 71–73, <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> (last visited Sept. 17, 2021) [<https://perma.cc/D7L7-VFUC>] (archived Sept. 17, 2021).

itself is not imminent.<sup>121</sup> While there are different approaches to both personal and national self-defense on the question of imminence, the general pattern is consistent: the justification for engaging in lethal force depends on the immediacy of the threat that needs to be forestalled or the urgency of the need to forestall it.<sup>122</sup> It is therefore unnecessary to create a new legal framework that makes use of hybrid categories like “unlawful combatancy” in order to articulate a coherent framework for dealing with violent nonstate actors.

Once it is determined that the nonstate actor poses a serious risk of harm and that it is necessary to act immediately to forestall that harm, the question is whether it is feasible to capture and detain that individual. In a law of war framework, of course, it is not necessary to attempt capture prior to killing.<sup>123</sup> But in a civilian framework, even when the threat is imminent, capture must be attempted provided it is feasible and provided that the threat can be adequately prevented through capture.<sup>124</sup>

Of course, the meaning of “feasibility” in this context is complex. The question usually boils down to what degree of risk to combatants is required before capture is declared infeasible. Particularly where drones are concerned, capturing a suspect requires confronting much greater risk than is involved in killing him, given that capture operations must be conducted in proximity to the target. The killing of Osama bin Laden, for example, was presented as a capture operation, but it seems more likely that the option of capture was never seriously considered.<sup>125</sup> Immediately following the announcement of the bin Laden strike, President Obama said he had directed Leon Panetta, then director of the CIA, “to make the killing or capture of bin Laden the top priority of our war against al Qaeda,” and that, at his direction, the United States “launched a targeted operation against [bin Laden’s] compound in Abbottabad, Pakistan.”<sup>126</sup> That statement did not clarify whether the operation was a targeted killing operation or whether it

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121. See Ignaz Stegmiller, *The Right of Self-Defense Under Article 51 of the UN Charter Against the Islamic State in Iraq and the Levant*, 90 *DIE FRIEDENS-WARTE* 245, 265–70 (2015) (discussing the need for a broader conception of imminence).

122. See generally Finkelstein, *supra* note 84 (introducing the concept of preemptive killing to provide a rationale for targeted killing in which harm is non-imminent).

123. See Jens Ohlin, *The Duty to Capture*, CORNELL L. FAC. PUBL’N 1268, 1269–70 (2013), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2001&context=facpub> (last visited Sept. 17, 2021) [<https://perma.cc/VA8X-S3N5>] (archived Sept. 17, 2021).

124. *Id.*

125. Yochi Dreazen, Aamer Madhani, & Marc Ambinder, *The Goal Was Never to Capture bin Laden*, ATLANTIC (May 4, 2011), <https://www.theatlantic.com/politics/archive/2011/05/the-goal-was-never-to-capture-bin-laden/238330/> [<https://perma.cc/EG49-WVB9>] (archived Sept. 17, 2021).

126. Macon Phillips, *Osama Bin Laden Dead*, WHITE HOUSE (May 2, 2011, 12:16 AM), <https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead> [<https://perma.cc/CFU7-5264>] (archived Sept. 17, 2021).

was originally a capture mission, but there were no statements to the effect that the United States intended to capture bin Laden and bring him back to stand trial.

Finally, once the threat posed by the nonstate actor has been determined to be imminent or the need to use of force immediate, and capture has been determined to be infeasible, the question is whether it is permissible to breach the sovereignty of the host country where the suspected terrorist resides. The concept of sovereignty in international law would suggest that it is not. The autonomy of each nation normally overrules the need of an aggrieved country to demand access to a suspected terrorist who has performed acts of violence against it. In the case of Osama bin Laden, for example, Pakistan in theory had the right to refuse to turn bin Laden over to the Americans. However, if a country is harboring a criminal (or suspected terrorist) and that person poses a continuing danger, yet the host country is unwilling or unable to turn that person over to stand trial or to otherwise eliminate the danger, the aggrieved country may take matters into its own hands and act against him.<sup>127</sup> While it was widely suspected that Pakistan probably did covertly extend permission to the Americans to conduct its raid on the bin Laden compound, arguably if it had not granted that permission, the United States might have been entitled to act to defend itself in any event. If Pakistan harbors a terrorist and refuses to take steps to protect other nations from the harm he poses, then other countries can consider Pakistan either “unable” or “unwilling” to neutralize the danger, and they can then take matters into their own hands.

Needless to say, no comparable doctrine exists in the law of war. If an enemy belligerent escapes from the zone of armed conflict and crosses the border into a neighboring country, the United States as the pursuing country is not permitted to breach the sovereignty of the nonbelligerent nation. To proceed with a strike in such a case would be tantamount to an act of hostility against the harboring nation and could lead to drawing that country into war. Consider, for example, a fanciful case in which Hitler had fled Germany towards the end of the war and escaped to Switzerland. Imagine US forces had stopped pursuing him at the Swiss border and had then demanded permission to enter Switzerland to target Hitler. If Switzerland had refused such a request and American forces proceeded nevertheless, US military action inside Switzerland could well be considered an attack on Switzerland itself, despite the fact that US actions would be directed against a German citizen and a member of the German military. The

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127. See Elena Chachko & Ashley Deeks, *Which States Support the ‘Unwilling and Unable’ Test?*, LAWFARE (Oct. 10, 2016), <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> [<https://perma.cc/UH9T-LWQY>] (archived Sept. 17, 2021).

“unable or unwilling” doctrine would not give the United States leave to ignore Swiss sovereignty.

The line between combatants and civilians, even civilians directly participating in hostilities, is thus of the utmost importance for establishing the legal framework in which kill or capture operations take place. Once again, a fuller treatment of this topic would be necessary to clarify the meaning of “direct participation in hostilities” and where to draw the line between that category and civilians who are not sufficiently involved to count as “direct participants.” But for present purposes, the focus of this Article is only on establishing the correct framework for determining the status of violent nonstate actors. The framework this Article has set out makes clear that there is a viable way to understand violent nonstate actors based on traditional law of war categories and that it is therefore unnecessary to establish new categories such as “unlawful combatancy” in order to determine the treatment to which such individuals may be subjected.

#### VII. THE ROLE OF THE STATE IN ESTABLISHING COMBATANCY

Stepping back from the above details, the question arises what the basis is for distinguishing violent nonstate actors from violent state actors, where the latter’s methods are as brutal and threatening as the former. What is significant about the fact that a combatant acts in the name of a state on the traditional account is that it is a politically recognized, autonomous, and sovereign entity, one that possesses the same rights and entitlements as other sovereign entities with whom it might have disagreements. In the traditional approach to the law of war, states are special and different from other organizations in multiple ways; one of particularly great importance is the concept of state sovereignty. Since states do not rule each other and there is little in the way of common law that governs relations among states, war is the last resort for autonomous entities that have no common judge or other sovereign to whom they can appeal to settle their differences. Within a given state, the matter is entirely different: where, as Hobbes would say, there is “a common power to keep them all in awe,” there is no need, in theory, to resort to war.<sup>128</sup> The law, as implemented by the sovereign under whose power it falls, provides the answers, as any use of force in that context is usually not an act of war but a crime.

Accounts that attempt to find a middle ground between combatancy and criminal responsibility, or, more particularly, attempt to bring terrorism within the fold of combatancy by revising the definition of the latter, create the risk of weakening the limits on war and the prerogatives of civil authority within a given legal regime. The concept of combatancy is integrally linked to the concept of “armed conflict.” When there is armed conflict there are combatants, and

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128. THOMAS HOBBS, *LEVIATHAN* 83 (A.R. Waller ed., 1904).

without that designation of their activities, it cannot be said that those individuals are belligerents. Thus, the functionalist view of combatancy, insofar as it broadens that concept, also broadens the concept of armed conflict. There are grave risks, however, involved in expanding that notion. Partly, this has occurred because of the unbounded nature of war: military confrontations tend now to have no distinct beginning, middle, or end, as well as no clear location. A further loosening of the criteria for what counts as armed conflict risks it losing the distinctiveness of war, with its particular rules and norms, resulting in a state of affairs the famous theorist of war Von Clausewitz described as a hellish descent into “absolute war.”<sup>129</sup>

On the alternative view, this Article suggests that violent nonstate actors are civilians, albeit civilians engaged in militaristic activity. Violent nonstate actors may be thought of as highly dangerous members of an illegal criminal conspiracy, precisely on par with violent members of drug cartels and comparable to the Revolutionary Armed Forces of Columbia (FARC), one of the largest organized crime syndicates in history.<sup>130</sup> Efforts to combat such groups lie within the ambit of law-enforcement practices and international efforts to fight political terrorism as coordinated law-enforcement operations among sovereign nations with a stake in the outcome. While such an approach may appear to tie the hands of the US military and its ability to defend the country from terrorism, this is not the case, as military tools and methods can be deployed to fight civilian threats. Indeed, the civil law enforcement model possesses great advantages, both for the rule of law and for national security efforts in fighting terrorism.

First, and most notably, there is a legal advantage in approaching terrorists as members of a criminal conspiracy, in which mere membership is *per se* illegal. Under the armed conflict approach that has dominated since 9/11, there is little basis for condemning members of al-Qaeda or ISIS because terrorists are combatants. The concept of “combatancy,” after all, affords as much protection and entitlement as it does targetability.<sup>131</sup> There is no reason, however, to dignify membership in al-Qaeda or ISIS with the protection and status that state military organizations possess. The latter are legitimate because sovereign states are entitled to defend their existence, but al-Qaeda and ISIS deserve no such protection. If the organizations themselves are illegal, membership in them should also be illegal.

The question that must be considered carefully, however, is the extent to which the civilian law-enforcement model can apply within

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129. See generally CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds., Michael Howard & Peter Paret trans., 1976).

130. See generally Jeremy McDermott, *The Changing Face of Colombian Organized Crime*, PERSPECTIVAS (Sept. 2014), <https://library.fes.de/pdf-files/bueros/la-seguridad/11153.pdf> [<https://perma.cc/9AFV-5UA4>] (archived Sept. 17, 2021) (discussing the structure and the metamorphosis of Colombian drug cartels).

131. See *supra* Part II.

armed conflict—that is, to a high-intensity battle with nonstate actors where the civilians in question can be classified as serving “a continuous combat function.” And relatedly, should they still be treated according to the combatancy model suggested in Geneva for combatants in a NIAC? Or should they be treated instead according to the civilian law-enforcement model discussed above? Additional Protocol I supports the view that violent nonstate actors should be thought of as on a par with civilians taking part in hostilities. Although the Additional Protocol does not specifically articulate such a conception, nonstate combatants would be targetable on an activity-based theory, rather than a purely status-based account. In the case of high-intensity conflict, such as occurred in Afghanistan and Iraq, state actors can target nonstate combatants in a continuous fashion because the threat they pose is continuous and the activity in which they are engaged is hostile. As the level of threat diminishes, however, activity-based targeting would require a greater demonstration of threat. Such would be the case outside the zone of armed conflict.

What this means for all intents and purposes is that in the case of al-Qaeda or ISIS in areas covered by the PPG, such individuals are not serving a continuous combat function and thus are not targetable in the first instance unless they pose an imminent danger of harm. As argued in the case of Anwar al-Awlaki, they must be arrested, not summarily executed, unless the threat they pose warrants the immediate use of lethal force based on the need to forestall an imminent danger. On this view, it is problematic to target someone from a distance unless that person poses an imminent threat and there is no way to apprehend him. However, the use of drones against nonstate actors may be justified within the formal zone of armed conflict, given that the intensity of conflict and the high level of danger creates an activity-based justification for making the enemy continuously targetable.

In this regard, international law arrives at roughly the same conclusion as the Obama administration, but via a somewhat different route. Targeted killing in Iraq and Afghanistan, which were zones of conflict for most of the last twenty years, and targeting in other areas, such as Yemen, Pakistan, Syria, and Somalia, can be properly distinguished, not because in the zones of armed conflict there are combatants in a traditional sense and in areas covered by the PPG there are none. Since nonstate actors are best understood as civilians, albeit civilians participating in hostilities, they become targetable as though they were state actors.

Outside a zone of armed conflict, however, the civilian model must actually prevail in practice over the military model, and individuals targeted cannot be thought of as combatants in any sense, with the exception of the self-defense-based killing that applies to every civilian. This implies that nonstate actors cannot simply be targeted without an antecedent attempt to capture and a determination that capture is

“infeasible,” as discussed above. It is only by distorting the feasibility and imminence requirements that the conclusion emerges that nonstate actors can be directly targeted under the PPG.

Moreover, the areas covered by the former PPG are still sovereign nations, and thus it is not permissible under the LOAC to conduct targeted killings in those areas without permission of the host nation. In theory, if the United States proceeds without such permission, it is engaging in an act of war. This once again helps to distinguish conflict in outlying areas, at the periphery of the conflict, from military engagement, in which sovereignty considerations would not impede military engagement.

#### VIII. IMPLICATIONS FOR DOMESTIC LAW ENFORCEMENT

This Article has argued in favor of the traditional position that the notion of combatancy is fundamentally tied to the concept of the state and the idea of state agency. Because of this, the Article has also argued that violent nonstate actors are essentially criminal civilians, rather than combatants, based on the fact that they are nonstate actors. The discussion has allowed, however, that in the case of high-intensity conflict, such civilians may become continuously targetable based on their levels of activity and the threat they pose. This is what leads IHL, specifically Additional Protocol I, to treat such nonstate actors as combatants and to distinguish them from civilians as though the traditional principle of distinction applied. On the view defended here, the label “combatant” is only a rough approximation when that term is used against nonstate actors: individuals are combatants only in the sense that they are targetable and that they must be treated on a par with formal POWs, despite the fact that they lack the state-based identity that provided the true basis for both combatant POW protections and for targetability based on status.

The insistence on state agency as a feature of combatant identity connects that concept with the deeper justification for permitting armed combat, namely that states have equal autonomy and, accordingly, there is no power over them to resolve disputes between them. A nonstate actor who wages “war” does not in fact possess that justification for resolving differences through combat. Instead of supplying a military justification for acting, he has acted on a principle that lends itself to resolution within the context of existing state or interstate political and legal frameworks. To proceed as though he possessed the same justification as a traditional state actor is to confuse structure or function with normative principle.

The Obama administration’s imprecise concept of a NIAC at least suggests that there is a form of warfare that is asymmetric in that it pits a sovereign state against a large and highly organized militant organization. When this occurs, the UN Charter suggests that the LOAC will apply. This, then, underscores the flaw in the Forfeiture

Theory of compliance with international norms: the fact that al-Qaeda does not follow international law does not release the United States from the duty to follow those same norms since the source of authority of the norms in question is not the compliance of the other party.

With regard to Qassim Soleimani and other state actors, there is no avoiding the full panoply of rules of the Law of Armed Conflict. Despite Soleimani's potentially terroristic activities, his status as a state actor must take precedence over his nonstate actions. The "dual hatted" theory does not work as a justification for extrajudicial killing. Nor, from what is known of the facts, does the theory of self-defense, which requires an imminent threat to the country or to an individual state actor. Once the limitations on the moves that can legitimately be made in this space become clear, it is quite a bit easier to justify those targeted killings that are legitimate and also easier to protect the boundaries that demarcate domestic criminal law. The more the distinction between the law of war and the law of crime is effaced, the greater the erosion of our constitutional principles like due process, rights that require constant vigilance to safeguard and protect.

Recent events have made this all too clear. During the summer of 2020, federal agents were deployed to quell domestic disturbances against supposed Antifa demonstrators as well as against Black Lives Matter protests in Portland and other cities that were the site of unrest around the United States.<sup>132</sup> And in the wake of the January 6, 2021, attack on the Capitol building, federal agencies, the U.S. Congress, and domestic law-enforcement authorities have become alarmed about the increase in domestic extremism, particularly white supremacist violence.<sup>133</sup> A recent report by the Office of the Director of National Intelligence, for example, warns that racially motivated domestic violent extremists "who promote the superiority of the white race" are the actors "with the most persistent and concerning transnational connections because individuals with similar ideological beliefs exist outside of the United States" and that these groups "frequently communicate with and seek to influence each other."<sup>134</sup> Likewise, data show a rise in domestic extremism not seen in over twenty-five years,

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132. Claire Finkelstein & Kevin Govern, *The Deployment of Federal Agents in Portland is a Harbinger of Authoritarianism*, UNIV. PENN. CTR. FOR ETHICS & RULE L. BLOG (July 24, 2020), <https://archive.law.upenn.edu/live/news/10301-the-deployment-of-federal-agents-in-portland-is-a> [<https://perma.cc/8KKJ-5YYP>] (archived Sept. 17, 2021).

133. This comment reflects events up until and at the point of writing.

134. See OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 2 (2021) <https://int.nyt.com/data/documenttools/biden-administration-domestic-extremist-report-march-2021/ab0bbdf0a8034aea/full.pdf> (last visited Sept. 17, 2021) [<https://perma.cc/8KKJ-5YYP>] (archived Sept. 17, 2021).

driven primarily by white-supremacist, anti-Muslim, and anti-government extremists on the far right.<sup>135</sup>

The United States has seen this movie before. In 1985, the Philadelphia Police Department bombed a residential home occupied by a militant black group called MOVE following a protracted standoff in which the police used tear-gas and fired multiple rounds of ammunition into the house.<sup>136</sup> In the bombing and subsequent fire, eleven people in the house, including five children, died.<sup>137</sup> One of the two MOVE survivors claimed that the police fired on inhabitants as they were escaping the fire.<sup>138</sup> The Philadelphia Special Investigation Commission, which examined the event, found that “[t]he plan to bomb the MOVE house was reckless, ill-conceived and hastily approved. Dropping a bomb on an occupied row house was unconscionable and should have been rejected out of hand.”<sup>139</sup> While the use of excessive force on domestic populations is not new, the risk that such confrontations become increasingly militarized lurks in the background at all times. Unless the law governing the use of force, in both war and law enforcement, is crystal clear, the practice will continue to shift in the direction of escalation and increasing use of military technology.

Polarization and even radicalization of the US population has created a grave risk that the norms of war will seep into domestic law-enforcement practices as the divisions in American society continue to grow. Previously clear legal distinctions between the domestic law of crimes and the law of war have become difficult to maintain. As a result, other distinctions that are neighboring concepts relating to the rule of law, such as that between state and nonstate actors or that between foreign and domestic criminals, are also becoming eroded. The effects of such erosion have been felt in other countries where illiberal regimes do not hesitate to turn deadly force on their own populations as a method of political control. Political assassinations have been a particularly preferred method of maintaining political control on the

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135. Robert O’Harrow Jr., Andrew Ba Tran, & Derek Hawkins, *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), [https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/?utm\\_campaign=wp\\_post\\_most&utm\\_medium=email&utm\\_source=newsletter&wpisrc=nl\\_most&carta-url=https%3A%2F%2Fs2.washingtonpost.com%2Fcar-ln-tr%2F31d62d1%2F607471819d2fda1dfb4c85b1%2F596bdd7eae7e8a44e7dfe6bc%2F8%2F68%2F607471819d2fda1dfb4c85b1](https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most&carta-url=https%3A%2F%2Fs2.washingtonpost.com%2Fcar-ln-tr%2F31d62d1%2F607471819d2fda1dfb4c85b1%2F596bdd7eae7e8a44e7dfe6bc%2F8%2F68%2F607471819d2fda1dfb4c85b1) [https://perma.cc/5TB2-M47A] (archived Sept. 17, 2021).

136. See Akela Lacy, Opinion, *Philadelphia Keeps Revisiting MOVE Bombing History Because We Never Truly Learned It*, PHILA. INQUIRER (June 4, 2021), <https://www.inquirer.com/move-bombing/> [https://perma.cc/2DT7-GV8B] (archived Sept. 17, 2021).

137. See *id.*

138. See *id.*

139. *Excerpts from Commission’s Report on Bombing*, N.Y. TIMES (Mar. 7, 1986), <https://www.nytimes.com/1986/03/07/us/excerpts-from-commission-s-report-on-bombing.html> [https://perma.cc/F6K6-JG2A] (archived Sept. 17, 2021).

part of the Russians.<sup>140</sup> But a similar phenomenon has occurred in North Korea, China, Saudi Arabia, Chile, and in many other places across the globe.

The legal confusion brought to this area and the weakening of formerly clear legal principles may ultimately open the door to domestic abuse of the technologies of war. As a result, there is a risk that the practices the United States exports abroad may not stay on foreign soil when the conditions for their use are ill-defined. It is commonplace to suppose that extrajudicial killings, particularly those involving drone technology, could not occur on US soil, and that the traditional legal system and constitutional criminal guarantees will remain untouched by US military and intelligence practices overseas. But drone technology is already in use by federal law enforcement for surveillance purposes, as are technologies like bomb-diffusing robots or other AI-based systems. In addition, the United States now faces a significant problem of radicalism in the US population, not unlike what the United States confronted in Iraq and Afghanistan at the beginning of the war on terror. The rising tide of domestic terrorism may thus provide precisely the catalyst for a wholesale transformation of domestic law, one that must be forestalled at all costs.

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140. See RICHARD W. PAINTER & PETER GOLENBOCK, *AMERICAN NERO: THE HISTORY OF THE DESTRUCTION OF THE RULE OF LAW AND WHY TRUMP IS THE WORST OFFENDER*, 243–44 (2020).