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

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By Matthew Hoisington

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Abstract

This article addresses the instrumentalization of international humanitarian law (IHL) and the Islamic *jus in bello* for the purposes of targeting. It begins with an examination of the radical innovations in the Islamic *jus in bello* that resulted in its instrumentalization by al Qaeda and other Islamic armed groups in the name of *jihad*. It then addresses the key legal arguments of the U.S.-led response, particularly in the post-9/11 period. Finally, it offers a critical appraisal of the use of targeting rules to justify killing by both sides. The conclusion summarizes the argument and comments on the dangers of legal instrumentalization.

Introduction

One seemingly simple question has perplexed humanity for millennia:

*Who can be targeted in war?*

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

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

¹ See generally Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int’l L. 239 (noting that wars have been a part of the human condition since Cain and Abel, and regrettably are likely to remain so, but expressing optimism over the direction that international humanitarian law has been evolving, in particular its increasing consideration of human rights).

² Corfu Channel, Merits, I.C.J. Reports 1949, p. 22, para. 215. In this quotation the ICJ was referring to Common Article 3 of the Four Geneva Conventions of 1949. As Theodor Meron notes, even Shakespeare has gotten into the act. See generally THEODOR MERON, BLOODY CONSTRAINT: WAR AND CHIVALRY IN SHAKESPEARE (1998); THEODOR MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE MIDDLE AGES (1994).
Developing in parallel to the largely secular, Western-driven IHL project, other manifestations of the mortal balance between military necessity and restrictions on the use of force during times of war also emerged. Notably, the Islamic *jus in bello*, which dates to the time of the Prophet Muhammad in the seventh century “was largely responsible for moving humanity from the darkness of Greco-Roman ideas about war to the light in which the enemy was guaranteed certain rights and the fighting man was assured of certain protections.”

It includes combatant/non-combatant distinctions, as well as prohibitions on the targeting of women, children, infirm men and civilian objects. Within Islam, armed conflict is divided into two general categories: wars of public interest; and wars against polytheists and apostates. Wars of public interest equate roughly with armed conflicts not of an international character (NIAC) from IHL. They are fought against rebels and dissident *kharajites* who “rebel against the Imam (ruler), differ with the community, and adopt a reprehensible, innovated school of thought” known as the *Maṣḥabah.* Wars against polytheists and apostates, by contrast, often occur internationally. With regard to the latter, they are fought against people who declare themselves Muslim, but later renege or are declared un-Islamic. Specific restrictions are applicable to each category of conflict. The concept of *jihad* also plays a pivotal role in Islamic thought, but not as a *holy war*, as it is commonly portrayed. Rather, *jihad* is a term used to describe “a determined effort” to overcome Satan, oneself or an opponent. There are also different sorts of *jihad*. The greater *jihad* is the struggle one has to lead against himself/herself and the lesser *jihad* is understood as war against others. It is this lesser *jihad* that has served as the rallying cry for radical Islamic armed groups in their battle against the West.

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3 General Orders No. 100, Adjutant General's Office (1863) at art. 15.
4 Id. at art. 16.
5 JEAN HENRY DUNANT, A MEMORY OF SOLFERINO (1862).
8 See Yamani, supra note 6, at 193.
9 See id. at 195.
11 See Engeland, supra note 10, at 83.
12 See id. at 83. In the *uzna* the Prophet Muhammad is recorded as stating that “self-exertion in peaceful and personal compliance with the dictates of Islam [constitutes] the major or superior *jihad*.” See Karima Bennoune, *As-Salāmu ‘Alaykum* Humanitarian Law in Islamic Jurisprudence, 15 Mich. J. INT'L L. 605, 615 (1993-1994) citing ABDULLAH AN-NA‘IM, TOWARD AN ISLAMIC REFORMATION (1990) 145. For an in-depth review of the concept see also Shaheen Sardar Ali and

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**Government of Armies of the United States in the Field** (the “Lieber Code”) recognized that military necessity “admits of all direct destruction of life or limb of armed enemies” but directed the Union Army to refrain from “the infliction of suffering for the sake of suffering or for revenge” and “any act of hostility which makes the return to peace unnecessarily difficult.” The Lieber Code laid the groundwork for the Hague Conventions of 1899 and 1907, the Four Geneva Conventions of 1949 (and their additional protocols) and the various arms specific treaties that followed. In his seminal *A Memory of Solferino*, Henri Dunant asked: “Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?” Dunant’s lamentation led to the founding of the International Committee of the Red Cross (ICRC), which later became the guardian of the Geneva Conventions and the keeper of the body of law known today as international humanitarian law or IHL.
The dramatic events of the morning of September 11, 2001 brought these two parallel regimes into direct conflict with one another. While al Qaeda’s intentional targeting of civilians aboard American Airlines Flight 11, American Airlines Flight 77, United Airlines Flight 175 and United Airlines Flight 93 and the crashing of three of those aircraft into the civilian-occupied World Trade Center in New York City and the largely-civilian occupied Pentagon in Arlington, Virginia represented clear violations of both IHL and Islamic *jus in bello*, the perpetrators claimed a legal right for their actions. In its April 24, 2002 justification for the attacks titled *A Statement from Qaidat al-Jihad Regarding the Mandates of the Heroes and the Legality of the Operations in New York and Washington* al Qaeda asserted:

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

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

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

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\(^{13}\) Regarding the Islamic *jus in bello*, on September 14, 2001 the leaders of forty-six Islamic fundamentalist groups issued a statement denouncing the September 11, 2001 attacks, which read:

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

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

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

\(^{15}\) See generally Quintan Wiktorowicz and John Kaltner, *Killing in the Name of Islam: Al Qaeda’s Justification for 9/11*, 10 MIDDLE EAST POLICY 76 (SUMMER 2003) (discussing al Qaeda’s seven conditions with regard to existing Islamic jurisprudence).
[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.\(^\text{16}\)

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

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

Do these broad statements and claims to legal authority, which resulted in the expansion of targeting practices by both radical *jihadi* and U.S. forces, have anything in common? A review of the

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\(^{19}\) Address of President George W. Bush to the Congress and the Nation (Oct. 7, 2001) available at http://www.law.ou.edu/hist/bush-addr-nation-begin-attacks-on-queda-10-07-01.shtml. Immediately after the Bush address, a video tape of an Osama bin Laden speech was released to the media. In it, bin Laden stated:

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


\(^{21}\) See id.
methods that led to the current state of affairs uncovers more similarity than one might think. This article begins with an examination of the radical innovations in the Islamic *jus in bello* that resulted in its instrumentalization by al Qaeda and other Islamic armed groups in the name of *jihad*. It then addresses the key legal arguments of the U.S.-led response, particularly in the post-9/11 period. Finally, it offers a critical appraisal of the use of targeting rules to justify killing by both sides. In conclusion it summarizes the argument and comments on the dark sides of legal instrumentalization.

**Radical innovations in the Islamic *jus in bello*: Takfiris, new apostates and the global *jihad***

"I am the Prophet of gentle compassion; I am the Prophet of fierce battle."

—Prophet Muhammad

With this simple quotation, the Prophet Muhammad succinctly summarizes the tension between considerations of humanity and military necessity. In recent years, the latter has trumped the former, at least in the hearts and minds of fundamentalist Islamic armed groups such as al Qaeda. A number of radical innovations within the Islamic *jus in bello* led to this result.

The roots of the modern radical position lay in the writings and teachings of Sayyid Qutb, an Egyptian scholar, educator, theorist, poet and author known for his two great works, *Milestones*, first published in 1964, and *In the Shade of the Qur'an*, which was first published in 1954, and was revised during Qutb’s imprisonment in Egypt from 1954-1966 following an attempted assassination of then President Gamel Abdel Nasser. In his writings, Qutb divided the world into two groups, Islam and *jabilīyya* (the period of darkness preceding Islam). For Qutb, *jabilīyya* encompassed all of modern life, including manners, art, literature and especially Western values. The only way to save Islam was to reject the *jabilīyya* through perpetual *jihad*. His choice was clear: “pure, primitive Islam or the doom of mankind.”

Ayman al-Zawahiri, the Egyptian leader of Islamic al-Jihad, which formally merged with al Qaeda in 2001, was a student of Qutb during his formative years in Cairo and the hallmarks of his teacher’s viewpoints are omnipresent in al Qaeda’s activities. From the early days in Peshawar to the deserts of Khartoum, to the chaos of Mogadishu and the caves of Tora Bora, the overriding mantra of al Qaeda has been a rejection of modernity and a revival of Islam through a rededication to fundamentalist teachings.

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

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23 Unlike many of his later disciples, Qutb was familiar with U.S. culture. During the late 1940s he spent nearly two years studying and traveling in the country. For a comprehensive review of his activities and the effect the visit had on his views see id. at ch. 1.
24 Id. at 35.
26 Id.
takfiris, such as those populating al Qaeda’s ranks believe that they themselves may make the declaration. The result of the takfiri movement was a general increase in the scope and intensity of violence between Muslims.\(^{27}\)

In addition to the expansion of takfiri, another major innovation in Islamic *jus in bello* jurisprudence—and the shift in thinking that brought about the conflict between violent armed groups such as al Qaeda and the West—was the globalization of jihad. As noted in the introduction, the notion of *jihad* has many variations. The greater/lesser dichotomy represents one distinction. Within the lesser category another division exists between *local jihad* and *global jihad*. Historically, the former represented the only type. Because *lesser jihad* was primarily defensive it was fought within Muslim countries against invading forces. Bin Laden altered this paradigm with his February 23, 1998 *Declaration of the World Islamic Front for Jihad against the Jews and the Crusaders*, in which he called on all Muslims to attack the United States:

“To kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible, until the Aqsa Mosque [in Jerusalem] and the Haram Mosque [in Mecca] are freed from their grip and until their armies, shattered and broken-winged, depart from all the lands of Islam, incapable of threatening any Muslim.”\(^{28}\)

The *global jihad*, as declared by bin Laden, went against centuries of tradition and practice of the *lesser jihad*. It erased any distinction between civilian and military targets, turned a historically collective obligation into an individual one and disconnected *jihad* from specific territories.\(^{29}\)

Despite its deviation from established practice, bin Laden’s declaration gained widespread support. From these fundamentalist and expansionist *jihadi* precepts, al Qaeda was able to justify its violent activities with reference to the Qur’an, religious imagery and the *fatwas* (religious edicts) of mercenary and/or sympathetic scholars. Various other issues, such as the use of suicide bombers, were also redefined by the group.\(^{30}\) Although the ideas were largely dismissed by mainstream Islamic jurists, the violent ideology of al Qaeda attracted many young, disaffected Muslims seeking an outlet for their resentment of the West. In their hands, the expanded targeting authority provided by bin Laden’s radical revision of the Islamic *jus in bello* proved to be a powerful weapon.

**The U.S.-led response in the post-9/11 period: “Unlawful enemy belligerents,” direct participation in hostilities and the global war on terror**

“There are no rules. It’s barbaric behavior. They slit throats of women on airplanes in order to achieve an objective that is beyond comprehension, and they like to hit and then they like to hide out. But we’re going to smoke them out.”

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\(^{27}\) Examples include the violent fundamentalist insurgencies in Egypt and Algeria during the 1990s.


Thinking back to the disorienting days after 9/11, the anger was palpable. President Bush aptly captured the mood of the nation in his remark on smoking bin Laden and the other culprits out of their hiding places. The view held by the vast majority of U.S. citizens was that the response against those responsible had to be immediate and merciless. The resulting legal framework adopted by the U.S. government reflected that imperative. From the beginning, the U.S. clearly took the position that the attack by al Qaeda constituted an act of “war” rather than a crime. This decision legitimated the widespread use of lethal force and thrust IHL to the fore.

From the start, the conflict with al Qaeda, the Taliban and associated forces in the post-9/11 period challenged the established categories of IHL. As U.S. and allied forces deployed to the region and started to capture suspected al Qaeda and Taliban members, for instance, detention issues received substantial scrutiny. The detention position originally taken by the U.S. was that none of the detainees could be considered prisoners of war because the Geneva Conventions did not apply to the conflict. Later, it claimed that the Conventions applied in principle, but that none of the detainees—neither those who were in the Taliban nor those in al Qaeda—met the definition of a prisoner of war. Military commissions were created at Guantanamo Bay, Cuba, where detainees were held and investigated for their alleged offenses. After numerous U.S. Supreme Court challenges and legislative revisions the government settled on a hybrid position under which the detainees, classified as unlawful enemy belligerents were not to be treated as prisoners of war, but were to be treated “humanely” as a matter of policy. Under the Military Commissions Act of 2009, the definition of unlawful enemy belligerent is extremely broad:

31 Brian Knowlton, Terror in America/We’re Going to Smoke Them Out: President Airs His Anger, N.Y. TIMES (Sept. 19, 2001). Always the gunslinger, President Bush also said famously at the time: “I want justice, and there’s an old poster out West I recall that said ‘Wanted, Dead or Alive.’” See id.


33 The memoranda produced by the U.S. Department of Justice, Office of Legal Counsel in the period following 9/11 are informative on this point. They each reinforced the armed conflict paradigm and applicability of IHL. See e.g., Memorandum Regarding Determination of Enemy Belligerency and Military Detention (June 8, 2002); Memorandum from Patrick F Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Legality of the Use of Military Commissions To Try-Terrorists, (Nov. 6, 2001); Memorandum to Alberto Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General. Office of Legal Counsel, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002).

34 Space constraints limit an involved discussion on this point. For an informative review of the decision-making process at the time, which focused on a parsing of the “armed conflict not of an international character” language from Common Article 3 of the Geneva Conventions see generally Steven Ratner, Jus ad Bellum and Jus in Bello after September 11, 96 AM. J. INT’L L. 905 (2002).

35 See id. at 911.

36 See Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (President George W. Bush).

The term *unprivileged enemy belligerent* means an individual (other than a privileged belligerent) who (a) has engaged in hostilities against the United States or its coalition partners; (b) has purposefully and materially supported hostilities against the United States or its coalition partners; or (c) was a part of al Qaeda at the time of the alleged offense.38

Just as detention strained existing categories, targeting also represented a vexing issue. Because al Qaeda and Taliban members did not wear uniforms or otherwise identify themselves as parties to the conflict, and because they often intentionally hid among the civilian population, U.S. forces faced the serious logistical dilemma of distinguishing between combatants and non-combatants for the purposes of using force.39 The framework that the government eventually developed was expansive. It premised targeting decisions on whether individuals *directly participated in hostilities* (DPH). This followed from the unlawful enemy belligerent standard of detention. Because members of al Qaeda and, to a lesser extent the Taliban, were not part of a regularly constituted force, they were not privileged belligerents. As a result they were civilians who engaged in unlawful combatancy. Under the targeting standard adopted by the U.S., those individuals serving a continuous combat function (*status* targets) could be targeted anywhere, at any time (subject to proportionality requirements), while those only intermittently involved in hostilities (*functional* targets) could be targeted only during the period of their DPH. Within these categories, substantial wiggle room existed for broadening and creative interpretation. Considerable uncertainty also attached to the “revolving door” (*functional*) targets, who did not serve continuous combat functions but were on-again, off-again participants in the conflict.40

The detainee and targeting frameworks fit within the larger view at the time that the conflict with al Qaeda was *global* in scope. Because the group operated as a diffuse, transnational network, the U.S. position was that the normal territorial restrictions on the conduct of war did not apply. This resulted in the doctrine of the *global war on terror* (GWOT). As articulated by President Bush in his June 1, 2002 address to the U.S. Military Academy at West Point:

> [T]he war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action. And this nation will act.41

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39 The Authority for U.S. Military Forces to Combat Terrorism within the United States, supra note 20, at 3.
41 President George W. Bush, Remarks at the Graduation Exercise of the United States Military Academy, West Point, New York (June 1, 2002) (emphasis added). But see John Bellinger, Legal Adviser, U.S. Department of State, Armed Conflict with Al Qaeda OPINIOJURIS.ORG (Jan. 15, 2007) http://opiniojuris.org/2007/01/15/armed-conflict-with-alqaida/ (asserting “[t]he phrase ‘the global war on terror’—to which some have objected—is not intended to be a legal statement. The United States does not believe that it is engaged in a legal state of armed conflict at all times with every terrorist group in the world, regardless of the group’s reach or its aims, or even with all of the groups on the State Department’s list of Foreign Terrorist Organizations. Nor is military force the appropriate response in every situation across the globe. When we state that there is a ‘global war on terror,’ we primarily mean that the scourge of terrorism is a global problem that the international community must recognize and work together to eliminate. Having said that, the United States does believe that it is in an armed conflict with al Qaeda, the Taliban, and associated forces.”). Whether
The GWOT framework created serious time and space problems for IHL. On the issue of time, the conflict has no logical end point. This is confirmed in the AUMF, which will remain in effect until the U.S. Congress decides to repeal it, as well as the remarks of President Bush. The enemy is nebulous, and what counts as “winning” is not altogether clear. With regard to space, the need to act offensively and to confront threats “before they emerge” requires omnipresence. Instead of being tied to a particular territory or locus of conflict, the GWOT would attach wherever the terrorists themselves could be found.

In the period since those initial innovations, the U.S. has continued to use IHL as a tool for the targeting of terrorist suspects. For instance, despite the Obama administration’s rejection of the GWOT paradigm, U.S. officials maintain that certain members of al Qaeda can be targeted at any time, wherever they are found. The result has been an armed conflict taking place in different locations, at different times. In his justification for U.S. policy, the Legal Adviser to the U.S. Department of State, Harold Koh asserted:

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

The matter of targeted killing through the use of drones, to which Koh alludes in his remarks, represents another continuation of the U.S. position. In fact, under President Obama’s stewardship, the program has grown exponentially. The September 30, 2011 drone attack that killed Anwar al-Awlaki, an American citizen who was also a member of al Qaeda, in Yemen represents the latest salient example of this policy.

A critical appraisal: Finding ways to justify killing through the instrumentalization of the law

The argumentative techniques employed by al Qaeda and post-9/11 U.S. policy-makers exhibit clear similarities. As shown in the preceding sections, each moves in the general direction of breaking down preexisting barriers to violence during war. This began with new determinations on who could be targeted. For al Qaeda and other violent jihadihs, a return to fundamentalist views resulted in the

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takfīr movement and the general proliferation of apostates. For the U.S., the hysteria caused by terrorism and the anger over 9/11 spilled-over into a general opening-up of combatancy through a reformation of civilian participation in conflict. These initial pragmatic innovations eventually resulted in a geographical expansion of the targeting area. Both bin Laden’s Declaration of the World Islamic Front for Jihad against the Jews and the Crusaders and the Bush administration’s policy of GWOT shattered the existing spatial boundaries that had been placed on the conduct of war by the Islamic jus in bello and IHL, respectively.

Perhaps more troubling than these changes in perspective, however, was the way in which law was instrumentalized to serve particular interests. Rather than let these pronouncements lay in the realm of politics, both al Qaeda and the post-9/11 U.S. administration sought to legitimize their positions by reference to the law. Whether by fatwa or Executive branch opinion, each approach reaches for the imprimatur of jurisprudential approval. Instead of an honest effort to act according to the rule of law, however, the argumentative techniques represent superficial testimonials. They bow to the law only insofar as it suits their interests.\(^{46}\) In this way, the leaders of each organization sought to instrumentalize law as a justificatory device. The net results were legal opinions supporting policies of warfare that deviated from existing norms. Moreover, the general trend was more—more targeting, in more places, through more means. While some may refer to such uses of the law as lawfare,\(^ {47}\) the real danger is to see this argumentative technique for what it really is—a method to justify predetermined acts.

It should be noted, of course, that the approaches of al Qaeda and the U.S. were also dissimilar in many ways. For instance, there is no comparison as to degree. The al Qaeda approach was much more expansive. Bin Laden drew little, if any, meaningful distinction between combatants and civilians. His method was wholesale destruction and his targets were often specifically and exclusively civilian. The U.S., for its part, did continue to insist on principles of distinction, proportionality and military necessity. Rather than celebrate civilian deaths, it undertook serious and time-consuming processes to avoid them. A great number of U.S. military operations were postponed or cancelled because they presented a disproportionate threat to civilian life. This approach, which was also premised largely on legitimacy, formed a significant part of the “winning-hearts-and-minds” counterinsurgency strategy in Afghanistan and Iraq. Although to its credit, even in the covert operation that resulted in the killing of bin Laden on May 2, 2011 in Abbottabad, Pakistan the U.S. purportedly took “great pains both to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter [...] even if it meant putting U.S. forces in harm’s way.”\(^ {48}\)

Taking that proviso into account, the point of this critical review has not been to equate al Qaeda’s methods with those of the U.S. in response to 9/11. The goal was to identify the ways in which

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\(^{46}\) As Derek Goodman wrote with regard to preventive detention: “In addressing that issue, leading lawmakers, litigators, and adjudicators have misconstrued or misappropriated aspects of the IHL regime.” Derek Goodman, The Detention of Civilians in Armed Conflict, 103 Am. J. INT’L L. 48 (2009).

\(^{47}\) See e.g. Col. Mark Holzer, Offensive Lawfare and Current Conflict, HARV. NAT. SEC. J. FEATURES (2012).

\(^{48}\) Harold Koh, The Lawfulness of the U.S. Operation against Osama bin Laden, OPINIOJURIS.ORG (May 19, 2011) http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/. It could be said that Navy Seals would not have been pursuing bin Laden at all were it not for the prior instrumentalization of IHL that occurred in the post-9/11 period. The fact that the bin Laden operation was carried out by military forces speaks to the increase in violence that results from such instrumentalization. While that violence might have objectively positive effects, it might also have dark sides.
both the Islamic *jus in bello* and IHL were instrumentalized to serve a particular end, namely to enable the targeting of an enemy force. As the brief discussion shows, the fact that certain basic similarities exist cannot be denied.