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Table of Contents:

BARNES-WALL FOUNDATION OF SOUTH CAROLINA AWARD 2012 ANNOUNCEMENT

The Military Legitimacy Review (MLR) is pleased to announce that the Barnes Wall Foundation of South Carolina, after careful consideration and deliberation, has selected for its 2012 scholarship award Cornell Law School Class of 2012 Juris Doctor Candidate Louis Guard's work entitled:

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

The Barnes Foundation, through the efforts of the MLR and also from recommendations of university and law faculty professors, sought nominations for this award amongst many deserving student-candidates. Special thanks go to Jens Ohlin, Associate Professor of Law at Cornell Law School, and Claire Finkelstein, the Algernon Biddle Professor of Law and Professor of Philosophy at the University of Pennsylvania Law School. Mr. Guard was a visiting scholar at University of Pennsylvania Law School when he completed this superb work regarding targeted killing and just war theory. Mr. Guard's impressive scholarship and work experience profile is available for viewing, and he can be congratulated, via his LinkedIn page online at http://www.linkedin.com/pub/lou-guard/24/b36/a80.

The award includes publication in MLR as well as a monetary prize ($500.00) given in this inaugural year of competition to Mr. Guard for having written the best paper on a topic related to military legitimacy.

The award is not intended to recognize a paper for academic credit in an independent study, but an award for the best paper in a class or group of 3 or more. The topic and paper should relate to legal and moral issues in military operations and/or strategy (e.g. democracy, human rights and the rule of law, and religion/cultural issues), with the winning paper being posted with the author's permission on the Military Legitimacy Review (MLR) website at http://militarylegitimacyreview.com/

With this award a new cycle for 2013 begins, with submissions solicited for the next year's competition encouraged and accepted through April 6th, 2013. For additional details please contact the Editor in Chief of the MLR, Professor of Law Kevin Govern, via info@militarylegitimacyreview.com and / or khgovern@avemarialaw.edu for additional details.

RECONCILING KILL-CAPTURE MISSIONS AND THE COMBATANT CIVILIAN FRAMEWORK

Louis Guard

"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?

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.[1] Adopted by the United States primarily in the wake of the

[1] *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*

terrorist attacks of September 11,[2] targeted killing has arguably become a favored tool for fighting al Qaeda and their supporters under the administration of Barack Obama.[3] According to 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."[4]

The Obama Administration asserts that the United States' use of targeted killing comports with basic principles of international law.[5] 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."[6] John Brennan, Assistant to the President for Homeland Security and Counterterrorism, recently stated that the United States uses "every lawful tool and authority available"[7] in the war against al Qaeda and that the core values of the United States include "adhering to the rule of law," [8] 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

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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.

[2] *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).

[3] 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 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/.

[4] 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].

[5] 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). S*ee 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).

[6] Koh, *Id*.

[7] Brennan, *Id*.

[8] *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.[9] In turn the determination of the legality of targeted killing in its various forms warrants further consideration[10] and the significant moral questions raised by targeted killing given traditional principles of just war theory constitute yet another inescapable layer of the analysis.[11] Indeed, ignoring moral considerations in wrote application of the law of war to terrorist fighters can result in severe consequences.[12] Kill-capture missions—a sub-species of targeted killings[13] and the method employed in the raid resulting in the death of Osama bin Laden[14]—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.[15] According to unofficial sources, targets are pre-designated as a target for either capture or killing.[16] But, "whenever it is possible to capture a suspected terrorist, it is the unqualified preference of the [Obama] Administration to take custody of that individual" [17]—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"[18] 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.[19] Given the logistical complexities of the war against al Qaeda and

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[9] *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. 6 [forthcoming] (2011).

[10] *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").

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

[12] *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.

[13] Masters, *supra* note 2.

[14] Schmidle, *supra* note 1; Naylor, *supra* note 3.

[15] 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.

[16] 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.

[17] 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.").

[18] Naylor, *supra* note 3, quoting General John Allen, Commander of the International Security Assistance Force in Afghanistan.

[19] Partlow, *supra* note 15.

affiliated groups[20] kill-capture missions have proven effective and the United States shows no signs of stopping the practice.[21] 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."[22] 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."[23]

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-civilian distinction in just war theory. Given the moral and legal nuances of kill-capture missions in scenarios like those sketched at the outset[24] 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 wrote application of select black letter law of war principles, hinges on the just war distinction between

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[20] 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.

[21] "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/.

[22] 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.

[23] 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.

[24] 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. However, the term could be usefully employed to convey the broader colloquial context in which kill-capture missions are discussed in this paper.

combatant and civilian as essentially a threshold matter. The framework advanced in this paper—the traditional framework of distinct combatants and civilians garnished 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"[25] legal principles in international law to which normative claims advanced in this paper could, and likely would, apply in practice.[26]

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

In traditional just war theory combatants "as a class are set apart from the world of peaceful activity"[27] 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."[28] Together the provisions of Protocol I "adopt a bright line interpretation that establishes two privileged classes: combatants and civilians."[29]

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[25] *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.").

[26] *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…").

[27] MICHAEL WALZER, JUST AND UNJUST WARS 144 (4th ed. 2006).

[28] 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].

[29] 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

b. Just War Foundations of Combatant and Civilian Status

Just war theory sees non-combatants, or civilians, as immune from intentional direct harm[30] in the form of killing or otherwise. In order to intentionally kill, there must be a justification.[31] 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."[32] The concept of fighting on behalf of a state is accompanied in the just 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]."[33] 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.[34] That is, non-combatants are strictly immune from attack as they have done nothing to lose "their usual rights against attack."[35] This is juxtaposed with *combatants* who in the just war tradition "are subject to attack at any time"[36] within the bounds of *jus in bello*. The line between combatants and civilians thus demarks a "fundamental distinction"[37] 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."[38] This holds true regardless of the

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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.").

30 As opposed to being a victim of so-called "collateral" damage.

31 *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.").

32 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 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.

33 HELEN FROWE, THE ETHICS OF WAR AND PEACE 153 (Rutledge 2011) citing Hugo Grotius.

34 *Id*.

35 Id. at 151.

36 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.

37 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).

38 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…").

justness of the particular war.[39] 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] actions criminal…[combatants]…have control over military matters, not political decisions"[40] regarding going to war. Obeying *in bello* rules is arguably a condition for qualification as a combatant, although this is disputable.[41] In sum, given that *in bello* rules "prohibit aiming force at non-combatants,"[42] the just war tradition compels the additional requirement of distinction between combatants and non-combatants. Much of the principles of distinction are "legally enshrined"[43] 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.

c. Codified Combatant-Civilian Principles

Protocol I provides plainly that "members of the armed forces of a party to a conflict…are combatants"[44] and that in the interest of protecting the civilian population "combatants are obliged to distinguish themselves from the civilian population"[45] while attacking or preparing to attack.[46] 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"[47] 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."[48]

Other specific just war factors used for discerning combatants from civilians can be gleaned from the Geneva Conventions and Protocol I.[49] For instance, the Geneva Conventions required organized resistance movements in the wake of World War II to meet "the six conditions of combatancy"[50] 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."[51] Similarly the just war thinker Michael Walzer notes that soldiers, as opposed to civilians, are

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39 *Id*. *But see* JEFF MCMAHAN, KILLING IN WAR (Oxford 2009)(arguing against the just war tradition's "moral equality" of combatants).

40 FROWE, *supra* note 33 at 99.

41 *Id*. at 103.

42 *Id*.

43 *Id*. at 101.

44 Protocol I art. 43.2.

45 *Id*. art. 44.3.

46 *Id*.

47 *Id*.

48 *Id*. (a) & (b).

49 *See, e.g.,* Watkin, *supra* note 25 at 668.

50 *Id*. at 668.

51 *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).

"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."[52]

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.[53] 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."[54]

d. IHL and the Current Conflict

Aspects of International Humanitarian Law (IHL) are highly relevant to kill-capture missions against al Qaeda and questions of targeted killing more broadly.[55] Indeed, a primary goal of IHL is to protect civilians.[56] Moreover, IHL, embodied in the Geneva Conventions and Additional Protocols, largely comprises the *in bello* restrictions placed on combatants.[57]

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.[58] As such, the conflict is subject to Common Article 3 of the 1949 Geneva Conventions.[59] The NIAC categorization "encompasses armed conflicts pitting a state against a non-state actor"[60] and in NIACs actual combatant status does not exist.[61] 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…."[62] 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.[63] Moreover,

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52 WALZER *supra* note 27 at 144.
53 Watkin, *supra* note 25 at 668.
54 Parks, *supra* note 37.
55 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.").
56 *See* Interpretive Guidance, *supra* note 32 at 4.
57 *See* Kutz, *supra* note 38.
58 Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).
59 *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.
60 Chesney, *Id*.
61 *See* ICRC, "FAQs: The Relevance of IHL in the Context of Terrorism," *supra* note 55.
62 Chesney, *Ibid*.
63 *See* ICRC, "FAQs: The Relevance of IHL in the Context of Terrorism," *supra* note 57.

"traditional rules of *jus in bello* deny protected status to [these] civilians"[64] 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."[65]

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"[66]—the "set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements"[67] 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.

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.[68] 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

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64 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.

65 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.

66 WALZER, *supra* note 27 at 44.

67 *Id*.

68 *See also* Finkelstein, *supra* note 31.

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,"[69] 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.[70] First, it does not set combatants apart "from the world of peaceful activity."[71] The requirement of a uniform or some shared mark,[72] as well as the alternative requirement to bear arms openly under circumstances where uniforms are not worn,[73] 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"[74] 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.[75] 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.

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

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69 Brennan, *supra* note 5.

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

71 WALZER, *supra* note 27.

72 Protocol I art. 44 and *infra* pp. 10-11.

73 *Id*.

74 WALZER, *supra* note 27 at 36.

75 *See* FROWE, *supra* note 33 at 121.

combatants."[76] It appears that little hard evidence for such a proposition exists in traditional just war sources.[77] Article 44 (2) of Protocol I states that "violations of these rules shall not deprive a combatant of his right to be a combatant."[78] 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,"[79] 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 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.[80] Indeed, American intelligence officials seem to know a great deal about the structure, breadth, and complex chain of command of these organizations.[81] 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.

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[76] *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.

[77] *See* FROWE, supra note 33 at 193.

[78] Protocol I, art. 44 (2).

[79] WALZER, *supra* note 27 at 36.

[80] *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

[81] *See* Govern, *supra* note 2 (outlining the military necessity considerations behind the kill-capture mission on Osama bin Laden).

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."[82] Innocent in this sense refers not to matters of personal guilt, but rather to those who are *not* harming in war.[83] On this view, the people fighting, the combatants, are 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."[84] Indeed, al Qaeda has carried on a steady assault against the United States[85] in which the September 11th attacks amount to what has been called a "decapitation strike" [86] strategically delivered with the intention of eliminating various civilian and military leaders of the United States in one fell swoop.[87] 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."[88] The harm al Qaeda and its affiliates are capable of is amplified by the group's alleged efforts to obtain nuclear and chemical weapons,[89] a possibility recently described as "[t]he single biggest threat to U.S. security."[90] 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.

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82 Elizabeth Anscombe, *Mr. Truman's Degree*, 67 (Oxford 1957). See also WALZER, *supra* note 27 at 30.

83 *Id*.

84 Brennan, *supra* note 5.

85 *Id*.

86 Yoo & Ho *supra* note 76 at 4-5.

87 *Id*. at 6.

88 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.

89 *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.

90 *See* Jeffrey Goldberg and Mark Ambinder, *The Ally From Hell*, THE ATLANTIC, December 2011 quoting Barack Obama.

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,[91] 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 notion that combatants fight on behalf of a state.[92] 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."[93] 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).[94] 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.[95] DPH, if it is in fact applicable to al Qaeda,[96] 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 (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

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91 *See* Yoo & Ho, *supra* note 76 at 6-7.

92 *See infra* p. 9.

93 FROWE, *supra* note 33 at 99.

94 Protocol I art. 51 (3). *See also* Interpretive Guidance, *supra* note 32 at 5; *supra* note 65.

95 *See* Interpretive Guidance, *supra* note 32.

96 *See* Ohlin, *supra* note 10 ("[T]he concept of direct participation links the individual to the collective fighting force that is engaged in hostilities.").

because although they are not combatants, they are actually participating in armed conflict. They are harming, pose a threat and are not "innocent."[97] 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.[98] 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 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

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97 Anscombe, *see infra* p. 17.

98 *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").

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."[99] Ohlin in turn advances that "voluntary membership in an organization engaged in an armed conflict with the United States"[100] logically suffices as a linking principle that is "a functional equivalent to being a member of a military organization"[101] 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.

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99 Ohlin, *supra* note 10.
100 *Id*.
101 *Id.*

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

Philosopher Jeff McMahon has argued, contrary to just war theory, that traditional combatants are more properly viewed as morally unequal.[102] In such a context, the "criterion of liability to attack in war is not merely that one poses a threat to another"[103] but more is required. The person upon whom force is being used must be "morally responsible for posing an objectively unjustified threat."[104] 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,"[105] McMahon 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"[106] 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.[107] Underlying the specific categories McMahon 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.

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

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102 *See* JEFF MCMAHAN, KILLING IN WAR (Oxford 2009).
103 *Id*., ch. 4, 157.
104 *Id*.
105 *Id*. at 158.
106 *Id*. at 159.
107 *Id*. at 168.

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"[108] 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

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.[109] 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 western nations 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."[110] 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.

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108 *Id*. at 159.

109 *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...").

110 Anscombe, *supra* note 82 at 68-9.

BACK TO THE FUTURE: HUMAN RIGHTS AND LEGITIMACY IN THE TRAINING AND ADVISORY MISSION

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The strategic dilemma of promoting democracy and human rights

Democracy and human rights have long been promoted as the ideals of U.S. foreign policy, with the rule of law being the glue that holds democracy and human rights together. But law can be a means of tyranny in the wrong hands, and democracy can produce a tyranny of the majority, as our founding fathers warned and as we are now witnessing in the Middle East and in North Africa. Human rights are what give legitimacy to democracy and the rule of law. Human rights protect the freedoms of minorities in a democracy, but they are meaningless without the rule of law.

The image of the U.S. as a champion of democracy, human rights and the rule of law was tarnished in the Middle East where, until recently, the U.S. supported authoritarian rulers. With the outbreak of democracy and the overthrow of autocratic rulers, the strategic dilemma of promoting human rights in Islamic cultures became apparent. The fundamental freedoms of religion and expression and the prohibition of discrimination based on sex or religion conflict with Islamic law, or Shariah, as well as with tribal practices that have become customary law.

The strategic dilemma is whether to promote democracy or human rights, since in emerging Islamist democracies the former can preclude the latter, and Islamist policies can also threaten U.S. national-security interests in the region, as seen in Mali. This creates both a strategic issue for U.S. policymakers and a tactical issue for SOF trainers and advisers whose mission success depends upon developing a relationship of trust and confidence with their indigenous counterparts. The requirement to report violations of human rights where they are not protected by local laws can create a mission impossible.

Back to the Future in promoting human rights

In the summer of 2001 human-rights compliance was an operational priority for special-operations forces engaged in training and advisory missions.[1] But on 9/11, those priorities changed. With the invasions of Afghanistan and Iraq, the operational priority of human rights was

subordinated to the more conventional priorities of combat operations. And even after conventional combat and stability missions were superseded by counterinsurgency (COIN) operations,[2] SOF remained more focused on direct-action counterterrorism (CT) operations than on indirect training and advisory missions.

It was only after U.S. combat forces had been withdrawn from Iraq and were being drawn down in Afghanistan that President Obama signaled a major shift in U.S. operational strategy — from COIN operations conducted by conventional combat forces back to SOF training and advisory missions coupled with CT operations.[3] For SOF it was back to the future and a reorientation to pre-9/11 operational priorities; but experience during the intervening years will make a return to the human-rights priorities of 2001 problematic.

In doctrinal terms, the strategic shift from COIN to foreign internal defense (FID) may at first glance seem to be a distinction without a difference. But there is an important difference. While FID has the same political objective as COIN, which is to gain the public support necessary to win the battle for legitimacy against an insurgent threat, COIN operations in Iraq and Afghanistan have been carried out by large deployments of conventional forces whose primary mission is to provide security for the local population, while FID is conducted by a relatively few highly trained SOF operators whose mission is to train and advise indigenous forces to conduct the lethal operations that in COIN have been conducted directly by U.S. and NATO military forces.[4] Legitimacy is about public perceptions of what is right and is what gives governments the moral authority to act. Military legitimacy is about might being right, and in COIN and FID the battle for legitimacy is won by the side that gains enough public support to govern. That makes legitimacy an operational imperative in COIN and FID.[5]

Experience in Iraq and Afghanistan has demonstrated that large deployments of conventional U.S. and NATO forces can undermine the public support needed for legitimacy and mission success in COIN. In such hostile cultural environments a relative few SOF are more effective than many more combat forces. In addition to maintaining a low profile, SOF are diplomat-warriors with the leadership, language and cultural skills needed to train and advise indigenous forces to carry out the lethal operations needed to defeat an insurgent threat.[6]

After more than 10 years of COIN, the increasing hostility of Afghans to the continued presence of U.S. and NATO forces may make it impossible to salvage legitimacy from a legacy of corrupt government and endemic religious hatred. The lesson of legitimacy learned in Iraq and Afghanistan — that fewer U.S. forces are better than more in hostile cultural environments — should be applied in other strategically important regions where Islam predominates but where the potential for public support has not yet been contaminated by large deployments of U.S. combat forces. In African Islamic cultures, SOF training and advisory missions have been successfully conducted without fanfare or negative publicity.[7]

The Middle East, Africa and Asia are strategically important regions where Islamic standards of legitimacy often prevail and conflict with those of the West. In such hostile cultural environments the quiet professionals of SOF can avoid incidents that undermine the public support needed for legitimacy and mission success.

The success of the SOF training and advisory mission depends upon the military and diplomatic skills of SOF personnel and their compliance with local laws, moral standards and values. There is a double standard of legitimacy that complicates mission success: Standards in the U.S. often conflict with those in the operational area, and SOF must maintain public support both at home and in the area of operations. That can be a delicate balancing act; but SOF, like civilian diplomats, understand the importance of avoiding conflict with local legal, religious and cultural standards and they have the language capability to effectively communicate with their indigenous counterparts.

Laws are the clearest standards of legitimacy and human rights the most important standards of law, so that compliance with human rights is essential whenever public support is critical to mission success. But values, moral standards, laws and even human rights are pluralistic and vary according to differing cultures. What is considered legitimate conduct in the U.S. often conflicts with standards in the Middle East and Africa, where a combination of tribal traditions and the Islamic religion have shaped standards of legitimacy and law.[8]

Religion and secular traditions are primary sources of the standards of legitimacy, law and human rights; and because religious rules are considered sacred, they take precedence over secular standards. In Western nations like the U.S., the Judeo-Christian tradition has been shaped by the Enlightenment and capitalism to produce a culture reflecting the libertarian values of legitimacy and democracy that has fostered progress and modernity. In contrast to the libertarian values of legitimacy and law prevalent in the West, Eastern Islamic cultures have had little experience with democracy and capitalism; their values have been shaped more by tribal traditions and religious laws than by individual rights, liberty and capitalism.[9]

In Islamic cultures of the East, religion and the rule of law are inseparable. Islamic law has produced conflicting standards of legitimacy that help explain the negative public attitudes that have plagued U.S. COIN operations. The lower profile of SOF personnel, with their diplomatic skills and indirect advisory and training mission can minimize that conflict; but that advantage can be lost if direct-action counterterrorism operations produce collateral damage, as they have in Iraq, Afghanistan and Pakistan.

The elite commando-warriors who conduct direct-action CT missions — such as those on Seal Team 6 who killed Osama bin Laden — offer a stark contrast to those diplomat-warriors who must lead from behind in FID. Both are SOF personnel and represent the unique and irregular military capabilities that are critical to protecting U.S. security interests overseas, but their operational methodologies are dramatically different and require contrasting skill sets.

The commandos who conduct direct-action CT missions are pure warriors for whom mission success depends on lethal skills in striking clearly defined targets. The mission success of SOF diplomat-warriors who conduct FID depends upon indigenous forces that they train and advise to conduct lethal operations and maintain public support. While CT and FID are both considered special operations within the United States Special Operations Command, their means and methods can be in conflict. Issues of legitimacy that are critical to FID have little relevance to CT operations, but the collateral damage caused by CT operations can undermine the legitimacy required by FID.

Religion and the rule of law: Where East meets West

Many of the problems of legitimacy experienced by U.S. forces can be attributed to the conflict between tribal traditions, the religious standards of Shariah and the secular standards of Western law. Any SOF trainer or adviser serving in an Islamic culture can expect to encounter such conflicts, but in Afghanistan the future of the SOF training mission is in jeopardy. The increasing number of green-on-blue killings of U.S. trainers by Afghans caused SOF commanders to put a hold on the training of more than 20,000 Afghan forces in order to evaluate security concerns.[10]

In the West, the rule of law is founded on the social contract theory and libertarian principles of the Enlightenment that were enshrined in The Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The U.S. Constitution provides for a democratic government that protects those fundamental freedoms in the form of civil (human) rights; and U.S. religions have accommodated the libertarian norms of the Enlightenment and capitalism in the concept of free will (religious freedom) and the Puritan work ethic.

All U.S. military personnel take an oath to protect and defend the Constitution against all enemies, and that includes defending the right of civilians to exercise their freedoms of religion and expression, even to the point of burning the American flag or holy books. That is ironic, since the military is an authoritarian regime within a democratic society and requires that its members forfeit some of the very freedoms they risk their lives to defend for civilians.[11]

There is little democracy or individual freedom in the authoritarian regimes of the Islamic East where the law of Shariah is based on tribal traditions and the dictates of the Quran, the holy book of Islam, and where burning the Quran is a capital crime and can cause widespread rioting, as it did following the intentional burning of a Quran by a pastor in Florida in March 2011 and the accidental burning of Qurans by U.S. military personnel in Afghanistan in February 2012.

Most Muslims consider the Quran to be the immutable word of God, just as fundamentalist Christians and Jews believe their holy books are the inerrant and infallible word of God, and in most Muslim nations Shariah produces a rigid and inflexible code of laws. While some progressive

Islamists have embraced libertarian forms of democracy, others have argued that God is the only legislator and have promoted an emasculated form of democracy.[12]

Indonesia and Turkey are notable exceptions as Muslim democracies with secular rules of law. Saudi Arabia and Iran are Islamist nations that have rigid and comprehensive rules of law derived from Shariah that are interpreted and enforced by religious authorities. Indications are that emerging democracies in Tunisia, Libya and Egypt may join Saudi Arabia and Iran and embrace Shariah as a divine standard for their rules of law, as have Pakistan, Iraq and Afghanistan.

Shariah is considered to be God's immutable law and often functions like a constitution in Western jurisprudence; and like Western constitutions, Shariah comes in different forms. Most of the differences in Shariah can be attributed to traditional tribal practices that are not included in the Quran but that over time have been given divine sanction in Shariah. These tribal practices include female circumcision, honor killings and other barbaric practices that brutalize women and discriminate against non-Muslims.

Not only are there different forms of Shariah, but there are differences among Islamic scholars on the nature of Shariah: Whether it is a divine set of principles upon which laws should be based or an immutable code of laws to be enforced. There are also differences among Islamic scholars on how Shariah defines reason, free will, justice, democracy and human rights.[13] But in some Muslim nations such as Pakistan, Iran and Saudi Arabia, blasphemy and apostasy are capital crimes, and Islamic law condones discriminatory practices against women and non-Muslims. Such laws are clearly in conflict with fundamental human rights.[14]

Eastern and Western concepts of human rights differ, and when Shariah provides a comprehensive and rigidly authoritarian rule of law it precludes libertarian standards of human rights.[15] This is evident in the Preamble to the 1990 Cairo Declaration of Human Rights that asserts a unique Islamic view of human rights that are "…an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them as they are divine commands, which are contained in the Revealed Books of Allah…." The freedoms of religion and expression are fundamental human rights under the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966. While Muslim nations are parties to both the Declaration and Covenant, the Cairo Declaration of Human Rights reveals a different understanding of the freedoms of religion and expression.[16]

The legal pluralism resulting from conflicting Eastern and Western concepts of law and human rights makes compliance requirements for SOF trainers and advisers in Islamic cultures problematic. It was difficult enough in 2001 when human rights were an established operational priority and Shariah was not a complicating factor; but today Shariah is a factor, so that human rights compliance is an even more daunting challenge for SOF.

Human rights as an operational priority for SOF trainers and advisers

Human rights have long represented the highest standards of legitimacy and law for SOF trainers and advisers.[17] To maintain that priority Congress has placed certain restrictions on foreign-training missions to ensure compliance with human rights,[18] and the Department of Defense has issued policy directives through its chain of command that require any violation of human rights be reported, and also require special training in human rights for U.S. military trainers and advisers both in the schoolhouse and at the operational level whenever military advisers and trainers are deployed.[19]

The following background is provided for U.S. Special Operations Command Human Rights Policy:

> One goal of U.S. national-security strategy is to champion aspirations for human dignity. Coupled with our effort to promote regional stability through democratic reform and our belief that all people are born with certain inalienable rights, our nation has focused efforts to protect the rights of all people throughout the world. The Department of State, with support of the Department of Defense, plays a key role in achieving the foreign-policy goal of promoting human rights abroad. DOD accomplishes this goal by shaping the international security environment and influencing those nations and militaries that can affect or assist the U.S. … By their nature as warrior-diplomats and global scouts, SOF must incorporate and fully support these regional programs and plans [of the geographic combatant commands].[20]

And the following are USSOCOM Policies and Procedures:

> Human-rights awareness, concepts, reporting requirements and themes will be an integral part of SOF training with foreign forces. SOF will be prepared to teach and demonstrate by word and deed that the protection of human rights is imperative for military success in any environment, from garrison operations to conduct of war.[21]

This command policy is a reminder that SOF trainers/advisers must be diplomat-warriors who can bridge the formidable gap between civilian diplomacy and military operations. When it comes to training military forces in emerging democracies overseas, SOF must not only provide effective military training but also promote democracy and human rights and exemplify the role of the military in a democratic society.

It is clear that the promotion of human rights is essential to political and military legitimacy, which has been a long-standing operational imperative for SOF.[22] It is also clear that SOF trainers/advisers have a legal obligation to report any violations of fundamental human rights. What is not clear is a definitive list of those fundamental human rights that must be reported if violated.[23]

The plurality of human-rights standards and the lack of clarity of fundamental human rights complicate issues of legitimacy in peacetime training and advisory missions; further complicating matters are different legal standards for human rights in peacetime and wartime. It has long been assumed that the law of war preempts human-rights law through doctrine, but one senior military lawyer has argued that "…human rights are now the prism through which all military operations are viewed and judged" and "…the continued development of human-rights law has arguably eclipsed that of the law of war."[24]

It is clear that genocide, murder, extra-judicial executions, torture, mutilation, slavery or the slave trade, including trafficking women or children for prostitution, prolonged arbitrary detention, kidnapping or taking hostages are all violations of fundamental human rights and must be reported. But real questions arise as to what constitutes "outrages upon personal dignity,","…cruel, inhuman or degrading treatment or punishment" and "other flagrant denial of…liberty, or the security of a person." Would condoning honor killings and the abusive treatment of women and non-Muslims and trials and executions for blasphemy and apostasy be considered gross violations of human rights?

Questionable acts must be considered in the context of national policy promoting democracy and human rights and take into account the primacy of legitimacy as well as the practical realities of accomplishing the training and advisory mission. The burden of defining what to report as violations of human rights falls upon SOF commanders, who need specialized staff support in Islamic cultures to provide guidance to their trainers, advisers and operators in order to negotiate hazardous human terrain and comply with human-rights requirements.

Defining human rights and negotiating the human terrain

Human-rights compliance is part of operational-law support and normally the exclusive province of military lawyers, but because religion has a dominant role in defining human rights in Islamic cultures chaplains should be considered operational assets who can work with local Muslim religious leaders and assist military lawyers in providing operational-law support to the SOF trainer and adviser.

An increasing emphasis on rules of engagement in the 1980s gave military lawyers an operational-support role; setting a precedent for chaplains to become operational assets when religion shapes the human terrain and defines the rule of law.[25] But unlike the specificity of rules of engagement, the complexity and ambiguity of human rights in Islamic cultures requires specialized training for those required to report violations. Training in Shariah and human rights could be provided at the International and Operational Law Department of The Judge Advocate General's School in Charlottesville, Va., and at the Center for World Religions at the Chaplains' School at Fort Jackson, S.C.

It is axiomatic that U.S. forces must respect local values and laws to maintain their legitimacy,[26] but when Shariah and tribal laws conflict with U.S. standards of fundamental human rights it creates a strategic and tactical dilemma. If SOF trainers and advisers are sent into Islamist regimes where religion defines the law, then military lawyers, chaplains and Civil Affairs personnel must work together and in dialogue with their Muslim counterparts to define those moral standards and laws — especially human rights — that define legitimacy.

A distinguished group of Muslim scholars has given Jews and Christians a common word of love for God and neighbor to find consensus on issues of religion, legitimacy and law.[27] Whenever that common word of love is the primary guide for interpreting Shariah, there will be few conflicts in standards of legitimacy and law, and fundamental human rights will be respected. But it is yet to be seen whether love of neighbor — to include neighbors of other faiths[28] — will be the norm or the exception in Islamist cultures in the future.

Conclusion

Before 9/11, the human-rights policy for SOF and other U.S. military forces was defined without reference to conflicting standards of law and human rights in Islamic cultures. Experience in Iraq and Afghanistan has since provided important lessons in legitimacy. If it's back to the future for SOF, then training and advisory missions conducted in Islamist cultures must consider the hazards of the human terrain and require an increased emphasis on the interwoven issues of religion, legitimacy and law.

It can be difficult for the SOF trainer/adviser to comply with U.S. laws and human-rights compliance standards while respecting conflicting standards of legitimacy in Islamist cultures, especially if those standards condone honor killings, brutality to women, discriminate against non-Muslims and deny the freedoms of religion and expression. To maintain military legitimacy while promoting democracy and human rights in Islamist cultures, respect for prevalent religions, laws and values must be an operational priority, and USSOCOM should utilize its legal, religious and CA personnel to help SOF trainers and advisers understand and mitigate conflicting standards of legitimacy and law —especially those that relate to human rights.

It is a daunting challenge for SOF trainers and advisers to tolerate conflicting standards of legitimacy in Islamic cultures, and there are limits to that tolerance. Violations of fundamental human rights should never be tolerated in the name of military expediency, but it is not always clear just what those fundamental rights are. For those trainers and advisers who work directly with indigenous counterparts in Islamic cultures there should be clear guidance as to what human rights are fundamental — for instance, whether they include religious freedom and expression and equal treatment of women and non-Muslims under Islamic law. Otherwise, military legitimacy could become a casualty of military expediency.

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Notes

1. Rudy Barnes, "Human Rights and Legitimacy in the Foreign Training Mission," Special Warfare, Spring 2001, p 2.
2. General Petraeus was a principle author of the Counterinsurgency Manual, which describes legitimacy as the main objective in COIN in paras 1-113 through 1-136, and there is special emphasis on the rule of law in chapter 7 and Appendix D. Counterinsurgency, FM 3-24 and MCWP 3-33.5, December 2006, Headquarters, Department of the Army. On the distinction between COIN and FID, see note 4, infra.
3. Thom Shanker and Eric Schmitt, "U.S. Plans Shift to Elite Units as It Winds Down in Afghanistan," The New York Times, February 4, 2012.
4. Jeff Hasler, "Defining War," Special Warfare, Mar/Apr 2007, p 23; also Mulbury, "ARSOF, General Purpose Forces and FID," Special Warfare, Jan/Feb 2008.
5. On the importance of legitimacy in COIN, see note 2, supra. The concept of military legitimacy and its relationship to public support is defined and explained in Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, 1996, in chapters 2 and 3 (hereinafter cited as "Military Legitimacy"); see also Barnes, "Military Legitimacy in OOTW: Civilians as Mission Priorities, Special Warfare, Fall 1999.
6. Counterinsurgency (supra at note 2) for reference to diplomat-warriors at para 2-36 (p 2-8), and leadership requirements in chapter 7; see also "Military Legitimacy" (supra at note 5) at pp 105-117; and Barnes, "Civil Affairs: Diplomat-Warriors in Contemporary Conflict," Special Warfare, Winter 1991, p 4.
7. Violent public demonstrations and the killing of US advisers following the accidental burning of Qurans on February 21, 2012 at Bagram Air Base in Afghanistan raised doubts as to whether adequate security could be provided for US advisers and trainers against the increasing hostility of those Afghans being trained.
8. Barnes, "Religion and the Rule of Law: Shariah, Democracy and the Rule of Law," 2011 Military Legitimacy Review, www.militarylegitimacyreview.com.
9. "Religion and the Rule of Law," supra at note 8, p 7.
10. Graham Bowley and Richard A. Oppel, Jr., "U.S. Halting Program to Train Afghan Recruits," New York Times, September 2, 2012; see also note 7, supra.
11. On the oath of office and the paradox of the military as an authoritarian regime in a democratic society, see "Military Legitimacy," supra note 5 at pp 105-107, 118-126.
12. "Religion and the Rule of Law," supra at note 8, at pp 15-21: *Let the Scholars Speak*.
13. Idem.
14. Abdullahi Ahmed An Na'im in "Religion and the Rule of Law," supra at note 8, p 18.
15. Mark R. Amstutz has summarized the differences between Western and Eastern concepts of human rights in the International Covenant on Civil and Political Rights favored by the West and the International Covenant on Economic, Social and Cultural Rights favored by the East, illustrating the pluralism of human rights well before the Cairo Declaration of 1990 (see note 16 infra). Amstutz notes "The limited consensus on human rights doctrines, coupled with the ever-expanding list of rights, has had a deleterious effect on the moral foundations and priority of international human rights claims." And he asserts: "The idea of human rights is subversive because it establishes norms that if not fulfilled by a state can undermine its international legitimacy." Amstutz, International Ethics: Concepts, Theories and Cases in Global Politics, Third Edition, Rowman & Littlefield Publishers, Inc., 2008, pp 95-102).

16. Articles 18, 19 and 20 of the Universal Declaration of Human Rights (1948) provide for the freedom of religion and free expression; and Articles 18, 19 and 20 of the International Covenant of Civil and Political Rights (a 1966 treaty signed by the US in 1977 and ratified in 1992) make those rights the law of the land. The Cairo Declaration on Human Rights in Islam of 1990 has no provisions comparable to Articles 18, 19 and 20 of the Universal Declaration of Human Rights or the International Covenant of Civil and Political Rights, but following a Preamble that asserts the primacy of Shariah in defining human rights, the following relate to the freedoms of religion and expression: Article 18 provides in part: Everyone shall have the right to live in security for himself, his religion, his dependents, his honor and his property…. Article 22 provides: (a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shariah. (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shariah. (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith. (d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination. Article 24 provides specifically what the Preamble implies: All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shariah. Article 25 provides: The Islamic Shariah is the only source of reference for the explanation or clarification to any of the articles of this Declaration.
17. LTC Jeffrey F. Addicott, "Special Forces and the Promotion of Human Rights," Special Warfare, December 1996), p 30.
18. Department of Defense Instruction Number 5111.19, July 26, 2011, Enclosure 2, para 1c., which assigns to the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict and Interdependent Capabilities the responsibility to ensure compliance with the current "Leahy" human rights provisions of section 8058 of Public Law 112-10, and section 2378d of title 22, United States Code (also known as section 620J of the Foreign Assistance Act of 1961, as amended.
19. Ibid Enclosure 2, at para 8g, which requires Geographic Combatant Commanders to verify that human rights vetting requirements and human rights training requirements have been met.
20. USSOCOM Directive 350-28cc, Training, Human Rights Policy, 11 May 2005, Section I, para 3a.
21. Ibid at Section II, para 4d.
22. Barnes, "Military Legitimacy in OOTW: Civilians as Mission Priorities," Special Warfare, Fall 1999, p 32.
23. If a specific human right falls within the category of customary international law it is a "fundamental" human right binding on U.S. forces during all overseas operations. Unfortunately there is no definitive "source list" of those human rights considered by the U.S. to fall within this category of fundamental human rights. The source list for fundamental human rights includes, but is not limited to, the Universal Declaration of Human Rights, Common Article III of the Geneva Conventions, and the Restatement (Third) of the Foreign Relations Law of the U.S. and authoritative pronouncements of U.S. policy by ranking government officials. According to the Restatement (Third) the U.S. accepts the position that certain fundamental human rights fall within the category of customary international law and a state violates such law, when, as a matter of policy, it "practices, encourages, or condones" a violation of such rights. Examples of such rights are "…cruel, inhuman or degrading treatment or punishment, and consistent patterns of gross violations of internationally recognized human rights." See Operational Law Handbook, 2011, International and Operational Law Department, The Judge Advocate Generals Legal Center and School, Charlottesville, VA, Chapter 3, Human Rights, at page 45 and note 22. See *supra*, notes 15 and 16, on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Cairo Declaration of Human Rights of Islam. Little has changed since 2001 when the following lists of human rights were cited as standards for reportable violations: Those under Common Article 3 of the Geneva Conventions: (1) Violence to life and person—in particular, murder, mutilation, cruel treatment and torture; (2) Taking of hostages; (3) Outrages upon personal dignity—in particular, humiliating and degrading treatment; (4) Passing of sentences and carrying out executions without previous judgment by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized people. Another list of gross violations of human rights is found in the Security Assistance law at US Code of Laws at 22 U.S.C.A. 2304(d)(1): (1) Torture; (2) Cruel, inhuman or degrading treatment or punishment; (3) Prolonged arbitrary detention without charges or trial; (4) Causing the disappearance of persons by the abduction and clandestine detention of those persons; (5) Other flagrant denial of the right to life, liberty, or the security of person. The Office of the Staff Judge Advocate at USASOC provided a combined list of offenses that are considered gross violations of human rights:

(1) Genocide; (2) The murder or causing the disappearance of individuals, including extra-judicial executions; (3) Torture, mutilation, or other cruel, inhuman, or degrading treatment or punishment; (4) Slavery or slave trade, including the trafficking of women or children for prostitution; (5) Prolonged arbitrary detention; (6) Kidnapping or taking hostage of civilians; (7) Other flagrant denial of the right to life, liberty, or the security of a person or persons. See Barnes, *Human Rights and Legitimacy in the Foreign Training Mission*, Special Warfare, Spring 2001, at pp 5, 6.

24. See Bill, "Human Rights: Time for Greater Judge Advocate Understanding," The Army Lawyer, June 2010, at pp 60, 62.

25. On Shariah and human terrain, see Timothy K. Bedsole, "Religion: The Missing Dimension in Mission Planning," Special Warfare, November-December 2006, p 8. On religion as a strategic operational priority, see Raymond Bingham, "Bridging the Religious Divide," Parameters, Autumn, 2006, p 6.

26. See David Gordon, "Cultural Context, Religion and Shariah in Relation to Military Rule of Law Operations," 2011 Military Legitimacy Review, www.militarylegitimacyreview.com at p 59; see also note 8, supra.

27. That common word is the greatest commandment taught by Jesus to love God and neighbor (See Mark 12:28-33; Matthew 22:34-40; and Luke 10:25-37). It is two commandments taken from the Hebrew Bible (See Deuteronomy 6:4, 5, Leviticus 19:18). For more information on a common word see www.acommonword.com.

28. Luke's version of the greatest commandment reports Jesus answering the critical question, "And who is my neighbor?" Jesus responded with the story of the good Samaritan in which he told of a Jew stopping to help and care for a wounded Samaritan. (Luke 10:29-37) Jesus was a Jew, and the story is especially relevant today since in the time of Jesus the Jews thought of Samaritans much as Jews and Christians today think of Muslims. If the story were told to Jews or Christians today it would be the story of the good Muslim, or for Muslims it would be the story of the good Jew (or the good Christian). In short, in the greatest commandment Jesus taught that to love God we must love those of other faiths, even those we detest.

STRENGTHENING THE RULE OF LAW IN THE LOCAL COMMUNITY: SOF, CUSTOMARY JUSTICE, AND HUMAN RIGHTS

David Stott Gordon

Introduction: Rule of Law and Special Operations

Special Operations Forces (Special Forces, Civil Affairs, and Military Information Support Operations (MISO)) should understand the importance of the concept of "rule of law" as it applies to their operations in counterinsurgency (COIN), foreign internal defense (FID), and Nation Assistance (NA). COIN, FID and NA involve stability operations, which in turn often have a rule of law component. In particular, rule of law can be a decisive concept in planning and executing operations to bring stability to local communities in which SOF operate.

As the US Army/Marine Corps Field Manual *Counterinsurgency* states, "Gaining and retaining the initiative requires counterinsurgents to address the insurgency's causes through stability operations as well. This initially involves securing and controlling the local populace and providing for essential services." The COIN manual goes on to state that "establishing the rule of law is a key goal and end state in COIN ".[1]

Successful FID also has a significant stability operations element. The primary intent of FID "is always to assist the legitimate host government in addressing internal threats and their underlying causes."[2] As discussed below, operations to strengthen the rule of law allow US SOF and host nation (HN) forces to address the causes of insurgency and other internal threats.

Nation Assistance (NA) may also include rule of law operations. Rule of law operations may be conducted directly by US forces or by military civic action (MCA) programs conducted by HN military forces under the mentorship of US advisors.[3]

What is the "Rule of Law?"

A frequently used definition is one given by the UN, which states that rule of law:

> . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness

[1] FM 3-24/MCWP 3-33.5, *Counterinsurgency* (December 2006), Paras 1-14, D-38.
[2] FM 3-57, *Civil Affairs Operations* (October 2011), Para 3-61.
[3] FM 3-57, *Civil Affairs Operations* (October 2011), Paras 3-58, 3-167.

> in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. [4]

If the high-level definitions used by the UN and the US military are boiled down to their most basic terms, the concepts are quite simple: in every society, no matter how big or small, there are rules of conduct that are accepted by most, if not all, the members of that community. The fundamental idea of the rule of law is that everyone must follow the accepted rules, including the government and the powerful; everyone, including the government and the powerful, can be held accountable under the rules; everyone must get fair treatment according to the rules.

Rule of law is the lynch pin of stability at all levels. All societies have conflicts, even the most stable. Rule of law means that there are checks and balances which ensure that everyone plays by the same set of fair rules. If a society has fair and effective ways to decide disputes and resolve conflict, no one needs to assert rights with a weapon. Stable societies have established ways to resolve conflicts between individuals and groups without anyone resorting to violence. In less stable societies, individuals and groups may conclude that they cannot obtain fair treatment unless they help themselves by taking up arms. Rule of law is strengthened by assisting a society to make its peaceful methods of dispute resolution fairer and more effective. Strengthening the rule of law makes a society more stable by addressing the root causes of violent conflict.

Rule of law often involves the application of fundamental human rights principles. Fundamental human rights by and large deal with protection of the individual from being killed, tortured, imprisoned arbitrarily, or being deprived of basic property rights. Widespread patterns of such violations by either the government or other actors erode reliance on peaceful dispute resolution processes and tend to create instability.

Rule of law is by no means exclusively the province of lawyers. In many cases, the people who contribute substantially to strengthening the rule of law are police, government administrators, and Special Forces and Civil Affairs personnel operating within local communities.

Understanding the ROL Operational Environment[5]

In any society, the rule of law systems are generally complex and interrelated. A useful analytical framework is to look at rule of law as involving three types of interrelated systems. ***Formal systems*** include law codes, courts, prosecutors' offices, prison systems, police organizations, government ministries, legislatures, executive agencies and similar elements.

[4] Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (United Nations Security Council, 2004), Para 6. The UN definition has been adopted by the *Handbook of Military Support to Rule of Law and Security Sector Reform*, US Joint Forces Command (2011), page I-3. The US Army has adopted the UN definition with minor modifications in FM 3-07, *Stability Operations*, (October 2008), Para 1-40.

[5] For a more detailed discussion of this framework, see the *Handbook of Military Support to Rule of Law and Security Sector Reform*, US Joint Forces Command (2011), pages II-1 through II-8.

Informal/social systems are the social networks by which societies, institutions and groups operate. These networks may work within formal systems, or they may be in opposition or competition. Individuals and networks of individuals are the means by which both formal and informal organizations operate, and identifying the key actors is critical to understanding the operational environment. ***Accountability systems*** monitor the performance of the other systems to ensure that they operate fairly, effectively and efficiently. They consist of auditors, inspectors, review commissions, oversight committees, and the court system, with the ultimate accountability system being the populace.

In addition to understanding the three types of systems and how they operate in the environment, it is important to determine what factors are driving the conflict. In some cases, these factors may be at the national level, but often the causes of conflict will be local and vary from place to place. Is the conflict the result of religious, cultural, or political differences? Are two or more groups competing for political power, or for resources such as land or water? Is one group using its power to take advantage of another group? Once the drivers of conflict are identified, it is possible to develop courses of action which use the three types of systems to reduce the drivers of conflict. The ultimate goal is to reduce the drivers of conflict to the point that host nation institutions can deal with their problems without the assistance of the US military.

Rule of Law and Customary Justice Systems[6]

The basic principles of rule of law apply at all levels, whether national, provincial, or local community. Rule of law is not restricted to formal courts or legal systems; in many cases, the most effective systems will be what are referred to as informal, customary, or traditional systems administered at the local level . Often, Special Forces and Civil Affairs personnel operating in the field will encounter such systems, and will be in a position to influence and strengthen them in ways that promote US interests in HN stability.

"Customary" "informal," or "traditional" justice are terms that refer to methods a community uses to resolve disputes by allowing its community leaders to apply local customs to reach a solution the members of the community see as right and fair. In much of the world, these customary systems are more important than formal legal systems in ensuring that disputes are peacefully resolved. These systems often have developed over extended periods of time, and generally the members of the community accept the results they produce. They may operate in tandem or in competition with more formal court systems created by the state, or they may be the only effective peaceful dispute resolution method available because the formal systems are corrupt, ineffective, or non-existent. By producing peaceful resolutions of disputes within a community they can contribute to stability. In some cases, there are customary methods that work not only within a community but can allow different communities to reconcile their differences. While sometimes customary systems may violate western concepts of human rights or act contrary to the formal laws of the host nation, the important thing to remember is that they generally reflect the values of the

[6] For a more detailed discussion of customary justice systems, see the *Handbook of Military Support to Rule of Law and Security Sector Reform*, US Joint Forces Command (2011), pages D-29 through D-34.

local community, and decisions reached by them will be accepted and followed by most of the local populace.

In many cases, communities will prefer taking their disputes to customary systems rather than a formal court system because they are readily accessible, less expensive, more effective, and more in consonance with community values. This is particularly true in communities where the laws and court procedures of the formal system are viewed as being foreign impositions or tools that powerful individuals and groups use to gain advantages over other groups.

The laws that govern customary justice are simply the rules that are accepted by a community as governing their lives. The community may be a remote village, or it may be a tribe or ethnic group that has thousands of members spread out over hundreds of square miles. Usually the rules are transmitted orally, although in some cases there might have been attempts to write them down, such as has been done with the *Pashtunwali* of the Pashtuns of Pakistan and Afghanistan. There may be local variations of the same basic system, and there may be different groups with different systems living in the same area.

While these systems of rules may have their roots in the distant past, this does not mean that the rules have not changed over time; generally, the rules are reinterpreted to apply to new situations. Often, the rules and the methods of applying them are strained and altered by protracted conflicts.

Customary rules are generally very effective in determining property disputes and relations between members and families in the community, such as who is entitled to a goat or piece of land, who gets the property of someone when he or she dies, and who has what responsibilities in caring for children and the aged. Unlike our formal, adversarial system in the US, rules in a customary system are designed and applied so as to maintain or restore harmony within the community, rather than determining who is right and who is wrong, or to punish lawbreakers. While the formal systems to which we are accustomed look at individual rights and duties, winners and losers, retribution, and consistency, customary systems are usually more interested in communal order and harmony. Usually the concern is not just the relationships between the individuals involved, but relations between their families and within the overall community. Methods of resolution often involve compensation, apology and reconciliation, rather than punishment.

It is important not to confuse customary justice systems with Islamic *Shari'a* law. *Shari'a* law is the basis of Islamic legal thought, and deeply influences Muslim thought about law in both formal and customary systems. However, customary justice systems exist in North America, Africa and Asia in societies that are not Islamic or influenced by Islamic thought. Within the Muslim world there are customary justice systems that are influenced by *Shari'a* to a greater or lesser extent, and often those who apply such rules may believe they are applying *Shari'a* when in fact they are following their own local customs.

Usually, the community leaders who provide customary justice will be the heads of families or tribal groups, or will be elders who are respected in the community for their experience and wisdom. They normally have no means of exerting force, but receive their power from the tacit consent of the members of the community. They may hear disputes as individuals or as part of a group, such as a council of elders. Their judgments are accepted because the members of the community trust them to be able to reach decisions that reflect the values of the community and which will be acceptable to the majority of the members of the community. They can lose influence and leadership positions if their people start questioning or rejecting their advice and decisions.[7] What makes these customary systems work is their decentralized and local character, and the legitimacy and authority of the traditional leaders who lead the process. [8] The way these systems work can vary from highly informal to very ritualistic proceedings. The results are almost always intended to restore harmony to the community.

Applying the analytical framework described above to customary systems, the formal systems (to the extent that term can be used) are the customs of the community and the usual method of decision making (single elder, council of elders, or consensus of the community). The informal/social systems consist of the relationships between the elders/leaders with each other and with the rest of the community. In customary justice systems, the most important accountability system is the community itself; the community as a whole decides if the decisions of its leaders are right and fair according to the community's values.

Customary Justice and Human Rights

The relationship between human rights and customary justice is often difficult. While a customary system may apply different rules from what we are accustomed in the US, that does not mean necessarily that their rules or actions violate human rights principles. Although it is US policy to support fundamental human rights, the US government has not issued any definitive list of what constitutes such rights.[9] Some guidance can be found in 22 US Code sec. 2304, which governs human rights in security assistance programs. The statute prohibits giving security assistance to "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights." The section goes on to say that "gross violations of internationally recognized human rights" includes "torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person." Human rights policy guidance tailored to the mission should be provided by higher headquarters. Consult the servicing judge advocate for specific legal guidance. Generally, actions that may be taken if a potential human

[7] Bruce L. Benson, *The Enterprise of Law: Justice without the State*, (San Francisco: Pacific Research Institute, 1990), 20, citing E. Adamson Hoebel, *The Law of Primitive Man* (Cambridge, MA: Harvard University Press, 1954), 294.
[8] Deborah Isser, remarks made at the US Joint Forces Command-US Institute of Peace Conference on Traditional Justice and Military Support to Rule of Law, December 16, 2008.
[9] The Judge Advocate General's Legal Center and School, US Army, *Operational Law Handbook* (2012), p. 47.

rights violation is observed is to protest to HN leaders and try to persuade them not to commit the violations. If persuasion is unsuccessful, then all US personnel must disassociate themselves from the action, and report any violations to higher headquarters.

Practical Considerations

While there may be information on customary systems available from human terrain teams or other sources, often the ODA/CA team is its own best source of information. Ask your local contacts about how they deal with disputes and solve problems within the community. Everything should be cross-checked as much as possible so that the picture is accurate. Report what is learned so that others in similar environments can learn as well.

Do not reject customary systems or ignore them because they are unfamiliar. The HN formal systems may be corrupt, ineffective, expensive, slow, or be based on foreign ideas unacceptable to the populace. In most cases, customary systems are very accessible, inexpensive, reflect community values, and are trusted. They may be the most practical path to solving disputes within the community peacefully.

However, do not simply accept customary justice as an automatic solution. Check claims that they in fact are legitimate within the community. Conflict can strain the fabric of communities and pit factions against each other so that custom is no longer able to resolve disputes. Traditional leaders may be displaced by war, or may be involved in the hostilities. Often warlords, insurgents, or the government replace traditional leaders with figureheads that do not exert any real influence within the community. In some cases, customary systems may take actions that seriously violate US policy on human rights which can force US personnel to withhold or terminate support to that community, thereby making it much more difficult to achieve the stability objectives of the military mission.

Avoid creating a vacuum. Do not disrupt the operation of an existing customary system unless there is there is something that can effectively replace it. This may be an effective and legitimate host nation formal court system, or it may be an alternative informal system; otherwise you may help create lawlessness and the breakdown of the community. If possible, try to bring the HN formal legal systems and the customary systems together so that the members of the community view them as complementary, rather than competing ways of reaching justice.

Local legitimacy is essential for stability. A justice system, formal or customary, must be acceptable to and accepted by the local populace. Even if a system meets all the highest aspirations of the international community, it will not improve stability if the local populace does not see it as embodying their values and as capable of resolving their disputes in ways they think are fair.

Positive change is possible even in customary systems. Customary rules reflect the values and beliefs of both the leaders of the community and the members of the community who empower

the leaders. Even the most conservative customary systems change over time to deal with new problems and changing conditions. US SOF personnel can influence changes by education and mentoring, but any changes must be able to fit within the culture of the community to be accepted.

Keep in mind the long-term goals of the US, and do not sacrifice them for short-term success. If you do something that strengthens customary justice, you are giving greater power to the local leaders. What will these leaders do with that power, and will they support our goals over time? Always remember that you are not managing your local contacts, they are managing you. They know what they want, and will try to use you and the resources you have to get power for themselves or their group. Be cautious, even if they appear to hold common goals with you and the US government.

Be careful to not appear to take sides. US forces will often be called on to be mediators, adjudicators and power brokers in local communities because they have both the power of their weapons and the power of their dollars, and are not invested in local interests and rivalries. By appearing to be even handed, you can defuse conflicts, help bring the community together and increase stability.

Secure the leaders who administer customary justice. Insurgents, criminals and others who benefit from instability will try to disrupt customary justice by killing or intimidating the local leaders and their families. It is essential to assess the adequacy of security measures and, if necessary, act to ensure the safety of local leaders and their families.

Expect tension between customary justice systems and the formal justice systems. In many cases, those that operate the formal justice systems will see those who apply customary justice as threatening their power, and vice versa. Often US forces will find themselves in the role of mediators between those that implement the two systems, and can persuade both sides to cooperate with each other in the interests of making the community more stable.

Always coordinate with US civilian agencies, international actors, and HN authorities who are conducting rule of law operations within the area of operations. At a minimum, coordination de-conflicts activities so that no one is working at cross purposes. Sharing information can allow all the actors to develop a more accurate common operational picture. Ideally, coordination will generate synergy between the activities and programs of the various actors so that they support each other to strengthen the rule of law and create greater stability.

Conclusion

Rule of law is often treated as a very high level abstraction, suitable for pronouncements by the UN and national governments and for large-scale programs at the national and provincial levels, but as having little to do with actions at the local level. However, operations to strengthen the rule of law are frequently most effective when done within the local community, where they can give average people reason to believe that their disputes and injustices can be solved fairly, peacefully,

and effectively. By careful and informed engagement with local communities, their leaders and their customary ways, SOF personnel can strengthen the rule of law, increase stability, and achieve the US policy goals they were deployed to promote.

ASYMMETRIC WARFARE: THE STRAIT OF HORMUZ AND FUTURE CRISES

Kevin H. Govern

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On June 9, 53 BCE, Marcus Licinius Crassus' 30,000 Roman Legionaries were encircled by Parthian General Surena's small, mobile formations of slaves and nobles astride fast horses from Persia (the pre-1935 name for Iran). When the battle in Carrhae (now Diyarbakir, Turkey) was finished, all of Crassus' forces had either been killed or captured. Over 2,000 years later, on July 16, 2012, the USNS Rappahannock, a US Navy supply ship, fired on a fishing boat off the coast of the United Arab Emirates (UAE) after the fishing boat disregarded warnings and rapidly approached the US ship within the narrow Strait of Hormuz. Initial reports indicate an Indian national was killed and three others were seriously injured.

Could these incidents possibly have a common thread?

Iran's national maritime security strategy focuses regular and elite units on establishing the Persian Gulf as the front line of any potential confrontation with the US. Fast-forwarding from Carrhae to more contemporary times, during the Iran-Iraq War groups of small, fast Iranian gunboats (not mounted forces) and mined sea lanes posed a modern asymmetric threat to crude oil shipping in the Persian Gulf — the so-called "Tanker War" which lasted from 1984-1988. As a military reaction, in April 1988, the US Navy conducted Operation Praying Mantis, which destroyed almost half of the Iranian navy in several hours. Twelve years later on October 12, 2000, the US Navy destroyer USS Cole suffered 17 casualties and nearly sank during an asymmetric attack by al Qaeda that detonated an explosive-laden boat next to the destroyer while it was near a port in Yemen.

In 2006, the Iranian Minister of Petroleum, Kazem Vaziri-Hamaneh, claimed that Iran may use oil as a weapon if it served its national interests, and Iranian government spokesperson Gholam Hossein Elham said in June 2006 that Iran would disrupt oil supplies as a last resort if it were punished over its nuclear program. On January 6, 2008, Iranian Revolutionary Guard Corps (IRGC) patrol boats confronted a US Navy destroyer, cruiser and frigate in a tense encounter that ultimately cost no lives but raised serious questions about whether the aforementioned lessons from military history are going unheeded.

Since taking office, US President Barack Obama has purportedly ordered increasingly sophisticated secret attacks on the computer systems that run Iran's main nuclear enrichment facilities. At the same time, Iran has increased its cyberwarfare capabilities, evidenced by a recent $1 billion investment in new technology, and has grown to be the "most active state sponsor of

terrorism," according to the US State Department's estimation. The day before the incident involving the USNS Rappahannock, Iran threatened to close the Strait of Hormuz — through which about one-fifth of the world's traded oil passes — unless sanctions imposed over Iran's nuclear program were lifted.

To put it mildly, Iran has a complicated stance on issues of international maritime law. While Shah Mohammed Reza Pahlavi did not sign the 1958 UN Convention on the High Seas, he stipulated that the Strait of Hormuz is an international corridor not subject to local sovereignty. Although Iran has not signed any treaty on transit passage, the country asserts that it has the right to close the Strait if other countries ban its oil export and imports under a tenuous interpretation the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

Iran has signed the 1982 UN Convention on the Law of the Sea (UNCLOS), but has not yet ratified it. Nonetheless, Iran claims it is committed to the Convention's principles and considers transit passage as available to only those countries that have ratified the Convention — thus excluding the US, among others. Closing the Strait could be a method of retaliation for the alleged cyberattacks or retribution for nuclear sanctions. Such a closure would economically paralyze the other exporting countries in the region (Saudi Arabia, Kuwait, Iraq, Qatar, the UAE and Bahrain) as well as importing states (including Japan and the oil-dependent Western states). At a minimum, under the UNCLOS such actions would be considered a serious violation of international laws and regulations by the concerned states. Such closure could also conceivably constitute an act of war, which would draw together the Gulf Cooperation Council (GCC) members under their mutual defense agreement to combat against possible internal and external subversion.

The reaction of the USNS Rappahannock's crew to a small approaching vessel was part of the evolving rules of engagement (ROE) and national defense strategy to deal with asymmetric threats at sea, which sometimes involve individual vessels converging with others in insect-like "swarming" tactics. Since the Cole incident, the US Department of Defense (DoD) commissioned the Rand Corporation's 2000 monograph, *Swarming on the Battlefield, Past Present and Future,* which aptly noted that "swarming has occurred throughout military history, and the lessons of this past experience may offer insights into a possible future application of swarming." Testing the Rand Corporation's observation, the DoD's so-called Millennium Challenge 2002 (MC 2002) military exercise pitted notional Iranian versus notional coalitional forces. While details remain classified, the *New York Times* in January 2008 interviewed Marine Lieutenant General Van Riper, who served in MC 2002 as commander of the notional Iranian force. Van Riper observed "important lessons of his simulated victory were not adequately acknowledged across the military," namely that "the sheer numbers [of swarming forces] involved overloaded [coalitional] ability, both mentally and electronically, to handle the attack," ending the encounter "in 5, maybe 10 minutes." Since MC 2002, the US armed forces have intensively studied, trained, and fought under asymmetrical conditions. By 2004, the US Navy anticipated this kind of tactic in the guise of Irreducible Semi-Autonomous Adaptive Combat (ISAAC) and the US Marine Corps' Center for

Emerging Threats and Opportunities (CETO) has extensively explored [PDF] "swarm tactic" operations.

For that matter, Persian Gulf littoral states have grown their military forces since the 1980s, such that even the UAE has a more capable air force than Iran. French and US forces stationed near the Strait of Hormuz will also remain poised to keep the Strait open and challenge terrorist threats in the region. It doesn't take a historian, or even a military member, to appreciate the asymmetrical tactics Iranian forces have used, or may use again. These tactics even have analogues in the realm of business and culture; consider how Malcolm Gladwell's book *Blink: The Power of Thinking Without Thinking* and Peter Miller's *The Smart Swarm* have popularized the notion of "swarm theory" in realms off of the battlefield. As our politicians and military leaders anticipate and encounter emergent threats from Iran and other actors they will find that future battlespaces are multidimensional domains where an adversary can be engaged outside of the traditional parameters of space and time.

THE 'GREAT GAME' & THE US-AFGHAN STRATEGIC PARTNERSHIP AGREEMENT

Kevin H. Govern

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As immortalized in Rudyard Kipling's novel Kim, the nineteenth century "Great Game" was a bilateral military, diplomatic, and economic competition between the British and Russian empires in Afghanistan. One hundred and eleven years after the publication of Kipling's book, a monumental confluence of events has occurred: a signed bilateral agreement between the US and Afghanistan, a presidential speech describing the engagement between the two nations, the US Department of Defense's latest Report on Progress Toward Security and Stability in Afghanistan [PDF] and the first strategic meetings between Afghan and Indian diplomats under their shared October 2011 bilateral agreement. All of this came on May 1, 2012, the first anniversary of Osama bin Laden's targeted killing — an operation which was launched from Afghan soil into Pakistan. Yet, this coincidental convergence describes only a small fraction of the growing "Great Game" moves amongst many nations across the twenty-first century Afghan playing board.

After more than a year of talks and 23 drafts, Afghanistan and the US came to an agreement governing the next phase of their tempestuous relations. This Strategic Partnership Agreement (SPA) is one of only about 100 bilateral and multilateral agreements addressing the status of US armed forces while they are present in foreign nations. These agreements are commonly called Status of Forces Agreements (SOFAs) because, as I have previously noted, they are legal frameworks that define how foreign militaries operate in a host country. SOFAs may delineate, among other things, who is subject to the criminal and civil jurisdiction of the host country, as well as civil liabilities such as taxation.

This is merely the latest of many US-Afghan agreements following the terrorist attacks of September 11, 2001, and the ensuing Operation Enduring Freedom combat operations. In 2002, there was an exchange of notes under the Foreign Assistance Act of 1961 for economic grants and the providing of defense articles, services, and related training pursuant to the United States International Military and Education Training Program. Later, in 2004, there was an Acquisition and Cross-Servicing Agreement, followed by a 2005 joint declaration outlining a prospective future agreement regarding security, governance and development penned between the two countries, preceding a similar agreement [PDF] with the European Union (EU).

The US-Afghan dynamic dramatically changed in August 2008, after US airstrikes caused civilian casualties in Afghanistan, prompting Afghan President Hamid Karzai to call for the conclusion of formal SOFAs governing the forces operating in the nation. The US considered, but

did not actually establish such a SOFA for another two years. Curiously, the major impetus for a SOFA might have come had the United States-Afghanistan Status of Forces Agreement Act of 2011 moved beyond committee.

With the recent signing of the SPA, the US committed to the sovereignty, territorial integrity and national unity of Afghanistan, and to support Afghanistan's social and economic development, security, institutions and regional cooperation. This was matched by Afghan commitments to strengthen government accountability, transparency, oversight and to protect the human rights of all Afghans — men and women. The SPA commits Afghanistan to provide US personnel access to and use of Afghan facilities through 2014, while providing for the possibility of US forces in Afghanistan after 2014 for the purposes of training Afghan forces and targeting the remnants of al-Qaeda. It further commits the US and Afghanistan to initiate negotiations on a bilateral security agreement to supersede the current SOFA.

What of other nations involved in the "Great Game?" Central Asian states like Kazakhstan, Uzbekistan, Tajikistan, Kyrgyzstan, and Turkmenistan have *de facto* and *de jure* arrangements to provide the Northern Distribution Network (NDN) with multiple ground and air transportation routes into and out of Afghanistan for commercial carriers and US military aircraft. Neighboring Iran concluded its first Joint Defense Commission meeting with Afghan officials in Tehran in December 2011 for fuel and food exports, along with civil, military and cultural exchanges. This does not include Iran's investment of approximately $500 million in reconstruction and development efforts in Afghanistan, the arrangement of trilateral summits with Pakistan in Islamabad on counter-narcotics and refugee cooperation or the suspected continued equipping and training of Taliban and other insurgent groups. Within a week of the Afghan-US agreement, Iranian foreign ministry spokesman Ramin Mehmanparast publicly denounced it. Mehmanparast hinted that the agreement would imperil Iranian aid to Afghanistan and casted doubt on its efficacy, claiming that:

> [N]ot only will the strategic pact not resolve Afghanistan's security problems, but it will intensify insecurity and instability in Afghanistan.

The People's Republic of China pursues trade and natural resource exploitation in Afghanistan, and has committed more than $180 million in development aid to that nation, with another $75 million committed through 2014. Yet, there is no indicated clear intention regarding security arrangements in the future. As the dominant partner in bilateral arrangements with Pakistan, one cannot consider China's influence in Afghanistan isolated from its influence in Pakistan. As I have previously written, Pakistan is important to a trilateral power play not just for influence in Afghanistan but in opposition to India. Pakistan remains an important foothold for coalition forces in the region, and offers vital logistical lines of communication. Pakistan's egregious domestic human rights abuses, removal of top US military trainers from its soil, limiting of visas for US personnel and aiding and abetting of insurgent and terrorist elements make Pakistan a difficult case at best.

Just as China's influence in Afghanistan cannot be considered in isolation from its influence in Pakistan, India's influence in Afghanistan cannot be considered in isolation of its opposition to China and Pakistan. As mentioned earlier, bilateral relations between Afghanistan and India commenced the same day as the SPA. Foreign ministers Zalmai Rassoul of Afghanistan and S.M. Krishna of India met in the first session of meetings set up under an October 2011 strategic agreement between the two countries — purported to be Afghanistan's first with any country. The Afghan minister is also slated to meet Indian Prime Minister Manmohan Singh and finance and security officials. As the US-led coalition plans to withdraw forces from Afghanistan in 2014, there comes an Afghan shift in regional alignments toward India after Karzai chastised Pakistan for failing to act against Taliban-led insurgents based in Pakistan. The arrangement comes at the same time as relations between India and Pakistan have strained even further over attacks I have previously chronicled, which were purportedly sponsored by Pakistan on Indian soil. The October 2011 Indo-Afghan pact also outlined areas of common concern including trade, economic expansion, education, security and politics, as India plans to increase its participation in Afghanistan development.

The six members of the Gulf Cooperation Council intend to provide financial support to stabilize Afghanistan, and provide vital airbase, port, over-flight and transit arrangements with coalition forces operating in Afghanistan, while at the same time unofficially funding Taliban and other terrorist groups operating in Afghanistan and Pakistan.

Erstwhile occupier of Afghanistan, Russia, continues to play the "Great Game" to combat the flow of Afghan narcotics into its homeland, while supporting stability and security efforts in that nation and facilitating the flow of logistics via the NDN.

In his May 1, 2012 speech at Bagram Air Base, President Obama said:

> This time of war began in Afghanistan, and this is where it will end. ... With faith in each other, and our eyes fixed on the future, let us finish the work at hand and forge a just and lasting peace.

This is an ambitious, if not optimistic, outlook as Afghanistan has long been called the "graveyard of empires," given the failed incursions of Alexander the Great, the Persians, Genghis Khan, the British Empire (twice) and the Soviet Union. In July 2011, Zalmay Khalilzad, former US ambassador to Afghanistan and Iraq, suggested ways in which the US should be offering "more carrots along with the sticks" in the multilateral relationships with Afghanistan and the nations influencing and influenced by it. Considering the complex relationships between players in this twenty-first century version of the "Great Game," it is easy to see the difficulty inherent in deciding how many "carrots" and "sticks" to offer in these relationships, especially when one is doing so with an eye toward "forg[ing] a just and lasting peace."