# International & National Security Law

## Obama's War Law

*By Robert J. Delahunty**

Among the critics of the Bush Administration's legal policies in the "war on terror," few were more unrelenting or more vituperative than Harold Koh, then the Dean of Yale Law School.[1] With the change of Administrations, Dean Koh has become the Legal Adviser to the U.S. Department of State. In that capacity, he addressed the annual meeting of the American Society of International Law last March on the topic *The Obama Administration and International Law.*[2] In some circles, Koh's remarks caused shock and dismay. Dean Koh met Legal Adviser Koh, and Legal Adviser Koh, it turned out, had come to accept many of the basic premises and practices of the Bush Administration. Although there are undeniable differences of emphasis and even of policy between the two Administrations, many of the innovations Koh described make little difference in practice, and some might even be described as cosmetic.[3] Koh's readers could reasonably conclude—as others had done before—that "[a]lmost all of the Obama changes have been at the level of packaging, argumentation, symbol, and rhetoric."[4] Certainly the continuities in the legal policies of the two Administrations are marked and substantial.[5]

In this brief paper, I will focus on three main areas of continuity: the Obama Administration's reliance on the "war paradigm" rather than the "law enforcement" or "crime" paradigm; its understanding and application of the Geneva Conventions of 1949; and most importantly (because Koh's speech emphasized the subject) its practice of "targeted killings."

### The War Paradigm

Almost since the attacks on 9/11, legal experts have debated whether the United States was "at war" with al Qaeda and its Taliban supporters, or rather had been the victim of a mass atrocity committed by a criminal syndicate.[6] The appropriate legal strategy for the United States depended on which answer was given. If the "war" paradigm applied, the United States' legal strategy would be governed by the law of armed conflict. Under that body of law, enemy combatants may lawfully be targeted and killed by the opposing belligerent's forces.[7] They may also be captured and detained indefinitely without criminal charges, or tried by military commissions on charges of war crimes. If, however, the "crime" paradigm applied, the normal rules governing the conduct of domestic law enforcement agencies would govern. The use of lethal force would be restricted; detention would be lawful only if criminal charges were lodged; and any criminal trials would have to be held before ordinary Article III civil courts. Many critics of the Bush Administration argued that the "crime" paradigm applied. The Bush Administration maintained that the United States was *at war* with al Qaeda and Taliban.

That position formed the fundamental premise of the Bush Administration's legal policy. On the international law side, the policy was anchored in the inherent right of national self-defense recognized by article 51 of the United Nations Charter, in a series of Security Council Resolutions starting with S.C. Res. 1386 (2001) and continuing up to the present,[8] and in the actions of NATO in the immediate aftermath of the 9/11 attacks.[9] On the domestic side, it relied on the Authorization for the Use of Military Force (AUMF) enacted by Congress in 2001,[10] and on the rulings of the Supreme Court.[11]

Those hoping that the Obama Administration would abandon the war paradigm must have been sorely disappointed by Koh's remarks. Noting that some have asked on what legal basis the United States is continuing to detain those held in Guantanamo and Bagram,[12] Koh answered:

> We continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States. . . . [I]n Afghanistan, we work as partners with a consenting host government. And . . . the United Nations Security Council has, through a series of successive resolutions, authorized the use of "all necessary means" by the NATO countries constituting the International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan.[13]

On the domestic legal side, Koh—again following the Bush Administration—rooted the authorization for the use of military measures against al Qaeda and Taliban, including detention, in the AUMF: "[a]s a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the . . . AUMF."[14] On the fundamental question of the legitimacy of using the war paradigm, there is no difference between the two Administrations.

Indeed, in one subtle respect, the convergence is even more striking—if also unacknowledged. Koh finds a legal foundation for the war against al Qaeda and Taliban in the right of self-defense.[15] But under the rulings of the International Court of Justice (ICJ), there is *no* right of self-defense against a non-state actor (such as al Qaeda and, now, Taliban).[16] Koh glides over this issue in silence.

### The Geneva Conventions

Once it is accepted that the war paradigm applies, it follows that the law of war (also called international humanitarian law) specifies the United States' rights and duties as a belligerent. Three major documents in the law of war are particularly relevant: the third and fourth of the four 1949 Geneva Conventions, and the first of the two 1977

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"Additional Protocols" to the 1949 Geneva Conventions. The third Geneva Convention (the POW Convention[17]) defines the criteria for being accorded the legal status of a prisoner of war, and specifies the powers and duties of a detaining Power toward such captives. The fourth Geneva Convention (the Civilian Convention[18]) defines the legal status and protections of a civilian non-combatant during wartime. The United States decided not to ratify the first of the two Additional Protocols to the Geneva Conventions (AP I[19]) on the grounds that some of its provisions "unduly favored irregulars and terrorists, and would endanger the civilian population among whom such persons might attempt to hide."[20] Nonetheless, some of AP I's clauses have been said to reflect customary international law.[21] Of particular relevance, the United States accepts the "principle of distinction" and the "principle of proportionality," both of which are codified in AP I. The principle of distinction is "[a]t the very heart of the law of armed conflict."[22] In Koh's words, it "requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack."[23] Koh explains the principle of proportionality as "prohibit[ing] attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated."[24]

In applying this body of law to the armed conflict between the United States and al Qaeda/Taliban, at least four important legal questions arose.

First, if the United States armed forces captured members of the al Qaeda/Taliban forces and detained them (as they have done and are still doing in Guantanamo Bay and Bagram), are those detainees entitled to the legal status of prisoners of war under the POW Convention?

Second, are members of those forces instead protected as civilians under the Civilian Convention?

Third, is there yet another legal category—unprivileged or illegal combatant[25]—that applies to al Qaeda/Taliban forces, such that (unlike civilians) they can legitimately be targeted or, if captured, detained, but also such that (unlike prisoners of war) they do not enjoy the full measure of the POW Convention's protections, such as immunity from criminal prosecution for their use of force in combat?[26] Critics of the Bush Administration argued with considerable vehemence that al Qaeda/Taliban detainees could only be *either* civilians under the Civilian Convention *or* prisoners of war under the POW Convention[27]: the claim that there was a third category was said by some scholars to create a supposed "legal limbo" or "black hole" for the detainees.[28] Then-Dean Koh himself derided the Bush Administration in 2004 for seeking to create "extra-legal zones, most prominently in Guantanamo Bay, where . . . extralegal persons, particularly those detainees labeled 'enemy combatants'" were held.[29]

Fourth, notwithstanding the fact that the United States has not ratified AP I, was it bound to accept that treaty's way of drawing the distinction between combatants and civilians? On the answers given to these questions hinged the legality under international law of the United States' targeting and detention policies.[30]

How does the Obama Administration answer these questions? In each case, its answers seem to be essentially the same as those of the Bush Administration.

***Does the POW Convention Apply?*** The Obama Administration does not believe that the detainees are entitled to the status of "prisoners of war" under the POW Convention. Although Koh avoids dealing candidly with this question, the Obama Administration's conduct would be inexplicable—and illegal—if it held any other view. As Professor Robert Turner points out, Article 84 of the POW Convention states that "[a] prisoner of war shall be tried only in a military court," and Article 97 states that "[p]risoners of war shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein."[31] Attorney General Holder's decision to prosecute five Guantanamo detainees, including Khalid Sheik Mohammed, before federal district courts[32] would only be permissible if those detainees were *not* prisoners of war.

Critics also assailed the Bush Administration because it claimed to be authorized to hold the Guantanamo detainees until the end of the conflict, i.e., for the indefinite future. In effect, it was said, this amounted to life imprisonment without trial. Koh remarks in passing that courts, following the Obama Administration's arguments, "have accepted the overall proposition that individuals can be subject to law of war detention *for the duration of the current conflict*."[33]

***Does the Civilian Convention Apply?*** Koh bases the United States' legal right to hold al Qaeda and Taliban detainees in Guantanamo and Bagram on the assumption that they are (or were) *combatants,* not *civilians*.[34] True, he prefers to call them "belligerents"[35] rather than "enemy combatants."[36] Setting aside whether the change in nomenclature is more than cosmetic,[37] the key point is that, for this Administration as for the last, the detainees are *not* "civilians" protected by the Civilian Convention. The Obama Administration has announced that at least forty of the Guantanamo detainees will be held indefinitely without trial[38]—a legally indefensible position if they were protected as civilians.[39] Attorney General Holder's position that the law of war would permit the resumed detention of Khalid Sheik Mohammed even if he were acquitted at his civilian trial is further evidence that the Obama Administration regards him and those like him as combatants rather than as civilians.[40] Still more clearly, al Qaeda and Taliban members could not be intentionally targeted for killing in Afghanistan, Pakistan, and elsewhere if they enjoyed the status of civilians.[41]

***Does AP I's Test of the Combatant/Civilian Distinction Apply?*** Koh implicitly rejects the—enigmatic[42]—test of non-combatant status set out in AP I. That test would hold that those who are not members of the regular armed forces of a belligerent are civilians "unless and for such time as they take *a direct part in hostilities*."[43] In its 2006 *Targeted Killings Case*,[44] the Supreme Court of Israel adopted that test, and it is strenuously advocated by the International Committee of the Red Cross (the ICRC).[45] Rather than relying on it, however, Koh now affirms a much broader view of combatant status. For him, the appropriate test

includes, but is not limited to, whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces. . . . [W]e disagree with the International Committee of the Red Cross on some of the particulars.[46]

Koh's disagreement with the ICRC is understated, to say the least.[47] In general, the ICRC's view is as follows:

> [a]ny member of the armed forces of a State is a legitimate target at all times, including the cook, the cleaner and the lawyer. . . [but] non-State forces individuals who do not have a continuous combat function will be civilians and therefore immune from direct attack unless they engage in a specific act which amounts to direct participation in hostilities, and only for such time.[48]

So, for example, the ICRC maintains that the driver of a truck who transports ammunition from a factory to a port for further shipping to a storehouse in a conflict zone is a civilian, and so immune from attack—even if the driver is an al Qaeda or Taliban member or supporter.[49] For Koh, on the other hand, the fact that the truck driver was "formally" a member of al-Qaeda by virtue of having taken an oath, or was "functionally" a member because he had trained with it, would suffice to render him a combatant and, hence, a legitimate target for killing.

To take an even clearer example, a 2009 Report to the U.S. Senate Foreign Relations Committee disclosed that the U.S. military was targeting Afghan drug lords suspected of financing the Taliban. According to the Report, "[t]he military places no restrictions on the use of force with these selected targets, which means they can be killed or captured on the battlefield."[50] Presumably Koh is aware of the military's targeting decision and considers it to be lawful. And so it may well be, on his understanding of combatant status. But it is plainly unlawful on the ICRC's interpretation, which would prohibit targeting those who provide combat service support, including financing, to groups like al Qaeda or Taliban.[51]

It is ironic to compare Koh's positions as Legal Adviser with the views he expressed in his 2004 Supreme Court amicus brief in the *Padilla* case.[52] There he appeared to endorse AP I's test of non-combatancy, arguing that in calling Padilla an "enemy combatant," the government had elided "the crucial distinction between actual *combatants* taking a *direct* part in hostilities . . . and *civilians* who may be subject to criminal trial in civilian courts for acts of espionage or treason in aid of an enemy power" (emphases in original).[53] Elsewhere, too, he affirmed that only those civilians "taking a *direct* part in the hostilities" may be detained by the military (original emphasis).[54] Applying the AP I test, Koh argued that José Padilla (whom his brief described merely as someone "alleged to have conspired abroad with al-Qaeda . . . to commit terrorist acts in the United States at some indefinite time in the future"[55]) was a *civilian,* not a combatant.[56] Yet under the tests Koh currently posits for combatant status, Padilla would unquestionably count as a *combatant* (as the Bush Administration argued in *Padilla*[57]), not as a civilian. Finally, in his *Padilla* Brief, Koh complained that "the Government makes no pretense that Padilla is being held for trial: he is simply being detained without any stated time limit for the duration of a global 'war on terrorism' that has no foreseeable end."[58] Now, as Legal Adviser, he remarks imperturbably that detainees may be held "for the duration of the current conflict."[59]

**Targeted Killings**

The Obama Administration has taken pride in its numerous missile and other attacks on targeted terrorist suspects in countries such as Yemen and Pakistan.[60] Obama's CIA Director Leon Panetta has described the drone strikes in Pakistan as "the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership."[61] Indeed, the number of drone attacks during the Obama Administration's first year reportedly exceeded the total for the Bush Administration's eight years.[62] Koh defends the practice of targeted killings against several legal criticisms, but fails to grapple with the most serious objections that have been made to the policy. There are at least three questions that deserve far closer and more sustained consideration.

***Pakistani Sovereignty.*** First, the United States conducted fifty-three U.S. missile strikes on targets in the tribal regions of Pakistan in 2009 alone. Do these strikes constitute a violation of Pakistan's territorial sovereignty? The answer to this would be "No," if—as some surmise—Pakistan has secretly consented to the program.[63] But there is uncertainty about Pakistan's true attitude: in an interview last December with *Der Spiegel,* Pakistani Prime Minister Syed Yousuf Raza Gilani stated that the drone strikes are "counterproductive in the sense that [they are] creating a lot of anti-American sentiment all over the country."[64] Indeed, one legal scholar has even contended recently that not only is the U.S. unable to "point to invitations from Pakistan for most of its drone attacks," but that "even express consent by Pakistan would not justify their use."[65]

If Pakistan has *not* consented to the drone program, the question becomes harder: under ordinary use-of-force rules in international law, the fact that Taliban forces located in Pakistan had launched attacks on U.S. and NATO forces might not be sufficient to justify an armed intervention by the latter into Pakistan's territory.[66]

The United States might, however, respond by pointing to the series of Security Council Resolutions mentioned earlier, culminating in last October's S.C. Res. 1890 (2009), for authorization to invade Pakistan's territorial sovereignty if that action was necessary for carrying out its mission against al Qaeda and Taliban forces in Afghanistan.[67] The argument would be that the member states of the United Nations, including Pakistan, have an obligation under article 25 of the U.N. Charter to "accept and carry out" the Security Council decisions, and that (especially when the Council is acting under its Chapter VII authority) this obligation may require them to cede their claim to territorial sovereignty in appropriate cases. One possible precedent that might be cited is S.C. Res. 688 (1991), which demanded that Iraq, "as a contribution to removing the threat to international peace and security in the region" in the aftermath of the First Gulf War, end its repression of the Iraqi civilian population, including that in Kurdistan. The

United Kingdom, followed by the United States and France, interpreted S.C. Res. 688 as authorizing the creation of two "no-fly" zones in Iraq, in abridgement of Iraqi sovereignty.[68] Another possible precedent is S.C. Res. 1244 (1999), which authorized NATO to form and lead the Kosovo Force (KFOR) to defend Kosovo—then still a province of Serbia—from renewed Serb attacks. S.C. Res. 1244 effectively severed part of the territory of Serbia from what the Resolution itself recognized as its sovereign government and authorized an outside military force to occupy and secure it.[69] But there is some legal authority, based on the principles of the U.N. Charter, against the claim that the Security Council can authorize the abrogation of Pakistani territorial sovereignty.[70] And even if the Council could do so, a close reading of the relevant Resolutions may not support the argument that the Council has in fact done so, even implicitly.[71] An argument in defense of U.S. strikes inside Pakistan would therefore need to be developed. Or it simply may not matter: presidential candidate Obama stirred up controversy by saying that if elected, he might bomb Pakistan.[72]

***The Principle of Proportionality.*** Second, there is the requirement that the targeted killings accord with the principle of proportionality, discussed earlier. Other than conclusory assurances that the requirement is satisfied, however, Koh does little to explain how the principle is being applied. For instance, he does not specify whether the proportionality principle is being applied to the targeted killing program in Pakistan as a whole, to some discrete segments of it, or to each individual strike.[73] He does not provide estimates of the numbers of militants and noncombatants killed in the program, although some estimates suggest a rather low level of civilian casualties.[74] He does not clarify what level of certainty is required before launching a strike that the intended target is indeed an al Qaeda or Taliban operative—a true, not a false, positive. He does not identify any of "the concrete and direct military advantage[s]" obtained from the strikes. Nor, in general, does he even begin to sketch out the overall costs and benefits of the drone program.

The Obama Administration's legal advisers and policy makers owe the American public, the people of Pakistan, and world opinion a fuller accounting. The Obama Administration's drones program is causing other nations' militaries to follow our lead, including those of the U.K., Germany, and Pakistan; one leading expert on contemporary warfare even contends that the impact of the new technology is comparable "with the introduction of gunpowder, the printing press or the airplane."[75]

Even setting apart "collateral damage" to Pakistani civilians and their property, the overall costs of the drone program may be significant. Polling data show that only nine percent of Pakistanis approve the program,[76] notwithstanding that the Pakistani public has suffered from the Taliban's depredations.[77] Targeted killing programs (which often depend on the assistance of local collaborators) tend to provoke moral outrage and to intensify hatreds between enemies.[78] Killing terrorists instead of capturing and interrogating them may preclude the discovery of valuable intelligence information.[79] The drone program may even be provoking retaliation against American civilians inside the U.S.[80]: Attorney General Holder has indicated that the recent attempt to set off a car bomb in Times Square, attributed to a U.S. citizen of Pakistani descent, may have been planned and even financed by the Taliban.[81] On the other hand, targeted killing programs may hold Pakistani civilian casualties to a minimum, immobilize or decapitate the militants' leadership, disrupt their operations, and demoralize their forces to an unusual degree.

***The Applicability of Human Rights Law.*** Third, Koh dealt only briefly with the objection recurrently posed by advocates of international human rights law that "the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing.*"[82] Unmentioned in his address were the facts that in 2004, the United Nations Commission on Human Rights had made precisely that complaint against the United States' use of drone missiles to kill suspected al Qaeda targets, and that the Bush Administration had vigorously defended the legality of the practice. Koh's defense differs little (except in its taciturnity) from the Bush Administration's.[83] Here again, there was a major but unacknowledged convergence of legal views between the two Administrations.

If Koh returns to the legality of targeted killing of al Qaeda and Taliban terrorist suspects, he should deal far more adequately with the human rights objection that targeting an un-uniformed combatant is akin to outlawing and sentencing him without trial—something more like killing individuals by paramilitary death squads than ordinary military combat. In my opinion, there are legally and morally persuasive answers to that objection.[84] But the problem is a serious one that deserves something more than Koh's shallow and evasive response. The U.N. Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions has recently questioned the legality of the Obama Administration's drones program, and Professor Mary Ellen O'Connell of the University of Notre Dame Law School has condemned it as illegal.[85] If the Obama Administration continues to laud its drone program, it should come forward with better reasoned legal and policy defenses of it. Stealth weaponry should no longer be defended by stealth lawyering.

If nothing else, Koh and other Obama Administration legal officials need to reckon with the possibility that their erstwhile allies in the human rights movement may eventually attack them. "[W]ithout an articulated legal basis for the attacks, U.S. officials could in the future be targeted themselves—by crusading judges in other countries who see targeted killings as violations of humanitarian law."[86] The threat is not an empty one: the UNHRC's Special Rapporteur Philip Alston recently warned that "if targeted killing violates [international law], . . . the author, *as well as those who authorized it*, can be prosecuted for war crimes."[87]

**Conclusion**

As we approach the mid-point of Obama's current term, how does the legal landscape of what used to be called "the war on terror" look? According to the highest legal authorities in our executive branch, including the State Department Legal Adviser, the nation is still in a state of war with its terrorist enemies. The detention facilities at Guantanamo are still operating. The Geneva Convention on Prisoners of War does not apply to any

of the detainees there. From the Administration's perspective, the detainees there are unlawful or unprivileged combatants, falling into a legal crevice between the Third and Fourth Geneva Conventions. Some of those detainees are being tried before military commissions. Others will remain in detention, without charges, until the conflict with our non-state adversaries has ended—i.e., as far out as the eye can see. The Administration argues that the courts lack jurisdiction to afford habeas relief to alien detainees held at the Bagram detention facility in Afghanistan. The International Court of Justice's use-of-force rulings are disregarded. The guidance of the International Committee of the Red Cross on non-combatancy goes unheeded. The United States remains outside the Rome Statute that created the International Criminal Court. Extraordinary renditions continue.[88] The policy of targeting individualized al Qaeda and Taliban suspects for killing—despite being condemned by the UN Human Rights Council—has been ramped up to an unprecedented degree of violence.

An unbiased observer might conclude that there has been little significant change in the landscape since at least the second term of the Bush Administration. Some disillusioned Obama supporters will agree, and deplore that outcome. Other more hopeful Obama supporters will argue that the changes in style, if not substance, have at least improved the United States' reputation in the world. Still other Obama supporters will point to evidence of material changes, such as Attorney General Holder's decision to try Khalid Sheik Mohammed in a federal district court in Manhattan.

And others will say that once the political campaigns are over, the cold, blue steel of international reality proves unyielding.

**Endnotes**

1 *See, e.g.,* Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 Ind. L.J. 1145 (2006); Harold Hongju Koh, *Setting the World Right*, 115 Yale L.J. 2350 (2006); Harold Hongju Koh, *The Case against Military Commissions,* 96 Am. J. Int'l L. 337 (2002).

2 Harold Hongju Koh, Legal Adviser, U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (hereinafter *OAIL*).

3 For example, Koh identified as an "important difference[] from the legal approach of the past Administration" the Obama Administration's decision, as a matter of domestic law, not to "base[] its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-chief." *OAIL* at 10. The Bush Administration did indeed take the position that the President had the Article II authority in question, but as an *argument in the alternative* that the Supreme Court noted but did not address in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004) (plurality op.) ("We do not reach the question whether Article II provides such [detention] authority, . . . because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention."). Furthermore, Koh was careful not to say that the Obama Administration had affirmatively *rejected* any claim to sole executive authority.

4 Jack Goldsmith, *The Cheney Fallacy: Why Barack Obama is Waging a More Effective War on Terror than George W. Bush,* The New Republic (May 18, 2009), *available at* /http://www.tnr.com/article/politics/the-cheney-fallacy?id=1e733cac-c273-48e5-9140-80443ed1f5e2. Likewise, Bradford Berenson of the White House Counsel's legal staff under the Bush Administration, told *The New Yorker* that "from the perspective of a hawkish Bush national-security person the glass is eighty-five per cent full in terms of continuity." Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheik Mohammed,* New Yorker, Feb. 15, 2010, *available at* http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer.

5 A former State Department Legal Adviser in the Bush Administration has also underscored the continuities in the two Administrations' views on international law. *See* John B. Bellinger III, *More Continuity Than Change,* N.Y. Times, Feb. 15, 2010, http://www.nytimes.com/2010/02/15/opinion/15iht-edbellinger.htm.

6 *Compare, e.g.*, Christopher Greenwood, *International Law and the "War Against Terrorism,"* 78 Int'l Aff. 301, 307–09, 314–16 (2002), *and* Daniel Statman, *Targeted Killing,* 5 Theoretical Inquiries L. 178, 183–85 (2004) *with* Frédéric Mégret, *'War'? Legal Semantics and the Move to Violence,* 13 Eur. J. Int'l L. 361 (2002). *See generally* Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 Yale J. Int'l L. 369, 376–79 (2008).

7 The eighteenth-century Swiss philosopher Jean-Jacques Rousseau stated the still- applicable rule as follows: "The object of the war being the destruction of the hostile State, the other side has the right to kill its defenders, while they are bearing arms . . . ." Jean-Jacques Rousseau, The Social Contract 171 (G.D.H. Cole trans. 1973) (1762).

8 The most recent in this series of resolutions is S.C. Res. 1890 (2009), in which the Council

> reiterat[ed] its support for the continuing endeavours by the Afghan government, with the assistance of the international community, including the [International Security Assistance Force (ISAF)] and the Operation Enduring Freedom (OEF) coalition, to improve the security situation and to continue to address the threat posed by the Taliban, Al-Qaida and other extremist groups.

In operative paragraphs 1 & 2, the Council extended ISAF's authorization for a further year and authorized "the Member States participating in ISAF to take all necessary measures to fulfill its mandate." ISAF is the NATO-led security mission operating throughout Afghanistan; OEF is the U.S.-led combat force.

9 *See* Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (Sept. 12, 2001), *available at* http://www.nato.int/docu/pr/2001/p01-124e.htm.

10 Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

11 Hamdan v. Rumsfeld, 548 U.S. 557, 594–95 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

12 For example, Gabor Rona, the International Legal Director of Human Rights First, has maintained that in "wars between states and non-state armed groups . . . detention authority does not exist." Gabor Rona, *Obama Administration Must Define 'Enemy Combatant' Consistent with Traditional Laws of War* (Feb. 17, 2009), *available at* http://www.law.pitt.edu/hotline/2009/02/obama-administration-must-define-enemy.php.

13 *OAIL* at 10.

14 *See id.* at 12; *see also id.* at 10 ("[W]e are resting our detention authority on . . . . [the] AUMF.").

15 *See id.* at 10 ("[W]e continue to fight a war of self-defense."); *id.* at 12 ("[T]he United States . . . may use force [against al Qaeda and Taliban] consistent with its inherent right to self-defense.").

16 *See* Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19); *see also Congo v. Uganda*, Separate Opinion of Simma, J., at 3-4, ¶¶ 10-15. For criticism, *see, e.g.,* Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It,* 4 Regent J. Int'l L. 149 (2006); Sean Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?*, 99 Am. J. Int'l L. 62 (2005); Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial,* 99 Am. J. Int'l L. 26 (2005).

17 Geneva Convention Relative to the Treatment of Prisoners of War, 6

U.S.T. 3316. Signed Aug. 12, 1948, entered into force Oct. 21, 1950.

18 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516. Signed Aug. 12, 1948, entered into force Oct. 21, 1950.

19 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 16 I.L.M. 1391 (1977).

20 Michael J. Matheson, *Continuity and Change in the Law of War: 1975 to 2005: Detainees and POWs,* 38 Geo. Wash. Int'l L. Rev. 543, 545 (2006). Mr. Matheson writes with particular authority as a former Principal Deputy Legal Adviser to the State Department. Further background for the U.S. decision not to ratify API may be found in *Letter of Transmittal from President Reagan, to the U.S. Senate, Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims,* 81 Am. J. Int'l L. 910 (1987); Abraham D. Sofaer, *The Rationale for the U.S. Decision,* 82 Am. J. Int'l L. 784 (1988).

21 *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,* 2 Am. U.J. Int'l L. & Pol'y 419 (1987).

22 W. Michael Reisman, *Holding the Center of the Law of Armed Conflict,* 100 Am. J. Int'l L. 852, 856 (2006).

23 *OAIL* at 12 (following AP I art. 51(2)).

24 *Id*. (following AP I art. 51(5)(b)).

25 The classic description of this category of combatants, written close in time to the drafting of the 1949 Geneva Conventions, is R.R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs,* 28 Brit. Y.B. Int'l L. 323 (1952). A State Department Legal Adviser in the Bush Administration also explained and justified the distinction between two categories of combatants. *See* William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features,* 28 Yale J. Int'l L. 319, 320-21 (2003).

26 It has been accepted on all sides since the Supreme Court's ruling in *Hamdan v. Rumsfeld,* 548 U.S. 557, 630-31 (2006), that the protections afforded to combatants in a non-international conflict under "common" Article 3 of the POW Convention applies in the current conflict with al Qaeda and Taliban. The Bush Defense Department ordered the Court's ruling to be implemented soon after it came down. *See* Office of the Secretary of Defense, Memorandum for Secretaries of the Military Departments (July 7, 2006) (quoted in part in Robert J. Delahunty, *Is the Geneva Convention 'Quaint'?*, 33 Wm. Mitchell L. Rev. 1635, 1649 n.47 (2007)).

27 *See, e.g.,* Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45 (2003).

28 *See, e.g.,* Gerry Simpson, Law, War & Crime 176-77 (2007).

29 Harold Hongju Koh, *On America's Double Standard: The Good and Bad Faces of Exceptionalism,* Am. Prospect (Sept. 20, 2004), *available at* http://www.prospect.org/cs/articles?article=on_americas_double_ standard.

30 For a superb recent review of the legal issues, *see* Curtis A. Bradley, *The United States, Israel & Unlawful Combatants,* 12 Green Bag 2d 271 (2009).

31 Robert F. Turner, *Civilian Terror Trials Are the Violation,* N.Y. Post, May 4, 2010, *available at* http://www.nypost.com/p/news/opinion/opedcolumnists/civilian_terror_trials_are_the_violation_irA81LHSMcsL1gVEw6OtRM.

32 *See United States to Prosecute Five Guantanamo Detainees in Federal Courts and Five Before Military Commissions, Use of Federal Courts Draws Criticism,* 104 Am. J. Int'l L. 112 (2010).

33 *OAIL* at 11 (emphasis added). In both Administrations, however, provisions have been made for individualized determinations of dangerousness, permitting the release of some detainees. *See* Bradley, *supra* note 30, at 284.

34 As Professor Bradley notes, the Obama Administration has also argued in court that it is entitled under international law to treat al Qaeda members as combatants rather than as civilians. Bradley, *supra* note 30.

35 *OAIL* at 12.

36 *Id.* at 11.

37 The courts apparently do not share Koh's reluctance to use the term. *See Faim al Maqaleh v. Gates,* No. 09-5265, D.C. Cir. (May 21, 2010), slip op. at 3 ("All three petitioners are being held as unlawful enemy combatants . . . in Afghanistan").

38 *See* Charlie Savage, *Detainees Will Still Be Held, but Not Tried, Official Says,* N.Y. Times, Jan. 22, 2010, *available at* http://www.nytimes.com/2010/01/22/us/22gitmo.html.

39 *See* Civilian Convention arts. 42, 132; *see also id.* art. 78; Bradley, *supra* note 30, at 273.

40 *See* Warren Richey, *Holder: 'Failure Not an Option' in New York 9/11 Terror Trial*, Christian Sci. Monitor, Nov. 19, 2009, *available at* http://www.csmonitor.com/USA/Justice/2009/1119/p02s13-usju.html ("Holder was repeatedly questioned about the prospect of an acquittal. He was reluctant throughout much of the hearing to say so, but ultimately he acknowledged that in the event of an acquittal in a terror trial the administration might consider shifting a defendant back from the criminal justice system into open-ended military detention. 'Under the regime we are contemplating. . . the ability to detain under laws of war, we would retain that ability,' Holder said.").

41 This follows directly from the "principle of distinction," discussed above.

42 Even Philip Alston, the Special Rapporteur for the United Nations Human Rights Council (UNHRC), concedes that "there is no commonly accepted definition of [direct participation in hostilities. . . . [T]here is dispute over the kind of conduct that constitutes 'direct participation' and makes an individual subject to attack." *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, U.N. General Assembly Doc. A/HRC/14/24/Add.6 at 19 (May 28, 2010)(UNHRC Report). Other legal scholars agree. "There is little guidance on what the words 'direct participation' mean and on when a person is to be considered as no longer taking a direct part in hostilities so that he again benefits from civilian immunity." Dapo Akande, *Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities* (June 4, 2009), *available at* http://www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/.

43 Additional Protocol I, art. 51(3) (emphasis added).

44 *See* HCJ 769/02 *Public Comm. Against Torture in Israel v. Gov't of Israel* [2006], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690. a34.pdf...

45 *See* Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (International Committee of the Red Cross) (Feb. 26, 2009), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-872-p991/$File/irrc-872-reports-documents.pdf.

46 *OAIL* at 11.

47 The UNHRC Special Rapporteur has also underscored this point. "[A]lthough the US has not made public its definition of DPH [direct participation in hostilities], it is clear that it is more expansive than that set out by the ICRC." UNHRC Report at 21.

48 Akande, *supra* note 42.

49 *Interpretive Guidance, supra* note 45, at 56.

50 U.S. Senate Foreign Relations Committee, Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents: Report to the Senate Committee on Foreign Relations, S. Rep. No. 111-29, at 15-16 (2009).

51 The UNHRC Report criticizes Koh on this very point. *See* UNHRC Report at 21.

52 Brief of Louis Henkin, Harold Hingju Koh, and Michael H. Posner as *Amici Curiae* in Support of Respondents, *Rumsfeld v. Padilla,* Sup. Ct. No. 03-1027 (Apr. 12, 2004) (*Padilla* Brief).

53 *Padilla* Brief at 20-1.

54 *Id.* at 19.

55 *Id.* at 23.

56 *Id.* at 21.

57 Padilla was convicted in 2007 on three terrorism-related charges, and his conviction is on appeal. "The key piece of physical evidence against Padilla was a 'mujahideen data form' – basically, a personnel form that a CIA witness testified had been recovered from an al-Qaeda camp in Afghanistan. Although

defense lawyers attacked its authenticity, it bore Padilla's fingerprints and some of his personal information." Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges: Two Co-Defendants Also Found Guilty,* The Washington Post (Aug. 17, 2007), available at http://www.washingtonpost.com/wp-dyn/content/article/2007/08/16/ AR2007081601009.html.

58 *Padilla* Brief at 25.

59 OAIL at 11.

60 As the strategic analyst Andrew Bacevich has written, drone missiles have become President Obama's "weapon of choice for an expanded Israeli-style program of targeted assassination in Pakistan." Andrew J. Bacevich, Op-Ed, *Obama's Sins of Omission*, Boston Globe, Apr. 25, 2009, *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/04/25/obamas_sins_of_omission/.

> On a typical day, there are roughly a half-dozen Predators in the air over the tribal areas of western Pakistan, looking for targets. . . . This intensive coverage is possible because the Obama CIA requested more resources for the drone attacks last March. . . . By the end of [2010], the number of drones available will have increased by about 40 percent since early 2009.

David Ignatius, *Terrorists in the Cross Hairs* (Feb. 17, 2010), available at http://www.realclearpolitics.com/articles/2010/02/17/terrorists_in_the_cross_hairs_104435.html.

61 CNN.com, *U.S. airstrikes in Pakistan called 'very effective,'* May 18, 2009, available at http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/.

62 *See United States Continues Attacks on Suspected Terrorists in Yemen, Pakistan,* 104 Am. J. Int'l L. 133 (2010).

63 *See* Peter Bergen & Katherine Tiedemann, *No Secrets in the Sky,* N.Y. Times (Apr. 25, 2010), *available at* http://www.nytimes.com/2010/04/26/opinion/26bergen.html; David Ignatius, *Revenge On the Taliban, From 10,000 Feet* (Feb. 4, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/02/ AR2010020203514.html ("Although Pakistan publicly criticizes the drone attacks, [an unnamed] administration official stressed that the recent campaign 'is being done in full concert and cooperation' with the Pakistani government."). .

64 '*American Drone Attacks Are Counterproductive*,' Der Spiegel Online International (Dec. 1, 2009), *available at* http://www.spiegel.de/international/world/0,1518,664328,00.html.

65 Mary Ellen O'Connell , *Lawful Use of Combat Drones,* Congress of the United States, House of Representatives, Subcomm. on National Security and Foreign Affairs, Hearing: Rise of the Drones II: Examining the Legality of Unmanned Targeting at 3 (Apr. 28, 2010). The argument is that Pakistan could not legitimately consent to the unlawful killing either of its own nationals or of others on its territory.

66 *Cf. The Corfu Channel Case (U.K. v. Albania),* Merits, [1949] ICJ Rep. 4, 35 (April 9); *id*., Separate Opinion of Alvarez, J., at 47.

67 *See Corfu Channel Case, supra* note 66*,* Separate Opinion of Alvarez, J. at 41.

68 For discussion and evaluation of the Coalition's interpretation of S.C. Res. 688, see John F. Murphy, The United States and the Rule of Law in International Affairs 151 -52 (2004). S.C. Res. 688 was not enacted as a Chapter VII measure.

69 Indeed, even after Kosovo's declaration of independence in February, 2008, NATO took the position that S.C. Res. 1244 authorized the continuing presence of its forces in Kosovo. *See NATO's role in Kosovo, available at* http://www.nato.int/cps/en/natolive/topics __48818.htm; *see also* Robert J. Delahunty & Antonio F. Perez, *The Kosovo Crisis: A Dostoievskian Dialogue on International Law, Statecraft, and Soulcraft,* 42 Vand. J. Transnat'l L. 15, 88-89 (2009).

70 *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16, 294 at ¶ 115(June 21) (Fitzmaurice, J., dissenting) ("*Even when acting under Chapter VII of the Charter itself*, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration.") (original emphasis).

71 For a penetrating analysis, *see* Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, Michael N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, 85 Int'l L. Stud. 109, 120-22 (Naval War College 2009).

72 *See* Timothy S. Lynch & Robert S. Singh, After Bush: The Case for Continuity in American Foreign Policy 136 (2008).

73 Koh asserts that the proportionality test is "implemented rigorously throughout the planning and execution of lethal operations," *OAIL* at 13, which leaves open the question of the specific level of its application. That question is important, however, in light of the "cumulative effects" test developed in the law of war jurisprudence of the International Criminal Tribunal for the Former Yugoslavia. *See* Prosecutor v. Kupresic*,* Case No. IT-95-16 at ¶ 526, Judgment of Jan. 14, 2000 (Trial Chamber) ("[I]t may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of [AP I] Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity.").

74 *See* Bergen & Tiedemann, *supra* note 63 (estimating that since January 2009, U.S. strikes in Pakistan have killed 520 people, of whom 410 were militants, and suggesting that civilian casualties might be significantly lower than that). The figures are, however, disputed, by Amnesty International among others. *See* Scott Shane, *C.I.A. to Expand Use of Drones in Pakistan,* N.Y. Times, Dec. 4, 2009, *available at* http://www.nytimes.com/2009/12/04/worl/asia/04-drones.html?. In general, however, U.S. forces operating in Afghanistan appear to have adopted rules of engagement that are highly protective of civilians. *See* Robert Burns & Anne Flaherty, US War Aim: Protect Civilians First, the Troops (May 13, 2010), *available at* http://www.realclearpolitics.com/news/ap/politics/2010/May/13/us_war_aim__protect_civilians_first__then_troops.html.

75 *'The Soldiers Call It War Porn.'* Interview with U.S. defense expert P.W. Singer, Der Spiegel Online International (Mar. 12, 2010), *available at* http://www.spiegel.de/international/world/0,1518,682852,00.html. *See generally* P.W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* 33-36 (2009).

76 *See* Shane, *supra* note 74. On the other hand, residents of the tribal areas where the drone attacks occur, who suffer under the rule of local militants, are reported to be much less critical of the drone program. *See id.* .

77 *See* Human Rights Watch, Pakistan: Taliban, Army Must Minimize Harm to Civilians (May 18, 2009), *available at* http://www.hrw.org/en/news/2009/05/18/pakistan-taliban-army-must-minimize-harm-civilians.

78 *See* Michael L. Gross, Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict 109, 112-13 (2010).

79 *See* Marc A. Thiessen, *Dead Terrorists Tell No Tales: Is Barack Obama Killing Too Many Bad Guys Before the US Can Interrogate Them?*, Foreign Pol'y (Feb. 8, 2010), *available at* http://www.foreignpolicy.com/articles/2010/02/08/dead_terrorists_tell_no_tales.

80 *See* Mark Mazzetti & Scott Shane, *Evidence Mounts for Taliban Role in Bomb Plot,* N.Y. Times, May 5, 2010, , *available at* http://www.nytimes.com/2010/05/06/nyregion/06bomb.html ("There is no doubt among intelligence officials that the barrage of attacks by the C.I.A. drones over the past year has made Pakistan's Taliban. . . . increasingly determined to seek revenge by finding any way possible to strike at the United States. . . . [N]ow possibly the failed S.U.V. attack in Manhattan [is a] reminder[] that the drones' very success may be provoking a costly response.").

81 The Associated Press, *Holder: Pakistani Taliban Behind Times Square Plot, Holder Says*, May 9, 2010, *available at* http://www.npr.org/templates/story/story.php?storyId=126559055.

82 *OAIL* at 13 (original emphasis).

83 The United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions took the position that such attacks constituted clear

cases of extrajudicial killing. The United States, in reply, maintained that the International Covenant on Civil and Political Rights had no application to the incident, on the grounds that "[t]he conduct of a government in legitimate military operations, whether against al Qaida operatives or any other legitimate military target, would be governed by the international law of armed conflict," rather than by international human rights law. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ ¶ 611–12, U.N. Doc. E/CN.4/2004/7/Add.1 (Mar. 24, 2004). It would have been more accurate for the U.S. to have described the conflict as "non-international."

84 *See* Gross, *supra* note 78, at 118 (arguing that "naming" un-uniformed targets redresses the unfairness of the unequal risks otherwise assumed by uniformed combatants). For a defense of the legality of the drone program against the charge that it violates international human rights law, see Robert J. Delahunty & John C. Yoo, *What is the Role of International Human Rights Law in the War on Terror?,* 59 DePaul L. Rev. 301 (2010).

85 *See U.S. Defends Legality of Killing With Drones,* WSJ.com (April 5, 2010), *available at*http://online.wsj.com/article/SB10001424052702303450704575159864237752180.html. .

86 *Id.*

87 UNHRC Report at 22 (emphasis added).

88 *See* Greg Miller, *Obama Preserves Renditions as Counter-Terrorism Tool,* L.A. Times (Feb. 1, 2009), *available at* http://articles.latimes.com/2009/feb/01/nation/na-rendition1.