
Doctrines of Equivalence?

A Critical Comparison of the Instrumentalization of International Humanitarian Law and the Islamic *jus in bello* for the Purposes of Targeting

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One seemingly simple question has perplexed humanity for millennia: Who can be targeted in war?

Hinging on the answer, of course, is nothing less than life and death. The question goes to the very heart of the conduct of war. If an individual can be targeted by an opposing side, then lethal force is legal and justified. If not, then certain precautions *must* be taken to prevent such a fate. Attempts to clarify the matter shed light on the darkest sides of human existence—the recourse to force, the taking of life, and the sanctioning of destruction.

Paradoxically, however, attempts to grapple with the inevitable violence of warfare also reveal some of humanity’s most laudable ambitions. Since Cain and Abel, combatants have made honest efforts to humanize the conduct of hostilities.¹ Such projects have gone by many names, including chivalry, mercy, honor, benevolence, parlay, clemency and finally, in the dry recital of the International Court of Justice (ICJ), the “elementary considerations of humanity.”² At each point peaceful ideas have collided

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with the imperatives of battle. During the U.S. Civil War, Francis Lieber's *Instructions for the Government of Armies of the United States in the Field* (the "Lieber Code") recognized that military necessity "admits of all direct destruction of life or limb of armed enemies" but directed the Union Army to refrain from "the infliction of suffering for the sake of suffering or for revenge"³ and "any act of hostility which makes the return to peace unnecessarily difficult."⁴ The Lieber Code laid the groundwork for the Hague Conventions of 1899 and 1907, the Four Geneva Conventions of 1949 and their additional protocols, and the various arms-specific treaties that followed. In his seminal work *A Memory of Solferino*, Henri Dunant asked: "Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?"⁵ Dunant's lamentation led to the founding of the International Committee of the Red Cross (ICRC), which later became the guardian of the Geneva Conventions and the keeper of the body of law known today as International Humanitarian Law or IHL.

Developing in parallel to the largely secular, Western-driven IHL project, other manifestations of the mortal balance between military necessity and restrictions on the use of force during times of war also emerged. Notably, the Islamic *jus in bello*, or the body of the law governing conduct in war, which dates to the time of the Prophet Muhammad in the seventh century, "was largely responsible for moving humanity from the darkness of Greco-Roman ideas about war to the light in which the enemy was guaranteed certain rights and the fighting man was assured of certain protections."⁶ It includes combatant/non-combatant distinctions, as well as prohibitions on the targeting of women, children, infirmed men, and civilian objects.⁷ Within Islam, armed conflict is divided into two general categories: wars of public interest and wars against polytheists and apostates. Wars of public interest equate roughly with armed conflicts not of an international character from IHL. They are fought against rebels and dissident *kharijites* who "rebel against the Imam, differ with the community, and adopt a reprehensible, innovated school of thought" known as the *Mazhab*.⁸ Wars against polytheists and apostates, by contrast, often occur internationally. With regard to the latter, they are fought against people who declare themselves Muslim, but later renege or are declared un-Islamic.⁹ Specific restrictions are applicable to each category of conflict. The concept of jihad also plays a pivotal role in Islamic thought, but not as a holy war as it is commonly portrayed.¹⁰ Rather, *jihad* is a term used to describe "a determined effort" to overcome Satan, oneself, or an opponent.¹¹ There are also different sorts

of jihad. The *greater jihad* is the struggle one has to lead against oneself and the *lesser jihad* is understood as war against others.¹² It is this lesser jihad that has served as the rallying cry for radical Islamic armed groups in their battle against the West. The dramatic events of the morning of September 11, 2001 brought these two parallel regimes into direct conflict. While al-Qaeda's intentional targeting of civilians represented clear violations of both IHL and Islamic *jus in bello*,¹³ the perpetrators claimed a legal right for their actions. In its April 24, 2002 justification for the attacks titled, "A Statement from Qaidat al-Jihad Regarding the Mandates of the Heroes and the Legality of the Operations in New York and Washington," al-Qaeda asserted:

We say that the prohibition against the blood of women, children, and the elderly is not an absolute prohibition. Rather, there are special conditions in which it is permissible to kill them if they are among the people of war, and these conditions exist in specific circumstances.¹⁴

The group then went on to justify its killing of civilians in accordance with those conditions, which included:
 the norm of reciprocity; the inability to distinguish between civilians and combatants; the assistance of civilians to the U.S. war effort in "deed, word, or mind;" the necessity of war; the use of heavy weaponry; and the use of human shields and the violation of a treaty.¹⁵ While these claims were not novel, they egregiously exemplified a dangerous turn in the development of the Islamic *jus in bello*. Whereas for centuries this body of rules served predominantly as a constraint on targeting practices, it was now being *instrumentalized* in the name of jihad by al-Qaeda and other radicals to disastrous effect.

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The necessarily ardent U.S. response also loosened preexisting legal mores. On September 18, 2001, the U.S. Congress granted the President broad authority to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,

or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.¹⁶

Coterminous with congressional authorization, President Bush issued a secret order that directed the Central Intelligence Agency (CIA) to kill or capture the leaders of al-Qaeda and other allied terrorist organizations using all means at their disposal, including through the use of drones.¹⁷ In an October 7, 2001 letter to the Security Council, the U.S. permanent representative John Negroponte expressed the nation's commitment to "minimizing civilian casualties and damage to civilian property" in Afghanistan; however, it soon became clear that the U.S. view of who could be targeted by its operations was extremely broad.¹⁸ In his address to the nation given the same day, President George W. Bush stated: "Every nation has a choice to make. In this conflict there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers themselves. And they will take that lonely path at their own peril."¹⁹ The techniques of response were also "unlike those that [had] occurred in America's recent wars."²⁰ As an October 23, 2001 Department of Justice memorandum noted, the uses of force to respond to al-Qaeda:

[M]ight include, for example, targeting and destroying a hijacked civil aircraft in circumstances indicating that hijackers intended to crash the aircraft into a populated area; deploying troops and military equipment to monitor and control the flow of traffic into a city; attacking civilian targets, such as apartment buildings, offices, or ships where suspected terrorists were thought to be; and employing electronic surveillance methods more powerful and sophisticated than those available to law enforcement agencies.²¹

Do these broad statements and claims to legal authority—which resulted in the expansion of targeting practices by both radical jihadis and U.S. forces—have anything in common? A review of the methods that led to the current state of affairs uncovers more similarity than one might think. In order to reach this conclusion, this article first examines the radical innovations in the Islamic *jus in bello* that resulted in its instrumentalization by al-Qaeda and other Islamic armed groups in the name of jihad. It then addresses the key legal arguments of the U.S.-led response, particularly in the post-9/11 period. Finally, it offers a critical appraisal of the use of targeting rules to justify killing by both sides. In conclusion, it summarizes the argument and comments on the dark sides of legal instrumentalization.

RADICAL INNOVATIONS IN THE ISLAMIC *JUS IN BELLO*: TAKFIRIS, NEW APOSTATES, AND THE GLOBAL JIHAD

The Prophet Mohammad said, “I am the Prophet of gentle compassion; I am the Prophet of fierce battle.”²² With this simple quotation, the Prophet Mohammad succinctly summarizes the tension between considerations of humanity and military necessity. In recent years, the latter has trumped the former, at least in the actions of fundamentalist Islamic armed groups such as al-Qaeda. A number of radical innovations within the Islamic *jus in bello* led to this result.

The roots of this modern radical position lay in the writings and teachings of Sayyid Qutb, an Egyptian scholar, educator, theorist, poet, and author known for his two great works, *Milestones*, first published in 1964, and *In the Shade of the Qur’an*, which was first published in 1954. *In the Shade of the Qur’an* was in fact revised during Qutb’s imprisonment in Egypt from 1954-1966 following an attempted assassination of then President Gamel Abdel Nasser. In his writings, Qutb divided the world into two groups: Islam and *jahiliyya*, or the period of darkness preceding Islam.²³ For Qutb, *jahiliyya* encompassed all of modern life including manners, art, literature, and especially Western values.²⁴ The only way to save Islam was to reject the *jahiliyya* through perpetual jihad. His choice was clear: “pure, primitive Islam or the doom of mankind.”²⁵ Ayman al-Zawahiri, the Egyptian leader of Islamic al-Jihad, which formally merged with al-Qaeda in 2001, was a student of Qutb during al-Zawahiri’s formative years in Cairo. The hallmarks of his teacher’s viewpoints are omnipresent in al-Qaeda’s activities. From the early days in Peshawar to the deserts of Khartoum, to the chaos of Mogadishu and the caves of Tora Bora, the overriding mantra of al-Qaeda has been a rejection of modernity and a revival of Islam through a rededication to fundamentalist teachings.

In the late 1980s and early 1990s, as al-Qaeda was developing into the radical armed group which we know today, a debate arose in Islamic thought over the issue of *takfir*. *Takfir* refers to the ability of one Muslim to declare that another Muslim is an apostate—an unbeliever or *kufr*. The outcome has serious consequences. Declaring that another Muslim is an apostate exposes that individual to legitimate targeting as part of armed conflict. Al-Qaeda and other violent groups argued that Muslims must follow Islam in both belief and action. If an individual betrayed either, then he would be un-Islamic, and thus an apostate.²⁶ This line of argument was used to accuse the leaders of Saudi Arabia and other Muslim countries, including Algeria and Egypt, of apostasy.²⁷ While the belief held by most

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ranks, believe that they themselves may make the declaration. The result of the *takfiri* movement was a general increase in the scope and intensity of violence between Muslims.²⁸

Because lesser jihad was primarily defensive, it was fought *within* Muslim countries *against* invading forces. Bin Laden altered this paradigm with his February 23, 1998 "Declaration of the World Islamic Front for Jihad against the Jews and the Crusaders," in which he called on all Muslims to attack the United States:

To kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible, until the Aqsa Mosque [in Jerusalem] and the Haram Mosque [in Mecca] are freed from their grip and until their armies, shattered and broken-winged, depart from all the lands of Islam, incapable of threatening any Muslim.²⁹

The global jihad, as declared by bin Laden, went against centuries of tradition and practice of the lesser jihad. It erased any distinction between civilian and military targets, turned a historically collective obligation into an individual one, and disconnected jihad from specific territories.³⁰

Despite its deviation from established practice, bin Laden's declaration gained widespread support. From these fundamentalist and expansionist jihadi precepts, al-Qaeda was able to justify its violent activities with reference to the Qur'an, religious imagery, and the *fatwas*, or religious

edicts, of mercenary or sympathetic scholars. Various other issues were also redefined by the group, such as the use of suicide bombers.³¹ Although mainstream Islamic jurists largely dismissed the ideas, the violent ideology of al-Qaeda attracted many young, disaffected Muslims seeking an outlet for their resentment of the West. In their hands, the expanded targeting authority provided by bin Laden's radical revision of the Islamic *jus in bello* proved to be a powerful weapon.

THE U.S.-LED RESPONSE IN THE POST-9/11 PERIOD: "UNLAWFUL ENEMY BELLIGERENTS," DIRECT PARTICIPATION IN HOSTILITIES AND THE GLOBAL WAR ON TERROR

Thinking back to the disorienting days after September 11, the anger was palpable. President Bush captured the mood of the nation in his remarks on September 19, 2001 when he stated: "There are no rules. It's barbaric behavior. [Al-Qaeda slits] throats of women on airplanes in order to achieve an objective that is beyond comprehension, and they like to hit and then they like to hide out. But we're going to smoke them out."³²

The view held by the vast majority of U.S. citizens was that the response against those responsible had to be immediate and merciless. The resulting legal framework adopted by the U.S. government reflected that imperative. From the beginning, the United States clearly took the position that the attack by al-Qaeda constituted an act of war rather than a crime.³³ This decision legitimated the widespread use of lethal force and thrust IHL to the fore.³⁴

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From the start, the conflict with al-Qaeda, the Taliban, and associated forces in the post-September 11 period challenged the established categories of IHL. For instance, as U.S. and allied forces deployed to the region and started to capture suspected al-Qaeda and Taliban members, detention issues received substantial scrutiny. The detention position originally taken by the United States was that none of the detainees could be considered prisoners of war because the Geneva Conventions did not apply to the conflict.³⁵ Later, it claimed that the Conventions applied in principle, but that none of the detainees—neither those who were in the Taliban nor those

in al-Qaeda—met the definition of a prisoner of war.³⁶ Military commissions were created at Guantanamo Bay, Cuba, where detainees were held and investigated for their alleged offenses.³⁷ After numerous U.S. Supreme Court challenges and legislative revisions the government settled on a hybrid position under which the detainees, classified as *unlawful enemy belligerents*, were not to be treated as prisoners of war, but were to be treated “humanely” as a matter of policy.³⁸ Under the Military Commissions Act of 2009, the definition of unlawful enemy belligerent is extremely broad:

The term *unprivileged enemy belligerent* means an individual (other than a privileged belligerent) who (a) has engaged in hostilities against the United States or its coalition partners; (b) has purposefully and materially supported hostilities against the United States or its coalition partners; or (c) was a part of al-Qaeda at the time of the alleged offense.³⁹

Just as detention strained existing categories, targeting also represented a vexing issue. Because al-Qaeda and Taliban members did not wear uniforms or otherwise identify themselves as parties to the conflict, and because they often intentionally hid among the civilian population, U.S. forces faced the serious logistical dilemma of distinguishing between combatants and non-combatants for the purposes of using force.⁴⁰ The framework that the government eventually developed was expansive. The rationale behind the unlawful enemy belligerent category asserted by the Bush administration was to deny individuals the rights of privileged belligerents if they were captured, while maintaining the freedom to target the same individuals on the battlefield as if they were combatants engaged in hostilities.⁴¹ In order to reach this latter position, the administration interpreted the term “direct participation in hostilities” (DPH) under IHL very broadly. In accordance with IHL, civilians are entitled to immunity from being targeted “unless and for such time as they directly participate in hostilities.”⁴² The orthodox interpretation of this phrase, as articulated by the ICRC, is that in order to qualify as DPH, a specific act must meet the following cumulative criteria: (1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁴³

By contrast, the Bush administration expanded the range of targets to include “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaeda or associated forces),”⁴⁴ the result of which was to make targetable individuals, such as propagandists of financiers, who were associated with terrorist groups, but who did not necessarily fire weapons or otherwise take part in military operations.

The detainee and targeting frameworks fit within the larger view at the time that the conflict with al-Qaeda was *global* in scope. Because the group operated as a diffuse, transnational network, the U.S. position was that the normal territorial restrictions on the

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conduct of war did not apply. This resulted in the doctrine of the Global War on Terror (GWOT). As articulated by President Bush in his June 1, 2002 address to the U.S. Military Academy at West Point:

[T]he war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action. And this nation will act.⁴⁵

The GWOT framework created serious time and space problems for IHL. On the issue of time, the conflict has no logical end point. This is confirmed in the *Authorized Use of Military Force of 2001*, which will remain in effect until the U.S. Congress decides to repeal it, as well as the remarks of President Bush. The enemy is nebulous, and what counts as “winning” is not altogether clear. With regard to space, the need to act offensively and to confront threats “before they emerge” requires omnipresence. Instead of being tied to a particular territory or locus of conflict, the GWOT would attach wherever the terrorists themselves could be found.

In the period since those initial innovations, the United States has continued to use the law as a tool for the targeting of terrorist suspects. For instance, despite the Obama administration’s rejection of the GWOT paradigm, U.S. officials maintain that certain members of al-Qaeda can be targeted at any time, wherever they are found.⁴⁶ The result has been an armed conflict taking place in different locations, at different times. In his

justification for U.S. policy, the Legal Adviser to the U.S. Department of State, Harold Koh asserted:

Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks [...] Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.⁴⁷

The matter of targeted killing through the use of drones, to which Koh alludes in his remarks, represents another extension of the U.S. position. In fact, under President Obama's stewardship, the program has grown exponentially.⁴⁸ The September 30, 2011 drone attack that killed Anwar al-Awlaki, an American citizen who was also a member of al-Qaeda, in Yemen represents the latest salient example of this policy.⁴⁹ In a white paper, dated November 8, 2011 and publically released in February 2013, the U.S. Department of Justice set forth its legal framework for considering the circumstances in which the U.S. government could "use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qaeda or an associated force of al-Qaeda—that is, an al-Qaeda leader actively engaged in planning operations to kill Americans."⁵⁰ While not specific to the use of drones, the opinion was clearly written to address concerns regarding the use of remote weapons to carry out targeted killings, particularly against U.S. citizens such as al-Awlaki. In its opinion, the Department of Justice concluded that "it would be lawful to conduct a lethal operation outside the United States against a U.S. citizen who is a senior, operational leader of al-Qaeda" under the following three conditions:

1. An informed, high-level official of the U.S. Government has determined that the targeted individual poses an imminent threat of violent attack against the United States;
2. Capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and
3. The operation is conducted in a manner consistent with the four fundamental principles of the laws of war [necessity, distinction, proportionality, and humanity] governing the use of force.⁵¹

Like the Koh position before it, the Department of Justice white paper puts no territorial or temporal limits on the use of lethal force. Moreover, despite its attempt at objectivity, it relies almost entirely on subjective judgments, including on the issue of membership in al-Qaeda and the existence of an imminent threat of violent attack against the United States. Instead of significantly restraining the targeting of individuals—even where they are U.S. citizens—the legal rules it articulates provide an argumentative framework through which predetermined policy prerogatives can be justified.

Another similarity worth noting is that both the Koh position and the Department of Justice white paper include elements of two separate legal regimes, namely the *jus ad bellum*, which is the body of the law governing the resort to force, and IHL. In addition to asserting that it is engaged in an armed conflict against al-Qaeda and its associated forces, and that under the rules applicable to the armed conflict it can target individuals in accordance with that law, the United States government further maintains that it may target individuals who pose an “imminent threat of violent attack” in accordance with its inherent right of self-defense under Article 51 of the Charter of the United Nations.

The layering of the two legal regimes in this manner allows the United States to justify targeting decisions on two separate bases of authority: either the targeting of an individual represents an exercise of the United States’ inherent right of self-defense, or it constitutes a decision carried out within an existing armed conflict against a lawful target in accordance with IHL. In either case,

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the respective legal rules are vulnerable to misuse and instrumentalization, depending on the particular circumstances. In effect, this layering enables the U.S. government to target individuals on the basis of blame, without necessarily identifying either a direct link to the ongoing armed conflict or providing evidence of a cognizable threat in a particular case.⁵²

A CRITICAL APPRAISAL: FINDING WAYS TO JUSTIFY KILLING THROUGH THE INSTRUMENTALIZATION OF THE LAW

The argumentative techniques employed by al-Qaeda and post-September 11 U.S. policymakers exhibit clear similarities. As shown in the preceding sections, each moves in the general direction of breaking

down preexisting barriers to violence during war. This began with new determinations on *who* could be targeted. For al-Qaeda and other violent jihadis, a return to fundamentalist views resulted in the *takfir* movement and the general proliferation of apostates. For the United States, the hysteria caused by terrorism and the anger over September 11 spilled over into a general opening-up of combatancy through a reformation of civilian participation in conflict. These initial pragmatic innovations eventually resulted in a geographical expansion of the targeting area. Both bin Laden's "Declaration of the World Islamic Front for Jihad against the Jews and the Crusaders" and the Bush administration's policy of GWOT shattered the existing spatial boundaries that had been placed on the conduct of war by the Islamic *jus in bello* and IHL, respectively.

Perhaps more troubling than these changes in perspective, however, was the way in which law was instrumentalized to serve particular interests. Rather than let these pronouncements lay in the realm of politics, both

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al-Qaeda and the post-September 11 U.S. administration sought to legitimize their positions by reference to the law. Whether by *fatwa* or executive branch opinion, each approach reaches for the imprimatur of jurisprudential approval. Instead of an honest effort to act according to the rule of law, however, the argumentative techniques

represent superficial testimonials. They bow to the law only insofar as it suits their interests.⁵³ In this way, the leaders of each organization sought to instrumentalize law as a justificatory device. The net results were legal opinions supporting policies of warfare that deviated from existing norms. Moreover, the general trend was *more—more* targeting, in *more* places, through *more* means. While some may refer to such uses of the law as "lawfare,"⁵⁴ the real danger is to see this argumentative technique for what it really is—a method to justify predetermined acts.

It should be noted, of course, that the approaches of al-Qaeda and the United States were also dissimilar in many ways. For instance, there is no comparison as to degree. The al-Qaeda approach was much more expansive. Bin Laden drew little, if any, meaningful distinction between combatants and civilians. His method was wholesale destruction and his targets were often specifically and exclusively civilian. The United States, for its part, has continued to insist on principles of distinction, proportionality, and military necessity. Rather than celebrate civilian deaths, it has undertaken

serious and time-consuming processes to avoid them. A great number of U.S. military operations have been postponed or cancelled because they presented a disproportionate threat to civilian life. This approach, which was also premised largely on legitimacy, formed a significant part of the “winning-hearts-and-minds” counterinsurgency strategy in Afghanistan and Iraq. To its credit, even in the covert operation that resulted in the killing of bin Laden on May 2, 2011 in Abbottabad, Pakistan the United States purportedly took “great pains both to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter [...] even if it meant putting U.S. forces in harm’s way.”⁵⁵

Taking that proviso into account, the point of this critical review was not to equate al-Qaeda’s methods with those of the United States in response to September 11. The goal was to identify the ways in which both the Islamic *jus in bello* and IHL were instrumentalized to serve a particular end, namely to enable the targeting of an enemy force. As this brief discussion has showed, the fact that certain basic similarities exist should not be ignored. ■

ENDNOTES

N.B. For present purposes, the term instrumentalization is used to capture the use of juridical reasoning to achieve a predetermined policy objective.

- 1 See: Theodor Meron, “The Humanization of Humanitarian Law,” *The American Journal of International Law* Vol. 94, No. 2, (April 2000): 239-278. Meron notes that wars have been a part of the human condition since Cain and Abel and, regrettably, are likely to remain so, but he expresses optimism regarding the direction in which international humanitarian law has been evolving, in particular in its increasing consideration of human rights.
- 2 *The Corfu Channel Case, (Merits), Judgment of April 9th, 1949*, International Court of Justice Reports of Judgments, Advisory Opinions and Orders, 1949, 22. In this quotation, the ICJ was referring to Common Article 3 of the four Geneva Conventions of 1949. As Theodor Meron notes, even Shakespeare has gotten into the act. See: Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (New York: Oxford University Press, 1998); and Theodor Meron, *Henry’s Wars and Shakespeare’s Laws: Perspectives on the Law of War in the Later Middle Ages* (Oxford: Clarendon Press, 1994).
- 3 Adjutant General’s Office, *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field* (Washington, DC: U.S. Government Printing Office, 1863), Article 15.
- 4 *Ibid*, Article 16.
- 5 Jean Henri Dunant, *A Memory of Solferino* (1862).
- 6 Ahmed Zaki Yamani, “Humanitarian International Law in Islam: A General Outlook,” *Michigan Yearbook of International Legal Studies*, Vol. 7 (1995): 189-190.

- 7 See: Muhammad Munir, "The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law," *Hamdard Islamicus*, Vol. 34, No. 4, (October-December 2011): 7; and Ella Landau-Tasserson, "Non-Combatants" in *Muslim Legal Thought*, Hudson Institute Center on Islam, Democracy, and the Future of the Muslim World, Research Monographs on the Muslim World, Series No. 1, Paper No. 3, December 2006.
- 8 Yamani, 193.
- 9 Ibid, 195.
- 10 Islam actually does not have a teaching for such a thing as "holy war." See: Anisseh Van Engeland, "The Differences and Similarities between International Humanitarian Law and Islamic Humanitarian Law: Is There Ground for Reconciliation?," *Journal of Islamic Law and Culture*, Vol. 10, No. 1, (April 2008): 81-83; citing Harfiyah Abdel Haleem et al., eds., *The Crescent and the Cross: Muslim and Christian Approaches to War and Peace* (Palgrave Macmillan, 1998), 67.
- 11 Van Engeland, 83.
- 12 Ibid. In the *sunna*, the Prophet Muhammad is recorded as stating that "self-exertion in peaceful and personal compliance with the dictates of Islam [constitutes] the major or superior *jihad*." See: Karima Bennoune, "As-Salāmu 'Alaykum? Humanitarian Law in Islamic Jurisprudence," *Michigan Journal of International Law*, Vol. 15, (1993-1994): 605, 615; citing Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press, 1990), 145. For an in-depth review of the concept, see also: Shaheen Sardar Ali and Javid Rehman, "The Concept of *Jihad* in Islamic International Law," *Journal of Conflict and Security Law*, Vol. 10, No. 3, (Winter 2005): 321; and James Turner Johnson, "Tracing the Contours of Jihad as an Individual Duty," *Journal of Church and State*, Vol. 53, No. 1, (Winter 2011): 37.
- 13 Regarding the Islamic *jus in bello*, on September 14, 2001 the leaders of forty-six Islamic fundamentalist groups issued a statement denouncing the September 11, 2001 attacks, which read:

The undersigned, leaders of Islamic movements, are horrified by the events of Tuesday 11 September 2001 in the United States which resulted in massive killing, destruction, and attack on innocent lives. We express our deepest sympathies and sorrow. We condemn, in the strongest terms, the incidents, which are against all human and Islamic norms. This is grounded in the Noble Laws of Islam which forbid all forms of attacks on innocents. God Almighty says in the Holy Qur'an: 'No bearer of burdens can bear the burden of another' (Surah al-Isra 17:15).

See: "MSA News," September 14, 2001: <http://msanews.mynet.net/MSANEWS/200109/20010917.15.html>. Signatories included the general guide of the Muslim Brotherhood of Egypt, the emir of the Jamaat-i-Islami in Pakistan, and Ahmad Yassin, the founder of Hamas.

- 14 "A Statement from Qaidat al-Jihad Regarding the Mandates of the Heroes and the Legality of the Operations in New York and Washington," April 24, 2002, <http://thesis.haverford.edu/dspace/bitstream/handle/10066/4796/QAE20020424.pdf?sequence=3>, 4. The al-Qaeda statement also justified the killing of Muslims who were working in the World Trade Center during the attacks according to a separate set of conditions. See: Ibid, 5-6.

- 15 See, generally: Quintan Wiktorowicz and John Kaltner, "Killing in the Name of Islam: Al-Qaeda's Justification for 9/11," *Middle East Policy*, Vol. 10, No.76 (Summer 2003), discussing al-Qaeda's seven conditions with regard to existing Islamic jurisprudence.
- 16 "Authorization for Use of Military Force," Senate Joint Resolution 23, Public Law 107-40, 115 Statute 224 (2001): hereinafter *AUMF*.
- 17 See: Bob Woodward, *Bush at War*, (Simon & Schuster, 2002): 101.
- 18 See: Letter dated October 7, 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2001/946, (October 7, 2001), submitted by John Negroponte.
- 19 Address of President George W. Bush to the Congress and the Nation, (October 7, 2001), <http://www.law.ou.edu/hist/bush-addr-nation-begin-attacks-on-alquaeda-10-07-01.shtml>. Immediately after the Bush address, a video tape of an Osama bin Laden speech was released to the media. In it, bin Laden stated:

As for the United States, I tell it and its people these few words: I swear by Almighty God who raised the heavens without pillars that neither the United States nor he who lives in the United States will enjoy security before we can see it as a reality in Palestine and before all the infidel armies leave the land of Muhammad, may God's peace and blessing be upon him.

See: "Bin Laden's Warning: Full Text," BBC.com (October 7, 2001), http://news.bbc.co.uk/2/hi/south_asia/1585636.stm. For an interesting look at the similarities in the rhetoric of Bush and Osama bin Laden, see: Bruce Lincoln, *The Rhetoric of Bush and Bin Laden*, University of Chicago Fathom Archive, <http://fathom.lib.uchicago.edu/1/777777190152/>.

- 20 "The Authority for U.S. Military Forces to Combat Terrorism within the United States," U.S. Department of Justice, Office of the Legal Counsel, Memorandum for Alberto Gonzales, White House Counsel, (October 23, 2001), 4.
- 21 *Ibid*.
- 22 See: Ahmed Zaki Yamani, "Humanitarian International Law in Islam: A General Outlook," *Michigan Yearbook of International Legal Studies*, Vol. 7, (1985): 189-190, citing: M. Coulson, *A History of Islamic Law*, (1964): 41-43 and 62-65.
- 23 Lawrence Wright, *The Looming Tower*, (Vintage Books: 2006), 35.
- 24 Unlike many of his later disciples, Qutb was familiar with U.S. culture. During the late 1940s he spent nearly two years studying and traveling in the country. For a comprehensive review of his activities and the effect the visit had on his views, see: *Ibid*, Chapter 1.
- 25 *Ibid*, 35.
- 26 Quintan Wiktorowicz and John Kaltner, "Killing in the Name of Islam: Al-Qaeda's Justification for 9/11," 79.
- 27 *Ibid*.
- 28 Examples include the violent fundamentalist insurgencies in Egypt and Algeria during the 1990s.
- 29 Quoted in: Bernard Lewis, "License to Kill: Usama Bin Laden's Declaration of Jihad," *Foreign Affairs*, Vol. 77 (November-December 1998). The Bin Laden declaration was originally published in the London-based Arabic language newspaper *Al-Quds al-Arab*. See: "Nass Bayan al-Jabhah al-Islamiyah al-Alamiyah li-Jihad al-Yahud wa-al-Salibiyyin," *Al-Quds al-Arab*, February 23, 1998, <http://www.library.cornell.edu/colldev/mideast/fatw2.htm>.

- 30 Jean-Pierre Filiu, "The Local and Global Jihad of al-Qa'ida in the Islamic Maghrib," *Middle East*, Vol. 63, No. 2 (Spring 2009): 213-14.
- 31 See: Assaf Moghadam, "Motives for Martyrdom: Al-Qaida, Salafi Jihad, and the Spread of Suicide Attacks," *International Security*, Vol. 33, No. 3 (Winter 2008/2009): 46.
- 32 Brian Knowlton, "Terror in America/'We're Going to Smoke Them Out': President Airs His Anger," *New York Times*, September 19, 2001, http://www.nytimes.com/2001/09/19/news/19iht-t4_30.html. Always the gunslinger, President Bush also famously said at the time, "I want justice, and there's an old poster out West I recall that said 'Wanted, Dead or Alive.'"
- 33 See: "The Authority for U.S. Military Forces to Combat Terrorism within the United States," 3-4. It should be noted that this assertion was supported at the time by the United Nations Security Council, NATO, and a number of U.S. allies. See, e.g.: UN Security Council Resolution 1373, September 28, 2001, and "NATO Update: Invocation of Article 5 Confirmed" October 2, 2001, <http://www.nato.int/docu/update/2001/1001/e1002a.htm>. Since that time, the assertion has been hotly disputed by legal scholars. See, e.g.: "Debate between Mary Ellen O'Connell and Benjamin Wittes," *Lawfare*, October 25, 2010, <http://www.lawfareblog.com/2010/10/wittes-v-oconnell-on-targeted-killing-and-drones/>.
- 34 The memoranda produced by the U.S. Department of Justice, Office of Legal Counsel in the period following September 11, 2001 are informative on this point. They each reinforced the armed conflict paradigm and applicability of IHL. See, e.g.: "Memorandum Regarding Determination of Enemy Belligerency and Military Detention," June 8, 2002; Memorandum from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, "Legality of the Use of Military Commissions To Try Terrorists," November 6, 2001; Memorandum to Alberto Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, "Re: Application of Treaties and Laws to al-Qaeda and Taliban Detainees," January 22, 2002.
- 35 Space constraints limit an involved discussion on this point. For an informative review of the decision-making process at the time, which focused on a parsing of the "armed conflict not of an international character" language from Common Article 3 of the Geneva Conventions, see: Steven Ratner, "*Jus ad Bellum* and *Jus in Bello* after September 11," *American Journal of International Law*, Vol. 96, No. 4, (2002): 905.
- 36 *Ibid*, 911.
- 37 See: President George W. Bush, Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."
- 38 See e.g.: *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Boumediene v. Bush*, 553 U.S. 723 (2008).
- 39 *Military Commissions Act of 2009*, 111th Congress, Public Law 111-84, amending Subchapter 1 of Chapter 47A of Title 10, U.S. Code, October 28, 2009.
- 40 *The Authority for U.S. Military Forces to Combat Terrorism within the United States*, 3.
- 41 See: Curtis Bradley, "The United States, Israel & Unlawful Combatants," *Green Bag*, Vol. 12, 2D: 271, 273 (2009); see also: Eric Christensen, "The Dilemma of Direct Participation in Hostilities," *Florida State University Journal of Transnational Law and Policy*, Vol. 19, (2010): 281, 291.

- 42 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) Article 51(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Article 13(3).
- 43 International Committee of the Red Cross, “*Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*,” *International Review of the Red Cross*, Vol. 90, (2008): 991, 1016 [emphasis added].
- 44 Military Commissions Act of 2006, Public Law No. 109-366, §3 (a).
- 45 President George W. Bush, “Remarks at the Graduation Exercise of the United States Military Academy,” West Point, New York, June 1, 2002. But see: John Bellinger, Legal Adviser, U.S. Department of State, “Armed Conflict with Al Qaida?” *Opinio Juris*, January 15, 2007, <http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida/>, asserting “[t]he phrase ‘the global war on terror’—to which some have objected—is not intended to be a legal statement. The United States does not believe that it is engaged in a legal state of armed conflict at all times with every terrorist group in the world, regardless of the group’s reach or its aims, or even with all of the groups on the State Department’s list of Foreign Terrorist Organizations. Nor is military force the appropriate response in every situation across the globe. When we state that there is a ‘global war on terror,’ we primarily mean that the scourge of terrorism is a global problem that the international community must recognize and work together to eliminate. Having said that, the United States does believe that it is in an armed conflict with al Qaida, the Taliban, and associated forces.” Whether the President and his Legal Adviser were in accord on this point and whether Bellinger’s view from 2007 was the view of 2002 represent other matters.
- 46 See, e.g.: Greg Miller, “Obama’s Counter-Terrorism Adviser Denounces Bush-Era Policies,” *Los Angeles Times*, August 7, 2009, <http://articles.latimes.com/2009/aug/07/nation/na-terrorism-brennan7>.
- 47 Harold Koh, Legal Adviser, U.S. Department of State, “The Obama Administration and International Law,” Speech to the American Society of International Law, March 25, 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm>.
- 48 See: Christopher Drew, “Drones are Weapons of Choice in Fighting Qaeda,” *New York Times*, March 17, 2009, http://www.nytimes.com/2009/03/17/business/17uav.html?pagewanted=all&_r=0; and Scott Shane and Thom Shanker, “Yemen Strike Reflects U.S. Shift To Drones as Cheaper War Tool,” *New York Times*, October 2, 2011, <http://www.nytimes.com/2011/10/02/world/awlaki-strike-shows-us-shift-to-drones-in-terror-fight.html?pagewanted=all>.
- 49 Charlie Savage, “Secret U.S. Memo Made Legal Case to Kill a Citizen,” *New York Times*, October 9, 2011, <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>.
- 50 U.S. Department of Justice, *White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force*, November 8, 2011, <http://www.fas.org/irp/eprint/doj-lethal.pdf>. 1.
- 51 *Ibid.*, 16.
- 52 Gabriella Blum and Philip Heymann, “Law and Policy of Targeted Killing,” *Harvard National Security Journal*, Vol. 1, (2010): 145, 156.

- 53 As Derek Goodman wrote with regard to preventive detention, “In addressing that issue, leading lawmakers, litigators, and adjudicators have misconstrued or misappropriated aspects of the IHL regime.” Derek Goodman, “The Detention of Civilians in Armed Conflict,” *American Journal of International Law* 103 (1) (2009): 48.
- 54 See: Colonel Mark W. Holzer, “Offensive Lawfare and Current Conflict,” *Harvard National Security Journal*, Online Features, April 10, 2012, <http://harvardnsj.org/2012/04/offensive-lawfare-and-the-current-conflict/>.
- 55 Harold Koh, “The Lawfulness of the U.S. Operation against Osama bin Laden,” *Opinio Juris*, May 19, 2011, <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>. It could be said that Navy Seals would not have been pursuing bin Laden at all were it not for the prior instrumentalization of IHL that occurred in the post-September 11 period. The fact that the bin Laden operation was carried out by military forces speaks to the increase in violence that results from such instrumentalization. While that violence might have objectively positive effects, it might also have a dark side.