TARGETING, DETENTION, AND PUNISHMENT: PROBLEMS IN THE RELATIONSHIP OF WAR AND CRIME

DISCUSSION LEADERS

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I. TARGETING, DETENTION, AND PUNISHMENT: PROBLEMS IN THE RELATIONSHIP OF WAR AND CRIME

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The laws of armed conflict rest on a sharp distinction between the domains of war and crime. Beginning in the seventeenth and eighteenth centuries, the condition of war was defined by its setting aside of justice. Security crises in the twenty-first century, however, have thrust these domains back together along multiple dimensions. This chapter's materials pursue the implications of the reintegration of war and crime in our time.

The readings begin with two preliminary questions. First, what counts as an armed conflict? In a world in which powerful states have an extraordinary technological capacity to kill, enormous pressure has been placed on this seemingly innocent question. Second, who is a combatant? Even after the threshold decision on armed conflicts has been made, many of the powers that armed conflict authorizes are held only in relation to those who have certain kinds of participatory relationships to the armed conflict. Moreover, as Carl Schmitt suggests in a provocative excerpt contained herein, the boundary between the lawful combatant and the unprivileged belligerent reveals the instability of the conventional categories of the laws of armed conflict.

Once these threshold questions have been aired, the chapter turns to the rise of targeting law and asks whether the targeted killings that are now a mainstay of antiterrorism efforts constitute acts of war, or crimes. Additional questions have arisen recently about the role of judges in reviewing decisions about military targeting, including how to review the administrative law systems for governing targeting decisions that some states—including Israel and the United States—have developed.

Like targeting, the traditional war power of detention has also come under pressure in twenty-first-century armed conflict. The International Committee of the Red Cross and others have urged with increased force in recent years that reasonableness and necessity restraints—the kinds of restraints long characteristic of the use of force by domestic criminal law agencies—should apply equally to armed conflicts, especially in the kinds of asymmetric conflicts typical of the past decade. Such critics assert a duty to capture (when feasible) even those persons who may lawfully be targeted. United States officials and courts have yet to embrace such a duty. But they do assert wide authority to detain in situations of armed conflict, even as the European Court of Human Rights has begun to place new limits on the detention of individuals suspected of terror.

Our discussion of detention concludes with a short treatment of one of the most dismaying possibilities to arise in debates over the laws of armed conflict in recent years: Do human rights norms or other forms of law governing the detention of suspected terrorists produce incentives for states to shift away from

detention and toward targeted killings? More generally, the possibility of a trade-off between detention law and targeting raises a particular form of a more general problem about the role of judges in the law of armed conflict. Structurally, courts can inevitably be only partial regulators of vast and complex systems of state authority in such settings (and in policing and detention more generally). Risks of unintended consequences and hydraulic effects abound.

The past few decades have also witnessed the reintroduction of crime into the domain of war. Enlightenment jurists such as the Swiss publicist Emmerich de Vattel founded the modern laws of war on the sharp separation of war and crime. Since at least Nuremberg in 1945 and 1946, a new generation of international criminal courts has brought crime and punishment back into war. But the eighteenth-century critique of integrating war and crime persists in the form of sharp anxiety that the criminalization of acts of war makes difficult the reestablishment of the peace that Vattel and others took to be the principal aim of humanitarian law.

Lacing all these issues are questions of fact and of judgment. How are decisions made about who to target, detain, and punish? What information comes from what sources, with what oversight, what structures, and what institutional arrangements? Are these arenas for courts? And if so, under what analytic frameworks?

Last, but not least, the chapter's materials take up the problem of proportionality in the conduct of war. Few areas have witnessed as dramatic a sea change as that of proportionality in armed conflict. As recently as the middle of the twentieth century, the necessity doctrine was well understood as a license for state violence vastly more destructive than was permitted to states outside of the war setting. Twenty-first-century humanitarian law, by contrast, aims to place far tighter limits on unintended harm to civilians. Modern proportionality, like targeting, detention, and punishment, raises deep questions about the role of courts in the regulation of armed conflict.

WHAT COUNTS AS ARMED CONFLICT AND WHO IS IN IT?

The Meaning of Armed Conflict

Prosecutor v. Tadić

Decision on the Defence Motion for Interlocutory
Appeal on Jurisdiction
International Criminal Tribunal for the Former Yugoslavia
Case No. IT-94-1-I (Oct. 2, 1995)

66. Appellant . . . asserts . . . that there did not exist a legally cognizable armed conflict—either internal or international—at the time and place that the alleged offences were committed. . . .

67. International humanitarian law governs the conduct of both internal and international armed conflicts. . . . [T]he temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated.

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. . . .

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that

the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. . . .

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

International Law Association

Final Report on the Meaning of Armed Conflict in International Law[*]

[A]rmed conflict is to be distinguished from "incidents"; "border clashes"; "internal disturbances and tensions such as riots, isolated and sporadic acts of violence"; "banditry, unorganised and short lived insurrections or terrorist activities" and "civil unrest, [and] single acts of terrorism." The distinction between these situations and armed conflict is achieved by reliance on the criteria of organisation and intensity. . . .

The criterion of organisation: . . . armed conflicts involve two or more organized armed groups. Violence perpetrated by the assassin or terrorist acting essentially alone or . . . disorganized mob violence . . . is not armed conflict. . . .

The Trial Chambers of the [International Criminal Tribunal for the Former Yugoslavia] have relied on several indicative factors outlined in detail above to determine whether the organisation criterion is fulfilled. . . . None of the factors in itself is central. Factors relevant to assessing organisation include command structure; exercise of leadership control; governing by rules; providing military training; organized acquisition and provision of weapons and supplies; recruitment of new members; existence of communications infrastructure; and

[*]Excerpted from *Final Report on the Meaning of Armed Conflict in International Law*, INT'L LAW ASSOC. 28-30 (2010), http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87.

space to rest. As a practical matter opposing groups will in most cases control enough territory to organize. Control of territory is an affirmative requirement for the application of Additional Protocol II. . . .

The criterion of intensity: . . . hostilities must reach a certain level of intensity to qualify as an armed conflict.

Factors relevant to assessing intensity include for example the number of fighters involved; the type and quantity of weapons used; the duration and territorial extent of fighting; the number of casualties; the extent of destruction of property; the displacement of the population; and the involvement of the Security Council or other actors to broker cease-fire efforts. Isolated acts of violence do not constitute armed conflict. The intensity criterion requires more than, for example, a minor exchange of fire or an insignificant border clash. None of the factors identified above is necessarily determinate in itself. A lower level with respect to any one may satisfy the criterion of intensity if the level of another factor is high.

The jurisprudence of the ICTY indicates that the requirement of intensity will normally have a temporal aspect in the case of non-international armed conflicts . . . . [I]n order to constitute a noninternational armed conflict there must be a certain level of armed violence over a protracted period. The two concepts, intensity and protraction, are linked and a lesser level of duration may satisfy the criterion if the intensity level is high. . . .

Who Is a Combatant?

Carl Schmitt

THEORY OF THE PARTISAN[*]

[T]he distinction of partisans—as irregular fighters who are not equal to regular troops—has been in principle retained to this day. The partisan in this sense does not have the rights and privileges of combatants; he is a criminal in

[*]Excerpted from CARL SCHMITT, THE THEORY OF THE PARTISAN: A COMMENT/REMARK ON THE CONCEPT OF THE POLITICAL 16, 25, 34, 36–37 (A.C. Goodson, trans., Michigan State University Press, 2004) (1963).

common law, and may be rendered harmless by summary punishments and repressive measures. . . .

The traditional European containment of war between states has proceeded since the eighteenth century from determinate concepts which, though interrupted by the French Revolution, were all the more effectively confirmed by the restoration work of the Congress of Vienna. These ideas of a contained war and a just enmity stemming from the age of monarchy can only then be legalized bilaterally when the warring states on both sides hold fast to them, both within their own states and between them, that is, when their domestic as well as their interstate concepts of regularity and irregularity, legality and illegality, are in alignment or at least structurally homogeneous to some extent. . . .

[I]t was Lenin who recognized the inevitability of violence and of bloody revolutionary civil war as well as state war, and so affirmed partisan war . . . .

The war of absolute enmity knows no containment. The consistent realization of absolute enmity provides its meaning and its justice. The only question therefore is this: is there an absolute enemy and who is it *in concreto*? For Lenin the answer was unequivocal, and his superiority among all other socialists and Marxists consisted in his seriousness about absolute enmity. His concrete absolute enemy was the class enemy, the bourgeois, the western capitalist and his social order in every country in which they ruled. . . . [Lenin's] comprehension of the partisan rested on the fact that the modern partisan had become the irregular proper and, in his vocation as the executor proper of enmity, thus, the most powerful negation of the existing capitalist order.

The partisan's irregularity refers today not only to a military "line" or formation, as it did in the eighteenth century, when the partisan was just a "lightly armed troop," nor to the proud uniform of the regular troop. The irregularity of class struggle calls not just the military line but the whole edifice of political and social order into question. The alliances of philosophy with the partisan, established by Lenin, unleashed unexpected new, explosive forces. It produced nothing less than the demolition of the whole Eurocentric world, which Napoleon had tried to save and the Congress of Vienna had hoped to restore.

International Committee of the Red Cross

Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law[*]

I. The concept of civilian in international armed conflict: For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

II. The concept of civilian in non-international armed conflict: For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In noninternational armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

III. Private contractors and civilian employees: Private contractors and employees of a party to an armed conflict who are civilians (see above I and II) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

IV. Direct participation in hostilities as a specific act: The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.

V. Constitutive elements of direct participation in hostilities: In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: 1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); 3. the act

[*]Excerpted from *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian La*w, 9 INT'L REV. RED CROSS 991 (2008).

must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

VI. Beginning and end of direct participation in hostilities: Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

VII. Temporal scope of the loss of protection: Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.

VIII. Precautions and presumptions in situations of doubt: All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.

IX. Restraints on the use of force in direct attack: In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

X. Consequences of regaining civilian protection: International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.

Public Committee Against Torture v. Government

Israel Supreme Court
Case No. HCJ 769/02 (2006)

President (Emeritus) A. Barak:

32. [W]e have seen that the basic principle is that the civilian population, and single civilians, are protected from the dangers of military activity and are not targets for attack. That protection is granted to civilians "unless and for such time as they take a direct part in hostilities."

33. [C]ivilians lose the protection of customary international law dealing with hostilities of international character if they "take . . . part in hostilities." What is the meaning of that provision? The accepted view is that "hostilities" are acts which by nature and objective are intended to cause damage to the army. . . .

34. Civilians lose the protection against military attack, granted to them by customary international law dealing with international armed conflict, if "they take a direct part in hostilities." . . . It seems accepted in the international literature that an agreed upon definition of the term "direct" in the context under discussion does not exist. . . . In that state of affairs, and without a comprehensive and agreed upon customary standard, there is no escaping going case by case, while narrowing the area of disagreement. . . . [A] civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it is a civilian taking "an active part" in the hostilities. However, a civilian who generally supports the hostilities against the army is not taking a direct part in the hostilities. Similarly, a civilian who sells food or medicine to unlawful combatants is also taking an indirect part in the hostilities.

35. [T]he following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army . . . ; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them . . . . The function determines the direct part of the part taken in the hostilities. . . .

36. What is the law regarding civilians serving as a "human shield" for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. . . . However, if they do so of their

own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities.

37. [I]n our opinion, the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take a "direct part." The same goes for the person who decided upon the act, and the person who planned it. . . .

39. [T]here is no choice but to proceed from case to case. . . . On the one hand, a civilian taking part in hostilities one single time, or sporadically, who later detaches himself from that activity, is entitled to protection from attack. . . . On the other hand, a civilian who has joined a terrorist organization which has become his "home," and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attach "for such time" as he is committing the chain of acts.

TARGETED KILLINGS

The Legal Culture of Targeting

Aharon Barak

Human Rights in Times of Terror—A Judicial Point of View[*]

[J]udges in modern democracies have a major role to play in protecting democracy. We should protect it both from terrorism and from the means the state wishes to use to fight terrorism. Judges are, of course, tested daily in their protection of democracy, but judges meet their supreme test when they face situations of war and terrorism. The protection of human rights of every individual is a duty much more formidable in situations of war or terrorism than in times of peace and security. If we fail in our role in times of war and terrorism, we will be unable to fulfill our role in times of peace and tranquility. It is a myth to think that it is possible to maintain a sharp distinction between the status of human rights during a period of war and the status of human rights during a

[*]Excerpted from Aharon Barak, *Human Rights in Times of Terror—A Judicial Point of View*, 28 LEGAL STUD. 493 (2008).

period of peace. It is self-deception to believe that we can limit judicial rulings so that they will be valid only during wartime, and that we can decide that things will change in peacetime. The line between war and peace is thin; what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction in the long term. We should assume that whatever we decide when terrorism is threatening our security will linger many years after the terrorism is over. Indeed, we judges must act with coherence and consistency. A wrong decision in a time of war and terrorism plots a point that will cause the judicial curve to deviate after the crisis passes. . . .

What is the scope of judicial review in time of terror? The answer to this question should vary according to the essence of the concrete question raised. At one end of the spectrum stands the question 'What is the law on the battle against terror?' That question is within the realm of the judicial branch. The court is not permitted to liberate itself from the burden of that authority. The question which the court should ask itself is not whether the executive branch's understanding of the law is a reasonable understanding. The question should be is it the correct understanding. We have not accepted the *Chevron* doctrine. At the other end of the spectrum is the decision, made on the basis of the knowledge of the military professionals, to execute a military operation. That decision is the responsibility of the executive branch. It has the professional-security expertise to make that decision. The Court will ask itself only if a reasonable military commander could have made the decision which was made. If the answer is yes, the Court will not exchange the military commander's security discretion within the security discretion of the Court. Judicial review regarding the military means to be taken is the regular review of reasonableness. True, 'military discretion' and 'state security' are not magic words which prevent judicial review. However, the question is not what I would decide in the given circumstances, rather whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make. On that subject, special weight is to be granted to the military opinion of the official who bears the responsibility for security.

Between the two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. One of those legal aspects is the decision about proportionality. By proportionality I mean the legal concepts that require that any limitation of human rights—whether by statute or by an administrative regulation—should fulfill the following requirements: (a) there should be a rational connection between the goal to be achieved and the means used, (b) there are no less restrictive means to achieve that goal, and (c) the benefit to the public interest achieved by the means is proportional to the harm caused to the human rights. Many judgments I gave

dealing with the battle on terror were dealing with proportionality. Thus, in occupied territories, the military cannot take possession of land, if the harm to the local population does not fulfill the requirements of proportionality. Similarly, under customary international law the state cannot harm civilians while fighting terror if such harm does not fulfill the proportionality requirement. In a recent case, I dealt with targeted killings. It was decided that the state cannot target a terrorist who takes direct part in terrorist activities if the collateral damage to civilians will be disproportionate.

Jack Goldsmith

POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11[*]

A targeting decision is the commander's decision, but lawyers like Mark Martins[**] are involved at every step. They first of all ensure compliance with international law, which demands that fire be directed to military and not civilian targets (a tricky issue when the enemy wears civilian clothes or hides in a hospital or a mosque); that it be calculated to not cause "unnecessary suffering"; and that the anticipated collateral damage to civilian life or property not be "excessive" when compared to the expected military gain of the attack (a difficult subjective judgment call). . . . The operational lawyer must also ensure that the attack is consistent with other domestic laws . . . and with the rules of engagement and scores of other regulations, directives, and executive orders that apply on the modern battlefield. Making these decisions in battle requires the lawyer to be well trained as a warrior, and to have a thorough and realistic understanding of battle situations, intelligence gathering techniques, and communications and weapons systems. "Soldier First, Lawyer Always" is the Army JAG Corps motto.

In theory the military lawyer can veto a targeting decision at many points in the targeting process. "Lawyers will be very clear if there is a 'no kidding' red line that you are about to walk over," says [David] Petraeus [currently director of

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[*]Excerpted from JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012). [Editor's Note: The author, a professor at Harvard Law School, was Assistant Attorney General, Office of Legal Counsel, in the United States Department of Justice from 2003 to 2004.]

[**][Editor's Note: As of 2012, Mark Martins was serving as the Brigadier General and Chief Prosecutor of the U.S. Office of Military Commissions at Washington D.C. and Guantánamo Bay, Cuba.]

the U.S. Central Intelligence Agency and former commander of U.S. forces in Afghanistan]. "They will generally be firm and reminding you of that." Commanders heed such advice, but in fact they rarely approach a red line because lawyers have exercised much of their influence before the battle begins. Petraeus and his subordinate commanders had trained with lawyers for decades, and together with lawyers had already folded legal considerations into the rules of engagement and other battlefield directives.

When Petraeus led the 101st Airborne Division in the battle of Najaf, Iraq, in the Spring of 2003, one of his battalions fighting toward the city center in tanks and armored personnel carriers was getting hammered by the Feyadeen Saddam using rocket propelled grenades, small arms, and howitzers from civilian strongholds within and around the shrine of Imam Ali, one of the holiest sites in Shia Islam. . . . "[O]perational lawyers . . . were there in each headquarters down to brigade level to provide sound advice and supervise training on rules of engagement," he recalls. Another factor kept the battalion far from any legal lines. Petraeus could have considered an attack on the holy shrine itself, which was shielding the enemy . . . . He didn't need a lawyer, however, to tell him this was a bad idea. "I didn't want a single round, not even a ricochet, to hit the dome," he says. . . .

Law and lawyers also help commanders in targeting and related decisions by acquainting them with the accumulated wisdom the past. "Law embodies and summarizes human experience and wisdom about right action in a particular context," says Martins. The international laws of war contain principles that, along with their precedents of application, reflect centuries of experience and learning. When the commander wants to take a militarily efficient action and . . . a law or regulation that suggests another course, the commander is forced to consider how others have thought in his shoes or might view his action from a different perspective . . . . When this process works, [Martins says], "legal advice does not constrain policy, but rather confirms it by forcing you to think about every aspect of the decision . . . ."

The military lawyer's value, and thus influence, come not just from the identification of and advice about laws, but also from advice on nonlegal matters. Lawyers help you come to grips with the issues involved in a targeting decision, not all of which are legal issues, explains Petraeus. He is speaking of the military lawyer's role as "counsellor" or, as some put it, "*consigliere*." Lawyers are trained to think clearly, critically, and analytically, to find weakness in evidence or in causal inferences, and to consider the broader implications and effects of a decision. They are typically more attuned to the context, appearance, and political and moral implications of particular actions. . . . Lawyers also have a slew of

precedents at their fingertips—not all of them legal precedents—to help commanders understand by analogy some of the hidden dangers behind the situation at hand. . . . This is why Petraeus uses lawyers "for a lot of other things" besides legal advice. It is yet another reason why they are so influential. . . .

Surrounded by law and under the gaze of many potential retroactive critics, it is entirely rational for soldiers up and down the chain of command to hesitate before acting. Such hesitation can be costly. In October 2001, a Predator drone identified a convoy believed to carry Taliban leader Mullah Omar and followed him to a building that looked like a mosque. . . . When Franks got the go-ahead, he ordered a strike on a vehicle outside the building rather than on the building itself. He did so in part on the advice of a military lawyer who expressed caution because of the probable presence of civilians inside the building. Omar escaped. This pattern of lawyer-induced hesitancy to strike top al Qaeda or Taliban leaders would repeat itself ten times in the first month of the war in Afghanistan . . . .

[E]ven General Petraeus, who and admires and relies heavily on lawyers, cautions that they can be "'surprise, surprise,' overly legalistic" . . . .

Amichai Cohen

Legal Operational Advice in the Israeli Defense Forces[*]

[T]he . . . "International Law Department" (ILD) in the Military's Advocate General (MAG) branch of the Israeli Defense Forces (IDF) . . . is entrusted with advising the military with regards to the requirements of international law. . . .

[A] major surge in ILD's lawyers' involvement in operational decisions took place at the beginning of the second intifada in September 2000. . . . In September 2000 the IDF began to view the conflict as something similar to war, albeit in a civilian setting. IDF commanders had very little experience as to the IHL limits under this kind of conflict. In order to receive some legal instructions, the IDF commanders turned to the ILD for advice. For example, one of the most controversial decisions taken at the beginning of the second intifada was the

[*]Excerpted from Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 CONN. J. INT'L L. 367 (2011)

initiation of a policy of targeted killings. When asked for an opinion regarding the legality of this policy prior to its adoption, the ILD advised that although targeted killings were permissible, several conditions had to be met prior to their undertaken. These included: the need to assure that there is no viable arrest opportunity; the need to follow the rule of proportionality; and ministerial level approval (usually by the Minister of Defense). This opinion, while important, was still in the traditional mold of ILD pre-action advice. Since some of these requirements were difficult to apply, the ILD was asked to send representatives to the command center where specific orders were given, and to grant their approval to operations. The ILD did indeed dispatch such representatives, and implemented "operational legal advice" was implemented, though at first without realizing its greater potential. . . .

There are two basic principles that run through official descriptions of the role of ILD lawyers and their self-perception. These principles are independence and the advisory role. Independence means that the legal advice given is based on independent legal analysis and not on the wishes of the commander. The advisory role means that the lawyer advises the military commander as to the legal limits of a course of action, but he is not the final decision maker. . . .

At least in the IDF, neither of the principles noted above (independence of the unit and its advisory role) [is] fully observed. . . . MAG lawyers involved in operational advice consistently report that even if a commander decided to ignore their advice, they (or their superiors in the MAG) were always able to prevail upon his superior commander to countermand whatever decisions he might wish to take. MAG lawyers also admit to issuing direct threats to military commanders, warning them with prosecution if they take a specific route of action. . . .

The principle of independence is also more problematic than it seems. Military officers do not apparently threaten lawyers or force them to change their opinions. On the contrary, reports speak of some courageous young lawyers who stood up to over-eager commanders, and halted some dangerous and illegal operations. But . . . the main problem with [International Humanitarian Law] is that many of its norms are ambiguous. In fact, it has been designed specifically as a system which leaves much room for interpretation. The result rests on external pressures and institutional structures. Senior military commanders and other external bodies like the Ministry of Justice are aware of this characteristic of IHL, and exploit it to promote their positions. . . .

MAG lawyers are part of an institution which considers one of its major tasks to be assisting commanders to win wars. When faced with . . . "gray areas," MAG lawyers try to be responsive to the military. . . . In this respect, the fact that

legal advisors sit in command centers is actually a double-edged sword. On the one hand, they are close to events, and can give immediate advice. On the other hand, their proximity to the decision makers increases the sense that they are part of the military machinery and therefore less likely to give "independent" advice.

Extra-Legal Killing or Armed Conflict?

Philip Alston
Study on Targeted Killings[*]

1. A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour 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. In recent years, a few States have adopted policies, either openly or implicitly, of using targeted killings, including in the territories of other States. . . . .

3. The result . . . has been a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks—human rights law, the laws of war, and the law applicable to the use of inter-state force. Even where the laws of war are clearly applicable, there has been a tendency to expand who may permissibly be targeted and under what conditions. Moreover, the States concerned have often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troublingly, they have refused to disclose who has been killed, for what reason, and with what collateral consequences. The result has been the displacement of clear legal standards with a vaguely defined licence to kill, and the creation of a major accountability vacuum. . . .

28. Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the interstate use of force. . . .

[*]Excerpted from Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/ADD.6 (May 28, 2010) (by Philip Alston).

In the Context of Armed Conflict

[30.] *Under the rules of [International Humanitarian Law (IHL)]*: Targeted killing is only lawful when the target is a "combatant" or "fighter" or, in the case of a civilian, only for such time as the person "directly participates in hostilities." In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity, and everything feasible must be done to prevent mistakes and minimize harm to civilians. These standards apply regardless of whether the armed conflict is between States (an international armed conflict) or between a State and a non-state armed group (non-international armed conflict), including alleged terrorists. Reprisal or punitive attacks on civilians are prohibited. . . .

Outside the Context of Armed Conflict

[32.] *Under human rights law*: A State killing is legal only if it is required to protect life (making lethal force proportionate) and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force necessary). The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others. The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture.

33. This means that under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation. Thus, for example, a "shoot-to-kill" policy violates human rights law. . . .

58. [S]tates are permitted to directly attack only civilians who "directly participate in hostilities" (DPH). Because there is no commonly accepted definition of DPH, it has been left open to States' own interpretation—which States have preferred not to make public—to determine what constitutes DPH.

59. There are three key controversies over DPH. First, there is dispute over the kind of conduct that constitutes "direct participation" and makes an individual subject to attack. Second, there is disagreement over the extent to which "membership" in an organized armed group may be used as a factor in determining whether a person is directly participating in hostilities. Third, there is controversy over how long direct participation lasts.

60. It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not "reward" an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities. The key, however, is to recognize that regardless of the enemy's tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.

One example of an approach taken by a nation-state comes from the Attorney General of the United States, who recently spoke on the American policy of targeted killings:

Eric Holder
Speech at Northwestern University Law School[*]

[W]e are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks—fortunately, unsuccessful—against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats.

[T]his does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. . . . [I]t is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto—the commander of Japanese forces in the attack on Pearl Harbor and the Battle of Midway—and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

[*]Excerpted from Eric Holder, Attorney Gen., Dep't of Justice, Speech at Northwestern University Law School (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

Some have called such operations "assassinations." They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. Here, for the reasons I have given, the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful—and therefore would not violate the Executive Order banning assassination or criminal statutes.

THE POWER TO DETAIN

Is There a Duty to Capture If You Can?

One of the most pressing questions to emerge out of the targeted killings campaign is whether and when there might be a duty to capture rather than kill in armed conflict situations. The duty to capture is familiar from peacetime policing contexts. But it also now appears in the settings that have become commonplace in twenty-first-century armed conflict. The U.S. Department of Justice, for example, is said to take the position that the United States may target an enemy combatant or enemy civilian directly participating in hostilities even when that civilian is also a United States citizen, but only when capture is not feasible. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011. Similarly, the International Committee of the Red Cross (ICRC) has recently interpreted international humanitarian law to include an obligation to capture civilians directly participating in hostilities.

International Committee of the Red Cross

Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law[*]

[T]he principle of military necessity is generally recognized to permit "only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources." Complementing

[*]Excerpted from *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 9 INT'L REV. RED CROSS 991 (2008).

and implicit in the principle of military necessity is the principle of humanity, which "forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes."

[I]n classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of [International Humanitarian Law]. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.

For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population. Similarly, under IHL, an insurgent military commander of an organized armed group would not regain civilian protection against direct attack simply because he temporarily discarded his weapons, uniform and distinctive signs in order to visit relatives inside government-controlled territory. Nevertheless, depending on the circumstances, the armed or police forces of the government may be able to capture that commander without resorting to lethal force. Further, large numbers of unarmed civilians who deliberately gather on a bridge in order to prevent the passage of governmental ground forces in pursuit of an insurgent group would probably have to be regarded as directly participating in hostilities. In most cases, however, it would be reasonably possible for the armed forces to remove the physical obstacle posed by these civilians through means less harmful than a direct military attack on them.

In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situations, the principles of

military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets.

The Vast Powers of Detention

Karl S. Chang

Enemy Status and Military Detention in the War Against al-Qaeda[*]

[U]nder the law of war, belligerents . . . may lawfully detain any enemy person whom they regard as militarily necessary to detain . . . .

First, belligerents may detain any person who has taken part in hostilities. The ability of states under the law of war to detain any person who has participated in hostilities is shown in the purpose of war detention, which is to prevent "further participation" in the war. Thus, anyone who has participated may be detained to prevent further participation.

In addition, belligerents can detain all members of enemy armed forces, regardless of whether individual members have participated in hostilities. Belligerents can capture former members of enemy armed forces. Belligerents can detain enemies who are armed. Belligerents can detain persons who materially support enemy forces in the fighting. Belligerents can detain all military-age inhabitants of an area during a mass uprising, known as a *levée en masse*. Belligerents can detain enemy persons present on their home territory at the outbreak of hostilities. Belligerents can detain enemy civilians who are "important" to the enemy, including senior government officials. Belligerents can detain enemy civilians for security reasons, regardless of whether they have participated in the armed conflict. The law of war guarantees humane treatment and requires that such detentions be non-punitive. In certain circumstances, the law of war requires periodic review of the necessity of continued detention. However, the law of war does not require the release of captured enemy persons whom belligerents view as necessary to continue to detain.

[*]*Excepted from* Karl S. Chang, *Enemy Status and Military Detention in the War Against al-Qaeda*, 47 TEX. INT'L L.J. 1 (2012). [Editor's note: As of 2012, the author was Associate General Counsel (International Affairs) in the U.S. Department Defense, Office of General Counsel.]

The law of war has left military detention authority broad for humanitarian reasons. In peacetime, detention without criminal trial is a severe deprivation of liberty. However, in war, detention is one of the more humane measures a belligerent can impose upon his enemy. The law of war has permissive rules on the use of deadly force compared to the civilian context. Peaceful civilians may be killed incidentally so long as their deaths are not excessive in relation to the military advantage to be gained by the attack. Under the law of war, there are circumstances in which a military commander may attack a military objective knowing that peaceful civilians will die. In contrast, "merely a temporary detention which is devoid of all penal character," is humane. Detention under the law of war can be far safer than the battlefield, as the hundreds of thousands of German and Italian prisoners of war who were interned in the United States during World War II and their counterparts fighting in Europe might attest. Moreover, by speeding the end of hostilities, military detention lessens the use of deadly force.

Al-Bihani v. Obama

United States Court of Appeals, District of Columbia Circuit
590 F.3d. 866 (2010)

[Janice Rogers] BROWN, Circuit Judge:

Ghaleb Nassar Al-Bihani appeals the denial of his petition for a writ of habeas corpus and seeks reversal or remand. He claims his detention is unauthorized by statute and the procedures of his habeas proceeding were constitutionally infirm. We reject these claims and affirm the denial of his petition.

Al-Bihani, a Yemeni citizen, has been held at the U.S. naval base detention facility in Guantanamo Bay, Cuba since 2002. . . .

Al-Bihani challenges the statutory legitimacy of his detention by advancing a number of arguments based upon the international laws of war. He first argues that relying on "support," or even "substantial support" of Al Qaeda or the Taliban as an independent basis for detention violates international law. . . .

Before considering these arguments in detail, we note that all of them rely heavily on the premise that the war powers granted by the [Authorization for Use of Military Force (AUMF) enacted by the U.S. Congress in October 2001] and

other statutes are limited by the international laws of war. This premise is mistaken. There is no indication . . . that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war power under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts. . . . Therefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers. Therefore . . . we have no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles. The sources we look to for resolution of Al-Bihani's case are the sources courts always look to: the text of relevant statutes and controlling domestic caselaw.

Under those sources, Al-Bihani is lawfully detained whether the definition of a detainable person is, as the district court articulated it, "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," or the modified definition offered by the government that requires that an individual "substantially support" enemy forces. The statutes authorizing the use of force and detention not only grant the government the power to craft a workable legal standard to identify individuals it can detain, but also cabin the application of these definitions. The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." The Supreme Court in *Hamdi v. Rumseld*, 524 U.S. 507 (2004), ruled that "necessary and appropriate force" includes the power to detain combatants subject to such force. The 2006 MCA authorized the trial of an individual who "engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." In 2009, Congress enacted a new version of the [Military Commissions Act (MCA)] with a new definition that authorized the trial of "unprivileged enemy belligerents," a class of persons that includes those who "purposefully and materially supported hostilities against the United States or its coalition partners."

[W]ith the government's detention authority established as an initial matter, we turn to the argument that Al-Bihani must now be released according to longstanding law of war principles because the conflict with the Taliban has allegedly ended. . . .

[T]he determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war. . . .

In addition to writing the decision for the panel, on which Judges Brett Kavanaugh and Stephen Williams also sat, Judge Brown filed an unusual additional opinion, concurring separately to add criticism of the Supreme Court's decisions in *Boumediene v. Bush*. (2008), and *Hamdi v. Rumsfeld* (2004). She described the Court as having given lower courts

> the unprecedented task of developing rules to review the propriety of military actions during a time of war, relying on common law tools. . . .
>
> War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules to be written. Falling back on the comfort of prior practices supplies only illusory comfort.

Judge Williams wrote a separate concurrence that, given the detainee's concessions, the court had "no need to discuss the constitutionality of the district court's factfinding process" and the standard of proof required. Similarly, when the circuit denied rehearing en banc, the opinion by Chief Judge Sentelle concluded that the discussion by the majority about the "role of international law-of-war principles in interpreting" the AUMF was "not necessary" to the disposition. *Al-Bihani v. Obama* (D.C. Cir. 2010), cert. denied, June 12, 2012.

Judge Brown again wrote separately to argue that her discussion was not dictum and to foreclose the "possibility . . . that domestic statutes are in fact subordinate to an over-arching international legal order. . . . The idea that international norms hang over domestic law as a corrective force to be implemented by courts is not only alien to our caselaw, but an aggrandizement of the judicial role beyond the Constitution's conception of the separation of powers."

Judge Kavanaugh wrote to agree, that "[i]nternational-law norms that have not been incorporated into domestic U.S. law by the political branches are not judicially enforceable limits on the President's authority under the AUMF" and then explained "at great length" his reasons for that view. Arguing that federal courts had no "common law"-making powers and that Congress had not in the AUMF imposed limits based on international law on the President's powers, Judge Kavanaugh concluded that federal judges lacked "legitimate authority to interfere with the American war effort by ordering the President to comply with international-law principles that are not incorporated in statutes, regulations, or self-executing treaties." Judge Williams wrote again, to agree that international law did not create independent judicially enforceable limits but to disagree in part with Judge Kavanaugh by stating that international law could be used to "affect a court's statutory interpretation." Thereafter, the Supreme Court denied certiorari.

The question of the quality of information and the role of district court factfinding returned in *Latif v. Obama* (D.C. Cir. 2011), cert. denied, June 12, 2012, which is a heavily redacted opinion. The majority, written by Judge Brown, overruled a district court order granting habeas relief based on inadequate evidence to detain Mr. Latif. Judge Brown found that government records—including those made through intelligence reports made during the conflict—were entitled to the "presumption of regularity" and that Mr. Latif could not prove the inaccuracy of those records. Judge Tatel's dissent argued that the district court should be affirmed:

> The government's "primary" piece of evidence is a single report. After carefully laying out the parties' arguments about the Report's internal and external indicia of reliability, the district court found it "not sufficiently reliable to support a finding by a preponderance of the evidence that Latif was recruited by an Al Qaeda member or trained and fought with the Taliban." According to the district court, "there is a serious question as to whether the [Report] accurately reflects [redacted] the incriminating facts in the [Report] are not corroborated, and Latif has presented a plausible alternative story to explain his travel." The government concedes that its case for lawfully detaining Latif "turn[s]" on the Report. This, then, represents a first among the Guantanamo habeas appeals in this circuit: never before have we reviewed a habeas grant to a Guantanamo detainee where all concede that if the district court's fact findings are sustained, then detention is unlawful.
>
> But rather than apply ordinary and highly deferential clear error review to the district court's findings of fact, as this circuit has

done when district courts have found the government's primary evidence *reliable*, the court, now facing a finding that such evidence is *unreliable*, moves the goal posts. According to the court, because the Report is a government-produced document, the district court was required to presume it accurate unless Latif could rebut that presumption. In imposing this new presumption and then proceeding to *find* that it has not been rebutted, the court denies Latif the "meaningful opportunity" to contest the lawfulness of his detention guaranteed by *Boumediene.*

Convention Relative to the Protection of Civilians in Time of War (Fourth Geneva Convention)

Aug. 12, 1949, 75 U.N.T.S 287

Article 42

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Article 43

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts

or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

Article 44

In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

New Legal Limits?

A and Others v. U.K.
European Court of Human Rights (Grand Chamber)
App. No. 3455/05 (2009)

10. The Government [of the United Kingdom] contended that the events of 11 September 2001 demonstrated that international terrorists, notably those associated with al'Qaeda, had the intention and capacity to mount attacks against civilian targets on an unprecedented scale. . . . In the Government's assessment, the United Kingdom, because of its close links with the United States, was a particular target. They considered that there was an emergency of a most serious kind threatening the life of the nation. Moreover, they considered that the threat came principally, but not exclusively, from a number of foreign nationals present in the United Kingdom, who were providing a support network for Islamist terrorist operations linked to al'Qaeda. . . .

[Article 5.1 of the Convention provides that "[n]o one shall be deprived of his liberty" except in six enumerated exceptions. Article 5.1(f) lists as one of those exceptions "the lawful arrest or detention of a person . . . against whom action is being taken with a view to deportation or extradition." The problem for the United Kingdom was that a number of the foreign nationals the Government believed provided support for terrorism "could not be deported because of the risk that they would suffer treatment contrary to Article 3 of the Convention in their countries of origin."]

11. On 11 November 2001 the Secretary of State made a Derogation Order under section 14 of the Human Rights Act 1998 in which he set out the terms of a

proposed notification to the Secretary General of the Council of Europe of a derogation pursuant to Article 15 of the [European Convention on Human Rights]. . . . The derogation notice provided as follows:

> [T]here exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.
>
> As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom.
>
> As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security Act 2001, inter alia, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist. That certificate will be subject to an appeal to the Special Immigration Appeals Commission ("SIAC"), established under the Special Immigration Appeals Commission Act 1997, which will have power to cancel it if it considers that the certificate should not have been issued. There will be an appeal on a point of law from a ruling by SIAC. In addition, the certificate will be reviewed by SIAC at regular intervals. SIAC will also be able to grant bail, where appropriate, subject to conditions. It will be open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.
>
> [A]s indicated above, there may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that "action is being taken with a

> view to deportation" within the meaning of Article 5(1)(f) of the Convention. . . . To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice."

[The Court first took up the applicants' challenge to their detention under Article 3 of the Convention, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment," and Article 13 of the Convention, which provides that "[e]veryone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority."]

128. [W]here a person is deprived of his liberty, the State must ensure that he is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention. . . .

129. [T]hree of the applicants were held approximately three years and three months while the others were held for shorter periods. During a large part of that detention, the applicants could not have foreseen when, if ever, they would be released. . . .

130. [T]he uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position. . . .

131. It cannot, however, be said that the applicants were without any prospect or hope of release. In particular, they were able to bring proceedings to challenge the legality of the detention scheme under the 2001 Act and were successful before SIAC, on 30 July 2002, and the House of Lords on 16 December 2004. In addition, each applicant was able to bring an individual challenge to the decision to certify him and SIAC was required by statute to review the continuing case for detention every six months. The Court does not, therefore, consider that the applicants' situation was comparable to an irreducible life sentence . . . capable of giving rise to an issue under Article 3. . . .

[The Court then turned to the Article 5 question and the derogation:]

161. The Court must first ascertain whether the applicants' detention was permissible under Article 5 § 1(f), because if that subparagraph does provide a defence to the complaints under Article 5 § 1, it will not be necessary to determine whether or not the derogation was valid. . . .

170. In the circumstances of the present case it cannot be said [that nine of the eleven] applicants were persons "against whom action [was] being taken with a view to deportation or extradition." Their detention did not, therefore, fall within the exception to the right to liberty set out in paragraph 5 § 1(f) of the Convention. This is a conclusion which was also, expressly or impliedly, reached by a majority of the members of the House of Lords. . . .

[Having concluded that the detention did not fall within the deportation exception to Article 5, the Court went on to inquire into "whether the United Kingdom validly derogated from its obligations under Article 5 § 1 of the Convention." Derogations are permitted by Article 15 of the Convention, which provides that "[i]n time of war or other public emergency threatening the life of the nation," a state party "may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."]

175. The applicants argued that there had been no public emergency threatening the life of the British nation, for three main reasons: first, the emergency was neither actual nor imminent; secondly, it was not of a temporary nature; and, thirdly, the practice of other States, none of which had derogated from the Convention, together with the informed views of other national and international bodies, suggested that the existence of a public emergency had not been established. . . .

177. [A]lthough when the derogation was made no al'Qaeda attack had taken place within the territory of the United Kingdom, the Court does not consider that the national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was "imminent," in that an atrocity might be committed without warning at any time. The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. . . .

181. On this first question, the Court accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation. . . .

184. When the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were "strictly required." . . . [W]here a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation [and] that it was fully justified by the special circumstances . . . .

186. [T]he 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament [to focus the Act on non-nationals] . . . had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad. . . .

188. [T]he Government has not placed before the Court any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al'Qaeda. . . .

189. [T]he Government [argued] that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals. In this connection, again the Court has not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment was unjustified. Indeed, . . . the national courts . . . which saw both the open and the closed material, were not convinced that the threat from non-nationals was more serious than that from nationals.

190. In conclusion, therefore, . . . the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals. It follows there has been a violation of Article 5 § 1 in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants. . . .

[The Court awarded damages to nine of the applicants, ranging from EUR 1,700 to EUR 3,900.]

Al-Jedda v. United Kingdom

European Court of Human Rights (Grand Chamber)
App. No. 27021/0 (2011)

9. [T]he applicant was born in Iraq in 1957. . . . He moved to the United Kingdom in 1992, where he made a claim for asylum and was granted indefinite leave to remain. He was granted British nationality in June 2000.

10. [O]n 10 October 2004 United States soldiers, apparently acting on information provided by the British intelligence services, arrested the applicant at his sister's house in Baghdad. He was taken to Basrah in a British military aircraft and then to the Sha'aibah Divisional Temporary Detention Facility in Basrah City, a detention centre run by British forces. He was held in internment there until 30 December 2007.

11. The applicant was held on the basis that his internment was necessary for imperative reasons of security in Iraq. He was believed by the British authorities to have been personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities there; for facilitating the travel into Iraq of an identified terrorist explosives expert; for conspiring with that explosives expert to conduct attacks with improvised explosive devices against coalition forces in the areas around Fallujah and Baghdad; and for conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high tech detonation equipment into Iraq for use in attacks against coalition forces. No criminal charges were brought against him. . . .

14. On 14 December 2007 the Secretary of State signed an order depriving the applicant of British citizenship, on the ground that it was conducive to the public good. The Secretary of State claimed, inter alia*,* that the applicant had connections with violent Islamist groups, in Iraq and elsewhere, and had been responsible for recruiting terrorists outside Iraq and facilitating their travel and the smuggling of bomb parts into Iraq.

15. The applicant was released from internment on 30 December 2007 and travelled to Turkey. He appealed against the deprivation of British citizenship. On 7 April 2009 the Special Immigration Appeals Commission dismissed the appeal, having heard both open and closed evidence, during a hearing where the applicant was represented by special advocates. The Special Immigration Appeals Commission . . . was satisfied on the balance of probabilities that the Secretary of State had proved that the applicant had facilitated the travel to Iraq of a terrorist explosives expert and conspired with him to smuggle explosives into Iraq and to

conduct improvised explosives device attacks against coalition forces around Fallujah and Baghdad. . . .

98. The applicant was detained in a British military facility for over three years, between 10 October 2004 and 30 December 2007. His continuing internment was authorised and reviewed, initially by British senior military personnel and subsequently also by representatives of the Iraqi and United Kingdom Governments and by non-British military personnel, on the basis of intelligence material which was never disclosed to him. He was able to make written submissions to the reviewing authorities but there was no provision for an oral hearing. . . .

99. [A]rticle 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. . . . No deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of [the six listed] grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention . . . .

100. [T]he list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time. The Government . . . argues that there was no violation of Article 5 § 1 because the United Kingdom's duties under that provision were displaced by the obligations created by United Nations Security Council Resolution 1546. . . .

101. [T]he key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment. . . .

105. [T]he language used in this Resolution [does not] indicate[] unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments . . . . In paragraph 10 the Security Council decides that the Multi-National Force shall have authority "to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed," which inter alia set out the Multi-National Force's tasks. Internment is listed in Secretary of State Powell's letter, as an example of the "broad range of tasks" which the Multi-National Force stood ready to undertake. . . . Moreover, in the Preamble, the commitment of all forces to act in accordance with international law is d. It is clear that the Convention forms part of international law . . . . In the absence of clear provision to the contrary, the presumption must be that the Security Council

intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law. . . .

109. [N]either Resolution 1546 nor any other United Nations Security Council Resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. . . .

110. In these circumstances, where the provisions of the Article 5 § 1 were not displaced and none of the grounds for detention set out in sub paragraphs (a) to (f) applied, the Court finds that the applicant's detention constituted a violation of Article 5 § 1.

[The Court awarded Al-Jedda EUR 25,000, plus EUR 40,000 for costs and expenses.]

The U.S. Constitutional Limitations on Military Detention

The United States Supreme Court has placed limitations of the detention of individuals classified as "enemy combatants." In *Hamdi v. Rumsfeld* (2004), the Court held that a U.S. citizen detained on U.S. soil as an enemy "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." In *Boumediene v. Bush* (2008), the Court held that non-citizens detained as enemy combatants at Guantánamo Bay, Cuba, enjoyed the privilege of the writ of habeas corpus, which the Court found the Military Commissions Act of 2006 had abridged. The Court then concluded that review procedures, established by the Detainee Treatment Act of 2005, did not provide an adequate substitute for habeas corpus. That Act had granted the Deputy Defence Secretary complete discretion to grant or deny detainee requests to convene tribunals to review new evidence, and had precluded federal courts from considering new evidence when reviewing the decisions of military commissions. The implications of *Boumediene* for those in detention have been the subject of a series of decisions in the D.C. Circuit, as *Al-Bihani*, above, illustrates.

Ryan Goodman

The Detention of Civilians in Armed Conflict[*]

In the armed conflict between the United States and Al Qaeda, the legality of the government's detention scheme has been mired in confusion. . . .

First, policymakers and advocates of U.S. practices improperly conflated two classes of individuals subject to detention: civilians who directly participate in hostilities ("unlawful combatants") and civilians who have not directly participated but nevertheless pose a security threat. Congress and the Bush administration acted to detain the latter. They did so, however, by eschewing legal authority that clearly supports such detentions and by resorting, instead, to excessively broad definitions of combatancy to reach the same individuals. Second, opponents, in response, . . . criticized the government for expansive definitions of combatancy without acknowledging the existing legal authority to detain the same individuals regardless of nomenclature. . . .

[M]aintaining the position that detention is permissible only for direct participants (and members of armed forces) exerts pressure on U.S. authorities to develop expansive definitions of direct participation. [A] broad definition of direct participation—or "combatancy"—leads to unintended consequences in the targeting context. Chief among them is that it may, in effect, expand the range of civilians who lose their immunity from attack. . . .

Finally, the conflation of targeting and detention powers may result in self-fulfilling consequences in terms of who can be subject to lethal force. Opponents have suggested that if the government can detain particular civilians (indirect participants), it could also shoot them on sight. In other words, these opponents have asserted that detention and targeting authority are coextensive. If opponents lose their one claim (and indirect participants are thus subject to detention), they will have unintentionally lent support to the result that such individuals are now legitimate military targets.

Is There a Detention/Targeting Tradeoff?

As Goodman suggests, a number of commentators have expressed concern that the U.S. approach to detention may have unwittingly created pressure to put

[*]Excerpted from Ryan Goodman, Editorial Comment, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48 (2009). This article is reproduced with permission from the January 2009 issue of the American Journal of International Law

new emphasis on targeted killings. A *New York Times* article observed that some believe that the Obama administration "has avoided the complications of detention by deciding, in effect, to take no prisoners alive." See Jo Becker & Scott Shane, *Secret Kill List Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012. Obama officials deny any such policy. The President's chief counterterrorism aid, John Brennan, asserts that the administration's "unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible." John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Address at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (April 30, 2012). But American officials conceded that the dramatic increases in targeted killings combined with the decreases in detentions and the declining detainee population at Guantánamo have given a contrary impression. As Gabriella Blum and Philip Heyman at Harvard Law School put it, "there is a danger of over-using targeted killings . . . [because] the killing of a terrorist often proves a simpler operation than protracted legal battles over detention, trial, extradition, and release." Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 146, 166 (2010).

Benjamin Wittes

Detention and Trial: The Case for Candor After Guantánamo[*]

[T]he desire to keep detention to a minimum probably creates perverse incentives for rendition and targeted killing, a practice that has escalated in recent years. . . .

It is a dubious victory indeed for human rights if U.S. forces are now killing people that they used to capture. But dead people do not file habeas lawsuits either—and strangely, perhaps, they do not attract the same kind of sustained political attention that prisoners do. . . . Though it yields a suboptimal outcome from the point of view of both intelligence gathering and human rights, these days a kill is, in legal terms, a far cleaner outcome than capture.

I do not mean to suggest that U.S. forces have made anything so crude as a decision to take no prisoners—or that as a matter of policy we are now killing

[*]Excerpted from BENJAMIN WITTES, DETENTION AND TRIAL: THE CASE FOR CANDOR AFTER GUANTÁNAMO 23–26 (2011).

people that we used to capture because of the legal and political difficulties associated with detaining them. . . . Still, rules create incentives, and the increasing prevalence of kill operations rather than captures is probably not altogether unrelated to the fundamental change in the incentive structure facing our fighters and covert operatives. . . .

In 2002, the United States had fairly liberal interrogation rules that in some instances at least bordered on torture, if they did not quite cross that line. The premise was that they facilitated intelligence collection; it also was assumed that detention posed no great legal problem. Today, however, the interrogation options are notably narrower and substantial hurdles encumber long-term detention. I suspect that those facts bear some relation, albeit not a dominant one, to our apparent willingness to kill enemies rather than risk forces to capture them. They certainly should, in my judgment any way. It's one thing to risk forces to capture someone if the fruits of interrogation are likely to be valuable and one can secure one's interest in incapacitating that person by means other than killing him. It's quite another thing to risk forces in order to buy nothing more than a long-term habeas battle.

It's worth dwelling at least momentarily on the costs of this shift, invisible though they may be. The first of them is a moral cost, and it is, at one level, obvious. Creating incentives to kill people or to encourage their detention by proxy forces under worse conditions to avoid the burden of managing their detention under the humanitarian and legal standards that American values demand elevates the appearance of humane treatment over the fact of it. Taking that approach involves a kind of moral preening that has less to do with human rights than it does with public relations. Its attraction for the U.S. government, which has to think about its human rights reputation as well as the real consequences of its policies for human rights, is understandable. Its attraction for international human rights organizations, which presumably would prefer real improvements in human rights to optical illusions, is far less clear.

A more subtle aspect of the moral cost is the reversal of a half-century's worth of settled understanding in international law of the relative evils of capturing and killing an enemy. The laws of war traditionally have made holding people in detention reasonably easy precisely to promote their capture . . . . The law, in other words, while unapologetically preserving the right of combatants to target each other without warning, has also traditionally sought to both ensure the availability of detention as an alternative to violence and, once surrender has taken place, to make its use mandatory.

The past few years have turned those presumptions on their heads. We have made detention difficult—shrouding it in shame and attaching it to due process requirements imported from other areas of law—with the predictable result that we have shifted the cost-benefit balance toward greater operational lethality. That is not a trade-off about which we should feel sanguine. It's an erosion of the venerable principle of proportionality in warfare—that a county should not use more force than is necessary to accomplish its military objectives—undertaken to flatter our consciences and to indulge the pretense that we are getting out of the detention business.

PUNISHING

The Enlightenment Immunity from Criminal Laws

John Fabian Witt

The Enlightenment Separation of War from Crime[*]

For centuries, Christian thinking about war proceeded along lines sketched out by Christian theorists of just and unjust war. In the medieval orthodoxy of St. Augustine and those who followed him, war was justified when waged by a commonwealth or prince to avenge an injury. Conduct in war, in turn, was justified when it was necessary to success in a just war. The trick, however, was that there could only be one just side in a war. The violent acts of the unjustified side were unlawful. Rather than legitimate acts of war, they were illegal acts of violence: assault and murder, trespass and theft. Unjust wars were a kind of crime.

For men like eighteenth-century Swiss jurist Emmerich de Vattel, however, the premises of the Christian just war theory seemed badly flawed. When opposing armies were each equally convinced of their own righteousness, the medieval theory of just wars risked plunging warfare into uncontrollable cycles of destruction. Departing from the just war tradition, Vattel thus announced what he called "the first rule" of the modern law of nations. "Regular war," he wrote, "is to be accounted just on both sides." Wars would not *really* be just on

[*]Excerpted from JOHN FABIAN WITT, LINCOLN'S CODE: THE LAW OF WAR IN AMERICAN HISTORY 17-18 (2012).

both sides, to be sure. God would know which side was just. But in the fallen world of flawed and partial men, wars would be *accounted* that way in order to create a manageable regime for policing the conduct of the contending armies. With justice thus set aside, Vattel hoped to bring an end to the otherwise endless and destructive contests over which of the belligerents—if any—fought on the side of the angels. "If people wish to introduce any order, any regularity, into so violent an operation as that of arms, or to set any bounds to the calamities of which it is productive, and leave a door constantly open for the return of peace," Vattel wrote, they would have to abandon their claims to justice.

At its heart, Vattel's conception of humanity introduced a way of separating means and ends, a way of preventing pursuit of war's purposes from obliterating regulation of its means. The moral neutrality of Vattel's approach allowed him to crystallize the limited war spirit of the age into legal rules. He insisted that "quarter is to be given to those who lay down their arms." Whole categories of people were to be exempt from the rigors of war. "Women, children, feeble old men, and sick persons" were to be protected. Soldiers were to spare men of the church, scholars, "and other persons whose mode of life is very remote from military affairs." Peasants no longer took any part in war and consequently no longer had anything "to fear from the sword of the enemy." All of these people were "protected, as far as possible, from the calamities of war." Military commanders and kings were sheltered from war's effects, too. Vattel's law of nations prohibited assassination, poisoning, and other forms of "treacherous murder." Even firing on an enemy's headquarters was condemned by Vattel's gentle rules. All of these were the voluntary conventions to which states at war submitted. "Humanity," Vattel summarized, obliged states "to prefer the gentlest methods" over the righteous pursuit of natural justice.

Vattel's settlement meant in essence that setting aside the criminal law would be the founding move of the modern laws of war. It would be the distinctive trait of modern humanitarian regulations, distinguishing it from the law of the early modern period and the Middle Ages. Privileged combatants are immune from criminal prosecution for acts of war because all sides in war are accounted as just. Humanity and justice, in this account, diverge not by accident or chance, but by design. In the middle of the nineteenth century, however, the sharp separation of the laws of war began to give way in the face of a reintroduction of the idea of crime. The first known tribunals in the modern era for the adjudication and punishment of violations of the laws of war arose in Mexico during that country's war with the United States from 1846 to 1848.

Further tribunals followed in the American Civil War. Still, decades later the idea of the war crime in international armed conflict remained an anomalous one, sitting uneasily in the structure of the laws of war. Consider the treatment by two of the great European jurists a century and more ago:

Johann Caspar Bluntschli

Amnesties*

§ 710. The peace agreement usually entails an amnesty, if special caveats do not justify an exception. This means that generally no more claims are allowed for damages and inconveniences caused by members of one of the warring parties to members of the other warring party during the war.

1. The amnesty is necessary to allow the atmosphere of peace to solidify. Would the dispute be allowed to continue, there would be the constant danger that the parties would return to arms and the war would start anew. Even if the claims were directed against individuals in the first instance, the state for which they fought would stand behind them. The less the conduct of war confirms to regular legal norms, and the more violent it is, the easier this leads to legal conflicts, and the more often claims will be brought. This conflict and these claims the amnesty attempts to lay to rest through forgetting/oblivion. In many peace agreements this [amnesty] is expressly mentioned, in others it is silently taken for granted. For example: Congress of Vienna Final Accord of 1815, Article XI. . . .

The prospect of a future amnesty is however, from the perspective of legal security, very problematic. Private persons have thus almost no other legal protection but the one which military discipline and military courts offer. The sentences of military courts, however, are annulled by the amnesty. Usually the amnesty also includes other individuals beyond soldiers who have committed crimes through their membership in one of the warring parties.

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*Excerpted from JOHANN CASPAR BLUNTSCHLI, THE MODERN INTERNATIONAL LAW OF CIVILIZED STATES (1868) (Translation by Philip Nielsen for John Witt).

It was Bluntschli who first published the term "war crime" (*Kriegsverbrechen*). He probably developed the idea in his exchanges with the American jurist Francis Lieber, who had used the term in private correspondence as early as 1865. But the idea of the war crime seemed an awkward one at best. In the aftermath of the American Civil War, for example, the attorney general of the United States, James Speed, insisted that there was no such thing as a war crime, at least not technically. Strictly speaking, Speed contended, there were only offenses and not crimes against the law of nations. Forty years later, the Whewell Professor of Law at Cambridge, Lassa Oppenheim, expressed continuing puzzlement at the concept of the war crime.

Lassa Oppenheim
Conceptualizing the War Crime*

§ 251. In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as members of armed forces who have done no wrong, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders. It must, however, be emphasized that the term war crime is used not in the moral sense of the term crime, but only in a technical legal sense, on account of the fact that perpetrators of these acts may be punished by the enemy. For, although among the acts called war crimes are many which are crimes in the moral sense of the term, such, for instance, as the abuse of a flag of truce or assassination of enemy soldiers; there are others which may be highly praiseworthy and patriotic acts, such as taking part in a levy *en masse* on territory occupied by the enemy. But because every belligerent may, and actually must, in the interest of his own safety punish these acts, they are termed war crimes, whatever may be the motive, the purpose, and the moral character of the respective act. . . .

§ 253. Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations by order of their Government, they are not war criminals and may not be punished by the enemy; the latter may, however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.

*Excerpted from LASSA OPPENHEIM, INTERNATIONAL LAW (1912).

Both Bluntschli and Oppenheim sought to preserve much of the domain of the laws of armed conflict as crime-free. That was the function of Bluntschli's amnesties. For Oppenheim, it explained his insistence that the concept of the war crime only had application to those acts of soldiers that were committed without the authority of their government. So long as a soldier acted within the scope of the authority granted to him by his own state, or acted pursuant to a lawful order, the concept of crime had no application.

The Return of Criminalization

Since Nuremberg, and accelerating in recent years, the concept of crime has returned to the domain of war. The following two cases suggest just how far the reintroduction of the crime concept has gone, both in eschewing the legal limits on the idea of the war crime articulated by jurists like Bluntschli and Oppenheim a century ago, and in discarding the international relations logic of publicists such as Vattel.

Prosecutor v. Erdemovic

International Criminal Tribunal for the Former Yugoslavia
Case No. IT-96-22 (Oct. 7 1997)

JUDGEMENT

3. [O]n 16 April 1993, the Security Council of the United Nations, acting pursuant to Chapter VII of the United Nations Charter, adopted resolution 819, in which it demanded that all parties to the conflict in the Republic of Bosnia and Herzegovina treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act. . . .

On or about 6 July 1995, the Bosnian Serb army commenced an attack on the UN "safe area" of Srebrenica. . . .

Between 11 and 13 July 1995, Bosnian Serb military personnel summarily executed an unknown number of Bosnian Muslims in Potoari and in Srebrenica. . . .

Between 13 July 1995 and approximately 22 July 1995, thousands of Bosnian Muslim men were summarily executed by members of the Bosnian Serb army and Bosnian Serb police. . . .

12. On or about 16 July 1995, DRAZEN ERDEMOVIC, did shoot and kill and did participate with other members of his unit and soldiers from another brigade in the shooting and killing of unarmed Bosnian Muslim men at the Pilica collective farm. These summary executions resulted in the deaths of hundreds of Bosnian Muslim male civilians. At his initial appearance on 31 May 1996, the Appellant pleaded guilty to the count of a crime against humanity. The Appellant added this explanation to his guilty plea:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you are sorry for them, stand up, line up with them and we will kill you too." I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me. That is all I wish to add.

By three votes (Judges McDonald, Li and Vohrah) to two (Judges Cassese and Stephen) FINDS that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.

JOINT SEPARATE OPINION OF JUDGE MCDONALD AND JUDGE VOHRAH

32. [T]he issue may be stated . . . specifically as follows: In law, may duress afford a complete defence to a soldier charged with crimes against humanity or war crimes where the soldier has killed innocent persons? . . .

75. [W]e must bear in mind that we are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered. Concerns about the harm which could arise from admitting duress as a defence to murder were sufficient to persuade a majority of the House of Lords and the Privy Council to categorically deny the defence in the national context to prevent the growth of domestic crime and the impunity of miscreants. Are they now insufficient to persuade us to similarly reject duress as a complete defence in our application of laws designed to take account of humanitarian concerns in the arena of brutal war . . . ? If national law denies recognition of duress as a defence in respect of the killing of innocent persons,

international criminal law can do no less than match that policy since it deals with murders often of far greater magnitude. . . .

76. It might be urged that although the civil law jurisdictions allow duress as a defence to murder, there is no evidence that crimes such as murder and terrorism are any more prevalent in these societies than in common law jurisdictions. We are not persuaded by this argument. We are concerned primarily with armed conflict in which civilian lives, the lives of the most vulnerable, are at great risk. Historical records, past and recent, concerned with armed conflict give countless examples of threats being brought to bear upon combatants by their superiors when confronted with any show of reluctance or refusal on the part of the combatants to carry out orders to perform acts which are in clear breach of international humanitarian law. It cannot be denied that in an armed conflict, the frequency of situations in which persons are forced under duress to commit crimes and the magnitude of the crimes they are forced to commit are far greater than in any peacetime domestic environment.

77. Practical policy considerations compel the legislatures of most common law jurisdictions to withhold the defence of duress not only from murder but from a vast array of offences without engaging in a complex and tortuous investigation into the relationship between law and morality. . . . [T]he common law in England denies recognition of duress as a defence not only for murder but also for certain serious forms of treason. In Malaysia, duress is not available as a defence in respect not only of murder but also of a multitude of offences against the State which are punishable by death. In the states of Australia which have criminal codes, the statutory provisions contain a list of excepted offences, with the Criminal Code of Tasmania having the longest, making the defence unavailable to persons charged with murder, attempted murder, treason, piracy, offences deemed to be piracy, causing grievous bodily harm, rape, forcible abduction, robbery with violence, robbery and arson. Legislatures which have denied duress as a defence to specific crimes are therefore content to leave the interest of justice to be satisfied by mitigation of sentence.

78. We do not think our reference to considerations of policy are improper. It would be naive to believe that international law operates and develops wholly divorced from considerations of social and economic policy. There is the view that international law should distance itself from social policy and this view has been articulated by the International Court of Justice in the *South West Africa Cases*, where it is stated that "[l]aw exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline." We are of the opinion that this separation of law from social policy is inapposite in relation to the application of international

humanitarian law to crimes occur[r]ing during times of war. It is clear to us that whatever is the distinction between the international legal order and municipal legal orders in general, the distinction is imperfect in respect of the criminal law which, both at the international and the municipal level, is directed towards consistent aims. At the municipal level, criminal law and criminal policy are closely intertwined. There is no reason why this should be any different in international criminal law. . . .

84. Secondly, as we have confined the scope of our inquiry to the question whether duress affords a complete defence to a soldier charged with killing innocent persons, we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight. The relevant question must therefore be framed in terms of what may be expected from the ordinary soldier in the situation of the Appellant. What is to be expected of such an ordinary soldier is not, by our approach, analysed in terms of a utilitarian approach involving the weighing up of harms. Rather, it is based on the proposition that it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons.

SEPARATE AND DISSENTING OPINION OF JUDGE CASSESE

11. I . . . respectfully disagree with the conclusions of the majority of the Appeals Chamber concerning duress, as set out in the Joint Separate Opinion of their Honours Judge McDonald and Judge Vohrah . . . :

> (i) after finding that *no specific international rule* has evolved on the question of whether duress affords a complete defence to the killing of innocent persons, the majority should have drawn the only conclusion imposed by law and logic, namely that the *general rule* on duress [i.e., permitting a duress defense to criminal charges] should apply—subject, of course, to the necessary requirements . . . .
>
> (ii) instead of this simple conclusion, the majority of the Appeals Chamber has embarked upon a detailed investigation of "practical policy considerations" and has concluded by upholding "policy considerations" substantially based on English law. I submit that this examination is *extraneous to the task of our Tribunal*. This International Tribunal is called upon to apply international law, in particular our Statute and

> principles and rules of international humanitarian law and international criminal law. Our International Tribunal is a court of law; it is bound only by international law. It should therefore refrain from engaging in meta-legal analyses. In addition, it should refrain from relying exclusively on notions, policy considerations or the philosophical underpinnings of common law countries, while disregarding those of civil-law countries or other systems of law. What is even more important, a policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*. . . .

16. [T]he relevant case-law is almost unanimous in requiring four strict conditions to be met for duress to be upheld as a defence, namely:

> (i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;
>
> (ii) there was no adequate means of averting such evil;
>
> (iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;
>
> (iv) the situation leading to duress must not have been voluntarily brought about by the person coerced. . . .

42. The third criterion—proportionality (meaning that the remedy should not be disproportionate to the evil or that the lesser of two evils should be chosen)—will, in practice, be the hardest to satisfy where the underlying offence involves the killing of innocents. Perhaps . . . it will *never* be satisfied where the accused is saving his own life *at the expense of* his victim . . . [H]ow can a judge satisfy himself that the death of one person is a lesser evil that the death of another? Conversely, however, where . . . there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does—then duress may succeed as a defence. . . . The important point, however—and this is the fundamental source of my disagreement with the majority—is that this question should be for the Trial Chamber to decide with all the facts before it. The defence should not be cut off absolutely and *a priori* from invoking the excuse of duress by a ruling of this International Tribunal . . . . This is altogether too dogmatic and, moreover, it is a stance unsupported by international law . . . .

46. Furthermore, a trial court adjudicating a plea of duress might also want to take into account another factor, namely whether and to what extent the person assertedly acting under duress willed the commission of the offence. For this purpose the court might enquire whether the person allegedly acting under duress *confessed at the earliest possible opportunity to the act he had committed and denounced it to the relevant authorities*. If the person at issue refrained from so doing, the inference might be warranted that he acquiesced in, and thus willed, the act which he perpetrated under duress.

Prosecutor v. Kallon

Decision on Challenge to Jurisdiction: Lomé Accord Amnesty
Special Court for Sierra Leone (Appeals Chamber)
Case No. SCSL-04-15-060-I, II (Mar. 14, 2004).

[In *Kallon*, the defendant's application to stay the prosecution contended that "the Government of Sierra Leone is bound to observe the amnesty granted under Article IX of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ("Lomé Agreement") and that "the Special Court should not assert jurisdiction over crimes committed prior to July 1999 when amnesty was granted by virtue of the Lomé Agreement." The Prosecution argued in response that "the Lomé Agreement, being an agreement between two national bodies, is limited in effect to domestic law" and moreover that "given the gravity of the crimes charged, discretion should not be exercised to grant a stay of proceedings."]

3. [O]n 23 March 1991 forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party rule of the All Peoples' Congress (APC). That was believed to be the beginning of the armed conflict in Sierra Leone which lasted until 7 July 1999 when the parties to the conflict signed the Lomé Agreement. . . .

5. Among other things, the parties to the Lomé Agreement stated that they were moved "by the imperative need to meet the desire of the people of Sierra Leone for a definitive settlement of the fratricidal war in their country and for genuine national unity and reconciliation."

7. [A]t the centre of these proceedings is Article 9 of the Lomé Agreement which provides [inter alia] as follows:

ARTICLE IX PARDON AND AMNESTY

> 2. [A]fter the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
>
> 3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the [Revolutionary United Front of Sierra Leone], ex-[Armed Forces Revolutionary Council], ex-[Sierra Leone Army] or [Civil Defense Forces] in respect of anything done by them in pursuit of their objectives as members of those organisations since March 1991, up to the signing of the present Agreement. . . .

12. On 16 January 2002, after a successful negotiation between the Secretary-General and the Government of Sierra Leone, an agreement was entered into by the United Nations and the Government of Sierra Leone whereby the Special Court for Sierra Leone was established ("Agreement").

13. The Special Court was established for the sole purpose of prosecuting persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. . . .

67. The grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power. Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.

68. A crime against international law has been defined as "an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act would probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state." In *[In] re List and Others* [(1948)], the US Military

Tribunal at Nuremberg defined an international crime as: "such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances." However, not every activity that is seen as an international crime is susceptible to universal jurisdiction.

69. The question is whether the crimes within the competence of the Court are crimes susceptible to universal jurisdiction. The crimes mentioned in Articles 2-4 of the Statute are international crimes and crimes against humanity. . . .

70. One consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes. In *Attorney General of the Government of Israel v. Eichmann* (1961) the Supreme Court of Israel declared:

> Under the universality principle, each and every state has jurisdiction to try particular offences. The abhorrent crimes defined in this Law are not crimes under Israeli law alone. These crimes which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself **(***delicta juris gentium*)." Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal. . . .

71. After reviewing international practice in regard to the effectiveness or otherwise of amnesty granted by a State and the inconsistency in state practice as regards the prohibition of amnesty for crimes against humanity, Cassese conceptualised the status of international practice thus:

> There is not yet any general obligation for States to refrain from amnesty laws on these crimes. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless if a court of another State having in custody persons accused of international crimes decide to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in

> particular to the principle of respect for the sovereignty of other States. [citing A. Cassese, *International Criminal Law* 315 (2003)]

The opinion stated above is gratefully adopted. . . .

86. The Lomé Agreement is not a treaty or an agreement in the nature of a treaty. The rights and obligations it created are to be regulated by the domestic laws of Sierra Leone. In the result, whether it is binding on the Government of Sierra Leone or not does not affect the liability of the accused to be prosecuted in an international tribunal for international crimes such as those contained in Articles 2 to 4 of the Statute of the Court. . . .

88. Whatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction.

In the wake of the *Kallon* decision, some commentators criticized the Special Court's decision on the ground that "the Appeals Chamber did not demonstrate that war crimes in noninternational armed conflict are subject to universal jurisdiction." Simon M. Meisenberg, *The Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court of Sierra Leone*, 86 INT'L REV. RED CROSS 856 (2004). Universal jurisdiction "applies to grave breaches of the Geneva Conventions and of Additional Protocol I," but "[t]here are no similar treaty provisions concerning the prosecution or extradition of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II." *Id*. On this view, the Special Court ought to have decided the case on the basis of whether the amnesty arrangement in Article IX of the Lomé Agreement violated international law and was therefore invalid. Concern about the relationship between criminal proceedings and peace have continued apace in the years since. Parallel concerns are raised in civil proceedings, as exemplified by *Sejdić v. Bosnia and Herzegovina* (Eur. Ct. H.R., 2009), excerpted in Chapter III: *(Dis)Uniformity of Rights in Federations and Unions*.

International Criminal Court, Interim Premises, The Hague, the Netherlands, circa 2006 (using the former offices of the Dutch telecom company KPN).

Courtroom, International Criminal Court, The Hague, the Netherlands, circa 2006.

The Critique of Criminalization

Some commentators have worried that the International Criminal Court (ICC) improperly brings criminal categories to bear on cases of armed conflict. Stephen D. Krasner at Stanford University, for example, argues that "[t]he fundamental problem with the International Criminal Court is . . . that courts are the wrong instrument for dealing with large-scale war, devastation, destruction and crimes against humanity. Judicial procedures are designed to judge the guilt or innocence of individuals, but developing stable democratic societies and limiting the loss of human life require prudent political calculations, not judicial findings." Stephen D. Krasner, *A World Court That Could Backfire*, N.Y. TIMES, Jan. 15, 2001. Such critics adopt the view of the eighteenth-century jurists who sought to separate crime from war and thought that doing so was critical to the reestablishment of peace. The following three excerpts offer examples of situations in which observers have levelled this critique in recent months and years. Related concerns come from Mark Osiel, *After International Law: Non-Juridical Responses to Mass Atrocity* (2011), excerpted in Chapter VI: *Law's Future(s)*. Below, we provide excerpts of a few such discussions, followed by Professor Reisman's analysis, which suggests a framework for thinking about the problems raised.

Michael Ignatieff
We're So Exceptional[*]

The current president of the [International Criminal] Court, Song Sang-Hyun, a South Korean judge, has cited the Security Council's unanimous referral of Muammar Qaddafi to the ICC for prosecution in 2011 as evidence that the Court has regained the US support it lost in the Clinton and Bush administrations. . . . [B]ut critics have argued . . . that when the Court's actual indictment came down in June 2011, it closed off the last exit for the dictator and guaranteed that he would go down fighting, as in fact he did. The unresolvable question is whether the ICC indictment played a part, inadvertently or not, in driving the Libyan operation beyond its original UN mandate of protecting civilians into full-scale "regime change," although a coherent new regime has yet to emerge. . . .

[*]Excerpted from Michael Ignatieff, *We're So Exceptional*, N.Y. REV. BOOKS, April 5, 2012, at 6-8.

No indictment of President Bashir Assad of Syria for the vile carnage in Homs and elsewhere is on the horizon, given Russian and Chinese refusal to authorize a Security Council referral. We have to question, therefore, whether the ICC has actually gained the support of the great powers that it thought it had achieved, once and for all, in the Libyan case.

Creating an international court was supposed to rescue the possibility of universal justice from the revenge frenzies, political compromises, and local partialities of national justice. International justice turns out to be as much the prisoner of international politics as national justice is of national politics. Indeed, given the stakes, international justice may be more partial, that is, more politicized, than national justice.

Abigail H. Moy

International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity[*]

On October 13, 2005, the International Criminal Court ("ICC") unsealed the arrest warrants for five senior leaders of the Lord's Resistance Army ("LRA"), a rebel group known for its long insurgency against Ugandan President Yoweri Museveni. . . .

[R]eactions to this decision have been mixed. . . .

[M]any organizations expressed concern for the ICC's failure to take broader action against human rights violations perpetrated on the other side of the conflict, by the [Uganda People's Defence Force] and Ugandan government officials. . . .

Some mediators also disapproved of the arrest warrants, arguing that they undermined peace efforts by alienating rebel forces and precluding the protection offered by the Ugandan government's Amnesty Act of 2000. The Amnesty Act was intended to provide an incentive for defection from the LRA; it guaranteed blanket amnesty for all rebels, regardless of rank, who voluntarily surrendered

[*]Excerpted from Abigail H. Moy, *International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity,* 19 HARV. HUM. RTS. J. 267 (2006).

themselves. With amnesty as a negotiating tool, Ugandan minister Betty Bigombe, backed by the United States, Britain, the Netherlands, Norway, and the Catholic Church, had organized a face-to-face meeting between senior government officials and LRA leaders in 2004. She came close to brokering a ceasefire agreement before her efforts were foiled at the last minute. After the release of the arrest warrants, the still-active Bigombe complained that the ICC "rushed too much." She felt that rescinding the amnesty option deprived her of a crucial bargaining chip and sent a conflicting message that would undermine the LRA's trust in future negotiations. Archbishop Odama of the Gulu Catholic Archdiocese added, "[tlhis is like a blow to the peace process. The process of confidence-building has been moving well, but now the LRA will look at whoever gets in contact with them as an agent of the ICC."

[S]ince the ICC referral, a number of former rebels and a high-ranking LRA brigadier have turned themselves in under the much-neglected Amnesty Act of 2000, which had produced few converts until that point. Rather than impede the pursuit of peace, some have argued that ICC involvement has increased the pressure on LRA members to defect. . . .

Ian Paisley

Peace and the Price of Justice[*]

An African proverb states, "Peace is costly but it is worth the expense." . . . [T]he I.C.C. was intended as an instrument for delivering peace. In this respect it has not been a success. It will continue to falter because its current methods go against the experience of many places in Africa and around the world where peace has been delivered through political negotiations and reconciliation efforts, not the imposition of international justice. . . .

[I]n places where there is no functioning government, or the government is hostage to one section of society, or where there is no viable reconciliation process, the international community has a duty to ensure that the court is the guardian of justice.

But the pursuit of justice should not replace or undermine ongoing national reconciliation efforts. The foremost challenge facing the I.C.C. is to

[*]Excerpted from Ian Paisely, *Peace and the Price of Justice*, INT'L HERALD TRIB., Mar. 17, 2012, at 6.

determine whether its intervention will help or hinder the cause of peace. The wheels of justice must be allowed to turn at their own pace, but that they must not impede the peace process.

In Kenya, where one the court's most high-profile cases is taking place, the I.C.C. has focused on bringing to trial those accused of inciting post-election violence in 2007-8. This risks fueling divisions in a country where tribal loyalties and factionalism still dominate politics. Kenya, often seen as a great African success story, is now heading toward a dangerous impasse. The court's determination to bring to trial several defendants accused of fomenting violence has enabled Prime Minister Raila Odinga to call for the arrest of his main political opponent, Deputy Prime Minister Uhuru Kenyatta, son of the country's founding president, who now faces I.C.C. charges. . . .

Proponents of the I.C.C. say there cannot be peace without justice. Yet experience teaches us that this is not always the case. Reconciliation is not an easy option, but it does allow people to move forward with the hope of unity, and the potential for justice in the future. . . .

Logo of the International Criminal Court, circa 1998.
Image reproduced courtesy of the International Criminal Court and provided courtesy of its Public Information and Documentation Section.

W. Michael Reisman

Institutions and Practices for Restoring and Maintaining Public Order[*]

[C]ommon to all legal systems is a set of fundamental sanctioning goals for the protection, restoration, and improvement of public order. While these fundamental goals have been expressed in many versions, they may be synthesized into seven specific goal programs:

(1) *Preventing* discrete public order violations that are about to occur;

(2) *Suspending* public order violations that are occurring;

(3) *Deterring*, in general, potential public order violations in the future;

(4) *Restoring* public order after it has been violated;

(5) *Correcting* the behavior that generates public order violations;

(6) *Rehabilitating* victims who have suffered the brunt of public order violations; and

(7) *Reconstructing* in a larger social sense to remove conditions that appear likely to generate public order violations. . . .

A wide range of international institutions and practices are currently used in different combinations for accomplishing the goals discussed above. [T]here are eight institutional practices and arrangements that are particularly important:

(1) human rights law, the law of state responsibility, and the developing law of liability without fault;

(2) international criminal tribunals;

(3) universalization of the jurisdiction of national courts for certain delicts, called international crimes;

(4) nonrecognition or the general refusal to recognize and to allow violators the beneficial consequences of actions deemed unlawful;

[*]Excerpted from W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995).

(5) incentives in the form of foreign aid or other rewards;

(6) commissions of inquiry or truth commissions;

(7) compensation commissions; and

(8) amnesties.

These practices and institutional arrangements are not interchangeable. Each deals with a different aspect of the problem and may not be appropriate for all circumstances. . . . Some may provide high returns for certain goals in particular cases, but may also prove very costly for alternative goals in other instances. For example, major cash payments or other concessions may prevent an imminent violation or secure the release of hostages, but will have high costs for deterrence in the future, as other actors may calculate that they too can extort concessions from the community by threatening to violate public order. On the one hand, international criminal tribunals may serve to deter violations in future cases, but may increase the costs of suspending ongoing violations if violators conclude that continued resistance is preferable to facing a judgment by the tribunal. On the other hand, amnesties may facilitate suspension of ongoing violations, but amnesties also undermine deterrence, the law of state responsibility, and human rights. Prospective violators may conclude that if they do not prevail, they can negotiate an amnesty.

Criminal tribunals involve the identification of perpetrators of violations of the law, confirmation of the norms that apply, and the imposition of penalties. Depending on the nature and goals of incarceration, criminal tribunals may be corrective. Although the international community often demands criminal tribunals when there are serious breaches of public order, tribunals only indirectly perform sanctioning goals. . . . In contrast, the focus of compensation tribunals or commissions shifts from the perpetrator of the crime to the victim of the crime . . . . [C]omissions of inquiry, now often referred to as "truth commissions," involve . . . investigation and publication of violations of international norms. . . .

Amnesties have been singled out recently as a technique for reestablishing internal public order after its violent disruption within a nation-state. Their compatibility with sanctioning goals will depend on their design and other contextual features. Amnesties are especially useful tools for prison administrators and political negotiators. For the administrator of a prison, the authority to grant amnesty on a discretionary basis is a technique of internal control; many prisoners will behave well if they think that there is a high probability that they will be rewarded with a shortened sentence or complete

amnesty. For the political negotiator, whether in a domestic or transnational conflict, the capacity to offer amnesty is also an indispensable tool. If the elite and substantial parts of the rank-and-file of one side anticipate that a consequence of a peace agreement will be their prosecution for acts undertaken in the course of the conflict, they hardly will be disposed to lay down their arms. . . .

However . . . [a]cts of kindness or grace to current violators may have very high, long-term costs: potential violators may assume that . . . when the time comes for settlement, they, too, can strike a bargain in which they will be forgiven. . . .

[T]he varied circumstances of the international community are such that, rather than a single institution, a toolbox of different institutions should be on hand. These tools may be adapted and used in particular circumstances to fulfill, in the most optimal fashion possible, the fundamental goals of international law: the protection and reestablishment of public order. In circumstances in which the international community is prepared to defeat an adversary, an international tribunal, applying an approximation of the domestic criminal law model, is an effective strategy. In circumstances in which the international community is unwilling to make such an investment . . . it is preferable to emphasize techniques that reestablish public order as quickly as possible . . . .

PROPORTIONALITY

Alongside the reintroduction of a modern concept of crime into the legal regulation of war, discussions of recent armed conflicts have been affected by a dramatic transformation in the legal culture of proportionality. The following materials begin with the first of the 1977 additional protocols to the Geneva Conventions, which sets out the modern proportionality idea. We then review some of the radically different views articulated by jurists and soldiers in the nineteenth century before coming back to the present through an application of modern proportionality by Justice Barak in Israel.

One question to ask throughout is this: What is the logic of proportionality in modern international humanitarian law? What premises does it rest on? As we have seen, the Enlightenment jurists who aimed put the criminal laws outside the domain of war did so in part to remove ultimate questions about right and wrong and just versus unjust wars from the regulation of combat. Modern proportionality

law seems to aim to do the same by removing the ultimate objectives of the belligerent parties from the calculation of proportionality. The ends, under this approach, do not justify the means. But does it make sense to evaluate conduct in war without reference to ends? The nineteenth-century Americans, whose perspectives are excerpted later, objected to setting aside a war's objectives in evaluating its conduct. Moreover, they insisted that limiting the conduct of militaries risked exacerbating the humanitarian toll of armed conflict.

Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

June 8, 1977, 1125 U.N.T.S. 3

Article 51. Protection of the civilian population

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. . . .

Article 57. Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . . ;

(ii) take all feasible precautions . . . with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one . . . or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

This modern proportionality rule in customary international law, which the Additional Protocol codifies, looks radically different from the constraints on incidental injury to civilians in past generations. Consider the following from the American Civil War.

Francis Lieber

Instructions for the Government of Armies of the United States in the Field[*]

(1863)

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult. . . .

29. [T]he more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

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[*]Excerpted from FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, ORIGINALLY ISSUED AS GENERAL ORDERS NO. 100, ADJUTANT GENERAL'S OFFICE 1863 at 7-11 (1898).

Correspondence Between Mayor and Councilmen of Atlanta, Georgia, and William Tecumseh Sherman, Major General, Union Army*
(1864)

[Mayor Calhoun's letter to Sherman:]

We, the undersigned, mayor and two of the council for the city of Atlanta, for the time being the only legal organ of the people of the said city to express their wants and wishes, ask leave most earnestly, but respectfully, to petition you to reconsider the order requiring them to leave Atlanta. . . .

[W]e are satisfied that the amount of it will involve in the aggregate consequences appalling and heart-rending. . . .

Respectfully submitted: James. M Calhoun, *Mayor*. E.E. Rawson, *Councilman*. S.C. Wells, *Councilman*.

[Sherman's response:]

GENTLEMEN: [M]y orders . . . were not designed to meet the humanities of the case, but to prepare for the future struggles in which millions of good people outside of Atlanta have a deep interest. We must have peace, not only at Atlanta but in all America. To secure this we must stop the war that now desolates our once happy and favored country. To stop war we must defeat the rebel armies that are arrayed against the laws and Constitution that all must respect and obey. To defeat those armies we must prepare the way to reach them in their recesses, provided with the arms and instruments which enable us to accomplish our purpose. . . . I cannot discuss this subject with you fairly, because I cannot impart to you what I propose to do, but I assert that my military plans make it necessary for the inhabitants to go away, and I can only renew my offer of services to make their exodus in any direction as easy and comfortable as possible.

You cannot qualify war in harsher terms than I will. War is cruelty and you cannot refine it, and those who brought war into our country deserve all the curses and maledictions a people can pour out. I know I had no hand in making this war, and I know I will make more sacrifices to-day than any of you to secure peace. But you cannot have peace and a division of our country. . . .

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*Excerpted from 2 WILLIAM T. SHERMAN, MEMOIRS OF GEN W. T. SHERMAN 124-27 (4th ed. 1891).

You might as well appeal against the thunder-storm as against these terrible hardships of war. They are inevitable, and the only way the people of Atlanta can hope once more to live in peace and quiet at home, is to stop the war . . . .

[I] want peace, and believe it can now only be reached through union and war, and I will ever conduct war with a view to perfect an early success.

But, my dear sirs, when that peace does come, you may call on me for anything. Then will I share with you the last cracker, and watch with you to shield your homes and families against danger from every quarter.

Now you must go, and take with you the old and feeble, feed and nurse them and build for them in more quiet places proper habitations to shield them against the weather until the mad passions of men cool down and allow the Union and peace once more to settle over your old homes at Atlanta.

Yours, in haste, W. T. SHERMAN, *Major-General* commanding.

Public Committee Against Torture v. Government

Israel Supreme Court
Case No. HCJ 769/02 (2006)

President (Emeritus) A. Barak:

The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.

1. In February 2000, the second *intifada* began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis. This assault of terrorism differentiates neither between combatants and civilians, nor between women, men, and children. The terrorist attacks take place both in the territory of Judea, Samaria, and the Gaza Strip, and within the borders of the State of Israel. They are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five

years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed. Thousands of Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.

2. In its war against terrorism, the State of Israel employs various means. As part of the security activity intended to confront the terrorist attacks, the State employs what it calls "the policy of targeted frustration" of terrorism. . . . During the second *intifada*, . . . preventative strikes have been performed across Judea, Samaria, and the Gaza Strip. According to the data relayed by petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them. More than thirty targeted killing attempts have failed. Approximately one hundred and fifty civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded. . . .

18. The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its center stands the international law regarding international armed conflict. . . . This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character—in other words, one that crosses the borders of the state. . . .

21. Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the *area* is the international law dealing with armed conflicts. . . . [T]he fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict. Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character.

22. The international law dealing with armed conflicts is based upon a delicate balance between two contradictory considerations. One consists of the humanitarian considerations regarding those harmed as a result of an armed conflict. These considerations are based upon the rights of the individual, and his dignity. The other consists of military need and success. . . . The result of that balancing is that human rights are protected by the law of armed conflict, but not to their full scope. The same is so regarding the military needs. They are given an opportunity to be fulfilled, but not to their full scope. . . .

42. [T]he principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate. Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as "human shields" from attack upon a military target, and they are harmed as a result. . . .

45. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to military advantage. . . . In other words, attack is proportionate if the benefit stemming from the attainment of the military objective is proportionate to the damage caused to innocent civilians harmed by it. This is a values based test. It is based upon a balancing between conflicting values and interests. . . .

46. [P]roportionality is required in any case in which an innocent civilian is harmed. Thus, the requirements of proportionality *strico senso* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage cause to nearby innocent civilians. . . . Performing that balance is difficult. [O]ne must proceed case by case. . . . Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed. The hard cases are those which are in the space between extreme examples. There, a meticulous examination of every case is required; it is required that military advantage be direct and anticipated. Indeed, in international law, as in internal law, the ends do not justify the means. . . .

60. The *Order Nisi* given at the request of petitioners was as follows:

> "to obligate respondents . . . to appear and explain why the 'targeted killing' policy . . . should not be annulled, and . . . to obligate respondents . . . to appear and explain why they should not refrain from carrying out executions of wanted persons according to said policy."

The examination of the "targeted killing" . . . has shown that the question . . . is complex. The result of that examination is not that such strikes are always permissible or that they are always forbidden. . . . Harming [civilians "for such

time as they take a direct part in hostilities"], even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not. . . .

61. [T]he saying "when the cannons roar, the muses are silent" is well known. A similar idea was expressed by Cicero, who said: "during war, the laws are silent." Those sayings are regrettable. They reflect neither the existing law nor the desirable law. It is when the cannons roar that we especially need the laws. Every struggle of the state—against terrorism or any other enemy—is conducted according to rules and law. There is always law which the state must comply with. There are no "black holes." In this case, the law was determined by customary international law regarding conflicts of an international character. Indeed, the State's struggle against terrorism is not conducted "outside" of the law. It is conducted "inside" the law, with tools that the law places at the disposal of democratic states.

In the Cohen excerpt, above, he observed that the Israeli targeted killings case "further promoted the involvement of [International Law Department (ILD)] lawyers in the process of approving targeted killings." According to Cohen, "[r]eports regarding the execution of the policy show, that following this decision, there were many cases in which the ILD consulted lawyers in matters regarding targeted killing operations." Indeed, according to Cohen, "the interventionist tendency of the Israeli Supreme Court in operational matters" has played an important role in shaping the role of operational lawyers in the Israeli defense forces: "Commanders are acutely aware that many of their decisions can be petitioned to the ISC, even in real-time."

CODA: THE ROLE OF THE JUDGE IN TERRIBLE DECISIONS?

One issue lurking behind the laws of armed conflict poses an acute question for the role of judges. In situations of crisis many citizens of liberal states expect statesmen to do things in the name of security and the state, even if sometimes those things violate the law. What posture is the judge to take in such moments? The closing pages of Michael Walzer's celebrated *Just and Unjust Wars* puts the problem in terms that are alternatively bleak and hopeful.

Michael Walzer
The Dishonoring of Arthur Harris*

[Arthur] Harris, who directed [Britain's] strategic bombing of Germany from February 1942 until the end of the war . . . was . . . the determined advocate of terrorism, resisting every attempt to use his planes for other purposes. Now, terror bombing is a criminal activity, and after the immediate threat posed by Hitler's early victories had passed, it was an entirely indefensible activity. Hence Harris' case isn't really an example of the dirty hands problem. He and Churchill, who was ultimately responsible for military policy, faced no moral dilemma: they should have simply stopped the bombing campaign. But we can take it as an example, nonetheless, for it apparently had that form in the minds of British leaders, even Churchill himself at the end. . . .

He had done what his government thought necessary, but what he had done was ugly, and there seems to have been a conscious decision not to celebrate the exploits of Bomber Command or to honor its leader. "From this work," writes Angus Calder, "Churchill and his colleagues at last recoiled. After the strategic air offensive officially ended in mid-April [1945], Bomber Command was slighted and snubbed; and Harris, unlike other well-know commanders, was not rewarded with a peerage." In such circumstances, not to honor was to dishonor, and that is exactly how Harris regarded the government's action (or omission). He waited a while for his reward and then, resentfully, left England for his native Rhodesia. The men he led were similarly treated, though the snub was not so personal. In Westminster Abbey, there is a plaque honoring those pilots of Fighter Command who died during the war, listing them all by name. But the bomber pilots, though

*Excerpted from MICHAEL WALZER, JUST AND UNJUST WARS 323-25 (1977).

they suffered far heavier casualties, have no plaques. Their names are unrecorded. . . .

[H]arris and his men have a legitimate complaint: they did what they were told to do and what their leaders thought was necessary and right, but they are dishonored for doing it, and it is suddenly suggested . . . that what was necessary and right was also wrong. Harris felt that he was being made a scapegoat, and it is surely true that if blame is to be distributed for the bombing, Churchill deserves a full share. But Churchill's success in dissociating himself from the policy of terrorism is not of great importance; there is always a remedy for that in retrospective criticism. What is important is that his dissociation was part of a national dissociation—a deliberate policy that has moral significance and value.

And yet, the policy seems cruel. Stated in general terms, it amounts of this: that a nation fighting a just war, when it is desperate and survival itself is at risk, must use unscrupulous or morally ignorant soldiers; and as soon as their usefulness is past, it must disown them. . . . For it is very rare, as Machiavelli wrote in the Discourses, "that a good man should be found willing to employ wicked means," even when such means are morally required. And then we must look for people who are not good, and use them, and dishonor them. Perhaps there is some better way of doing that than the way Churchill chose. It would have been better if he had explained to his countrymen the moral costs of their survival and if he had praised the courage and endurance of the fliers of Bomber Command even while insisting that it would not possible to take pride in what they had done (an impossibility that many of them must have felt). But Churchill did not do that; he never admitted that the bombing constituted a wrong. In the absence of such an admission, the refusal to honor Harris at least went some small distance towards re-establishing commitment to the rules of war and the rights they protect. And that, I think, is the deepest meaning of all assignments of responsibility.

A Note on "Bomber Harris"

The story of Arthur "Bomber" Harris is somewhat more complex than Walzer suggests. Harris's biographer surveys the evidence and concludes that Harris had probably been offered a peerage but turned it down, partly on the grounds that he believed his men to have been snubbed in the awarding of medals and distinctions after the end of the war. It is clear that Harris himself felt that his wartime efforts were underappreciated by Churchill and others, and his departure from the Air Ministry in 1946 was publicly viewed as a firing, even though it was

followed by an honorary promotion to Marshall of the Royal Air Force. See HENRY PROBERT, BOMBER HARRIS: HIS LIFE AND TIMES 351, 360-61 (2001).

Walzer's observations are not aimed principally at judges, but they raise deep questions about the ways in which judges assert jurisdiction over certain of the actions of states at war, for judges are now part of the process of honoring and dishonoring that Walzer describes.

Justice Robert Jackson of the U.S. Supreme Court made a point much like Walzer's in his dissent in the 1944 *Korematsu* case. Jackson, who had been Franklin Roosevelt's wartime Attorney General and later served as the chief prosecutor at the International Military Tribunal at Nuremberg, pleaded for his colleagues to protect the integrity of the law from the vicissitudes of wartime by retreating from the effort to exercise authority over military orders in situations of emergency. Even if the Japanese internment system was permissible as a military matter, Jackson wrote, and even if the Court decided not to order that it be shut down, it did not follow that the system was necessarily legal and thus entitled to the blessing of the judiciary:

> [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.