

Contemporary Armed Conflict and the Non-State Actor

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ABSTRACT

Recent challenges in international security posed by two terrorist organizations, Al Qaeda and the Islamic State of Iraq and Syria (ISIS), have highlighted an urgent domestic and foreign policy challenge, namely, how to address the threat posed by violent non-state actors while adhering to the rule of law values that form the core of democratic governance. Despite the vital importance of this topic, the legal framework for conducting operations of this magnitude against non-state actors has never been clearly identified. The Law of Armed Conflict (LOAC) is organized around the assumption that parties to an armed conflict are “combatants,” meaning that they are members of a state military acting in the name of that state. Norms of conduct are unclear with regard to non-state actors, and there are few consistent legal principles to provide guidance. In 2002, the Bush Administration declared members of Al-Qaeda and other violent non-state actors “unlawful combatants,” and as such declared them not subject to the Geneva Conventions. Legal scholars tend to agree, and many have written that LOAC must adapt to fit the new asymmetric nature of armed conflict. Law, however, is generally thought of as a constraint, rather than an instrument for achieving other goals. This article will address the status of unlawful combatants under existing International Humanitarian Law and Just War Theory and ask what the right legal framework is for addressing the threat posed by non-state actors in current asymmetric conflict. It will argue that violent non-state actors are more properly thought of as international criminals than as combatants of any sort. It will also examine the meaning of rule of law reasoning in the context of war. Results-oriented legal analysis treats law as failing to provide reasons to individual actors, and privileges form over substance. I argue that this approach must be rejected if war is to be constrained by law.

I. Introduction

In the wake of the 9/11 terrorist attacks on the World Trade Center and the Pentagon, the Bush Administration declared a “War on Terror.” In the early years of the counterterrorism efforts, the primary focus was on gathering information leading to the identification and detention of Taliban and al-Qaeda leaders in order to forestall further terrorist attacks. This resulted in the arrest of thousands of individuals in Iraq and Afghanistan and their indefinite detention at the U.S. military base in Guantanamo Bay, Cuba, as well as at “black sites” in the Middle East. The technique was detention and interrogation: detention as a temporary immobilization of potential terrorists, and interrogation to gather information needed to fight the war on terror.

The legal basis for the indefinite detention and interrogation of members of non-state militant groups was never entirely clear. In 2002, then-Defense Secretary Donald Rumsfeld announced that captured members of the Taliban and al-Qaeda were “unlawful combatants,” and that as such they were not entitled to prisoner of war status or other privileges under Common Article III of the Geneva Conventions. 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,¹ all entitlements we saw as threatening our efforts to win the war on terror. The decision to designate members of al-Qaeda and the Taliban “unlawful combatants,” however, was not merely a mechanism for avoiding the application of combatant privileges under international law.² Though the category had distinct benefits, it also

¹ Geneva Conventions, Common Art III.

² That the Bush Administration placed the Taliban in the same category with members of al-Qaeda tends to demonstrate that the motive for the use of the “unlawful combatancy” label was the denial of POW rights. The Taliban were state actors, and as such could have simply been

seemed necessary in view of the fact that the detainees could not count as combatants under LOAC, given that they were not members of a state-sponsored military organization. This was the inception of the most serious conceptual question in contemporary armed conflict, one that has roots in the recesses of political philosophy, religion, ethics, and both domestic and international law: What is the status of individuals connected with large, non-state militaristic organizations, groups bent on extensive destruction of life and property? How should state governments approach such non-state militias, and what legal frameworks should govern their treatment?

This Article will argue that the answer we have given to this question in the years since 9/11 has been largely mistaken, and that this conceptual mistake has had a negative impact on the effectiveness of our strategies in combatting al-Qaeda and ISIS, among other non-state actor groups. Instead of “unlawful combatants,” non-state military operations should be considered international criminal conspiracies, bringing their status more into line with drug lords and other illegal traffickers. Labeling violent non-state actors “unlawful combatants” has created a series of difficulties for international efforts to combat terrorism, chief among them the conceptual confusion that has resulted for just war theory and the theory of proportionality, the difficulties surrounding the treatment of detainees, and the inability to bring perpetrators to justice in any meaningful way. I shall argue that it has also damaged fidelity to the rule of law in the United States, a fact that has cost the U.S. in terms of its ability to galvanize European and other potential allies in the fight against ISIS and al-Qaeda.

labeled combatants in the traditional sense. The point was more complicated with regard to members of al-Qaeda.

In what follows, I shall begin by articulating the traditional concept of combatancy and explaining why violent non-state actors are not “combatants” in any meaningful sense of that term. I shall then explore the concept of “unlawful combatancy” and consider both the conceptual and practical difficulties with that notion. I shall then attempt to sketch the alternative conceptual framework I propose, namely that violent non-state actors are international criminals, rather than unlawful combatants, and explore accordingly the implications of such a view. Many aspects of our current law of war have become distorted in an effort to accommodate this basic concept, and the implications of this move have not been clearly perceived. In order to identify an alternative route in all of its detail, we will need to have a clearer view of the many doctrines, policies and practices that have developed since 9/11 as a result of, or in conjunction with, the concept of unlawful combatancy. I shall then explore a number of the difficulties associated with the civil law framework I propose and attempt to address them systematically. As I shall argue, the difficulties are more pragmatic than conceptual, and most can be solved fairly easily, without posing excessive restrictions on our ability to combat terrorism. Finally, I shall consider what is needed to ensure that we are reasoning about armed conflict in a way that is constrained by the rule of law. While these considerations will seem rather theoretical as compared with the more applied topic of combatancy, understanding what it means for legal reasoning to be constrained by rule of law values is a critical part of the point I wish to make.

II. The Status of Combatants in the Law of Armed Conflict

We should begin with a return to the basics of Just War Theory and consider who is a combatant and who not under traditional just war theory. This question is one of the most

critical in the law of armed conflict, given that it is essential for satisfying the core of military jurisprudence, namely the Principle of Distinction. The Principle of Distinction says that combatants may be targeted at any time, whether they are posing an immediate threat or not. Civilians, on the other hand, may never be targeted under the law of war, unless they are actively lending assistance to enemy forces. Of critical importance is the *status* of the person whose life is threatened – combatants are both at greater risk and have special privileges in virtue of their status. Civilians are protected in the sense that they may never be intentionally targeted, though their deaths or injury may be justified as “collateral damage” incident to carrying out a legitimate and proportional military objective.

The traditional requirements for combatancy are 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.³ Members of ISIS and al-Qaeda do not fit these criteria, since they do not operate in a command structure with a responsible agent over them; they do not wear distinctive insignia or carry arms openly, and they do not conduct their operations in accordance with the laws and customs of war. The Taliban are more likely to count as combatants in the traditional sense, since as the reigning power in Afghanistan at the time of the 9/11 attacks, they operated in a hierarchical structure of authority. But, as with members of al-Qaeda, they failed to identify themselves as members of

³ Convention (ii) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War of Land. The Hague, July 29, 1899 (hereinafter Hague Convention 1899) Available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D>.

an armed force by carrying arms openly or wearing distinctive insignia. They also refused to abide by the laws and customs of war.

While there has been a general consensus that members of ISIS and al-Qaeda are not combatants in the traditional sense, there has been no general agreement among experts about their status as “unlawful combatants.” Precedent for the use of the term appears in a case involving non-uniformed German U-boat operators who turned up off the coast of Long Island in German submarines and were thereafter captured and detained. The decision, *Ex Parte Quirin*,⁴ denied the German soldiers the right to right to criminal trials, but also denied them the right to POW status, on the grounds that as spies they were illicit saboteurs, rather than combatants, and as such were violating the rules of war. The case was controversial at the time it was rendered, given its use of the “unlawful combatancy” title, but its impact was limited, given the fairly specialized circumstances under which the arrests took place. The figure of the “unlawful enemy combatant” did not reappear after that case until Rumsfeld’s announcement in 2002.

Unlike in 1942, the Bush Administration’s use of the concept of unlawful combatancy took hold in common currency and official legal reasoning about the legality of our practices, and despite criticism of many aspects of recent counterterrorism policy, few commentators seriously question its usage. Echoing John Yoo’s frequent defense of post-9/11 detention and interrogation practices, 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 the laws of war. The argument is that since we are dealing with a totally uncivilized enemy, one that knows no law of any sort, we are legally and morally permitted to ignore the law of war in conducting our defensive campaign against them. It is not exactly that two wrongs make a right, but rather that

⁴ 317 U.S. 1 (1942).

self-restraint in the name of legality is for suckers. I shall call this the “Forfeiture Theory” of common international legal obligations.

The Forfeiture Theory reflects a combination of realism in international relations, legal realism and an unrelentingly skeptical view of the provisions of international law. A sustained discussion of this skepticism about international law appears in a work by Jack Goldsmith and Eric Posner, entitled *The Limits of International Law* (2005). On this view, international law is a coordination game which each state enters into for the sake of maximizing its own welfare. It lacks the power to impose true obligations on parties, outside those that are self-imposed for mutual gain. This skeptical view of duties under international law rejects the idea of obligations that are *jus cogens*, namely duties that apply regardless of whether they are voluntarily accepted by treaty or other vehicle that is subject to agreement. If this non-skeptical view of LOAC is accepted, the Forfeiture Theory of the duty to abide by the law of war makes no sense.⁵

The Forfeiture theory of legal obligations under international law is seriously flawed. The duty to abide by the laws of war is not dependent on the fidelity of our enemies to the law of war themselves. Notice, moreover, that the reasoning makes no sense. If the reason we can violate the laws of war with respect to al-Qaeda is that *they* do not observe the laws of war, then their status as “unlawful combatants” is beside the point. Would purveyors of this reasoning be willing to allow that *we are* bound by the laws of war in the event that our enemies are willing to regard themselves as bound? If so, then the status of members of al-Qaeda and ISIS as unlawful

⁵ It is important to distinguish here between the Geneva Conventions and the traditional Law of Armed Conflict. The former is of course 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 I view as rendering the Forfeiture Theory inapplicable.

combatants is irrelevant to how we may treat them, since it seems that adherence to the laws and norms of war on their part would indeed obligate us to apply the Geneva Conventions in this case. If, on the other hand, the fact that they are non-state actors, rather than representatives of a sovereign state in armed conflict, then *their* treatment of us is surely beside the point, since whether they treat us well or badly, legally or illegally, we would have no obligation to apply the Geneva rules for the treatment of combatants to their case, given that they are *not* combatants. On this scenario, there is no point in complaining about their unwillingness to adhere to international norms and treaties, since as non-state actors their violent conduct is criminal rather than belligerent.

While perhaps not clearly articulated, the inevitable conclusion by the Bush Administration and others outside the Administration that was reached in the early days of the war on terror was that the laws of war cannot be applied to contemporary, asymmetric war. That seemed to show that we must abandon traditional just war principles in favor of a law of war that fits the current situation. The thought seems to have been that we need a law of war that will not only “fit” the new asymmetrical warfare, but will also help us *win* the current conflict against terrorism by stacking the decks in our favor. Implicit in the reasoning regarding the status of detainees is the assumption that if the law is not serving our needs, we should abandon it in favor of a legal framework that is. As senior leaders in the White House, in conjunction with the Office of Legal Counsel saw it, the law is another tool in our arsenal, one we must use to military advantage. Justice Department lawyers worked to develop legal doctrines that were as skewed in our favor as possible without entirely abandoning the pretense of legal analysis.

We have inherited at least two significant legacies from this misguided chapter in U.S. history. First, we inherited a permanently altered view of the relationship between law and

armed conflict. We came to see the primary value of legal analysis as its propagandistic effect, both with domestic and international audiences. Similarly, the aspiration to discover neutral legal principles that would be compelling to individuals with different political convictions was abandoned by all sides of the debate. This dealt a fundamental blow to adherence to the rule of law. Second, and relatedly, there was an expansion of executive authority as part of this process, which further eroded adherence to the rule of law. Not only did the executive branch come to exercise a new level of autonomy over operations outside the formerly constrained ambit of armed conflict, but the Judiciary also ceded its traditional function of reviewing the scope of executive branch decisions that might infringe on federal constitutional rights. There was thus a shift towards the expansion of executive authority and away from judicial review. These two post 9/11 developments have largely continued unaltered under the Obama Administration, thus suggesting that they have become permanent features of our national security jurisprudence.

From the standpoint of protecting and preserving the rule of law in war such impulses are seriously misguided. To act under the rule of law implies, at a minimum, that law constrains policy, and that policymakers must act within its bounds. We abandon the traditional conception of law as serving this role when we casually adapt the law whenever it fails to fit the circumstances. If law is truly to constrain, there must be times when we feel the press of its boundaries. The widespread view that the law of war is outmoded, superseded by the changing nature of warfare, should be a last resort. Before we conclude that the law of war can no longer guide us under its traditional formulation, we might consider the implications of applying it without change to contemporary armed conflict. Just as a law that applies to “vehicles” might *not* require alteration when that category expands from horse and carriage to automobile, so might the traditional law of war apply to contemporary asymmetric conflict with only minor

adjustments. Using Ronald Dworkin’s distinction between a concept and its conception, we can say that LOAC identifies *concepts* of relevance to the law of armed conflict, and those are unlikely substantially to change across time. But it also identifies a conception, or particular instantiation of that concept, and this may rightly evolve across time. Let us consider whether the traditional concept of combatancy under LOAC might not be sufficiently robust that its interpretation in the context of current asymmetric war can provide a conception of combatancy that is both applicable to our current challenges and consistent with rule of law values.

III. From Detention and Interrogation to Targeted Killing

Public opinion began to shift markedly against the Bush Administration’s counterterrorism activities following 2009 reports of detainee abuses at Abu Ghraib prison and the release of photographs from that site. Reports of abuses at other prisons and “black sites” started to surface, and with them the public became aware of the use of “enhanced interrogation techniques” (EITs) to obtain information from suspected terrorists.⁶ In addition, critics began to charge that the individuals being subjected to such techniques did not in fact possess actionable intelligence much of the time and further that suspects were often selected for arrest nearly at random. Legal battles began to ensue around the treatment of detainees, and a lengthy public debate began about their legal status under both federal and international law. Continued

⁶ President Obama issued an executive order authorizing the continuation of a system of permanent detention for terror suspects detained in the course of fighting the war on terror. Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13567 (March 7, 2011).

detention was controversial and potentially illegal, but release and return home posed significant risks.⁷

As political pressure against the detention and interrogation practices grew, Obama pledged on the campaign trail to close the prison at Guantanamo Bay were he to become President. Among other things, he explained, the indefinite detention of suspected terrorists and the unwillingness to extend the protections afforded under the Geneva Conventions to such individuals, is illegal. Certainly the point was clear, he once thought, with respect to American citizens who have joined the war on terror. In response to a question by reporter Charlie Savage, Obama maintained that the President does not have the power to order the indefinite detention of American citizens without charges as unlawful enemy combatants: "I reject the Bush Administration's claim that the President has plenary authority under the Constitution to detain U.S. citizens without charges as unlawful enemy combatants."⁸ But a scant three years later, Obama was personally responsible for ordering the targeted killing by drone strike of Anwar al-Awlaki, the Muslim cleric living in Yemen who was killed by drone strike in the spring of 2011 along with his sixteen year old son. Obama, the constitutional lawyer, appears to have missed a critical point: The objectionable aspect of detaining a U.S. citizen without charges—namely that it is a denial of Due Process of Law under the Fifth and Fourteenth Amendment—is precisely the arguments critics raise against targeted killing as applied to American citizens. A comparable

⁷ Press Release, ACLU, "President Obama Issues Executive Order Institutionalizing Indefinite Detention," (March 7, 2011), available at <<http://www.aclu.org/national-security/president-obama-issues-executive-order-institutionalizing-indefinite-detention>> accessed November 4, 2011.

⁸ Citation

point would hold about the targeted killing of non-Americans, without the formulation in terms of due process. It is ironic that by rejecting the detention and interrogation program on legal grounds, Obama undercut the foundation of the very program he turned to as a way of rejecting detention and interrogation, namely targeted killing.

Despite the lingering lack of clarity about the status of Muslim insurgents with regard to the law of war, there followed a dramatic increase in the use of targeted killing as a technique in fighting the war on terror. In theory, targeted killing occurs as the culmination of a “kill or capture” mission, in which U.S. forces attempt to “capture” a terrorism suspect with the express purpose of detaining him for questioning and possible trial. As time went on, however, and targeted killing operations increased in both frequency and intensity, such missions were less focused on capture and increasingly focused on eliminating terrorist suspects. The program was not acknowledged, however, until May, 2013, when Attorney General Eric Holder sent the Senate Judiciary Committee a letter revealing the targeted killing by drone strike of four American citizens in Yemen, the chief target being Anwar al-Awlaki, a propagandist for AQAP. This acknowledgement came immediately prior to a speech by President Obama at the National Security University, at which the President for the first time took responsibility for the targeted killing program and defended its use. Despite the fact that the killing had taken place more than a year and a half prior to the admission of the program.

The killing of Anwar al-Awlaki turned out to be controversial, and fear began to spread about the extent of the principle applied in this case. Did the Obama Administration regard the pursuit of insurgents by targeted killing as legitimate no matter where they might be located? Could the U.S. military or the CIA authorize targeted killing of Americans on U.S. soil? To what extent should the CIA take over the pursuit of senior operatives abroad and in the U.S.,

given that with this function, the CIA has moved far away from its traditional fact-finding function and towards an active defense model traditionally reserved for the armed forces?

The shift from interrogation and detention to targeted killing occurred most markedly in the early years of the Obama Administration, and involved a significant change in U.S. counterterrorism policy.⁹ To look only at the statistics for targeted killing operations undertaken by drone, for example, between the years 2004 to 2008, the Bush Administration authorized 42 targeted killings, by comparison with the Obama Administration's count of 180 authorized drone strikes as of February 11, 2011.¹⁰ Between February and the time of this writing, the number of drone strikes has further increased significantly.¹¹

⁹See Harold Koh, Legal Adviser to Dept. of State, Address at American Society of International Law, "International Law and the Obama Administration" (March 25, 2010), available at <<http://www.state.gov/s/l/releases/remarks/139119.htm>> accessed November 4, 2011 (defending the use of targeted killing as part of armed conflict with enemies in the war on terror). International Law, "International Law and the Obama Administration" (March 25, 2010), available at <<http://www.state.gov/s/l/releases/remarks/139119.htm>> accessed November 4, 2011 (defending the use of targeted killing as part of armed conflict with enemies in the war on terror).

¹⁰ Tara Mckelvey, "Inside the Killing Machine," Newsweek, February 13, 2011.

¹¹ There were 1,172 reported kill or capture raids completed between March 2011 and September see Alex Strick van Linschoten and Felix Kuehn, "A Knock on the Door: 22 Months of ISAF Press Releases" p. 12, available at (https://www.afghanistan-analysts.net/uploads/AAN_2011_ISAFPressReleases.pdf)

The irony in the shift in policy under Obama from detention and interrogation to targeted killing is that most of the criticisms of the former detention and interrogation policies having to do with the status of the detainees also impacts the legality of targeted killing operations. As detailed in a government white paper issued in 2010 pertaining to the inclusion of Anwar al-Awlaki on the JPEL, or targeted killing list, the program seeks to target “Senior Operational Leaders” of al-Qaeda and affiliated organizations, now broadened to ISIS or ISIL. The status of such individuals is unclear in the Law of Armed Conflict (LOAC) when they are outside a zone of conflict, and the legality of targeted killing under international law subject to doubt.

A first and quite crucial point to note is that by going down the road of “unlawful combatancy,” the Bush Administration deprived itself of a tool that would have made it significantly easier to justify both detention and targeted killing: the insistence that members of insurgent groups are combatants, tout court, rather than the discounted version labelled “unlawful combatant.” True combatancy would once have been the only basis for refusing to extend the protections of the criminal process, such as the right to retained counsel and a trial by a jury of one’s peers. It would also once have been the only basis for finding an individual to be continuously targetable, and it was that liability that stands in equipoise with the controversial privileges that the Bush Administration felt so compelled to counteract as posing a serious impediment to prosecuting the war on terror.

Might members of ISIS count as full-bodied combatants—enemy belligerents, however wrongful, on a par with Hitler’s, Japan’s or North Korea’s armed forces? The result would have been that they would be continuously targetable, at the same time that we would lose the benefits of capture for information gathering and interrogation: they would have the right to principles of

non-self-incrimination, protection in detention, and a short list of bedrock rights for captured soldiers throughout the progress of the war effort.

The alternative, which we will be exploring here, is to regard violent, non-state actors as criminal civilians, comparable to drug lords who amass great power through complexity of organization and a hierarchy of roles and functions in a non-state organization. This approach is cleaner, more moral and ultimately easier to adopt than continuing to try to split the concept of combatancy down the middle. It does, however, have its disadvantages, both conceptually and operationally. In what follows I shall attempt to explore both the advantages and disadvantages of the civil law-enforcement approach, and to consider its potential benefits for the rule of law.

IV. The Moral Equality Thesis: The Traditional Framework

In the traditional law of war, combatants have the rights, privileges and protections they do by way of their status. Their status, however, is also what puts them at risk. Thus combatants are targetable 24/7 because of the special role they occupy relative to the sovereign entity of the state. They are not targetable because of their activity or the danger they present in a given moment. Thus a combatant can be targeted when he is sleeping, watching a movie, taking a shower, etc., as long as he remains a combatant. (If he is injured he may be “hors de combat” and then he is no longer a combatant.)

The Moral Equality Thesis maintains that all individuals having the status of combatants in an armed conflict possess an equal right to kill. 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, despite the fact that the Frenchman, whose country is under unlawful occupation, is fighting a just war, and

the German, whose country is unlawfully occupying another sovereign nation, is not. The fact that Germany is in violation of international law does not mean that the German soldier is himself violating the laws of war. In invading France, the German soldier participates in an action that is illegal under international law, yet he is within his rights as a combatant when he kills.

Why does the individual soldier not bear responsibility for the illegal policies of his country? The answer is the same as why the state executioner is not guilty of murder when he carries out the execution of a duly convicted criminal sentenced to death. The executioner's immunity to punishment, moreover, lies not in the justifiability of the death penalty, and so it is not the moral justifiability of the policy in the name of which he acts that allows him to claim a justification for his individual act. Assume the death penalty is morally indefensible, and that the state does wrong in putting a criminal convicted of even a heinous crime to death. Whether the executioner is justified or not justified in activating the electric chair or administering a lethal injection would not appear to depend on the defensibility of the death penalty. Rather, it depends on factors that are internal to the role he occupies in the state hierarchy of which he is the agent. Thus the executioner does do wrong, for example, if he knows that the warden has ordered him to carry out the execution in the face of a court order imposing a stay of execution, or a clemency award on the part of the state governor. And if the warden is unaware of the stay or the successful clemency petition and the executioner is not, then it is indeed the responsibility of the executioner to halt the execution and refuse to carry it out, as well as to inform the warden of the reason for his action.

The distinction to which I have just alluded also helps to illuminate a profound difference between the person who kills at the behest of a criminal organization of which he is a part, and

the person who kills on behalf of the state. A member of the mafia who carries out a “hit” on a member of a rival crime family may be acting under orders from his superior, and the criminal organization may function very much like a state if it is large and complex, but it is not in virtue of the individual’s function as a “foot soldier” in a hierarchy that confers on him the status of combatant. It is the fact that it is the *State* – an autonomous, sovereignty entity with a certain normative status itself – that has the ability to shift responsibility from the individual actor through which the state acts to the state itself. Thus, like the state executioner, the soldier is not a locus of responsibility in his own right when he acts on behalf of the state. As long as he is acting according to orders, or within the discretion he has been accorded, responsibility for the acts he performs lies with the political leaders above him, and with the state itself, in whose name all acts of war are performed.

To be sure, there are exceptions. One clear circumstance in which a soldier may be responsible for acts performed in a combat setting is that in which he acts outside the purview of his orders, and his acts either contravene his government’s policies, or they are grossly immoral. In some such cases, the soldier has stepped outside the protections inherent in his role and acts not as a representative of his government, but as a private individual. He is then no longer protected by the mantle of state authority according to which combatants normally act, but is subject instead to general principles of responsibility by which individuals are typically assessed. In other cases, he may be responsible despite following orders, if the acts he performed in the name of the state were of gross and obvious illegality or immorality. In these cases, though he acts as an agent of his state, he had reason to reject the orders of his commanders as they were patently illegal. We recognized this same point when we noticed that the executioner who injects a lethal substance, despite his awareness that the governor has just granted clemency, is

acting outside the legitimate purview of his role. The rules, adherence to which help to define the office within which he acts, are role-relative.

The same point can be made about a soldier who violates the *jus in bello* principles that boundary the permissible actions of combatants. The combatant who carries out an order to attack civilians, such as occurred at the My Lai massacre during the Vietnam war, acts contrary to the office and role he occupies, which role requires him to protect civilians and restrict acts of war to co-belligerents. The immunity he enjoys as defined by his combatant status does not extend to illegal acts of this sort. He does, therefore, retain a portion of his individual autonomy in carrying out of his duties, but the scope of that autonomy is limited to ensuring that his conduct remains within the boundaries of the *jus in bello*, and does not concern the ultimate justifiability of the policies, or the *jus ad bellum*, on which the war is based.

The framework set out above captures what has traditionally been the distinctive logic of Just War Theory. It is not only engrained in our way of thinking about war, but is also reflected in the treaties and other formal instruments as well as long-standing practices that make up international law. In recent work, philosopher Jeff McMahan has disagreed both with the idea that the law of war is premised on a distinctive moral logic, and with the implicit suggestion that morality contains “pockets” in which separate moral systems can operate. His writing on Just War Theory has sparked a robust debate about the traditional approach to combatant responsibility, based on an objection to the Moral Equality Thesis. McMahan thinks that whether it is justifiable to kill depends on the background moral justifiability of the killing, and that, in turn, depends on general moral facts about the larger purposes the killing is intended to serve. Rejecting the Moral Equality Thesis, McMahan insists that opposing sides in a military conflict cannot have equal moral entitlement to use force, any more than it would be possible for

a person using force in self-defense and the person against whom force is used to be equally entitled to attack one another. But as I have shown elsewhere, both the logic of self-defense and the logic of combatancy in war establish the permissibility of killing without reference to the larger purpose in the name of which one acts.¹²

V. The Challenge of Non-State Actors and the Concept of Unlawful Combatancy

Because of the perceived failure of the notion of combatancy in application to terroristic groups like ISIS and al-Qaeda, combined with a simultaneous desire to justify combatant-targeting of these groups, there has been an effort to revise the concept of combatancy in order to extend it to non-state actors. Law professors appear to be first in line to subscribe to this approach.

A common strategy for doing this is to focus more on the operational structure of the relevant group to which the non-state actor belongs, rather than the identity of that group. Under this approach, any individual engaged in armed conflict whose role is defined in a hierarchical command structure counts as a combatant, whether or not that command structure has a formal link to a sovereign state. Jens Ohlin, for example, argues that the correct approach to the concept of combatancy is to think of it as a “functionalist” category: If someone functions within an organization in the way that traditional combatants do in the state military hierarchy, then they should count as full blown combatants for the purpose of armed conflict. Ohlin writes that we need to find the “functional equivalent” of killing an enemy combatant on the battlefield in

¹² See Finkelstein, *Killing in War and the Moral Equality Thesis*, Social Philosophy and Policy (forthcoming).

application to the targeted killing of terrorists: “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.”¹³ 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 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.

Convenient as a middle ground would be for the ability of the law of war to absorb the non-state terrorist into its jurisprudence, the functionalist approach Ohlin proposes is problematic. The approach is ineffective because it misses the point of the traditional concept of combatancy, which has to do with the identity of the *state* as the organization to which the combatant is attached. 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, we would be unable to distinguish drug lords from foreign militaries and the meaning of the combatant status would be significantly altered.

What is significant about the fact that a combatant acts in the name of a state in 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. States are special, and different from other organizations in multiple ways, but

¹³ Jen Ohlin, *Targeting Co-Belligerents, Targeted Killings in Asymmetrical War*, eds. Claire Finkelstein, Jens Ohlin and Andrew Altman, Oxford University Press (2012).

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 men in awe,” there is no need in theory to resort to war. The law, as implemented by the sovereign under whose power it falls, provides the answers, and any resort to force in that context is not war but *crime*.

Accounts like the functionalist approach that attempt to find a middle ground between combatancy and criminal responsibility, or that 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 with it the prerogatives of civil authority within a given legal regime. The concept of combatancy is integrally linked to the concept of “armed conflict.” Where there is armed conflict there are combatants, and vice versa. Thus the functionalist view of combatancy, insofar as it broadens that concept, also broadens the concept of armed conflict. There are grave risks, however, to expanding the concept of armed conflict. Already, even under a traditional formulation, that notion is beginning to lose its boundaries – we have armed conflicts that no longer know distinct beginning, middle or end, and that increasingly represent a permanent state of affairs. With a further loosening of the criteria for what counts as armed conflict, we risk losing the distinctiveness of war entirely, and with it the distinctiveness of the rules of war.

It is also important to point out that adherence to the rule of law in war, as elsewhere, means that it is our legal categories that constrain our determinations of what is permissible and what is not. Thus in war, concepts such as “armed conflict,” “combatancy,” “civilian,”

“proportionality,” etc., must constrain what counts as permissible conduct in war. It is always a risk to the rule of law when we begin altering our concepts to what we hope to render permissible. This point is a basic one, but lack of fidelity to it abounds, particularly in the domain of national security. Altering the use of normative terms and the concepts associated with them does an end run around legal constraint, including the legal constraint that sets out fundamental norms and processes of change. The law contains sanctioned modalities of change, as HLA so eloquently explained when he identified the distinction between primary and second rules,¹⁴ and change in legal relations that does not observe the rules of change is itself lawless. That is the risk with the alteration of concepts associated with words as a method of effectuating legal adjustments in our normative relations.

VI. The Status of Violent Non-State Actors: An Alternative

Thus far I have argued against the concept of “unlawful combatancy,” in all of its various manifestations and permutations, as a way of bringing members of terrorist organizations like ISIS and Al-Qaeda within the fold of war. I have also argued against the revisionist strategy of sticking with the original category of combatancy but reconceiving that concept to broaden its domain. This move would place violent non-state actors into the same box as traditional, state-sanctioned members of official military organizations and label both as “combatants,” but it would do so, I have argued, to the detriment of the rule of law. What is the alternative to these two approaches? The logical implication of what I have been saying thus far is that they are

¹⁴ HLA Hart, *The Concept of Law*, Ch. V.

violent civilians, and must be treated as such. What would the implications of such an approach be and is it compatible with current national security imperatives?

On the view that most naturally recommends itself, violent non-state actors are highly dangerous members of an illegal criminal conspiracy, precisely on a par with violent members of drug cartels. This would place our efforts to combat such groups squarely 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 our military and our ability to defend ourselves from terrorism, I shall argue that it 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 members of terrorist organizations as members of a criminal conspiracy, which is that mere membership in the relevant organization is *per se illegal*. Under the armed conflict approach that has dominated since 9/11, since terrorists are combatants, there is nothing wrong with being a member of al-Qaeda or ISIS. The concept of “combatancy,” after all, affords as much protection and entitlement as it does targetability. There is no reason, however, to dignify membership in Al-Qaeda with the protection and status that state military organization possess. The latter are legitimate because sovereign states are entitled to defend their existence. Al-Qaeda and ISIS should possess no such protection. The organizations themselves are illegal and as such mere membership should be illegal.

It would also follow that the detention and incarceration of terrorists would be the first step in a civil legal proceeding. Of course on the combatancy model terrorist can be lawfully detained as POWs, but if we are following, rather than revising, the law of war, this would imply

the right to repatriation and release once hostilities had ceased. Since we are not interested in extending full POW rights, the traditional law of armed conflict would treat detained terrorists as criminals.

What would be the implication of taking this approach? On the criminal law model, suspects must be arrested, not summarily executed. On this view it is problematic to target someone from a distance, such as with a drone, unless they pose an imminent threat or their apprehension is “immediately necessary” and there is no way to apprehend them. This is a highly fraught area of policy, and is complicated under the military model as well. Under the current regime, there is in theory a significant difference between targeted killing in Iraq and Afghanistan, which are zones of conflict, and targeting in other areas, such as Yemen, Pakistan, or Syria. Outside a zone of hostility, attacks on terrorists are not considered part of “armed conflict,” and thus “kill or capture” missions take place outside of the context of war. Outside of armed conflict, the civil model prevails over the military model, and individuals targeted cannot be thought of as combatants. Moreover, these areas are still considered sovereign nations, and as such it is not permissible under LOAC to conduct targeted killings against enemy belligerents in those areas without permission of the host nation. In theory, permission to carry out such operations is necessary from the host country, and if we proceed without such permission, we are effectively declaring war.¹⁵

¹⁵ In May of 2016, the U.S. targeted and killed Mullah Akhtar Muhammad Mansour in the Pakistani province of Baluchistan. For the first time the Pakistanis were notified of the strike only after it occurred, signaling a change in U.S. policy with respect to Pakistani sovereignty. This action is legal conduct for a strike within the zone of hostilities. In theory, neither the duty to capture before killing nor the deference to another state’s sovereignty were observed in this case. See New York Times, http://www.nytimes.com/2016/05/23/world/asia/afghanistan-taliban-leader-mullah-mansour.html?_r=0.

The ambiguous status of targeted killing operations is already reflected in the legal guidance and official documents produced by the Obama Administration. The Justice Department White Paper that was leaked to NBC news dealing with the targeting killing of senior operational leaders of Al-Qaeda outside zones of hostility made clear that the harm sought to be prevented must be “imminent,” at the same time that it gave broad latitude to conduct such operations, regardless of nationality or citizenship.¹⁶ This document and other statements of the Administration with regard to targeted killing appear to acknowledge that the military model is not the right one outside of core zones of hostility. However, the civil model has not been clearly and systematically adopted, either in theory or in practice in such contexts either. The most obvious sign of this is that there is little attention paid to the “capture” part of the kill-or-capture equation. The standard says that there is a duty to capture unless capture is infeasible. Of course the degree of fidelity to this legal standard depends on the interpretation of what’s feasible. The definition of “feasibility” seems subject to great interpretive license. Must servicemen and women risk their lives to bring a suspected terrorist home alive when he or she could be taken out with a drone? While this issue has been hotly debated within the military framework in light of the above complications, the matter has not been resolved by any means. In a civil, law-enforcement framework, it would be more difficult to justify targeting without significant efforts to establish that no scenario involving capture could have been effectuated.

The civil law-enforcement model also requires us to try terrorists in a civil rather than a military court and to extend the full panoply of criminal law rights that either their own country allows or that is allowed them under international law. This is one of the most important implications of this position, since it imposes a duty to gather evidence that can stand up to

¹⁶ Office of Legal Counsel.

public scrutiny. It has the potentially great advantage, however, of indicting terrorists in the court of public opinion, rather than glorifying them as current practice appears to have done. Not only would they be labeled “criminals,” which has a great rhetorical advantage. Their crimes would also be publicly proven and their punishments meted out under the law. Although militarily we have been able to act with greater agility and flexibility when proceeding according to a military combatancy model, the cost has been great in terms of world opinion. We have alienated potential supporters both in Europe and the Middle East, and have created the impression that we are singularly bent on ignoring rule of law values in this fight because of anti-Muslim bias. The criminal law framework would allow us to seize the high ground and help to distance moderate Muslims from the values of Jihadism and extremist teachings.

What is striking about using a law-enforcement approach rather than the language of combatancy is that the change would not constitute a wholesale revision of the permissibility of such operations, but rather would place them on a clearer, more legally established footing. The law-enforcement/self-defense standard that would be required for killing in lieu of capture is already articulated, though in a somewhat muddled way, in the protocol for targeted killing outside the zone of hostilities. This standard would have to be clarified in order to bring it into line with current civil law in a consistent way. The standard is the “imminence” standard, which is spelled out in the targeted killing memo from the Justice Department as an “immediate necessity” standard. Though expressed in a confusing way, the standard is the right one outside the context of armed conflict.

Notice too that the civil, law-enforcement standard would also require greater care with regard to the killing of bystanders. In armed conflict, the unintentional infliction of harm on civilian bystanders is permissible as long as it is proportionate to the military objective the

operation in question serves. In civil law, harm inflicted on bystanders is largely unjustified and the restrictions on proceeding with self-defensive operations when bystanders are at risk are generally significant. Once again, however, the collateral damage from targeted killing operations conducted by drone have been more significant than the Obama Administration has previously admitted, and civilian deaths have contributed greatly to the opposition to American efforts to prosecute the war on terror and growing hatred and mistrust of American values. In this area as well, then, there may be a rhetorical and public relations advantage from restricting the scope of potential collateral damage and keeping the bounds of targeted killing operations within what is allowed under civil law.

A final point is critical for protecting the rule of law where domestic, rather than international law is concerned. Under civil law, the U.S. government has heightened responsibilities where the killing/detention of Americans is concerned. Unlike the law of war, the civil law distinguishes between Americans and non-Americans, given the constitutional jurisprudence surrounding search and seizure law and a variety of other constitutional provisions. Whether the killing of Anwar al-Awlaki, for example, depends on a variety of factors of relevance to American civil law. The turn to the military approach in this context may well have been unnecessary, as it appears that al-Awlaki did pose a significant risk of harm to third parties that may well have been imminent. Once again, the increased faith in the fairness and legality of our operations would have been greatly improved had al-Awlaki been brought home alive to stand trial, for all the world to see. Summary executive without serious attempt to capture, on the somewhat specious grounds in this case that capture was “infeasible,” has won al-Awlaki great sympathy and the U.S. significant criticism for the potential violations of al-Awlaki’s fundamental constitutional rights.

There are significant objections to using a civil law approach to terrorism. First, it will be objected that we cannot turn our operations over to the hands of police, both American and non-American, since they are not adequately militarily equipped to address the sheer magnitude of the forces we face. It is important to notice, however, that military assistance is not foreclosed in a civil matter. “Military assistance to civilian authorities” is a long standing basis for military intervention, not only in addressing terrorism and drug lords but also in the face of natural disasters, such as Hurricane Katrina. The military operation in zones of hostility might continue to look the same as they are now – there is no reason to call the legal basis for operations in Iraq and Afghanistan into question. Outside recognized zones of hostility the military efforts to combat terrorism would be placed in the framework of assistance to civilian authority, and with it the leadership of operations in those areas might shift. But the greatest difference would be in the normative framework and clarity of the legal restrictions under which such operations would be conducted, rather than the fact of military assistance or not.

Second, it is often objected to this kind of approach that we cannot bring terrorists into the Article III court system because such courts are not equipped to handle cases involving sensitive national security matters. It is objected that Article III courts cannot handle classified material, and that they also do not have the judgment to address critical issues affecting national security. In my view this is an extremely unwise position to take, since it obviates the protection of judicial review of potential violations of individual and constitutional rights that our court system has traditionally been designated to protect. Article III courts, moreover, can handle cases involving classified material as well as any other court: judges can receive temporary security clearances for the purpose of conducting in camera review of relevant documents. The benefit to the legitimacy of a conviction from having an impartial, Article III judge review the

evidence is one of the greatest protections citizens enjoy. The blithe acceptance on the part of courts, through the “political questions doctrine” and other jurisdiction-denying vehicles, of the idea that there should be no judicial review of targeted killing decisions constitutes the greatest rejection of rule of law values in this area, and accounts for a significant amount of the mistrust in which the Administration’s targeted killing program has been held.

VII. Moral Reasoning and the Rule of Law in War

As I have stressed repeatedly, for war to be governed by the rule of law, the law must serve as a constraint on what men and women do on the battlefield in the name of the law. This means that it must be possible to do something – even advantageous to do it – which is wrong and not permitted by the law of war. The decision-making framework we apply to what to do on the battlefield must therefore be capable of ruling out certain courses of action as impermissible. How should an individual reason in war if he is in fact, and not just in form, constrained by the laws of war? How should constraint by law operate in the decisionmaking of the individual soldier, as compared with that of the political or military leader?

One answer here with regard to the reasoning of the foot soldier has been famously articulated by Joseph Raz under the heading of “exclusionary reasons,” meaning that the law gives individuals reasons to follow its dictates that exclude considerations of other reasons. Leaders acting within the bounds of the law provide reasons for acting to those who are obligated to obey them by presenting them with reasons that exclude other reasons they may have for acting differently. That a leader has the power to present his or her subjects with such

“exclusionary reasons” is a way of articulating in what his authority consists. The same can be said for the authority of the law.¹⁷

I reject the concept of exclusionary reasons because I do not believe legal authority functions by entirely supplanting the actor’s own reasons with the reasons of another. A legal system based on such thorough abandonment of individual autonomy would be, as HLA Hart has written in another context, “deplorably sheeplike.”¹⁸ For law to operate on an agent’s reasons, it must not eliminate the functioning of reasons in the psychological processes of the agent. The Razian picture of legal authority as pre-empting individual reason leaves legal subjects as no better than an agent acting under the influence of a rule-of-law drug or hypnotic suggest. Instead, we need a more nuanced story about how individual judgment can incorporate the direction provided by legal authority in a way that operates through the reason of individual subjects, rather than pre-empting that reasoning altogether. The relevant space between individual reasoning and authoritative directions on the part of a legal authority may be provided by differentiation according to roles. In the context of just war theory, we can articulate the point in terms of different levels of reasoning about war: At the first level, the individual applies the law of war to particular situations (the *jus in bello*) in light of the military purposes of the authoritative leaders he must obey. At the second level, the justice of the military enterprise in which one is engaged is shaped by those providing legal constraint for others, and it is this reasoning that establishes the justifiability of one’s enterprise (the *jus ad bellum*).

Instead of Razian exclusionary reasons, a preferable model might be that provided by the framework of so-called “resolute choice” favored by philosophers such as David Gauthier and

¹⁷ For an account of legal authority based on Razian exclusionary reasons, see Scott Shapiro, *Legality* (2011).

¹⁸ HLA Hart, *Concept of Law*, Ch. V.

Ned McClennen in lieu of precommitment, and to think that role-relative morality lends itself to a more flexible way of thinking about individual reasons.¹⁹ In other writings I have written about resolute choice as an alternative to reasoning by making use of a system of exclusionary reasons.²⁰ The idea of resolute choice in the case of individual rationality is that individuals adopt plans and reason from those plans, because they are aware that reasoning from plans is pragmatically better than reasoning each time based on the costs and benefits of individual actions.

If we apply a resolute choice model in this context, we can see how it may be possible to reconcile the autonomy of individual judgment with the authority of the law under which that individual acts. Following authority appeals to the rational individual, because he is aware that he will fare better if he adjusts his individual reasoning to the legal framework in which he must act. Moreover, taking a leaf from HLA Hart's book, we might suppose that he comes to internalize that legal framework sufficiently thoroughly that he conceives of himself as obligated to obey the law. This process of internalization of legal standards is precisely what occurs in a society governed by rule of law values. And it is this that we abandon when we give up on articulating legal norms that can supply reasons for acting and seek to motivate action. Legal standards that provide mere propagandistic benefit supply no reasons to act at all, and cannot be internalized sources of guidance of any sort.

¹⁹ See David Gauthier, *Commitment and Choice: An Essay on the Rationality of Plans*, in *Ethics, Rationality and Economic Behavior*, eds. Francesco Farina, Frank Hahn and Stefano Vanucci, Oxford University Press (1996); *Assure and Threaten*, 104 *Ethics* 690 (1994).

²⁰ Claire Finkelstein, *Acting on an Intention*, in *REASON, INTENTION AND MORALITY* (eds. Gijs Van Donselaar and Bruno Verbeek), Ashgate Publishing, 2008; *Rational Temptation*, in *Practical Rationality and Preference: Essays for David Gauthier*, (eds. Christopher Morris and Arthur Ripstein), Oxford University Press, 2001.

VIII. Conclusion

I have argued in favor of the traditional position that the concept of the State is critical to the idea of combatancy. Because of this, I have also argued that ISIS/al-Qaeda are criminal civilians, rather than combatants, based on the fact that they are non-state actors. 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 so there is no power over them to resolve disputes between them. A non-state 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 inter-state 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.

This is the flaw in the Forfeiture theory of compliance with international norms: the fact that al-Qaeda does not follow international law does not release us 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. The Forfeiture theory is a perfect example of formalistic reasoning in the law of war that cannot supply anything other than a results-based mode of reasoning. Legal reasoning premised on formal features of an agent’s situation, rather than the content of the roles occupied with such a structure, cannot ultimately vindicate the rule of law and little by little will erode it. In the context of war, it is essential that reasoning about the *ius in bello* proceed on the basis of actual rules that reflect the values of Just War Theory. In the absence of such substantive values, legal constraint of war will be formalistic and ultimately will fail.