8 Armed Groups and the Law

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INTRODUCTION

In the tumultuous opening decade of the twenty-first century, the debate over which legal regime should be applied to armed groups leaped from its historical position in the pages of military manuals and academic journals to the front pages of leading newspapers and cable news services. As the violence by armed groups metastasizes and takes on new and ever-more-virulent forms, the legal system and its practitioners have struggled to keep up. There is every reason to believe that the United States is approaching a tipping point on the matter, and will soon be compelled to give the legal regime as much attention as has been given to strategies and policies for responding to the threats.

National security and defense strategists have long referred to the "spectrum of conflict," which stretches from low-level crime or civil disturbances in an otherwise "peaceful" situation at one end to unrestricted war between states at the other. Bookstores and leading journals are increasingly filled with dark and disturbing assessments documenting the emergence of a "new generation" of warfare operating in the middle of the spectrum—one characterized by strategies and tactics that blur the distinction between combatants and civilians, and that are often deployed in densely populated urban centers where avoiding collateral injury or damage to civilians and civilian objects is particularly difficult, and one that has now spread throughout what has been labeled the "arc of instability," with deadly forays into New York, Bali, Madrid, and London. The proponents and perpetrators of this new generation of warfare, which some believe now represents the dominant warfare paradigm, and which might soon be utterly transformed by the addition of weapons of mass destruction, pose a daunting challenge to our existing legal regime.

We find ourselves with a legal regime for large-scale violence that is seen by some as binary and yet, ironically, complete. On the one hand, we have a "warfare" paradigm for formal belligerencies and insurgencies, while on the other we rely on a law enforcement paradigm for violence at the low-level end of the spectrum of conflict. The choice has

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important consequences for issues regarding the use of force against members of armed groups, as well as their capture, detention, interrogation, and punishment. The warfare paradigm is principally grounded in the Hague Rules,[1] the Four Geneva Conventions,[2] and a body of customary international law, while the law enforcement paradigm is set out in a complex web of international conventions, bilateral treaties, and national laws. The warfare paradigm distinguishes between combatants and civilians; prescribes penalties for "war crimes," while otherwise immunizing lawful combatants for killing the enemy; and includes provisions for detention of enemy combatants and even civilians. The law enforcement paradigm consists of a broad set of criminal proscriptions, together with a body of international and national laws governing the extraterritorial application of national law, extradition, the rights of the accused, trial procedures, and, more recently, the relationship between national and international courts.

This chapter seeks to provide the reader with an introduction to the legal principles applicable to armed groups, with the more specific aim of providing the reader with the necessary background to evaluate three issues. The first is the extent to which members of armed groups may be targeted—that is, whether they can be killed by members of the armed forces of a state without benefit of prior due process of law. The second issue concerns the long-term detention of members of armed groups and the legal standards applicable to their capture, classification, interrogation, treatment, and release. The final issue focuses on the criminal liability of members of armed groups, either under the law of war or the ordinary international and national criminal laws typically applied in peacetime.

I. THE NATURE OF ARMED GROUPS AND THE THREATS THEY POSE

The terms coined to describe the various forms of "irregular" forces are numerous and oftentimes confusing.[3] Over the years, the term has been applied to armed bands, armed groups, armed opposition groups, guerrillas, insurgents, militias, organized resistance movements, rebels, transnational armed groups, volunteer corps, and the *levée en masse*. More specific labels, such as pirates, terrorist organizations, and criminal syndicates, and value-laden terms like "freedom fighters" and "liberation movements" are also common.

As the section below on the armed-conflict approach will discuss more fully, the term "armed group" can refer to "organized" armed groups that operate under a responsible commander and are linked to a state party to an armed conflict, to similarly organized groups that are not affiliated with any state, or to groups that fail to meet the test for an "organized" armed group. Armed groups might be assisting the state in its defense against another state, an occupying force (a "resistance" movement) or another armed group; or they may be attempting to overthrow the existing government of the state ("opposition" groups) or to secede from the state and form a new state (perhaps invoking some version of the right of self-determination). Until recently, armed groups generally operated within a single state or engaged in only occasional cross-border raids in an adjacent state.[4] Al Qaeda is the clear exception, with its demonstrated capability and intent to project power transnationally and to inflict strategic impacts and consequences.

This chapter will focus on armed groups engaged in organized violent acts that rise to the level of active hostilities. It will not address gangs, criminal organizations, or other groups that for the most part present lesser levels of violence. The analysis will also distinguish between armed groups associated with a state and nonstate armed groups. The analysis will draw on a variety of international legal authorities, including treaties, customary international law,[5] and decisions of United Nations bodies (particularly the Security Council and the International Court of Justice), as well as U.S. sources, including the Constitution and federal statutes and judicial decisions. The reader is cautioned that the legal effect of international law in U.S. courts is governed by rules and canons that are complex, confounding, and sometimes conflicting, and that this chapter can only provide an introduction to the subject.

II. ARMED GROUPS AND THE INSTRUMENTS OF NATIONAL POWER

States draw on their instruments of national power to promote and achieve their security interests. Traditionally, those instruments included diplomatic, information, military, and economic powers (collectively captured in the "DIME" acronym). "Hard power" approaches, like the use of armed force, while by no means obsolete or unnecessary, are increasingly supplemented by "strategic communications," information operations, and "soft power" methods, which are designed to extend the nation's influence and "win hearts and minds." At the same time, a variety of other instruments, including law enforcement and financial tools, export controls, and restrictions on access to militarily useful technology or information are brought to bear against nonstate actors, particularly those who might be seeking to acquire weapons of mass destruction. Within the United States, the president oversees the actual deployment of most of the instruments of national power, either as the commander in chief of the armed forces or as the chief executive. In doing so, however, the president must operate within existing constitutional and statutory authorities and is subject to judicial review.

Having a broad range of instruments of national power provides flexibility, but it also requires the national leadership to choose the instruments that will best achieve the national goals. As the introduction suggests, the debate over the "best" approach to large-scale violence by armed groups is often framed as a choice between two paradigms. However, a nation that capitalizes on the full range of its instruments of national power will not see its options in such narrow, dichotomous terms but rather will call for the selection of the optimal mix of all of the instruments available. That mix will be determined by the respective state agencies' legal authorities, capabilities, and capacities to act, as well as their abilities to attract partners to assist them in achieving the ends sought.

III. THE LAW ENFORCEMENT APPROACH

For some, the threat posed by transnational armed groups like Al Qaeda falls squarely within the ambit of the criminal justice approach to law enforcement. For example, in sentencing Richard Reid to life imprisonment for attempting to blow up a commercial airliner with a bomb implanted in his shoe, and after Reid made comments pledging his allegiance to Osama bin Laden, federal district judge William Young explained his status this way:

> We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. . . . You are not an enemy combatant. You are a terrorist. You are not a soldier in any way. You are a terrorist. To give you that reference, to call you a soldier, gives you far too much stature. . . . And we do not negotiate with terrorists. . . . We hunt them down, one by one, and we bring them to justice. So war talk is way out of line in this court. You're a big fellow. But you're not that big. You are no warrior. I know warriors. You are a terrorist. A species of criminal, guilty of multiple attempted murders.[6]

Armed Groups and the Criminal Law

The path to bring terrorists like Richard Reid and other armed-group members to justice is typically long and complex and criminal convictions are by no means assured. It is therefore not surprising that not everyone shares Judge Young's somewhat simplistic view of the issues. A criminal justice system requires that laws be prescribed, enforced, and adjudicated. The applicable law may be that of the state where the crime was committed, the state of nationality of the accused or the victim, a third state exercising universal jurisdiction, or an international tribunal. U.S. statutes potentially applicable to conduct by armed groups include, among others, those prohibiting murder and assault (both are generally limited to such offenses in the "special maritime and territorial jurisdiction of the United States"), weapons offenses, certain terrorist activities, war crimes, genocide, racketeering, torture, and treason. Interestingly, several of those criminal prohibitions include jurisdictional limits on their application. For example, Congress limited the war crimes statute to cases in which either the alleged perpetrator or the victim is a U.S. national. Until it was amended in 2007 the genocide statute was limited to acts within the United States or against a U.S. national. By contrast, the torture statute applies only to acts occurring outside the United States.

The territorial reach of national laws is also limited by international law. International law recognizes five bases for a state to prescribe laws. The two most widely accepted principles are territoriality (jurisdiction over conduct occurring or having an effect in the state's territory) and nationality (jurisdiction over conduct by nationals of the state or that was committed on vessels and aircraft registered in the state). The final three bases of jurisdiction, protective, passive personality, and universality, are less clearly established or accepted. Protective jurisdiction permits a state to prescribe laws to protect its vital national interests, such as the security of its currency against counterfeiting. Passive personality jurisdiction refers to the principle that a state may prescribe laws governing conduct that injures one of its nationals. The U.S. genocide statute cited above is an example. Universal jurisdiction applies to those acts, such as piracy, that are universally condemned and that all states have jurisdiction to proscribe, regardless of where the crime was committed or of the nationalities of the actors.

Even where a state might have jurisdiction as a matter of international law to proscribe certain conduct, or to take action to enforce those laws, it might not choose to do so in a given case (as Congress did in the examples cited above). Courts in the United States have, in fact, adopted a presumption that U.S. statutes do not apply extraterritorially, absent a clearly expressed intent by Congress, at least for statutes other than criminal laws that do not logically depend on their locality for the government's

jurisdiction. In addition, some federal courts require, as a matter of due process, a nexus between the conduct of the accused and the United States, thus further limiting their extraterritorial applications.

International Criminal Tribunals

In the years since World War II, a number of ad hoc international criminal tribunals were constituted to adjudicate cases involving violations of international law during wars. Several of those ad hoc tribunals, including the international criminal tribunals for the Former Yugoslavia and for Rwanda, are still active. In 2002, the International Criminal Court (ICC) at The Hague became the first standing international criminal tribunal. The convention establishing the ICC, known as the Rome Statute,[7] in reference to the city where the treaty negotiations took place, now constitutes an important source of international criminal law. The statute defines, for example, war crimes, crimes against humanity, and the crime of genocide. In the near future a definition of the crime of aggression will likely be added by the states party to the Rome Statute.

Issues in the Law Enforcement Approach

The criminal justice system is carried out by government personnel charged with conducting investigations, prosecutions, adjudications, and incarcerations. The means and methods drawn upon to enforce laws vary from one nation-state to another. Within the United States, the criminal justice system functions within an elaborate system of checks and balances. Congress enacts the laws (all federal criminal laws are based on statutes), the executive branch investigates and initiates prosecutions when warranted, and the judicial branch adjudicates individual cases, while also exercising the power of judicial review over the other two branches to ensure they conform to the Constitution.

Any evaluation of the merits of the law enforcement approach to armed groups must acknowledge the obvious, but often-overlooked, requirement that a person may only be convicted of a crime where an applicable law prohibited the conduct at the time it was committed. This principle, known in the United States as the prohibition on *ex post facto* laws,[8] and internationally by the somewhat broader rule of *nullum crimen, nulla poena sine* (no crime can be committed and no punishment can be imposed without having been prescribed by a previous penal law), is a core tenet of the rule of law. Mature criminal justice systems also recognize a number of basic "due process" principles, including a presumption of innocence, the right to a speedy trial before an impartial judge and fact finder, conviction only upon proof of guilt beyond a reasonable doubt, and a right to appeal in cases of error at trial. Most such systems also include a right to be present during the trial, the right to confront witnesses in court, and the right to have the assistance of counsel throughout the proceedings.

Use of force against armed groups

The section on the armed-conflict approach that follows will describe the *jus ad bellum* restrictions on the use of armed force. For this section, however, it is important to bear in mind that not every use of force by a member of the armed forces constitutes an application of "armed force" under the UN Charter and the law of armed conflict. The focus of this section is on "police" force directed against private individuals who might be

members of an armed group, but not agents of a government. The section that follows addresses the use of armed force by members of a state's armed forces.

Enforcement actions within the United States, or involving U.S. nationals beyond the U.S. border, are constrained by the U.S. Constitution. The Supreme Court has made it clear that any use of force by the government to effect a seizure (including a seizure of a person) must be "reasonable" under the Fourth Amendment.[9] As a result, the reasonableness test is the standard by which a claim of excessive force in any seizure will be measured.[10] In defining the contours of the reasonableness test the Supreme Court recognized that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[11] Accordingly, the Court held, the reasonableness of the officer's belief as to the appropriate level of force should be judged by that on-scene perspective.

The Court has articulated a three-part balancing test for the use of force that turns on the severity of the crime at issue, whether the suspect posed an immediate threat to others, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. If an officer reasonably, but mistakenly, believes that a suspect is likely to fight back, the officer is justified in using more force than might in fact be needed.[12] Law enforcement agents may also use force, including deadly force,[13] in self-defense. However, only that force reasonably necessary under the circumstances may be used. Force may not be used where assigned duties can be discharged without the use of force. However, there is no duty to retreat to avoid law enforcement situations justifying the use of force, including deadly force.

Like the application of national laws, the exercise of law enforcement authority outside the territorial limits of the state may be governed in part by international law. Under international law, the use of force in actions not amounting to armed conflict may be authorized or limited by treaty, customary international law, and general principles of law. For example, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the United Nations[14] provide nonbinding guidance on the use of force in enforcement operations. Drawing on Article 3 of the UN Code of Conduct for Law Enforcement Officials,[15] the Basic Principles state that "law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." It generally argues against the use of firearms and asserts:

> Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These would include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.[16]

The commentary accompanying the Code of Conduct "emphasizes that the use of force by law enforcement officials should be exceptional." Whether such an approach is reasonable in situations involving members of armed groups is questionable.

Gathering intelligence and evidence on armed groups

The U.S. Constitution provides a number of important safeguards for persons suspected of or charged with a crime. Those rights include, for example, the rights to be free from unreasonable searches and seizures, to be provided "*Miranda* warnings" before being subjected to a custodial interrogation, and to have the assistance of legal counsel at certain critical stages in the criminal justice process. Typically, those safeguards are enforced by the exclusionary rule, which provides (with important exceptions) that evidence obtained in violation of the Constitution is not admissible against the defendant at trial.

The Supreme Court has held that the reasonableness requirement for searches under the Fourth Amendment does not apply to actions by U.S. law enforcement personnel acting outside U.S. territory when the action is taken against a nonnational of the United States.[17] Moreover, the reasonableness of foreign searches involving U.S. nationals is judged by reference to the law of the place where they were conducted.[18] At the same time, however, extraterritorial conduct by law enforcement officers amounting to "deliberate and unnecessary lawlessness" has on at least one occasion led the Court to dismiss the charges against the defendant.[19] Alternatively, such conduct may be analyzed under the applicable international human rights laws, which may provide additional or different protections.

Detention or expulsion of armed-group members

Responses to threats posed by armed groups may include expulsion or detention of aliens who have been determined to present a security risk to the nation. The Constitution of the United States and the International Covenant on Civil and Political Rights limit the state's power to detain an individual.[20] To be sure, there are well-recognized exceptions. For example, in the United States persons may be detained for a reasonable period of time while awaiting trial or to serve as a material witness in a criminal case. The USA PATRIOT Act added or amended provisions authorizing the detention of aliens awaiting exclusion or deportation, and of suspected alien terrorists.[21] Nevertheless, such detentions are subject to a variety of substantive and procedural protections and are strictly limited in time.

Prosecution of armed-group members

There is nothing particularly remarkable about the practice of prosecuting members of armed groups under the ordinary criminal laws, so long as the prosecuting state has probable cause to believe that the persons charged committed a crime under laws applicable to their conduct and evidence sufficient to support a conviction. Prosecution might be carried out by the state where the conduct occurred, the state of nationality of the accused or the victim, a third state claiming treaty-based or universal jurisdiction over the offense, or an international criminal tribunal, such as the ICC. The choice of forum turns on questions of jurisdiction, the location of the accused, availability of witnesses and evidence, international comity, and the policies and predilections of the relevant states and

their judges and prosecutors. It should be noted that membership in an armed group is almost never a defense to conduct proscribed by an applicable law. The notable exception is for conduct falling within the phrase "combatant immunity" discussed below in the section on the armed-conflict approach.

Evaluation of the Law Enforcement Approach

The criminal justice system is premised on the belief that criminal activity can be prevented or controlled through deterrence. Deterrence takes two forms. Specific deterrence refers to the practice, usually through imprisonment, of disabling a particular actor from committing future crimes. Richard Reid will be specifically deterred from committing future acts of airborne terror while imprisoned. General deterrence refers to the "public example" effect of such punishment in deterring others from committing crimes. General deterrence presumes a rational actor will refrain from criminal behavior if the potential cost, as discounted by the probability of apprehension and conviction, is too high. To the extent that a general-deterrence approach to criminal justice relies on the "choice theory" of criminal behavior,[22] which views the decision to engage in criminal activity as a rational choice based on the perceived consequences of engaging or not engaging in such conduct, the deterrence approach tends to break down with respect to terrorists (particularly those who engage in suicidal attacks) or those who plot their crimes in locations beyond the criminal jurisdictions of states able and willing to take action. It can also be seen that the law enforcement approach is by nature reactive. In contrast to the futuristic vision depicted in the film *Minority Report*, in which those who would otherwise commit a crime in the future are arrested *ex ante*, today's criminal justice professionals generally seek to identify persons who have already committed crimes and to then gather the evidence necessary for their indictment, prosecution, and conviction.

The prosecutions that followed the 1993 World Trade Center attack and the 1994 Pacific airliner bombing plot demonstrated that it is certainly feasible to prosecute members of terrorist groups (if they live through the attack),[23] and even the number of persons being detained at the Guantánamo Bay facility would not present an insurmountable challenge to the federal criminal justice system. However, the challenges to doing so would be far greater than many are willing to admit. A law enforcement approach implicates issues regarding application of the Posse Comitatus Act,[24] which places restrictions on Department of Defense support of civilian law-enforcement activities. Gathering the evidence necessary for a conviction from overseas locations can be carried out only with the consent and cooperation of the host state. Not all states will be willing to cooperate, and some (the failed and failing states) may be unable to offer any assistance. Asserting jurisdiction over members of armed groups and securing their presences through extradition can be thwarted by the absence of an extradition treaty, invocation of a "political offense" exception in an extradition treaty, or a refusal to extradite any person to a state where the death penalty might be awarded if the person is convicted. The security measures required for judges, jurors, prosecutors, and witnesses in trials of terrorists in New York and Washington, DC, provided a preview of the personal and financial costs of such prosecutions. In many cases some evidence against the accused will be classified or will require subpoenaing witnesses from overseas and calling members of the U.S. armed forces away from duties to testify at trial. The chilling

prospect of being compelled to provide classified information to Al Qaeda members for their use at trial brings the national security implications of the criminal justice approach into sharp focus.

IV. THE ARMED-CONFLICT (WAR) APPROACH

If the law enforcement approach is characterized as one that seeks to prevent criminal conduct through specific and general deterrence, the armed-conflict approach can be seen as one that seeks to provide for the "common defense" of the nation and its people by employing the armed forces and related intelligence assets of the nation to combat states or armed groups that pose a security threat to the nation or its allies. As the Supreme Court recognized, it is "obvious and inarguable" that no governmental interest is more compelling than the security of the nation.[25] Accordingly, threats to the nation call for the employment of all of the relevant instruments of national power. In the terrorism context, the armed-conflict approach is woven into the four-prong strategy set out in the 2003 *National Strategy for Combating Terrorism*, which calls for defeating terrorists and their organizations; denying sponsorship, support, and sanctuary to terrorists; diminishing the underlying conditions that terrorists seek to exploit; and defending U.S. citizens and interests at home and abroad. The "defeat terrorist" prong in turn calls for expanding law enforcement efforts while at the same time focusing "decisive military power and specialized intelligence resources to defeat terrorist networks globally."[26]

Armed Groups and the *Jus ad Bellum*

The body of international law governing the use of armed force—commonly referred to as the *jus ad bellum*—comprises articles of the UN Charter, customary international law, and resolutions of the UN Security Council. Article 2(4) of the UN Charter forbids the use or threat of use of armed force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN. At the same time, Article 51 of the charter recognizes each state's inherent right of self-defense in cases of armed attack. The use of force in self-defense is subject to the customary-law limits of necessity, proportionality, and immediacy. Beyond the use of force in self-defense under Article 51, military measures are also lawful when authorized by the UN Security Council acting under its Chapter VII power to take action necessary to maintain or restore international peace and security.

Until recently there was some question whether the state's right of self-defense applied to armed attacks by members of a nonstate armed group. Importantly, nothing in Article 51 suggests that only armed attacks by nation-states (as opposed to armed groups) fall within the inherent right of self-defense. Indeed, the leading case on the law of anticipatory self-defense, which arose out of the destruction of the vessel *Caroline*, involved an 1837 British military expedition against nonstate actors in the United States.[27] More important, following the September 11, 2001, attacks by Al Qaeda, nearly all of the relevant international and national authorities agreed that the right of individual and collective self-defense applied.[28] Armed groups and their leaders have also been the subjects of Chapter VII measures imposed by the Security Council on several occasions. Resolution 1267, issued in 1999, identified a nonstate actor, Osama bin Laden, as a threat to international peace and security. Similarly, resolutions 1373 and 1540 deal

with threats by nonstate actors and international measures to address those threats. Surprisingly, however, a majority of the judges on the International Court of Justice still suggest that the right of self-defense does not apply to attacks by armed groups.[29] The court offered no reasoning for its conclusion and did not attempt to reconcile its conclusion with the text of Article 51, historical cases like the *Caroline*, or resolutions issued by the UN Security Council in the wake of the September 11, 2001, attacks.

Armed Groups and the Law of Armed Conflict

The law of armed conflict ("LOAC"), sometimes called the *jus in bello*, "law of war"[30] or "international humanitarian law," refers to the body of law that regulates the actual conduct of armed conflict. It is important to bear in mind that the LOAC applies regardless of whether the conflict itself is "legal" under the *jus ad bellum*. The LOAC sets out standards of humane conduct that apply to all parties engaged in an armed conflict. In this usage the term "armed conflict" is broader than "war," in that it includes not just wars in the traditional sense but also lesser levels of armed conflict. However, the term does not include "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature."[31] Assuming a conflict rises to the level of an armed conflict under the LOAC, such conflicts are divided into international armed conflicts and armed conflicts not of an international character.

An armed conflict cannot exist without two or more parties, either states or armed groups. All parties engaged in an armed conflict, including armed groups, are required to comply with the law of armed conflict.[32] A person who commits a serious violation of the LOAC may be subject to prosecution under international criminal law. At the same time, under the law of some states, including the United States,[33] violations of such laws may give rise to civil liability and a suit for compensation.

It is well established that whenever armed force is used the choice of means and methods is not unlimited. This rule is reflected in a number of LOAC instruments.[34] Any use of force is also governed by well-established principles, including the rules regarding distinction, humanity, and proportionality.[35] More specifically, under the LOAC, acts or threats of violence intended primarily to spread terror among civilians are forbidden, even if carried out for military purposes.[36]

Common Article 2 in the four Geneva Conventions (so named because it is "common" to all four conventions) defines an international armed conflict as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." In an international armed conflict between states that are parties to the Geneva Conventions, all four conventions apply. In addition, Additional Protocol I to those conventions applies among states that are party to the protocol, as well as any applicable customary international law.[37] Additional Protocol I to the Geneva Conventions expands the definition of international armed conflict[38] and the potential application of all four conventions.[39] However, the United States is not a party to Additional Protocol I, and it has rejected its more expansive definition of international armed conflicts.[40]

"Noninternational armed conflicts" refer to armed conflicts occurring within the territory of a single state. The term is limited to conflicts between a state and an armed group or between two armed groups within the state.[41] Because states sometimes direct,

control, sponsor, or support armed groups, the law of state responsibility must be considered in determining whether an armed conflict involving an armed group is an international armed conflict.[42] In most circumstances, the four Geneva Conventions do not apply to noninternational armed conflicts. However, to assure a minimal level of humane treatment, Common Article 3 of those conventions provides that[43]

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> 2. The wounded and sick shall be collected and cared for.

For those states that are party to Additional Protocol II to the Geneva Conventions, that protocol supplements the Common Article 3 protections applicable to noninternational armed conflicts.

Issues in the Armed-Conflict Approach

Like the law enforcement approach, the armed-conflict approach to combating violence by armed groups presents a number of legal and practical issues. The most contentious issues concern targeting, detention, interrogation, and prosecution. Each of those issues is in turn affected by the person's status as a combatant (lawful or unlawful) or civilian.

Classification of members of armed groups

In general, the LOAC distinguishes between combatants and civilians. Civilians are those who are not combatants.[44] The starting point for the definition of "combatant" is Article 1 of Hague Regulations IV[45] and Article 4 of the Third Geneva Convention (which addresses treatment of prisoners of war). Article 1 of Hague Regulations IV uses the classification to assign application of "laws, rights, and duty of war." Article 4 of the Third

Geneva Convention is more limited, in that it provides a definition of those persons who are entitled to prisoner-of-war status. Those persons include, inter alia,

> 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) That of being commanded by a person responsible for his subordinates;
>
> (b) That of having a fixed distinctive sign recognizable at a distance;
>
> (c) That of carrying arms openly;
>
> (d) That of conducting their operations in accordance with the laws and customs of war.
>
> 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> 4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. . . .
>
> 6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[46]

Additional Protocol I has muddied the definition of a combatant. For example, Article 43 of the protocol provides an alternative definition of "armed forces/combatants" that varies from Article 4 of the Third Geneva Convention. Article 43 provides that

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44 of the protocol further departs from the Geneva Convention approach, particularly in its controversial provisions that permit combatants to blend into the civilian population.[47] Article 44 also conflicts with Article 37, which prohibits "perfidy" by feigning civilian, noncombatant status.[48] Article 45 of the protocol creates a presumption that any person who takes part in hostilities, falls into the hands of an adverse party, and claims status as a prisoner of war is entitled to the prisoner-of-war protections under the Geneva Convention. If the claim is refuted, the person is nevertheless entitled to the protections set out in Article 75 of the protocol.

Use of force against armed groups

Assuming that the use of armed force is justified under the *jus ad bellum*, combatants and military objectives may be directly targeted.[49] Accordingly, members of armed groups and other persons meeting the legal test for "combatant" status are lawful targets for the duration of their memberships in the groups,[50] subject to the limits imposed by the applicable rules of engagement (ROE).[51] As one author puts it:

> Combatants may be targeted wherever found, armed or unarmed, awake or asleep, on a front line or a mile or a hundred miles behind the lines, "whether in the zone of hostilities, occupied territory, or elsewhere." Combatants can withdraw from hostilities only by retiring and becoming civilians, by becoming hors de combat, or by laying down their arms.[52]

What about members of armed groups and other persons who do not meet the combatant status test?[53] It will be recalled that under the LOAC civilians may not ordinarily be targeted. However, civilians lose their protection from attack if they take an active or direct part in hostilities.[54] Such persons have been variously classified as "unlawful combatants," "unprivileged belligerents," or simply civilians. For states-parties to Additional Protocol I or II, the loss of protection for civilians exists only for such time as the civilian takes a direct part in hostilities;[55] however, that qualification is not a customary-law rule and is therefore not binding on states that are not party to the protocols.

Assuming that force may be used against members of an armed group, such use of force is limited by the LOAC principles of necessity and proportionality, just as it is with lawful combatants.[56] Independently of the use of force under the *jus ad bellum*, the section on the law enforcement approach above demonstrates that the law generally recognizes a right of self-defense, to include deadly force when necessary, against any person who poses an imminent threat of death or serious bodily injury.

Use of force by armed groups

Members of armed groups and other persons who meet the test for lawful-combatant status have the right to participate directly in hostilities[57] and to target enemy combatants and military objectives, subject to the limits imposed by the law of armed conflict.[58] This so-called combatant immunity does not extend to members of armed groups and others who do not meet the legal test for combatant status.[59] Such persons may therefore be punished for crimes, such as killing an enemy combatant or destroying a military object, under circumstances where a lawful combatant would enjoy immunity (if carried out in compliance with the LOAC).[60]

Gathering intelligence on armed groups

In the post-9/11 environment, terrorism has been deemed to be the national and homeland security communities' most important mission, and intelligence has been touted as the nation's first line of defense. Without timely, effective intelligence the layered defense that facilitates preventive action is virtually impossible. The most important source of intelligence in such cases is generally the members of the armed group, and that intelligence will in nearly all cases come from human and signals intelligence methods. Both methods present a host of legal and practical problems.

Historically, intelligence goals and processes differed in several important respects between the law enforcement and armed-force approaches. The intelligence community gathers information, analyzes it, and reports its findings and assessments to those empowered to take action to prevent harm to the nation. By contrast, law enforcement agents gather evidence ex post facto to convict criminals. Both information-gathering systems are constrained by law, but the limits on intelligence gathering for national security are less onerous. For example, under U.S. law, persons associated with foreign powers and terrorist organizations are subject to more intrusive intelligence collection measures.[61] At the same time, however, it is important to bear in mind that, for a variety of reasons, information gathered through intelligence methods or by the armed forces might not be admissible in an ordinary criminal trial in the United States, thus complicating the usability of information transferred between the two domains. Although some of the impediments were addressed by the 2001 USA PATRIOT Act and 2004 Intelligence Reform and Terrorism Prevention Act,[62] others remain embedded in the constitutional and statutory protections and procedures applicable to criminal trials.

Detention and interrogation of armed-group members

The discussion of detention of armed-group members begins with the Supreme Court's conclusion that the lesser power to detain combatants falls within the authority to use force against them.[63] In fact, detention is the humanitarian alternative to the days when no quarter was given to enemy combatants. Restrictions on detaining members of an armed group turn in part on their status under the Third and Fourth Geneva Conventions when those conventions apply. In international armed conflicts, the Third Geneva Convention permits detention of enemy prisoners of war until the cessation of active hostilities.[64] Such persons are, however, entitled to the protections accorded to prisoners of war.[65] The Fourth Geneva Convention, which provides for the protection of civilians during armed conflicts and periods of occupation, provides for two forms of detention. First, persons protected under the convention may be detained for offenses committed ("criminal detainees").[66] Second, the occupying power may detain other persons for imperative reasons of security ("security detainees").[67] Regardless of the reasons for detention, civilians under the control of a party to an armed conflict must be treated humanely. This obligation includes, for example, the duty to take care of the wounded and sick and prohibitions on murder; torture and humiliating and degrading treatment; rape; extrajudicial executions; discrimination on grounds such as race, sex, or religion; and hostage taking.[68]

In international armed conflicts, restrictions on interrogation of members of an armed group also turn in part on their possible status under the Third and Fourth

Geneva Conventions. The Third Geneva Convention prohibits interrogation of enemy prisoners of war.[69] The Fourth Geneva Convention, applicable to civilians, does not foreclose questioning such persons, but it forbids the use of physical or moral coercion, in particular to obtain information from them or from third parties.[70]

Parties to a noninternational armed conflict are subject to many of the same requirements applicable in international conflicts. They are required by Common Article 3 to treat persons not taking an active part in the hostilities "humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." Common Article 3 also expressly prohibits certain acts, including, inter alia, cruel treatment, torture, outrages upon personal dignity, and, in particular, humiliating and degrading treatment.

After quoting the text of Common Article 3, including the final sentence declaring that nothing in Article 3 affects the legal status of the parties to the conflict, the Department of the Army's *Counterinsurgency* (COIN) field manual explains the status and treatment of insurgents:

> The final sentence of Common Article 3 makes clear that insurgents have no special status under international law. They are not, when captured, prisoners of war. Insurgents may be prosecuted legally as criminals for bearing arms against the government and for other offenses, so long as they are accorded the minimum protections described in Common Article 3. U.S. forces conducting COIN should remember that the insurgents are, as a legal matter, criminal suspects within the legal system of the host nation. Counterinsurgents must carefully preserve weapons, witness statements, photographs, and other evidence collected at the scene. This evidence will be used to process the insurgents into the legal system and thus hold them accountable for their crimes while still promoting the rule of law.[71]

Turning to U.S. law, a plurality of the Supreme Court in *Hamdi v. Rumsfeld* upheld the government's right to detain enemy combatants who were part of, or supporting, forces hostile to the United States or its coalition partners,[72] but the Court also held that the authorized use of military force did not authorize indefinite detention only for purposes of interrogation.[73] To guard against unjustified detentions, in 2004 the Department of Defense (DoD) implemented provisions for a Combatant Status Review Tribunal and an Administrative Review Board,[74] to determine whether each detainee is an "enemy combatant." DoD Directive 2310.01E now defines the terms "enemy combatant," "lawful enemy combatant," and "unlawful enemy combatant."[75]

Within the United States, treatment of detainees is addressed by the Detainee Treatment Act (DTA),[76] DoD directives,[77] and Army field manuals.[78] All DoD and Army directives are, of course, subject to any requirements imposed by the Constitution or applicable federal statutes, including the Detainee Treatment Act (a table adapted from the *Counterinsurgency* manual summarizing the effect of the DTA is included in the appendix to this chapter). Similarly, interrogation procedures are now governed by the DTA,[79] DoD directives,[80] and Army field manuals.[81] The Detainee Treatment Act established Army Field Manual 2-22.3 as the legal standard for interrogations.[82] No techniques other than those prescribed by the field manual are authorized by DoD personnel.

Under the new Army field manual, regardless of the precise legal statuses of those persons captured, detained, or otherwise held in custody by U.S. forces, they must receive

humane treatment until properly released. Specially trained, organized, and equipped military police units in adequately designed and resourced facilities should administer any prolonged detention. The military police personnel operating such facilities shall not be used to assist in or "set the conditions for" interrogation (as they allegedly did at the Abu Ghraib prison). There are also certain conditions under which U.S. forces may not transfer the custody of detainees to the host nation or any other foreign government. For example, U.S. forces will retain custody if they have substantial grounds to believe that the detainees would be in danger in the custody of others. Such dangers might include the risk of being subjected to torture or inhumane treatment.[83]

Prosecution of armed-group members and leaders

International criminal law refers to crimes defined as such by treaty, such as the Geneva Conventions or the Rome Statute, or customary international law. Lawful combatants are subject to prosecution under the international criminal law and the laws of their states for a variety of war-related offenses, including war crimes, crimes against humanity, and genocide. Moreover, nothing in the law of armed conflict precludes a state from prosecuting a member of the armed forces or an armed group for other crimes not arising under the law of armed conflict.[84] When it applies, the Third Geneva Convention provides that enemy prisoners of war may be prosecuted "only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."[85] Similarly, the Fourth Geneva Convention provides important safeguards applicable in any trial of a person protected under that convention.[86] In noninternational armed conflicts, Common Article 3 provides that no person may be convicted of a crime related to the hostilities except by a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable."

In an international armed conflict, where the four Geneva Conventions apply, grave breaches of those conventions constitute "war crimes."[87] States that are party to the Geneva Conventions are required to search for persons suspected of grave breaches of the conventions and to bring them before the states' own courts, extradite them to another state willing to prosecute them, or surrender them to an international criminal court with jurisdiction. A similar duty exists under the UN Convention against Torture with respect to torture committed during peacetime or armed conflict. An offense not constituting a "grave breach" of one of the Geneva Conventions may be punished under other international criminal laws, such as those prohibiting genocide, crimes against humanity, and war crimes not constituting grave breaches. For example, the Rome Statute of the International Criminal Court lists 26 war crimes applicable in international armed conflicts and 12 for noninternational armed conflicts.[88]

Under customary international law, war crimes can also be committed during noninternational armed conflicts. Such criminal prohibitions extend to willful killing, torture or inhuman treatment, the taking of hostages, the intentional direction of attacks against a civilian population, and indiscriminate attacks that fail to distinguish between civilians and civilian objects and members of armed forces and military objectives. Killing or wounding another "treacherously" by, for example, approaching enemy soldiers pretending to be a civilian, to attack them by surprise, is also a war crime.[89] Finally, it should be noted that the principle of command and superior responsibility, which, under specified

circumstances, imposes individual criminal responsibility on commanders or superiors for acts of people under their effective command and control, is also applicable to leaders of armed groups. For crimes such as war crimes, genocide, crimes against humanity, and other crimes under international law, the question of whether the alleged offender belonged to a formal armed force or an armed group is largely irrelevant.

Within the United States, the choice of forum for trials of armed-group members has been highly controversial. Options include federal courts established under Article III of the Constitution, courts-martial, or military commissions.[90] One key Civil War–era case limited the use of military commissions to cases where ordinary law enforcement has broken down and civilian courts are not functioning.[91] In a later case involving German saboteurs captured during World War II, the Supreme Court upheld their trial by military commission, even though the civil courts were open and functioning.[92] In 2001, shortly after the United States responded to the September 11 attacks, the president issued a military order directing the detention and trial of persons responsible for those attacks.[93] Under the order, enemy combatants were to be subject to trial and punishment by military commission;[94] however, the presidentially created commissions did not survive legal challenges.[95] As a result, Congress enacted the Military Commission Act of 2006 to remedy the earlier defects.[96] The legality of the new congressionally created commissions has not yet been authoritatively determined.

Evaluation of the Armed-Conflict Approach

Where and when states have lost their monopoly on the large-scale use of violence within their borders, either because of the size of the group or the weapons and other capabilities it possesses, law enforcement measures will continue to be a necessary "endgame," but they may not be sufficient to ensure the desired level of security. Under circumstances where the threat posed by armed groups is too great to rely on a reactive law enforcement approach, law enforcement efforts will likely continue to be supplemented by military forces and intelligence assets. Additionally, where the armed group posing such a threat operates beyond the borders and jurisdiction of a nation's law enforcement authorities, and law enforcement and other control measures by the host state are absent or ineffective, the nation under threat will have to look beyond enforcement to protect itself.

At the same time, we must be mindful of Alexander Hamilton's suggestion in the *Federalist Papers* that overreliance on military power can enervate civil institutions, as the people become increasingly dependent on the armed forces for their security.[97] Relying too heavily on the U.S. armed forces may also degrade their readiness for major combat operations, undermine morale, and lead to disciplinary problems as service members increasingly experience mission ambiguity, frustration, the inevitable erosion of public support,[98] and abandonment by coalition partners and the United Nations. Finally, such a choice does nothing to lessen apprehensions of U.S. hegemony abroad.

Accordingly, the "warfare" approach should be limited to those conflicts where the regularity, intensity, and scale combine to pose a threat that exceeds the authority, competency, and capability of law enforcement agencies to provide the needed level of security. These will include situations where law enforcement forces lack jurisdiction and international cooperation options, or those where the threat to the homeland exceeds the

capabilities of law enforcement forces. Military measures should be applied only to those actively participating in hostilities and must conform to the applicable *jus ad bellum* and LOAC. The fact that military measures are used against members of an armed group does not preclude those members from later being prosecuted; however, the circumstances that led to their captures may not be conducive to producing the evidence necessary for convictions.

To admit the need for the military forces to combat the threats posed by armed groups should not blind us to deficiencies in the accompanying legal regime. Most modern armed conflicts are not international, rendering many of the protections of the Geneva Conventions irrelevant except as customary law. The battle space has increasingly moved to urban centers where combatants mingle with civilians, and often wear civilian attire, rendering distinction nearly impossible. Although Common Article 3 sets a reasonable floor for humane treatment, the LOAC otherwise fails to provide adequate standards for the means and methods of conducting noninternational armed conflict. Moreover, outside states assisting a host state in operations against opposition armed groups are severely constrained in their authority to detain individuals in such noninternational armed conflicts (where the "imperative security" detainee rule in the Fourth Geneva Convention does not apply).

The conceptual, practical, and diplomatic problems with a stubborn reliance on a law-of-war approach were perceptively summarized by Benjamin Wittes:

> For all the administration's commitment to the war analogy, its ill fit has become glaring, particularly in the area of detentions. It starts with the fact that the laws of war generally presume there exists little or no doubt that a captured enemy fighter is, indeed, a captured enemy fighter. Detentions in the current conflict, by contrast, are rife with factual ambiguity and uncertainty. . . . Most fundamentally, the laws of war presuppose detentions to be a temporary incapacitation of the fighters until the warring parties make peace and arrange their repatriation. No such presumption makes any sense here. This conflict seems like a permanent state of affairs and, if it someday does end, it will end only because all members of al Qaeda are caught or killed. Releasing them then would only reignite the conflict. The administration can kid itself that it is merely applying the laws of war. But something else is going on too: the adjudication of the justice of incarcerations based on contested facts. And that is a subject that judges know something about.[99]

If the use of armed force to combat violence by armed groups is necessary but not sufficient, and the accompanying legal regime is so problematic, perhaps it is time to search for a third way.

A THIRD WAY?

The threats posed by armed groups plainly challenge our traditional paradigms for preventing and controlling large-scale violence. Conflicts with armed groups such as Al Qaeda—whose members are not found on the battlefield, who "hide in plain sight" among civilians, and who flout the principles of distinction and humanity that are so central to the law of armed conflict—do not fit nicely into the "war" construct, and yet the magnitude of the risk posed by those groups does not fit within our traditional

understanding of "crime." In short, the threat is too lethal to be treated as a mere crime and too private to be called a war.

In trying to force transnational armed groups into the existing legal regimes for armed conflict or criminal justice we run the danger of debasing both and compromising their utility for the purposes for which they were designed. The rule sets for detention and interrogation of combatants or criminal suspects are particularly susceptible to being twisted out of shape to fit the new threat.

Perhaps it is time to reject the binary thinking that fuels the present destructive debate and acknowledge that the existing regimes do not, individually or collectively, adequately address the present needs for an ordered approach to the myriad forms of contemporary large-scale violence by armed groups. Such a declaration is, perhaps, the indispensable first step in formulating a new and more flexible regime that will allow us to harness law as an ordering force in what has become an increasingly disordered world. Some reform proposals in the United States advocate that Congress establish a new hybrid federal court that would aim for the Aristotelian "golden mean" between the armed-force and criminal justice approaches.[100] Under some proposals, the government would still have the power to detain individuals who pose a significant threat to the security of the nation, as determined by a legal framework prescribed by Congress, but such detentions would be subject to review by the new federal court, thus preserving separation of powers. That same court—one established under Article III of the Constitution and presided over by judges nominated by the president, confirmed by the Senate, and enjoying the independence that comes with life tenure—would have jurisdiction over criminal trials of persons charged with the national security offenses prescribed by Congress, following trial procedures that provide due process protections for the accused yet are also consistent with the government's security concerns and the nature and location of the evidence available, along with its classification levels and sources.

But many are reluctant to take seriously any reform proposals, whether at the international or national level. They argue that there is not sufficient international will or cohesion to develop and ratify a new international regime. Perhaps they also fear that an admission that the existing regime does not cover the present situation would be an invitation to an unprincipled nation or its executive to exploit the gap, while arguing that the law does not constrain it. On the national level, the fierce and debilitating partisan divide and the dizzying sine curve of public opinion cast serious doubt on the prospects for any reform, particularly one that would establish a basis for preventive detentions and provide for criminal trials with fewer protections than those afforded to ordinary criminal defendants.

In the final analysis, program analysts and policy makers must determine which approach best provides the optimal level of security, liberty, and protections for the accused. More than a half century ago Abraham Maslow reminded us that in the hierarchy of human needs none is more fundamental than security. If security is defined as the freedom from violent acts, an effective security regime must do more than merely respond to attacks; it must also prevent them when possible—particularly those that might include unleashing a weapon of mass destruction.

NOTES

1. The "Hague Rules" refer to the conventions and regulations respecting the laws and customs of warfare adopted at peace conferences held at The Hague in 1899 and 1907.
2. "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field," 12 August 1949, *United States Treaties and Other International Agreements* 6:3114, United Nations *Treaty Series* 75:31 [hereinafter "Geneva Convention I"]; "Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea," 12 August 1949, *United States Treaties and Other International Agreements* 6:3217, *Treaties and Other International Acts Series* 3363, United Nations *Treaty Series* 75:85 [hereinafter "Geneva Convention II"]; "Geneva Convention Relative to the Treatment of Prisoners of War," 12 August 1949, *United States Treaties and Other International Agreements* 6:3316, United Nations *Treaty Series* 75:135 [hereinafter "Geneva Convention III"]; "Geneva Convention Relative to the Protection of Civilian Persons in Time of War," 12 August 1949, *United States Treaties and Other International Agreements* 6:3516, United Nations *Treaty Series* 75:287 [hereinafter "Geneva Convention IV"].
3. See Richard H. Shultz et al., "Taxonomy of Armed Groups," in *Armed Groups: A Tier-One Security Threat*, INSS Occasional Paper 57 (USAF Institute for National Security Studies, September 2004), 14–31.
4. The scale of the threat is demonstrated by armed groups like Hezbollah, which is armed with sophisticated antiship missiles and unmanned aerial vehicles and capable of launching thousands of rockets and missiles into cities in northern Israel.
5. "Customary international law" refers to international rules derived from a general and consistent practice of states followed out of a sense of legal right or obligation.
6. "Reid: 'I Am at War with Your Country,'" *CNN.com*, 31 January 2003, www.cnn.com/2003/LAW/01/31/reid.transcript/.
7. "Rome Statute of the International Criminal Court," 17 July 1998, UN Doc. A/CONF.183/9, *International Legal Materials* 37 (1998): 999 [hereinafter "Rome Statute"]. The statute entered into force on 1 July 2002. The United States is not a party.
8. U.S. Constitution, art. 1, secs. 9 and 10. The Constitution also prohibits punishment by a "bill of attainder"—that is, an act of the legislature declaring a person or group of persons guilty of some crime and punishing the individual or group without benefit of a trial. Ibid.
9. *Tennessee v. Garner,* 471 U.S. 1, 7–12 (1985) (holding that the use of deadly force to stop a fleeing suspect is only reasonable if the officer has probable cause to believe that the suspect poses a significant threat of death or physical injury to the officer or others). See also *Scott v. Harris,* 127 S. Ct. 1769 (2007) (explaining that *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." The Court there simply applied the Fourth Amendment's "reasonableness" test to the use of a particular type of force in a particular situation.).
10. *Graham v. Connor,* 490 U.S. 386, 388 (1989).
11. Ibid., 397.
12. *Saucier v. Katz,* 533 U.S. 194, 205 (2001).
13. Deadly force is defined as any force that is likely to cause death or serious physical injury. See *Model Penal Code* (American Law Institute, 1985), sec. 3.11(2). The Model Penal Code (MPC) serves as a template for defining the elements of crimes and defenses for many jurisdictions and sets out several defenses to what would otherwise be crimes involving the use of force. The MPC is not legally binding.
14. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, UN Doc. E/CN.15/1996/16/Add.2 [hereinafter Basic Principles].
15. *UN Code of Conduct for Law Enforcement Officials,* adopted by the UN General Assembly Resolution 34/169, 17 December 1997, UN Doc. A/RES/34/169 (1997).

16. *Basic Principles,* para. 2. The European Court of Human Rights held that Turkey was responsible under human rights law for failing to equip its security forces with nonlethal-force equipment when they responded to a large internal civil disturbance, leaving the forces no alternative to the use of deadly force. *Güleç v. Turkey*, 1998 Eur. Ct. H.R. 21593/93, paras. 71, 73, 83.
17. *United States v. Verdugo-Urquidez,* 494 U.S. 259, 274–75 (1990). See also *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001) (confirming it is "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").
18. *United States v. Peterson,* 812 F.2d 486, 491 (9th Cir. 1987) (holding that a foreign search is reasonable if it conforms to the requirements of foreign law). But see *United States v. Bin Laden,* 132 F. Supp.2d 168, 186–87 (S.D.N.Y. 2001) (holding that Fifth Amendment protections relating to self-incrimination apply to the use, in a U.S. court, of statement obtained in a foreign custodial interrogation by U.S. government agents because the Fifth Amendment "violation" occurs when the statement is used at trial, not when it was obtained).
19. *United States v. Toscanino,* 500 F.2d 267, 274–75 (2d Cir. 1974). In *Ker v. Illinois,* 119 U.S. 436 (1886), however, the Court held that a defendant who was forcibly abducted in Peru for trial in the United States was not entitled to have the charges dismissed on grounds that his right to due process was violated.
20. "International Covenant on Civil and Political Rights," 23 March 1976, United Nations *Treaty Series* 999:171, *International Legal Materials* 6 (1992): 368. Whether the ICCPR applies in time of armed conflict or outside the territory of the state-party is not settled.
21. *USA PATRIOT Act,* Public Law 107-56, *United States Statutes at Large* 115 (26 October 2001): 272–403, sec. 412(a).
22. James Q. Wilson and Richard J. Herrnstein, *Crime and Human Nature*, chaps. 2 and 19 (New York: Simon and Schuster, 1986).
23. See, e.g., *United States v. Yousef,* 327 F.3d 56 (2d Cir. 2003); *United States v. Bin Laden,* 186–87; *United States v. Rahman,* 189 F.3d 88 (2d Cir. 1999); *United States v. Yunis,* 924 F.2d 1086, 1092 (D.C. Cir. 1991).
24. *Posse Comitatus Act, U.S. Code* 18, sec. 1385. See also *U.S. Code* 10, sec. 375; Department of Defense, *DoD Cooperation with Civilian Law Enforcement Officials,* DoD Directive 5525.5 (15 January 1986).
25. *Haig v. Agee,* 453 U.S. 280, 307 (1981) (citations omitted).
26. *National Strategy for Combating Terrorism* (Washington, DC: Executive Office of the President, February 2003), 17, available at www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf. A new version was released in 2006.
27. The *Caroline* (exchange of diplomatic notes between Great Britain and the United States, 1842), in *A Digest of International Law,* by John Bassett Moore, vol. 2 (Washington, DC: Government Printing Office, 1906), 409.
28. See, e.g., UN Security Council resolutions 1368 and 1373. Member states of the NATO and OAS alliances also invoked the relevant articles in those collective self-defense treaties. Similarly, in its widely publicized decision on targeted killings of terrorists, the Israeli Supreme Court ruled that "the law that applies to the armed conflict between Israel and the terrorist organizations in the area is the international law dealing with armed conflicts." Public Committee against Torture in *Israel v. Government of Israel,* Supreme Court Sitting as the High Court of Justice, 11 December 2005, para. 21 [hereinafter "Committee against Torture"].
29. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, Advisory Opinion, 2004 I.C.J. Rep. 136, para. 139 (9 July) [hereinafter "Israeli Security Barrier opinion"] (concluding that the UN Charter provisions on self-defense had "no relevance" to Israel's construction of a security barrier because Israel did "not claim that the attacks against it are imputable to a foreign State").
30. The U.S. Department of Defense defines the "law of war" as

    > That part of international law that regulates the conduct of armed hostilities. It is often called the "law of armed conflict." The law of war encompasses all international law for the conduct of hostilities binding

> on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

Department of Defense, *The Law of War Program,* DoD Directive 2311.01E (9 May 2006).

31. See "Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)," 8 June 1977, United Nations *Treaty Series* 1125: 609, *International Legal Materials* 16 (1977): 1442 [hereinafter "Additional Protocol II"], art. 1.2. It is the policy of the United States to apply the LOAC "during all armed conflicts, however such conflicts are characterized, and in all other military operations." DoD Directive 2311.01E, para. 4.1.
32. See Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, Program on Humanitarian Policy and Conflict Research Occasional Paper Series 6 (Harvard University, Winter 2006).
33. See *Alien Tort Statute, U.S. Code* 28, sec. 1350; *Torture Victim Protection Act, United States Code Annotated* 28, sec. 1350n.
34. See, e.g., "Convention IV Respecting the Laws and Customs of War on Land, with Annex of Regulations," 18 October 1907, *United States Statutes at Large* 36:2277, *Treaty Series* 539 [hereinafter "Hague Regulations IV"], art. 22; and "Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I)," 8 June 1977, United Nations *Treaty Series* 1125:3, *International Legal Materials* 16 (1977): 1391 [hereinafter "Additional Protocol I"], art. 35.1.
35. Although there are no explicit provisions for proportionality directly applicable to noninternational armed conflicts, the obligation is considered to be inherent in the principle of humanity that is applicable to these conflicts. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), 1:48–49.
36. See Additional Protocol II, art. 13.2, which is generally accepted as reflective of customary international law applicable in a noninternational armed conflict. See also ibid., art. 4.2(d), which prohibits acts of terrorism "at any time and in any place whatsoever" against "persons who do not take a direct part or have ceased to take a direct part in hostilities."
37. Additional Protocol I. Because some parts of Additional Protocol I represent customary international law, those parts are binding even on states not party to the protocol, except where a state has persistently objected to the rule. See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*.
38. See Additional Protocol I, art. 1.4, which extends beyond Common Article 2 to include

> armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

39. See ibid, art. 3(a), which would extend application of the four Geneva Conventions to conflicts falling outside of Common Article 2, but within Article 1(4) of the protocol.
40. See Michael J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention," *American University Journal of International Law and Policy* 2 (1987): 424–27. Editorials in the *New York Times* and *Washington Post* strongly condemned Additional Protocol I and its provisions on "national liberation movements" as a "shield for terrorists." See "Denied: A Shield for Terrorists," *New York Times*, 17 February 1987, A22; "Hijacking the Geneva Conventions," *Washington Post,* 18 February 1987, A18.
41. Noninternational armed conflicts do not include conflicts in which two or more states are engaged against each other. Nor do they encompass conflicts extending to the territories of two or more states. When a foreign state extends its military support to the government of a state within which a noninternational armed conflict is taking place (as the NATO members are presently doing in Afghanistan), the conflict remains noninternational in character. Conversely, should a foreign state extend military support to an armed group acting against the government, the conflict will become international in character. See Yoram Dinstein et al.,

eds., *The Manual on the Law of Non-international Armed Conflict* (International Institute of Humanitarian Law, March 2006).

42. If the conduct of the armed group is attributable to the state, the conflict may be deemed an international armed conflict. For example, if the conduct of Hezbollah during the 2006 conflict with Israel is attributable to the state of Lebanon, that conflict would be deemed international. The Israeli Supreme Court's decision in the Committee against Torture case suggests that the Hezbollah conflict was an international one even if not attributable to the state of Lebanon.
43. The International Court of Justice has opined that Common Article 3 represents customary international law in both international and noninternational armed conflict. Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States)*, Merits, 1986 I.C.J. Rep. 4 (June 27), paras. 118–20.
44. See Geneva Convention IV, art. 4. See also Geneva Conventions I and II, art. 13; Additional Protocol I, art. 50. Under the protocol definition, if there is any doubt whether a person is a civilian (for purposes of applying protected-person status) the person will be considered to be a civilian.
45. Hague Regulations IV, annex 1, art. 1.
46. See Geneva Convention III, art. 4. Article 5 then goes on to say:

    > The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
    >
    > Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

47. See Additional Protocol I, art. 44.3. Some criticize Article 44 for blurring the distinction between combatants and civilians, diminishing legal protections for the latter.
48. Ibid., art. 37.1(c).
49. The law of armed conflict, broadly defined, may limit the means used. For example, there may be restrictions on the use of nonlethal weapons and riot control agents.
50. See Additional Protocol I, art. 43.2; Additional Protocol II, arts. 1, 13.
51. See Chairman, Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Armed Forces,* Chairman, Joint Chiefs of Staff Instruction 3121.01B (13 June 2005).
52. Gary Solis, "Targeted Killings and the Law of Armed Conflict," *Naval War College Review* 60*,* no. 127 (Spring 2007): 130 (quoting Army Field Manual 27-10, para. 31). It should be added that this is true only while the armed conflict is ongoing.
53. Kenneth Watkin, "Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict," in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts,* ed. David Wippman and Matthew Evangelista (Ardsley, NY: Transnational, 2005).
54. See Geneva Convention IV, arts. 3, 5; Additional Protocol I, art. 51.3; Additional Protocol II, art. 13(3). The phrases "active participation" and "direct participation" in hostilities are often used interchangeably. Common Article 3 uses the word "active," while Article 13.3 of Additional Protocol II uses the word "direct." There is no substantive distinction between the two terms. Each requires "a sufficient causal relationship between the active participation and its immediate consequences." See Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977* (Geneva: Martinus Nijhoff, 1987), para. 4787.
55. Additional Protocol I, art. 51.3; Additional Protocol II, art. 13.3.
56. See Committee against Torture, para. 60 (holding that the proportionality standard applies to "targeted killing" of civilian terrorists taking a direct part in hostilities).
57. See Additional Protocol I, art. 43.2.

58. UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 4.1 ("Combatants have the right to attack and to resist the enemy by all the methods not forbidden by the law of armed conflict.").
59. Combatant immunity is derived from articles 87 and 99 of the Third Geneva Convention.
60. See International Committee of the Red Cross, *Model Manual on the Law of Armed Conflict for Armed Forces* (1999), 34, para. 610. The Israeli Supreme Court put it this way:

    > That is the law regarding unlawful combatants. As long as he preserves his status as a civilian—that is, as long as he does not become part of the army—but takes part in combat, he ceases to enjoy the protection granted to the civilian, and is subject to the risks of attack just like a combatant, without enjoying the rights of a combatant as a prisoner of war. Indeed, terrorists who take part in hostilities are not entitled to the protection granted to civilians. True, terrorists participating in hostilities do not cease to be civilians, but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack. Nor do they enjoy the rights of combatants, e.g. the status of prisoners of war.

    Committee against Torture, para. 31.
61. See, e.g., *Foreign Intelligence Surveillance Act, U.S. Code* 50, secs. 1801–1802 (establishing electronic surveillance authority for "foreign powers" and agents of foreign powers). FISA was amended by the 2001 USA PATRIOT Act. See also Executive Order no. 12,333, *Code of Federal Regulations* title 3 (1981), 200 (reprinted in *United States Code Annotated* 50, sec. 401n), paras. 2.3 and 3.4(i) (restricting intelligence collection activities involving "United States persons").
62. *Intelligence Reform and Terrorism Prevention Act of 2004,* sec. 1016, Public Law 108-458, *United States Statutes at Large* 118 (2004): 3638, codified at *U.S. Code* 6, sec. 485.
63. *Ex parte Quirin,* 317 U.S. 1, 28 (1942).
64. Geneva Convention III, art. 118. See also *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004) (holding that persons legitimately determined to be Taliban combatants could be detained so long as active hostilities continue). But see *Al Marri v. Wright,* 487 F.3d 160 (4th Cir. 2007) (holding that because Al Qaeda is not a state, Al Qaeda members like al-Marri must be treated as civilians, subject to prosecution, but not as enemy combatants, subject to detention until cessation of active hostilities. The circuit court reasoned that the Supreme Court concluded that the conflict in Afghanistan is an internal armed conflict, and the International Committee of the Red Cross has concluded that the legal classification of "enemy combatant" does not apply in such conflicts). The circuit court's holding plainly steers the United States away from the armed-conflict approach and toward the law enforcement approach. See generally Peter Berkowitz, ed., *Terrorism, the Laws of War, and the Constitution: Debating the Enemy Combatant Cases* (Stanford, CA: Hoover Institute Press, 2005).
65. See Geneva Convention III, art. 4. See also Additional Protocol I, art. 44.1; Hague Regulations IV, annex 1, arts. 4–20.
66. Geneva Convention IV, art. 76. Article 77 makes it clear that such persons must be turned over at the close of occupation to authorities of the liberated state.
67. Ibid., art. 78.
68. Additional Protocol II, art. 5. Common Article 3 to the Geneva Conventions also requires the humane treatment of those who are detained, although it does not set forth specific requirements. See also *Hamdan v. Rumsfeld,* 548 U.S.__, 126 S. Ct. 2479 (2006).
69. Geneva Convention III, art. 17.
70. Geneva Convention IV, art. 31.
71. U.S. Department of the Army, *Counterinsurgency,* Field Manual 3-24/U.S. Marine Corps Warfighting Publication 3-33.5 (December 2006) [hereinafter "Counterinsurgency Manual"], D-4.
72. *Hamdi v. Rumsfeld,* 518.

73. Ibid., 521. The Court left open the question whether detention was authorized to prevent the detainee from returning to the battlefield.
74. The CSRT procedures have been criticized on the grounds that they do not provide the same kind of protections that would be accorded to a person suspected of a crime, but nearly all agree that they meet or exceed the requirements established by Article 5 of the Third Geneva Convention.
75. Department of Defense, *The Department of Defense Detainee Program,* DoD Directive 2310.01E (5 September 2006). The Military Commissions Act of 2006 provides statutory definitions of each term.
76. *Detainee Treatment Act,* Public Law 109-148, *United States Statutes at Large* 119 (2005): 2739–40, codified at *U.S. Code* chap. 10, 47A. Section 1003 of the act prohibits cruel, inhuman, or degrading treatment or punishment (as defined in the act) of detainees.
77. DoD Directive 2310.01E.
78. Counterinsurgency Manual, D-4 to D-6; U.S. Department of the Army, *The Law of Land Warfare,* Field Manual 27-10 (1956); U.S. Department of the Army, *Internment and Resettlement Operations,* FM 3-19.40 (1 August 2001); U.S. Department of the Army, *Police Intelligence Operations,* FM 3-19.50 (21 July 2006).
79. *Detainee Treatment Act,* secs. 1002–1003.
80. U.S. Department of Defense, *DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning,* DoD Directive 3115.09 (3 November 2005).
81. U.S. Department of the Army, *Human Intelligence Collector Operations,* Field Manual 2-22.3 [formerly FM 34-52] (September 2006).
82. *Detainee Treatment Act,* sec. 1002.
83. See also DoD Directive 2310.01E.
84. See, e.g., *United States v. Noriega,* 808 F. Supp. 791 (S.D. Fl. 1992).
85. Geneva Convention III, arts. 99–108.
86. Geneva Convention IV, art. 71.
87. "Grave breaches" are defined in Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147.
88. Rome Statute, art. 8. The classification of the armed conflict is critical. Note, for example, that intentionally launching a disproportionate attack is only a war crime in an international armed conflict. Note also that the war crimes provision of the Rome Statute for noninternational armed conflicts only applies to "protracted" armed conflicts. Ibid., art. 8(2)(f).
89. Ibid., art. 8(2)(e)(ix).
90. See Louis Fisher, *Military Tribunals and Presidential Power* (Lawrence, KS: University Press of Kansas, 2005). Although military commissions were widely used following World War II, some allies, including the United Kingdom, now consider them politically unacceptable.
91. *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866).
92. *Ex parte Quirin.*
93. President, Military Order, "Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism," *Federal Register* 66 (13 November 2001): 57,833. Section 3 of the order addressed detentions and Section 4 addressed trials by military commission. See also *Code of Federal Regulations,* title 32, pts. 9–11; *Ex parte Quirin* (upholding the trial of Nazi saboteurs by military commission and distinguishing *Ex parte Milligan).*
94. *Military Commissions Act of 2006 (MCA),* Public Law 109-366, *United States Statutes at Large* 120 (17 October 2006): 2600, enacted to provide the legislative authority for military commissions the Supreme Court found lacking in *Hamdan v. Rumsfeld* (2006).
95. See *Hamdan v. Rumsfeld* (2006).

96. On 13 December 2006, Salim Ahmed Hamdan challenged the MCA's denial of habeas corpus to "alien unlawful enemy combatants" in the U.S. District Court for the District of Columbia. Judge James Robertson, who ruled in favor of Hamdan in the *Hamdan v. Rumsfeld* 2004 case, ruled against him in this case, writing: "The Constitution does not provide alien enemy combatants detained at Guantanamo Bay with the constitutional right to file a petition for habeas corpus in our civilian courts, and thus Congress may regulate those combatants' access to the courts." But see *Al Marri v. Wright* (holding that, in applying the authorized use of military force, mere affiliation with Al Qaeda does not make a person an "enemy combatant" who can be detained indefinitely).
97. Alexander Hamilton, "The Consequences of Hostilities between the States" [Federalist 8], *New York Packet,* 20 November 1787, available at www.constitution.org/fed/feder08.htm. A contrary argument can be made that the balance between liberty and security is easier to preserve with a military approach to violent armed groups. By relying on the armed forces to prevent and contain the violence, adjustments to the law enforcement system are obviated, reducing the risk of a runaway police state or an erosion of rights for the ordinary criminal defendant.
98. Throughout U.S. history, the "remarkable trinity" described by Clausewitz as the military, government, and public, has suffered from any long-term reliance on the military, as the media and other antiwar influences highlight failures and obscure successes.
99. Benjamin Wittes, "Terrorism, the Military and the Courts: What Kind of Process is Due Detainees?" *Policy Review,* June/July 2007.
100. See, e.g., Jack L. Goldsmith and Neal Katyal, "The Terrorists' Court," *New York Times,* 11 July 2007.