

Targeted Killing and Just War:  
Reconciling Kill-Capture Missions, International Law, and the Combatant Civilian  
Framework

Louis Guard<sup>1</sup>  
University of Pennsylvania Law School

*“Part of our challenge is reconciling these two seemingly irreconcilable truths -- that war is sometimes necessary,  
and war at some level is an expression of human folly.”*

- *President Barack Obama  
Nobel Prize Lecture at Oslo*

## Introduction

Imagine that a single terrorist mastermind had planned and executed one of the largest and most deadly terrorist acts in history on United States soil. Imagine that the mastermind was still on the loose, actively planning more terrorist attacks and managing an extensive network of terrorist cells across several sovereign nations. He hides far from any known battlefield. He does not wear a uniform. He does not carry a weapon openly. He is probably surrounded by women, children and others who may neither support nor even know his cause. Technological advances help the terrorist mastermind spread his message and perpetrate acts of terror and similar advances aid the specialized team charged with hunting the terrorist. If the United States were to target and kill the terrorist mastermind would it comport with principles of international law and traditional notions of just war theory?

---

<sup>1</sup> Visiting student, University of Pennsylvania Law School, 2011-2012. J.D. expected in May 2012, Cornell Law School. The author wishes to thank Professor Claire Finkelstein for her valuable input and guidance throughout the course “Law and Morality of War,” as well as Professors Kevin Govern and Jens Ohlin who provided insight as guest lecturers in the course.

Consider another hypothetical. You are the President of the United States and your national security personnel report that they have discovered the location of a known terrorist who poses some uncertain but approximately high level of threat to the United States. He is a member of al Qaeda, but he is not known to be among their most actively violent members. He has served in various roles supporting communications, recruiting and logistical functions of the organization. Your national security personnel present three options. First, you could bomb the location where the suspected terrorist is thought to be hiding. Second, you could dispatch a small elite force to kill the terrorist directly and confirm the terrorist's death. Finally, you could instruct the strike force to capture the terrorist. Myriad policy considerations and variations of the facts would undoubtedly play a role in your decision-making, but placing these considerations and factual possibilities aside, what option is a legitimate exercise of your authority as commander in chief?

Under facts loosely analogous to all of the scenarios just described the United States has chosen the option of targeted killing.<sup>2</sup> Adopted by the United States primarily in the wake of the terrorist attacks of September 11,<sup>3</sup> targeted killing has arguably become a favored tool for fighting al Qaeda and their supporters under the administration of Barack Obama.<sup>4</sup> According to

---

<sup>2</sup> See Nicholas Schmidle, *Getting Bin Laden*, The New Yorker, August 8, 2011 (illustrating the U.S. response under the first scenario); Karen DeYoung & Joby Warrick, *Under Obama, More Targeted Killings than Captures in Counterterrorism Efforts*, Wash. Post (February 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/13/AR2010021303748.html> (illustrating the U.S. response in the second scenario). See also Charlie Savage, *Secret Memo Made U.S. Case to Kill A Citizen*, N.Y. Times, (October 8, 2011), available at [http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?\\_r=2](http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?_r=2).

<sup>3</sup> See Jonathan Masters, "Backgrounder: Targeted Killings," The Council on Foreign Relations, November 7, 2011, available at <http://www.cfr.org/intelligence/targeted-killings/p9627>. But see Kevin Govern, "Operation Neptune Spear: Was Killing Bin Laden a Legitimate Military Objective?," forthcoming in *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford 2011)(Finkelstein, Ohlin, Altman eds.)(discussing the use of targeted killings in World War II).

<sup>4</sup> See, e.g., "The Year of The Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2011," The New America Foundation, available at <http://counterterrorism.newamerica.net/drones>; Mark Mazzetti & Soud Mekhennet, *Drones Kill Westerners in Pakistan*, N.Y. Times, Oct. 4, 2010, at A13; Sean D. Naylor, "Chinook Crash

Philip Alston, the United Nations' Special Rapporteur on extrajudicial, summary, or arbitrary executions, targeted killing specifically entails the "intentional, premeditated and deliberate use of lethal force, by States or their agents acting under [color] of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator."<sup>5</sup>

The Obama Administration asserts that the United States' use of targeted killing comports with basic principles of international law.<sup>6</sup> One high level official has stated that "this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles."<sup>7</sup> John Brennan, Assistant to the President for Homeland Security and Counterterrorism, recently stated that the United States uses "every lawful tool and authority available"<sup>8</sup> in the war against al Qaeda and that the core values of the United States include "adhering to the rule of law,"<sup>9</sup> whether the military action taken is clandestine or in plain sight.

Despite assurances from various sources that the practice of targeted killing is lawful, the specific laws that apply or that should apply to targeted killing are subject to dispute in their

---

Highlights Rise in Special Ops Raids," Army Times, August 21, 2011, available at

<http://www.armytimes.com/news/2011/08/army-chinook-crash-highlights-rise-in-spec-ops-raids-082111w/>.

<sup>5</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, para. 1, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston].

<sup>6</sup> John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, "Strengthening Our Security by Adhering to Our Values and Laws," Remarks at Program on Law and Security at Harvard Law School (Sep. 16, 2011)(transcript available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>). See also Harold Hongju Koh, Legal Advisor, U.S. State Dept., Speech at Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>).

<sup>7</sup> Koh, *Id.*

<sup>8</sup> Brennan, *Id.*

<sup>9</sup> *Id.* (defining the conflict by stating "[a]s the President has said many times, we are at war with al-Qa'ida....[A]l-Qa'ida attacked our nation and killed nearly 3,000 innocent people...[and]...al-Qa'ida seeks to attack us again. Our ongoing armed conflict with al-Qa'ida stems from our right—recognized under international law—to self defense").

application.<sup>10</sup> In turn the determination of the legality of targeted killing in its various forms warrants further consideration<sup>11</sup> and the significant moral questions raised by targeted killing given traditional principles of just war theory constitute yet another inescapable layer of the analysis.<sup>12</sup> Indeed, ignoring moral considerations in wrote application of the law of war to terrorist fighters can result in severe consequences.<sup>13</sup> Kill-capture missions—a sub-species of targeted killings<sup>14</sup> and the method employed in the raid resulting in the death of Osama bin Laden<sup>15</sup>—serve as an apt lens through which to examine these interwoven issues given the prominent role kill-capture missions have taken in the war against al Qaeda.

Kill-capture missions, defined succinctly, are organized raids conducted by special operations personnel for the purpose of strategically capturing or killing certain enemy targets, gathering information and disrupting enemy networks and capabilities.<sup>16</sup> According to unofficial sources, targets are pre-designated as a target for either capture or killing.<sup>17</sup> But, “whenever it is possible to capture a suspected terrorist, it is the unqualified preference of the [Obama]

---

<sup>10</sup> See generally, David Kretzmer, *Targeted Killing of Suspected Terrorists: Extrajudicial Executions or Legitimate Means of Defense*, 16 Eur. J. Int’l L. 171 (2005); Gabriella Blum and Philip Heymann, *Law and Policy of Targeted Killing*, 1 Har. Nat. Security J. 145 (2010)(discussing the potential applicability of domestic law as well as the law of war to targeted killing); Andrew Orr, *Unmanned, Unprecedented and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 Cornell Int’l L.J. [forthcoming] (2011).

<sup>11</sup> See Jens David Ohlin, “Targeting Co-Belligerents,” forthcoming in *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford 2011)(Finkelstein, Ohlin, Altman eds.) (“At a conceptual level, international law is deeply conflicted about how to handle targeted killings....”); Govern, *supra* note 2, (advancing that targeted killing raises “unique moral and legal dilemmas that do not admit of resolution according to the traditional principles of war”).

<sup>12</sup> See generally, *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford 2011)(Finkelstein, Ohlin, Altman eds.)[forthcoming].

<sup>13</sup> See, e.g., Memorandum from Jay S. Bybee to Attorney General Alberto Gonzales, Aug. 1, 2002. [hereinafter “Bybee Memo”]. See also, *The Ghosts of Abu Graib*, HBO Documentary.

<sup>14</sup> Masters, *supra* note 2.

<sup>15</sup> Schmidle, *supra* note 1; Naylor, *supra* note 3.

<sup>16</sup> Joshua Partlow, *Karzai Wants U.S. To Reduce Military Operations in Afghanistan*, Wash. Post (November 14, 2010), <http://www.washingtonpost.com/wpdyn/content/article/2010/11/13/AR2010111304001.html>.

<sup>17</sup> Kevin Govern, Professor and former United States Judge Advocate General in remarks at University of Pennsylvania School of Law, Law and Morality of War Seminar, Nov. 30, 2011.

Administration to take custody of that individual”<sup>18</sup>—killing is not the administration’s asserted preference. All told, the United States has operated “more than a couple thousand of these night operations over the last year”<sup>19</sup> according to one U.S. General commanding in Afghanistan. Kill-capture raids have garnered intense scrutiny but given their arguable success have weathered calls for the practice to end.<sup>20</sup> Given the logistical complexities of the war against al Qaeda and affiliated groups<sup>21</sup> kill-capture missions have proven effective and the United States shows no signs of stopping the practice.<sup>22</sup> The Obama Administration’s remarks on this subject are telling of the future necessity of kill-capture missions: “[g]oing forward, we will be mindful that if our nation is threatened, our best offense won’t always be deploying large armies abroad but delivering targeted, surgical pressure to the groups that threaten us.”<sup>23</sup> This approach to unconventional new enemies and threats, as President Obama himself has stated, “require[s] us to think in new ways about the notions of just war and the imperatives of a just peace.”<sup>24</sup>

This paper addresses how kill-capture missions can be reconciled with the underlying principles of just war theory. In particular, this paper grapples with the traditional combatant-

---

<sup>18</sup> Brennan, *supra* note 5 (“This is how our soldiers and counterterrorism professionals have been trained. It is reflected in our rules of engagement. And it is the clear and unambiguous policy of this Administration.”).

<sup>19</sup> Naylor, *supra* note 3, quoting General John Allen, Commander of the International Security Assistance Force in Afghanistan.

<sup>20</sup> Partlow, *supra* note 15.

<sup>21</sup> Pertinent to this paper, the Justice Department has stopped using the term “enemy combatant” to describe these fighters and as a basis for their detention of suspected terrorists upon capture. *See* <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>.

<sup>22</sup> “Report: Current Pace of Night Raids in Afghanistan Not Sustainable,” PBS, *available at* <http://www.pbs.org/wgbh/pages/frontline/afghanistan-pakistan/kill-capture/report-current-pace-of-night-raids-in-afghanistan-not-sustainable/>.

<sup>23</sup> Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, “On Ensuring al-Qa’ida’s Demise,” Paul H. Nitze School of Advanced International Studies, Washington D.C., June 29, 2011 *available at* <http://www.whitehouse.gov/the-press-office/2011/06/29/remarks-john-o-brennan-assistant-president-homeland-security-and-counter->

<sup>24</sup> Barack Obama, “A Just and Lasting Peace,” Nobel Prize Lecture at Oslo, December 10, 2009 *available at* [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2009/obama-lecture\\_en.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html).

civilian distinction in just war theory. Given the moral and legal nuances of kill-capture missions in scenarios like those sketched at the outset<sup>25</sup> this paper argues that the traditional combatant-civilian framework is not conceptually suitable for war against belligerents like al Qaeda. Where traditional just war theory has embodied a clear distinction between its two foundational categories—combatant and civilian—the military practices essential to fight terrorism in its various forms do not fit neatly into the just war tradition’s established moral and legal framework. Nor do the activities of terrorist organizations. The new framework advanced in this paper therefore calls for a third category for fighters such as al Qaeda, called alternative belligerents, that evolves out of traditional just war distinctions and their rationales.

Rather than considering combatants and civilians as exclusive categories this paper argues for an approach wherein groups of fighters such as al Qaeda overlay aspects of moral and legal ground exclusive to both combatants and civilians. This new framework, the argument goes, is useful for navigating the legal and moral sticking points of kill-capture missions and targeted killing more broadly. This paper will apply the framework to consider the question of when, if ever, combatants should capture rather than kill a target in scenarios like those at the outset of this paper. Such a question, if we see it as worthy of general moral consideration beyond rote application of select black letter law of war principles, hinges on the just war distinction between combatant and civilian as essentially a threshold matter. The framework advanced in this paper—the traditional framework of distinct combatants and civilians garnished

---

<sup>25</sup> The phrase “War on Terror” is no longer used by the U.S. Government. See Al Kamen, *The End of the Global War on Terror*, Wash. Post, Mar. 24, 2009 available at [http://voices.washingtonpost.com/44/2009/03/23/the\\_end\\_of\\_the\\_global\\_war\\_on\\_t.html](http://voices.washingtonpost.com/44/2009/03/23/the_end_of_the_global_war_on_t.html). However, the term could be usefully employed to convey the broader colloquial context in which kill-capture missions are discussed in this paper.

with a separate conceptual category for alternative belligerents typified by groups of fighters like al Qaeda—will aid in answering such questions.

Part I of this paper outlines the traditional just war combatant-civilian framework and the basic legal doctrines currently thought to apply to targeted killing. Part II advances a new conception of the traditional combatant-civilian framework that incorporates the third category of alternative belligerents by showing how groups such as al Qaeda are neither combatants nor non-combatants in the just war sense and thus compel the creation of a third conceptual category. Part III of the paper applies the new framework to the kill-capture mission scenario and its core tension between the duty to capture or kill while addressing concerns and weaknesses of the new framework before concluding.

## I. Traditional Combatants in Just War Theory

This section provides the brief but necessary legal and theoretical background for supporting the claim that a third category beyond the traditional combatant-civilian distinction is useful. The section outlines the just war principles from which a new category of combatant would derive and highlights the “black letter”<sup>26</sup> legal principles in international law to which normative claims advanced in this paper could, and likely would, apply in practice.<sup>27</sup>

### a. *Just War Theory: A Hard Line Between Combatants and Civilians*

---

<sup>26</sup> See Kenneth Watkin, *Opportunity Lost: Organized Armed Groups And the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. Int’l L. & Pol. 641, 664-5 (2010)(“One of the most significant challenges in attempting to explain who can be targeted in armed conflict is the state of the existing “black letter” law and the degree of clarity it brings to the contemporary debate.”).

<sup>27</sup> See Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity*, 42 N.Y.U. J. Int’l L. & Pol. 831, 833 (2010)(Asserting that “[k]eeping the balance” of the goals of International Humanitarian Law is a delicate task in conflicts “marked by a continued blurring of the traditional distinctions and categories upon which the normative edifice of IHL has been built...”).

In traditional just war theory combatants “as a class are set apart from the world of peaceful activity”<sup>28</sup> and are strictly separate from civilians. This view is codified in the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) which asserts that “[t]he civilian population and individual civilians shall enjoy general protections against dangers arising from military operations...[and]...shall not be the object of attack.”<sup>29</sup> Together the provisions of Protocol I “adopt a bright line interpretation that establishes two privileged classes: combatants and civilians.”<sup>30</sup>

*i. Just War Foundations of Combatant and Civilian Status*

Just war theory sees non-combatants, or civilians, as immune from intentional direct harm<sup>31</sup> in the form of killing or otherwise. In order to intentionally kill, there must be a justification.<sup>32</sup> It is thus critical to understand the moral line between combatants and non-combatants in the just war tradition. In traditional just war theory fighting on behalf of a state as opposed to as part of a group unattached to a state, “was one of the defining principles of...combatant status.”<sup>33</sup> The concept of fighting on behalf of a state is accompanied in the just

---

<sup>28</sup> Michael Walzer, *Just and Unjust Wars* 144 (4th ed. 2006).

<sup>29</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, 8 June 1977 available at <http://www.icrc.org/ihl.nsf/WebART/470-750065?OpenDocument>. [hereinafter Protocol I].

<sup>30</sup> Watkin, *supra* note 25 at 665, (citing specifically Protocol I art. 50(1) and acknowledging that “adopting this interpretation at face value creates a number of significant challenges”); *see also* website for International Committee of the Red Cross on “Clarifying the Notion of Direct Participation in Hostilities” available at <http://www.icrc.org/eng/resources/documents/feature/direct-participation-ihl-feature-020609.htm> (“International humanitarian law hinges on the principle of the distinction between combatants, whose function is to conduct hostilities during armed conflict, and civilians, who are presumed not to be directly participating in the hostilities and, therefore, entitled to full protection from attack.”).

<sup>31</sup> As opposed to being a victim of so-called “collateral” damage.

<sup>32</sup> *See* Claire Finkelstein, “Targeted Killing as Preemptive Action,” forthcoming in *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford 2011)(Finkelstein, Ohlin, Altman eds.)(“As is the case with all intentional killing, in the absence of an affirmative justification, targeted killing is morally impermissible.”).

<sup>33</sup> Watkin, *ibid.* at 668. *See also* Walzer *supra* note 27 at 39 (invoking for this principle Shakespeare’s Henry V: “We know enough if we know we are the king’s men. Our obedience to the king wipes the crime of it out of us.”). Incidentally, Protocol I has been claimed to have “expanded the notion of combatant” beyond this traditional

war tradition by the “customary acceptance in the Western world that members of the armed forces may in war be treated as instruments, both by their own commanders and by their enem[ies].”<sup>34</sup> This distinction between those who use force on behalf of, or really at the behest of, a state, and those who do not threaten force forms the “foundation” of the key just war principle of non-combatant immunity.<sup>35</sup> That is, non-combatants are strictly immune from attack as they have done nothing to lose “their usual rights against attack.”<sup>36</sup> This is juxtaposed with *combatants* who in the just war tradition “are subject to attack at any time”<sup>37</sup> within the bounds of *jus in bello*. The line between combatants and civilians thus demarks a “fundamental distinction”<sup>38</sup> in the just war tradition.

Combatants receive immunity from the killing they carry out as long as they follow “the rules of *jus in bello*—the rules about how the war is fought.”<sup>39</sup> This holds true regardless of the justness of the particular war.<sup>40</sup> Similar to non-combatant immunity, this *combatant* immunity appears to stem from the connection to the state and the concept that because combatants “have no control over the sort of war that their leaders decide to wage, it would be unfair to label [their]

---

distinction. Watkin, *Id.* at 669 (referring chiefly to Protocol I art. 44(3)(b)). *See also* Protocol I art. 51(3). *See generally* Int’l Comm. of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009)(prepared by Nils Melzer) [hereinafter *Interpretive Guidance*] available at <http://www.icrc.org/eng/resources/documents/publication/p0990.htm>.

<sup>34</sup> Helen Frowe, *The Ethics of War and Peace* 153 (Rutledge 2011) citing Hugo Grotius.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 151.

<sup>37</sup> Walzer, *supra* note 27 at 138. Notable exceptions to this in both International Humanitarian Law and just war theory include surrender, capture or other factors making the person ‘hors de combat.’ *See* Protocol I art. 41.

<sup>38</sup> W. Hays Parks, *Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int’l L. & Pol. 769, 778 (2010).

<sup>39</sup> Frowe, *ibid.* at 99. *See also* Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 Phil. & Pub. Affairs 148, No.2, 152 (2005)(articulating that the law that regulates war in the *in bello* context, IHL, “demarcate[s] a zone of impunible violence” the boundaries of which “are set chiefly by the rules of proportionality and discrimination...”).

<sup>40</sup> *Id.* *But see* Jeff McMahan, *Killing in War* (Oxford 2009)(arguing against the just war tradition’s “moral equality” of combatants).

actions criminal...[combatants]...have control over military matters, not political decisions”<sup>41</sup> regarding going to war. Obeying *in bello* rules is arguably a condition for qualification as a combatant, although this is disputable.<sup>42</sup> In sum, given that *in bello* rules “prohibit aiming force at non-combatants,”<sup>43</sup> the just war tradition compels the additional requirement of distinction between combatants and non-combatants. Much of the principles of distinction are “legally enshrined”<sup>44</sup> in both the Hague Conventions of 1899 and 1907 as well as the subsequent Geneva Convention and Geneva Protocols (e.g. Protocol I) discussed briefly in the next section.

ii. *Codified Combatant-Civilian Principles*

Protocol I provides plainly that “members of the armed forces of a party to a conflict...are combatants”<sup>45</sup> and that in the interest of protecting the civilian population “combatants are obliged to distinguish themselves from the civilian population”<sup>46</sup> while attacking or preparing to attack.<sup>47</sup> However, when there are situations where an armed combatant cannot distinguish himself he retains his status as a combatant “provided that, in such situations, he carries his arms openly”<sup>48</sup> during each military engagement and “during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack.”<sup>49</sup>

---

<sup>41</sup> Frowe, *supra* note 33 at 99.

<sup>42</sup> *Id.* at 103.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 101.

<sup>45</sup> Protocol I art. 43.2.

<sup>46</sup> *Id.* art. 44.3.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (a) & (b).

Other specific just war factors used for discerning combatants from civilians can be gleaned from the Geneva Conventions and Protocol I.<sup>50</sup> For instance, the Geneva Conventions required organized resistance movements in the wake of World War II to meet “the six conditions of combatancy”<sup>51</sup> established by the Conventions for members of militia groups, including “being organized, being under responsible command, belonging to a party to the conflict, wearing a fixed distinctive sign, carrying weapons openly, and complying with the customs and law of war.”<sup>52</sup> Similarly the just war thinker Michael Walzer notes that soldiers, as opposed to civilians, are “trained to fight, provided with weapons, required to fight on command,” and war is not “their personal enterprise...[b]ut it is the enterprise of their class.”<sup>53</sup>

The 1907 Hague Regulations and the Geneva Conventions, both representative in large part of the just war tradition, bestow the two primary benefits on combatants: prisoner of war status and combatant immunity from prosecution for acts committed during war.<sup>54</sup> Along with these two codified benefits comes the chief detriment of combatant status, that is, vulnerability *in bello* to targeting at “any time, wherever located, regardless of the duties in which he or she is engaged.”<sup>55</sup>

### iii. IHL and the Current Conflict

---

<sup>50</sup> See, e.g., Watkin, *supra* note 25 at 668.

<sup>51</sup> *Id.* at 668.

<sup>52</sup> *Id.* (summarizing the requirements of Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Part 1, art. 4 available at <http://www.icrc.org/ihl.nsf/WebART/375-590007?OpenDocument>).

<sup>53</sup> Walzer *supra* note 27 at 144.

<sup>54</sup> Watkin, *supra* note 25 at 668.

<sup>55</sup> Parks, *supra* note 37.

Aspects of International Humanitarian Law (IHL) are highly relevant to kill-capture missions against al Qaeda and questions of targeted killing more broadly.<sup>56</sup> Indeed, a primary goal of IHL is to protect civilians.<sup>57</sup> Moreover, IHL, embodied in the Geneva Conventions and Additional Protocols, largely comprises the *in bello* restrictions placed on combatants.<sup>58</sup>

The conflict with al-Qaeda and its associates, the context in which kill-capture operations have been taking place, has been deemed a Non-International Armed Conflict (NIAC) under IHL according to the United States Supreme Court.<sup>59</sup> As such, the conflict is subject to Common Article 3 of the 1949 Geneva Conventions.<sup>60</sup> The NIAC categorization “encompasses armed conflicts pitting a state against a non-state actor”<sup>61</sup> and in NIACs actual combatant status does not exist.<sup>62</sup> This lack of combatant status in the NIAC context is because states have “traditionally resisted recognition of the combatant’s privilege and [incidentally] eligibility for POW status for non-state actors who take up arms to challenge the state....”<sup>63</sup> Sometimes called “unlawful” or “unprivileged” combatants, civilians who “directly engage in hostilities” can be prosecuted under domestic law in their detaining state for their belligerency in the NIAC context.<sup>64</sup> Moreover, “traditional rules of *jus in bello* deny protected status to [these] civilians”<sup>65</sup>

---

<sup>56</sup> See ICRC, “FAQs: The Relevance of IHL in the Context of Terrorism,” Jan. 1, 2011 *available at* <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm> (“When and where the “ global war on terror ” manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law.”).

<sup>57</sup> See Interpretive Guidance, *supra* note 32 at 4.

<sup>58</sup> See Kutz, *supra* note 38.

<sup>59</sup> Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).

<sup>60</sup> *Id.*; see also, Robert Chesney, “Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force,” *Yearbook of International Humanitarian Law*, Ch. 3, 39-40, M.N. Schmitt et al. (eds.), Vol. 13, 2010.

<sup>61</sup> Chesney, *Id.*

<sup>62</sup> See ICRC, “FAQs: The Relevance of IHL in the Context of Terrorism,” *supra* note 55.

<sup>63</sup> Chesney, *Ibid.*

<sup>64</sup> See ICRC, “FAQs: The Relevance of IHL in the Context of Terrorism,” *supra* note 57.

directly participating in the armed conflict. Civilians are protected by IHL and are protected from the use of force “unless and for such time as they take a direct part in hostilities.”<sup>66</sup>

These rules of IHL, along with the broader principles of just war theory sketched in the preceding sections, provide the theoretical, conceptual and in some cases “black letter” legal bases for the combatant-civilian distinction. Together they could be said to form a traditional combatant-civilian framework deriving from what Walzer would call the “War Convention”<sup>67</sup>—the “set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements”<sup>68</sup> that influence decisions of military conduct. Where actions by and actions against terrorist fighters such as al Qaeda do not comfortably square with just war principles because of the traditional combatant-civilian framework we must nonetheless ground our justifications for any intentional killing of these actors somewhere. It is this need for justification that compels the creation of a third conceptual category for these combatants deriving from the traditional just war combatant-civilian framework, a conceptual category that because of its roots in just war traditions should in turn lend theoretical clarity to moral and legal issues surrounding kill-capture missions.

---

<sup>65</sup> Ohlin, *supra* note 10 citing International Committee of the Red Cross, Customary International Humanitarian Law (Cambridge 2005) vol. I, 19-24 available at <http://www.icrc.org/eng/resources/documents/publication/pcustom.htm>.

<sup>66</sup> Interpretive Guidance, *supra* note 32 at 5. See also Protocol I art. 51 (3). Jens Ohlin has noted that this is a noticeably “difficult [standard] to apply to terrorists.” See *supra* note 10. Moreover, former military personnel engaged in scholarly work have also been highly critical of the category and its detailed practical implications. See, e.g., Parks, *supra* note 37 at 828 (referring to the ICRC’s guidance on the subject as “disappointing and frustrating”); Watkin, *supra* note 25 (entitling his work on the subject “Opportunity Lost”); see also Interpretive Guidance, *supra* note 32.

<sup>67</sup> Walzer, *supra* note 27 at 44.

<sup>68</sup> *Id.*

## II. Alternative Belligerents

The moral and legal sticking points surrounding kill-capture missions sought to be addressed by this paper hinge in large part on the question of whether terrorists are combatants or civilians.<sup>69</sup> The answer to this question as argued by this paper—that terrorists are neither combatants nor civilians (non-combatants) in the just war tradition upon which this paper is premised—gives rise to the necessity of a third category, alternative belligerents. Once the alternative belligerency category is established we can invoke the new framework implicated by the introduction of a third category to address questions posed at the outset specific to the burgeoning kill-capture “surgical” warfare policy, such as the extent of the duty to capture rather than kill.

### a. *These Fighters are Not Combatants*

Perhaps the most obvious way in which terrorist groups are not combatants in the just war sense is the failure of these groups to meet the principle of distinction. Al Qaeda “does not...wear uniforms, [or] carry its arms openly,”<sup>70</sup> nor does al-Qaeda generally coordinate its fighters in classic military fashion. The failure of terrorists to heed the principle of distinction has some important implications in the just war tradition.<sup>71</sup> First, it does not set combatants apart “from the world of peaceful activity.”<sup>72</sup> The requirement of a uniform or some shared mark,<sup>73</sup> as well as the alternative requirement to bear arms openly under circumstances where uniforms are

---

<sup>69</sup> See also Finkelstein, *supra* note 31.

<sup>70</sup> Brennan, *supra* note 5.

<sup>71</sup> See Kutz, *supra* note 38 (discussing uniforms in the just war tradition but ultimately concluding they are not as critical upon further examination).

<sup>72</sup> Walzer, *supra* note 27.

<sup>73</sup> Protocol I art. 44 and *infra* pp. 10-11.

not worn,<sup>74</sup> is not only a principle codified by Protocol I but also has the implication of shifting a risk typically borne by conventional combatants onto civilians. Failure to make oneself stand out from the civilian population as a combatant in turn impinges on the principle of non-combatant immunity. Traditional combatants wear uniforms to mark themselves as the ones open to attack. Terrorist groups like al Qaeda, alternative belligerents, largely hide among the civilian population secluding their purpose and motives, particularly at the moment of attack. When fighters are not distinctive legitimate targets become blurred to the detriment of civilians.

That terrorist fighters have no state affiliation further argues against their status as combatants. Not only do traditional combatants set themselves apart for purposes of distinction, but the burden they carry when they set themselves apart is typically the burden of the state on whose behalf they fight. State affiliation is a traditional principle underlying just war theory and failure to be affiliated with a state effectively eliminates the principle of combatant immunity. Traditional just war theory gives soldiers immunity for their *in bello* actions, regardless of the overall *ad bellum* reasons for war, in large part because combatants are “human instruments”<sup>75</sup> of the state who are not responsible for the political conduct that may have resulted in war. Under this framework there is a moral equality *in bello* because the soldiers on either side are not responsible for the justness of the actions resulting in war, and neither side implicates their own moral innocence by killing the other.<sup>76</sup> Terrorist fighters like al Qaeda who target civilian populations *do* however detract from their moral innocence through the act of intentionally targeting civilians. In doing so, they skew the principles of moral equality of combatants and also combatant immunity. In turn they undermine merits of their own status as combatants.

---

<sup>74</sup> *Id.*

<sup>75</sup> Walzer, *supra* note 27 at 36.

<sup>76</sup> See Frowe, *supra* note 33 at 121.

Some have advanced that a further condition for bestowing combatant status under traditional just war theory is that of actually obeying *in bello* restrictions. Those who violate the laws of war, the argument goes, cannot be combatants and are instead illegal or “illegitimate combatants.”<sup>77</sup> It appears that little hard evidence for such a proposition exists in traditional just war sources.<sup>78</sup> Article 44 (2) of Protocol I states that “violations of these rules shall not deprive a combatant of his right to be a combatant.”<sup>79</sup> This dispute, between those who believe that violation of *in bello* restrictions results in loss of combatant status and those who do not believe such an assertion calls to light an important point. To think that a member of al Qaeda’s violation of *in bello* restrictions does not “deprive a combatant of his right,” or alternatively, that violation of the Protocol would strip a combatant of their combatant rights necessarily presumes that the actor at issue was a combatant from the start. Arguments such as those advanced by John Yoo seem to assume that if terrorist fighters merely started obeying certain *in bello* restrictions—ceased targeting civilians for example—these fighters might then be considered combatants. This argument does not hold because regardless of al Qaeda’s conformity to *in bello* rules they do not fit the broader traditional just war concept of combatancy from the start. They are not instruments of any state or “‘poor sods’ ...trapped in a war they didn’t make,”<sup>80</sup> and in turn their actions erode the notion of the moral equality of combatants. Unlike the work of John Yoo this paper does not purport to establish terrorist fighters as a pseudo-third category by virtue of their “illegitimate” or illegal actions. Instead, recognizing that terrorist fighters do not

---

<sup>77</sup> See John Yoo & James Ho, *The Status of Terrorists*, U.C. Berkley School of Law Public Law and Legal Theory Research Paper, No. 136, 4 (2003) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=438123](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=438123).

<sup>78</sup> See Frowe, *supra* note 33 at 193.

<sup>79</sup> Protocol I, art. 44 (2).

<sup>80</sup> Walzer, *supra* note 27 at 36.

comport with moral or legal foundations of either combatant or civilian status in the just war tradition, it seeks to define a third category based on the moral space these fighters occupy.

b. *These Fighters are Not Civilians*

One argument that fighters like al Qaeda's are not civilians lies in the fact that, like state sponsored military organizations, terrorist groups are hierarchical organizations with a fairly clear chain of command. This just war characteristic as an aspect of combatant status is embodied in the Geneva Conventions.<sup>81</sup> Indeed, American intelligence officials seem to know a great deal about the structure, breadth, and complex chain of command of these organizations.<sup>82</sup> That terrorist organizations are organized hierarchies with a chain of command may weigh against conveying civilian status on these fighters but it still does little to establish a moral ground justifying their targeting as traditional combatants. A strong case that terrorists are clearly not civilians, but still not combatants because of the factors in the preceding section, can only be made when their organizational capacity is considered as it synchronizes with the scale of harm such groups threaten and actually have carried out.

Within a war context the harm that al Qaeda threatens speaks to the degree to which they and affiliated terrorist groups are not "innocent." Elizabeth Anscombe describes the "innocent" in war as "all those who are not fighting and not engaged in supplying those who are with the means of fighting."<sup>83</sup> Innocent in this sense refers not to matters of personal guilt, but rather to those who are *not* harming in war.<sup>84</sup> On this view, the people fighting, the combatants, are

---

<sup>81</sup> See, e.g., Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Part 1, art. 4 available at <http://www.icrc.org/ihl.nsf/WebART/375-590007?OpenDocument>

<sup>82</sup> See Govern, *supra* note 2 (outlining the military necessity considerations behind the kill-capture mission on Osama bin Laden).

<sup>83</sup> Elizabeth Anscombe, *Mr. Truman's Degree*, 67 (Oxford 1957). See also Walzer, *supra* note 27 at 30.

<sup>84</sup> *Id.*

harming and thus can be attacked whereas those who are not harming may not be attacked. Surely that al Qaeda could be said to be fighting or harming is beyond reasonable dispute. Admittedly however the innocent versus non-innocent distinction applies to the context of *war* and thus can only lend credence to the argument that al Qaeda fighters are not civilians if we can properly see the struggle against al Qaeda as a war in a broader sense. Although thorough discussion on whether the conflict with al Qaeda and its affiliates is properly viewed, *ad bellum*, as “war” in its traditional sense is well beyond the scope of this paper, a good case that the fight with al Qaeda is a war exists and is one this paper adopts for purposes of the argument.

The scale of the harm that terrorists are capable of inflicting and have inflicted cannot be underestimated. To be sure, their attacks are on a level that has caused the Obama administration to continue to view the group’s actions from the war paradigm: “we are at war with al-Qa’ida. In an indisputable act of aggression, al-Qa’ida attacked our nation and killed nearly 3,000 innocent people...al-Qa’ida seeks to attack us again.”<sup>85</sup> Indeed, al Qaeda has carried on a steady assault against the United States<sup>86</sup> in which the September 11th attacks amount to what has been called a “decapitation strike”<sup>87</sup> strategically delivered with the intention of eliminating various civilian and military leaders of the United States in one fell swoop.<sup>88</sup> Al Qaeda has also made, for what it is worth, an affirmative declaration of war against the United States and has clearly articulated goals of “kill[ing] Americans” and “get[ting] rid of them.”<sup>89</sup> The harm al Qaeda and its affiliates are capable of is amplified by the group’s alleged efforts to obtain nuclear and chemical

---

<sup>85</sup> Brennan, *supra* note 5.

<sup>86</sup> *Id.*

<sup>87</sup> Yoo & Ho *supra* note 76 at 4-5.

<sup>88</sup> *Id.* at 6.

<sup>89</sup> Ayman Al-Zawahiri, *Previously Unseen Tape Shows Bin Laden’s Declaration of War*, available at [http://articles.cnn.com/2002-08-19/us/terror.tape.main\\_1\\_bin-international-islamic-front-osama?\\_s=PM:US](http://articles.cnn.com/2002-08-19/us/terror.tape.main_1_bin-international-islamic-front-osama?_s=PM:US).

weapons,<sup>90</sup> a possibility recently described as “[t]he single biggest threat to U.S. security.”<sup>91</sup> This scale of harm also distinguishes terrorist groups from other groups such as gangs or organized crime rings perpetrating harm on a less massive scale and typically against each other or rival non-state groups. These considerations support the case that the fight against al Qaeda is properly viewed in the context of war.

In such a context the organizational capacity as well as the scale and complexity of the harm threatened by al Qaeda means al Qaeda’s fighters run afoul of properly being considered civilians. However, is even this enough to say members of groups like al Qaeda are not properly viewed as civilians? If it were it seems that members of any hierarchical non-state affiliated group that perpetrate large scale violence should not be viewed as civilians. It would probably still be considered a “crime” perpetrated by “criminals,” as opposed to an act of war perpetrated by combatants (non-civilians), if for example the Mafia detonated a nuclear device in New York City. One could argue, and the United States appears to adopt the position,<sup>92</sup> that where the only appropriate response to an attack requires mobilization of the military this may inherently mean that the group being dealt with is non-civilian in nature.

Let me instead offer another argument however that distinguishes the “Mafia gone awry on civilians” example from al Qaeda and its affiliates, and that pertains to the intrinsic sociopolitical motivations of al Qaeda. The just war tradition places a special emphasis on the

---

<sup>90</sup> See, *Wikileaks: Al-Qaeda Plotted Chemical and Nuclear Attack on the West*, The Telegraph, Apr. 26, 2011 available at <http://www.telegraph.co.uk/news/worldnews/wikileaks/8472810/Wikileaks-Al-Qaeda-plotted-chemical-and-nuclear-attack-on-the-West.html>.

<sup>91</sup> See Jeffrey Goldberg and Mark Ambinder, *The Ally From Hell*, The Atlantic, December 2011 quoting Barack Obama.

<sup>92</sup> See Yoo & Ho, *supra* note 76 at 6-7.

notion that combatants fight on behalf of a state.<sup>93</sup> That al Qaeda possesses political motivations like leaders of a state who send troops into battle is indicative of al Qaeda not being civilian in any traditional sense. However, it must be acknowledged that this observation has important implications on the concept of combatant immunity if we are to stretch it to its logical conclusion. As stated, the traditional view holds that combatants are immune in battle at least in part because they are in no way responsible for the actions of the leaders who sent them to war. The justness of their cause does not factor in to the analysis because they chose only to fight, not against whom and why they would fight. Al Qaeda on the other hand, having no sovereign commanding them, picks their battles so to speak. They very much have control over “military matters” as well as “political decisions.”<sup>94</sup> This implicates the moral equality of combatants, and as this paper addresses, speaks to appropriate responses to these belligerents in the kill-capture mission context.

An additional argument that al Qaeda cannot be considered traditional just war civilians or combatants stems from the issues surrounding the notion of direct participation in hostilities (DPH).<sup>95</sup> The DPH principle at first glance seems to support this paper’s position that terrorists are neither combatants nor civilians, but Article 51 (3) does not appear to embody this upon closer inspection.<sup>96</sup> DPH, if it is in fact applicable to al Qaeda,<sup>97</sup> first implies that actors directly participating in hostilities are not combatants in the traditional sense because the DPH principle does not formally group these actors with “combatants.” The actor under Protocol I article 51

---

<sup>93</sup> See *infra* p. 9.

<sup>94</sup> Frowe, *supra* note 33 at 99.

<sup>95</sup> Protocol I art. 51 (3). See also Interpretive Guidance, *supra* note 32 at 5; *supra* note 65.

<sup>96</sup> See Interpretive Guidance, *supra* note 32.

<sup>97</sup> See Ohlin, *supra* note 10 (“[T]he concept of direct participation links the individual to the collective fighting force that is engaged in hostilities.”).

(3) begins as a civilian and moves to a civilian “directly participating.” This is not necessarily a combatant although they are for a fleeting time linked to and targetable like combatants. The DPH principle also supports the fact that terrorist groups like al Qaeda are not “civilians.” This is because although they are not combatants, they are actually participating in armed conflict. They are harming, pose a threat and are not “innocent.”<sup>98</sup> DPH seems to counsel that they are not *pure* civilians. They are not civilians in that they are the opposite of combatants evoked by the negated combatant term, “non-combatant.” They are instead a *strain* of civilian, the strain that is related to combatants by virtue of directly participating in hostilities. IHL has non-combatancy as the default position for these fighters. Thus, IHL’s DPH category is not on point with the position taken by this paper that the default position for fighters like al Qaeda and their affiliates lies in a category for “alternative belligerents”—a distinct conceptual category and status used to classify these fighters who truly are neither combatant nor civilian.

*c. Alternative Belligerency*

Up to now this paper has discussed the traditional just war combatant-civilian framework and has argued that members of terrorist organizations like al Qaeda cannot be considered either combatants or civilians in the traditional just war sense. The moral and legal framework supporting the traditional combatant-civilian distinction does not comport with warfare with al Qaeda.<sup>99</sup> This is so neither in our surgical attacks on them nor in their attacks on innocent civilians. By not adhering to the principle of distinction alternative belligerents undermine civilian immunity principles. By not fighting at the behest of a nation state alternative

---

<sup>98</sup> Anscombe, *see infra* p. 17.

<sup>99</sup> *But see* Kevin Govern, *supra* note 2 (concluding in regard to the operation against Osama bin Laden that “[t]he structure of the operation, then, and the set of moral prohibitions operating on any such plan, should in theory not require new rules or new law of war prescripts”).

belligerents undermine traditional foundations of combatant immunity. By intentionally mounting attacks on civilians alternative belligerents detract from their own moral innocence, skewing the moral equality of combatancy. That these fighters do not comport with the traditional combatant civilian framework in turn compels the creation of a third conceptual category of fighters. While various accounts have ambled toward moral or legal solutions by categorizing al Qaeda's terrorist fighters as either a strain of combatant or a strain of civilian, this paper advocates a completely distinct third group that could simply be called alternative belligerents. Through this category we can more fully take into account the unique moral status of terrorist fighters while leaving the traditional combatant-civilian distinction untouched. Conventional war between combatants could still be governed by traditional just war notions of combatant and civilian status. Terrorist fighters on the other hand would fit the alternative belligerent category and war with alternative belligerents would be conducted with moral restraints unique to the moral status of the fighters involved.

### III. Alternative Belligerents and Kill-Capture

Merely establishing that terrorist fighters do not fit the traditional conceptions of just war combatants and civilians and then arguing that this compels the creation of a third distinct theoretical category does little good without examining the resulting implications and limitations of such an approach. This is particularly the case when the group displays the unconventional and nebulous characteristics of alternative belligerents. How for instance do we know who is an alternative belligerent? As such, what are the resulting duties in the new style of "surgical warfare" that has proven effective in responding to these belligerents: when should we capture rather than kill? How can this new category inform the conduct of kill-capture missions?

a. *Parameters of Alternative Belligerency*

This paper has defined the alternative belligerency category by reference to the characteristics specifically of al Qaeda as the model of an alternative belligerent force. It follows that future groups of fighters who fall into the mold of al Qaeda could similarly be categorized as alternative belligerents. The key factors for this categorization revealed in the sections on combatant and civilian status consist of the lack of a connection to a nation-state specific political mandate, failure to adhere to the principle of distinction despite having a complex hierarchical structure, and the infliction of mass harm on civilians as well as military and political leaders through what essentially constitute advanced acts of war. These factors implicate al Qaeda as a third category and would similarly implicate future groups and currently related groups where putting them into either the combatant or civilian just war category results in the breakdown of the moral underpinnings of those categories. However, questions remain as to how specific individuals might be said to be a part of the alternative belligerent force just described. Merely declaring that a separate category exists is unhelpful in practice without advancing ways that rightly connect individual fighters to the alternative belligerent group.

The concept of “linking” could be useful in a context where conventional combatants are targeting alternative belligerents such as in kill-capture missions. Jens Ohlin posits correctly that under the traditional principles embodied in IHL “the individual must be linked to a larger collective—a larger belligerent force...it is only when [a particular fighter’s] relationship to a larger collective is considered that the use of force against them may be permissible.”<sup>100</sup> Ohlin in turn advances that “voluntary membership in an organization engaged in an armed conflict with

---

<sup>100</sup> Ohlin, *supra* note 10.

the United States”<sup>101</sup> logically suffices as a linking principle that is “a functional equivalent to being a member of a military organization”<sup>102</sup> and thus in harmony with IHL. We can usefully employ Ohlin’s linking principle straightforwardly in the possible targeting of alternative belligerents. Where a suspected member of al Qaeda is found to be a voluntary member of that group and has not publicly renounced their membership, they may be susceptible to targeting, including targeted killing in the context of a kill-capture mission. Linking an individual to an alternative belligerent group could qualify them as an alternative belligerent. However, simply knowing that an individual is an alternative belligerent does not deal with issues of the legitimacy of the response to the alternative belligerent’s actions where combatants and alternative belligerents are not moral equals.

b. *Moral Inequality and Targeting Alternative Belligerents*

Explication of the reasons why alternative belligerents are neither civilians nor combatants in the traditional just war sense reveals that the traditional notion of the moral equality of combatants likely does not apply to armed conflict between alternative belligerents and traditional combatants. For example, as explained above, by intentionally targeting civilians alternative belligerents detract from their moral innocence, rendering the concept of the moral equality of combatants less applicable. If we accept however that traditional combatants and alternative belligerents are not moral equals this does not remove limits to the conduct of both parties at war. Quite the opposite, viewing alternative belligerents and combatants as morally

---

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

unequal may actually provide the fix and guide appropriate responses to alternative belligerents in the context of kill-capture missions.

Philosopher Jeff McMahan has argued, contrary to just war theory, that traditional combatants are more properly viewed as morally unequal.<sup>103</sup> In such a context, the “criterion of liability to attack in war is not merely that one poses a threat to another”<sup>104</sup> but more is required. The person upon whom force is being used must be “morally responsible for posing an objectively unjustified threat.”<sup>105</sup> Starting at this foundation and the implication that such an approach must recon with “various forms and degrees of responsibility, and therefore also of liability,”<sup>106</sup> McMahan constructs a spectrum of liability to attack whereupon liability to attack changes in degree along with the culpability of the threat. At one extreme are those who are fully liable to attack because they “have neither justification nor excuse”<sup>107</sup> and are fully culpable for their actions. At the other end are those “non-responsible threats,” those who “without justification threaten[] to harm someone in a way to which [they][are] not liable, but who [are] in no way morally responsible for doing so” and thus are not liable to attack.<sup>108</sup> Underlying the specific categories McMahan offers in between these two poles of liability is the concept of proportionality of a response. Where it is suitable to respond with perhaps even disproportionate force to a culpable threat, as one works across the spectrum eventually reaching those who are less culpable there are varying degrees of justifications and excuses for those in between and in turn the legitimate responses to the liability of these actors changes.

---

<sup>103</sup> See Jeff McMahan, *Killing in War* (Oxford 2009).

<sup>104</sup> *Id.*, ch. 4, 157.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 158.

<sup>107</sup> *Id.* at 159.

<sup>108</sup> *Id.* at 168.

Applying this framework to the morally unequal ground beneath traditional combatants and alternative belligerents is instructive in the kill-capture context. Let us take for example the hypothetical at the start of this paper, the targeting of Osama bin Laden. Bin Laden intended further harm on the United States. His actions in perpetrating and planning previous terrorist attacks, rooted in religious and political zealotry, were without justification or excuse. Considering further his continued membership in the organization and his critical leadership of al Qaeda bin Laden was fully liable to “necessary and appropriate defensive action”<sup>109</sup> where bin Laden was fully culpable. But most other cases, at least given the confines of public information not made confidential for purposes of national security, are not so clear cut and this is where a sliding scale framework like McMahan’s could be particularly helpful in the kill-capture context dealing with alternative belligerents. Consider the second hypothetical at the outset where an alternative belligerent is less of a known leader than bin Laden, or where their actions are significantly less culpable, albeit still not justified or excusable. Perhaps they are a member of al Qaeda so as to be sufficiently linked as an alternative belligerent but their actual activities are geared toward communications, recruiting and logistical support. In such situations the proportional response, drawing on the reasoning of McMahan’s work, is likely something less than a targeted killing. Such a scenario would counsel for capture rather than a targeted killing based on the degree of the target’s liability considering the detailed factors specific to that individual.

## Conclusion

---

<sup>109</sup> *Id.* at 159.

The framework proposed by this paper does not purport to solve all of the problems of the moral and legal legitimacy of kill-capture missions in international law and traditional just war theory. What this paper does do however is carve out a distinct conceptual category based on the premise that terrorist fighters such as al Qaeda cannot be made to fit either of the two traditional just war categories of combatant or civilian. From this acknowledgement that terrorist groups fit neither category we can begin to construct moral foundations for examining legitimate military operations against these actors, as this paper has sought to do, based on the belief that any intentional killing must always be justified.

Arguments could be advanced that terrorist groups are either combatants or non-combatants and should be treated as such.<sup>110</sup> Or, one could argue that an understanding that terrorist groups are neither combatants nor civilians does not necessarily compel the creation of a third category and only complicates matters practically as well as morally. These points all remain subject to further dispute in spite of this paper's work. The fact remains however that the threat that alternative belligerents pose to the United States and other nations and individuals is significant and the responses must be appropriate. Regardless of the form in which the threat comes it is the state that "actually has the authority to order deliberate killing in order to protect its people or to put frightful injustices right."<sup>111</sup> This authority should not be taken lightly, but also does not entail the forfeiture of the moral constraints that have guided just wars in the past.

---

<sup>110</sup> See, e.g., Frowe, *supra* note 33 at 194 ("These difficulties might make us think that, despite our misgivings, it makes sense to treat terrorists as combatants...").

<sup>111</sup> Anscombe, *supra* note 82 at 68-9.