

**THE LEGALITY OF GOVERNMENTAL RESPONSES TO TERRORISM
AND THE DICHOTOMOUS CHARACTERIZATION OF TERRORISTS
AS CRIMINALS OR ENEMY COMBATANTS**

by Gregory E. Maggs*

I. INTRODUCTION	2
II. THE DOMINANCE OF DICHOTOMOUS CHARACTERIZATION	6
A. <i>Authority to Use Force in Foreign Countries</i>	7
B. <i>Authority to Use Force Domestically</i>	13
C. <i>Targeted Killing</i>	19
D. <i>Detention</i>	26
E. <i>Trials</i>	33
F. <i>Search and Seizure</i>	37
G. <i>Duty to Provide Security</i>	41
H. <i>Compensation for Harm</i>	45
I. <i>What Dichotomous Characterization Does not Determine</i>	50
III. THE PROBLEMS WITH DICHOTOMOUS CHARACTERIZATION	52
A. <i>No Standard for Characterization Exists</i>	53
B. <i>Anti-Terrorism Measures Defy Simple Characterization</i>	56
C. <i>Unlimited Application of Either Body of Law</i>	59
D. <i>Discretion to Determine Legality</i>	62
III. THE ADVANTAGES OF CREATING SPECIALIZED LAWS TO REGULATE GOVERNMENTAL RESPONSES TO TERRORISM	66
A. <i>The Benefits of Specialized Laws</i>	66
B. <i>Creation of Specialized Laws</i>	69
C. <i>Consider the Alternatives</i>	73
D. <i>An Example of a Specialized Law</i>	75
IV. CONCLUSION	76

* Professor of Law, George Washington University Law School. I would like to thank Dean Fred Lawrence and Professors Orin Kerr, Jonathan Siegel, and Peter Smith for their comments and suggestions. In my capacity as a reserve officer in the U.S. Army Judge Advocate General’s Corps, I have worked on terrorism related issues, including those concerning military commissions. The views expressed here are my own and do not necessarily reflect those of the U.S. Army or the Department of Defense. The George Washington University Law School provided generous financial support.

I. INTRODUCTION

Nations around the world are responding to terrorism with a combination of law enforcement measures and military action.¹ In the United States, for example, the federal government has prosecuted terrorists responsible for the 1993 World Trade Center bombing,² the 1998 assaults on U.S. embassies in Kenya and Tanzania,³ and the attacks of September 11, 2001.⁴ At the same time, the government also has been using its armed forces against al-Qaida terrorists in Afghanistan, Iraq, Sudan, Yemen, and other places.⁵ Other countries fighting terrorism with both criminal proceedings and military actions include Egypt,⁶ Israel,⁷ Russia,⁸

¹For a general treatment of law enforcement, military, and other governmental responses to terrorism, see GREGORY E. MAGGS, *TERRORISM AND THE LAW: CASES AND MATERIALS* (2005).

²*See* *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998), *cert. denied* 525 U.S. 1112 (1999) (prosecution of terrorists who detonated a van full of explosives under one of the towers of the World Trade Center in New York City, killing six, injuring 1400 others, and caused over \$500 million of property damages).

³*See* *United States v. Bin Laden*, Transcript of Sentencing Hearing, No. S(7), 98 Cr. 1023 (S.D.N.Y. Oct. 18, 2001), available at <<http://cryptome.org/usa-v-ubl-78.htm>> (sentencing of terrorists who participated in the bombing of the American Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing 224 people and wounding thousands of others).

⁴The United States currently is prosecuting Zacarias Moussaoui, whom it accuses of having conspired with the hijackers involved in the attacks. *See* *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), *cert. denied* 125 S. Ct. 1670 (2005).

⁵Complete official news on the United States' military campaign against terrorism is available at <<http://www.defendamerica.mil>>. Discussion of several of military responses appears in part II below.

⁶*See* Susan Sachs, *A Nation Challenged: Bin Laden's Allies; An Investigation in Egypt Illustrates Al Qaeda's Web*, N.Y. TIMES, Nov. 21, 2001, at A1 (describing major anti-terrorism

Turkey,⁹ and the United Kingdom.¹⁰

When governments use military force to respond to terrorism, a debate often arises about the legality of the steps taken. As this article will show with numerous examples, the debate has familiar contours. Opponents of the governmental action typically argue that it violates legal guarantees designed to protect criminal suspects. They assert, for instance, that domestic and international laws do not permit the government simply to shoot suspected terrorists, or to detain them indefinitely, or to try them outside of ordinary courts.

But governments and their supporters have a standard reply to this objection. They assert that they are not merely addressing crime, but instead are fighting a war, and that the law applicable to armed conflict allows them to employ the measures that they have used. In the United States, the familiar refrain is: "We took these kinds of actions in World War II when we

prosecutions in Egypt); Associated Press, *Egypt Sentences 6 To Death for Attacks*, N.Y. TIMES, Jan. 14, 1996, at 12 (describing military process used against suspected terrorists).

⁷See Uri Dan, *Israel Blows Away 2 Top Terrorists*, N.Y. POST, Nov. 2, 2005, at 30 (describing targeted killing of suspected terrorists); Charles A. Radin, *Palestinian Leader Convicted in Israel Five Life Terms Sought in Killings*, BOSTON GLOBE, May 21, 2004, at A8 (describing prosecution of terrorists in Israel).

⁸See Nadezhda Gaisenok & Alexander Shashkov, *Russia Court to Examine Appeal of 3 Chechens Convicted for Terror*, TASS, Nov. 9, 2005 (discussing criminal prosecution of terrorists in Russia); David Holley, *Separatists Tied to '99 Bombings*, L.A. TIMES, May 1, 2003, at 5 (discussion Russian military responses to terrorist bombings of apartment buildings in Moscow).

⁹See Andrew Finkel, *A Foregone Conviction; the Trial of Kurdish Leader Abdullah Ocalan Is Set to Begin in Turkey amid Questions of Fairness*, TIME, Jun. 7, 1999, at 39; Sam Cohen, *Turkey's Military Rulers Post a Sharp Decline in Terrorism*, CHRISTIAN SCIENCE MONITOR, Nov. 25, 1980, at 6 (addressing Turkey's military responses to terrorism).

¹⁰See David Leppard & Richard Woods, *Britain's Secret War on Terror*, SUNDAY TIMES, Mar. 13, 2005, at 16 (describing the use of trials to combat terrorism); Brian Lavery, *Britain to Halve its Forces in Ulster*, INT'L HERALD TRIB., Aug. 3, 2005, at 3 (describing British military responses to terrorism in Northern Ireland).

were fighting the Nazis and the Japanese, and therefore we can take them in the war that we are fighting against al-Qaida."¹¹

So at present the debate often boils down to a question of which law governs governmental responses to terrorism. Is it the law that regulates law enforcement actions? Or is it the law of armed conflict? The choice matters. Those who believe that the rules that apply to law enforcement actions must govern responses to terrorism consider many of the responses that governments actually have taken to be illegal. And those who believe that the law of armed conflict applies tend to think that they fall wholly within accepted standards of war fighting.

Take the issue of targeted killing. A country engages in targeted killing when it locates and summarily kills a suspected terrorist. The United States has engaged in the practice in its struggle against terrorism. For example, the CIA has fired missiles at suspected members of al-Qaida, without trying to bring them into custody.¹² Israel also has done targeted killing, attacking Palestinians in the West Bank, Syria, and other places.¹³ And Russia reportedly once sent a poisonous letter to kill a Chechen leader.¹⁴

¹¹See, e.g., Thomas Sowell, *Fanatics in Court*, SUN-SENTINEL, Jul. 26, 2002, at 31A ("We never threw open our courtroom doors to captured Nazi prisoners of war in World War II, much less gave them access to our press.").

¹²See Reuters, *Rights Group Questions Attack; Amnesty Says U.S. Missile Strike in Yemen May be Illegal*, WASH. POST, Nov. 9, 2002 at A21 (describing an incident in which the CIA killed persons suspected of participating in the bombing of the *U.S.S. Cole*). For further discussion, see part II.C. *infra*.

¹³See Joel Greenberg, *Palestinian Militant Slain in Damascus; Israel Blamed; Revenge Vowed*, CHICAGO TRIBUNE, Sept. 27, 2004, at 3 (describing Israel's practice of targeted killing).

¹⁴See Peter Baker, *Russia Moving to Eliminate Chechen Rebel Leaders*, WASH. POST, Apr. 20, 2004, at A13 (reporting that Russia reported killa guerrilla called "Khattab" in 2002 with a poisoned letter).

Is the targeted killing of suspected terrorists lawful? As explained more fully below,¹⁵ everyone agrees that ordinary law enforcement rules in the United States (and in most other places) do not permit the police simply to kill criminal suspects. Instead, they must give them a chance to surrender before attacking them. In contrast, long established principles of the law of war say that military forces generally may target and kill enemy forces in the course of a lawful armed conflict, wherever they find them and without giving them a chance to surrender, unless they already have laid down their weapons and given themselves up.

But what do these two sets of rules say about the targeted killing of suspected terrorists? At present, the answer appears to depend on which of the two sets of rules apply. Opponents of targeted killing might view suspected terrorists as criminal suspects, concluding that the government cannot simply target and kill them. Meanwhile, proponents of targeted killing by military forces might consider the suspected terrorists to have the status of enemy combatants. If the two sides disagree on the proper characterization of the suspected terrorists, they will reach conflicting views about which set of legal rules should apply. In turn, they will arrive at different conclusions about the legality of any targeted killing.

Reacting to this familiar pattern of argumentation, this article considers in depth the dichotomous characterization of governmental responses to terrorism as either law enforcement measures against criminal suspects or exercises of armed force against enemy combatants. The article makes three specific claims, elaborated in parts II, III, and IV respectively. First, the need to characterize governmental actions to determine their legality is now and long has been a central feature of anti-terrorism law. A requirement of dichotomous characterization arises in no

¹⁵*See infra* part II.B. (describing legal rules that may apply to targeted killing).

fewer than eight different subject areas, ranging from targeted killing to the responsibility of the government to provide compensation. Characterization issues further have arisen not only in the United States but also in many foreign countries. And disputes over characterization are not new; they have occurred for many decades.

Second, determining the legality of governmental responses to terrorism by attempting to characterize terrorists as either criminal suspects or as enemy combatants is not a good system. Terrorists generally defy simple characterization because they resemble enemy combatants in some ways and criminal suspects in others. In addition, the different subject areas in which the issue of characterization arises vary from each other in so many respects that a characterization that makes sense in one area does not necessarily make sense in another. In fact, as the article will show, the United States has found itself hard pressed to take a consistent view on characterization, despite the centrality of the question.

Third, the law would be improved by moving to a system that does not rely so heavily on dichotomous characterization. The United States and other nations ought to create specialized laws to regulate governmental responses to terrorism, rather than debating whether the laws of war or the rules of law enforcement should apply. These laws would see terrorism as a problem that sometimes lies between traditional crime and traditional warfare, and establish rules designed to address governmental responses to it. Already examples of some of this kind of legislation are emerging in the United Kingdom.

II. THE DOMINANCE OF DICHOTOMOUS CHARACTERIZATION

The following discussion will show that the need to characterize terrorists as either

criminals or enemy combatants is now, and long has been, a central feature of the law regulating governmental responses to terrorism.¹⁶ This feature affects many different subject areas. It is present in domestic, foreign, and international law. And it has persisted for a long time.

A. *Authority to Use Force in Foreign Countries*

May a nation lawfully respond to a terrorist incident by using military force in a foreign country? This question often has great importance. Terrorist organizations sometimes have foreign bases of operation. In addition, after committing their assaults, terrorists often flee across borders. For these reasons, the United States and other nations may wish to make counterattacks abroad. The U.N. Charter generally forbids nations to use military force in foreign countries. Article 2(4) says: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹⁷ But the U.N. Charter has an exception in article 51 recognizing that nations have a right to use force when responding in self-defense to an "armed attack."¹⁸

So the precise legal issue is this: If a nation responds to a terrorist incident by using military force in a foreign country, does that violate the U.N. Charter? If the terrorist incident

¹⁶The discussion makes no claims about which side of the debate has the better argument as matter of policy or which side should win in the courts.

¹⁷Charter of the United Nations, 1945, art. 2(4), 1 UNTS 16 [*hereinafter* "U.N. Charter"].

¹⁸*Id.* art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and

was an "armed attack" within the meaning of article 51, then the response may be lawful. But if the terrorist incident was not an "armed attack," but instead merely a crime, then the response would violate the prohibition in article 2(4).

In past instances, national governments and international organizations have drawn conflicting conclusions on the very basic question of whether terrorists are just criminals or whether they are forces capable of mounting an "armed attack." As a result, observers have different views about the lawfulness of extra-territorial military responses to terrorism. Here are several prominent examples:

Example # 1: In 2004, at the request of the United Nations General Assembly, the International Court of Justice issued an advisory opinion on the legality of a lengthy fence constructed by Israel.¹⁹ Israel built the fence to block terrorists from entering Israel.²⁰ The fence partially followed Israel's internationally recognized borders, but in some places it also ran through the occupied territory of the West Bank.²¹

The International Court of Justice considered, among other issues, whether article 51 could excuse Israel's use of force (i.e., the building of the fence) outside of its borders as a measure taken in self-defense.²² The court concluded that it could not, giving two alternative

security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . .").

¹⁹*See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2003 I.C.J. No. 131 (advisory opinion of Jul. 9, 2004).

²⁰*See id.* ¶ 116.

²¹*See id.* ¶ 122.

²²*See id.* ¶ 138. Israel did not press a substantive argument before the court. It contended that General Assembly had acted in an ultra vires manner in seeking an advisory opinion because

reasons. First, the court said that "Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State" and that "Israel does not claim that the attacks against it are imputable to a foreign State."²³ Second, the court said that the threat originated from territory that Israel controls, and that Article 51 therefore does not apply.²⁴

In other words, the court concluded that Israel cannot use force but must instead use ordinary law enforcement measures to deal with the terrorist threat.²⁵ Praising the decision, Professor Mary Ellen O'Connell has written: "the situation Israel faced at the time of the Advisory Opinion was more akin to terrorist attacks perpetrated by the state's own nationals within the state's own territory because of the measure of control Israel exercises over the occupied territories. Terrorist attacks by nationals within their own state have invariably been treated as criminal. . . ."²⁶

But not everyone agrees with this position. Judge Burgenthal of the International Court of Justice filed a separate declaration in the case. Although he principally asserted that the court

the Security Council was actively addressing the Israeli-Palestinian conflict. *See id.* ¶ 24. In addition, because the General Assembly was seeking an advisory opinion, and had not named Israel as party to the lawsuit, Israel had no duty to make a substance argument. *See id.* (declaration of Judge Burgenthal), at ¶ 10. But the Court noted that Israel previously had told the United Nations General Assembly that it was constructing the fence in self-defense. Israel cited Security Council Resolution No. 1368 to support its argument. *See id.* ¶ 138.

²³*Id.* ¶ 139.

²⁴*See id.*

²⁵*See* Mary Ellen O'Connell, *Enhancing the Status of Non-state Actors through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435, 451 (2005).

²⁶*Id.*

should not have exercised jurisdiction,²⁷ he also specifically disagreed with the court's reasons for rejecting Israel's self-defense argument. He asserted that the U.N. charter does not permit self-defense only against armed attacks from other nations and that it was "irrelevant" whether Israel controlled the occupied territories.²⁸ In his view, in assessing Israel's position under article 51, the court should have judged Israel's actions by their "necessity and proportionality."²⁹ In other words, Judge Burgenthal did not think that nations could only use criminal law enforcement measures against terrorist acts.

Example # 2: On September 11, 2001, members of al-Qaida infamously hijacked and crashed four aircraft in the United States. The United States responded by using military force against al-Qaida in Afghanistan. In pursuing this action, the United States took the position that it was fighting a war and could do what the laws applicable to armed conflict allow. The United States informed the United Nations Security Council, as article 51 requires, that it was acting in self-defense in response to an "armed attack."³⁰ The United States also persuaded NATO to agree to this characterization of the terrorist attacks.³¹

²⁷See 2003 I.C.J. No. 131 (declaration of Judge Burgenthal) at ¶ 1.

²⁸See *id.* ¶ 6.

²⁹*Id.*

³⁰See U.N. Charter, *supra* note 17, art. 51 ("Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . .").

³¹North Atlantic Treaty Organization, Statement by NATO Secretary General Lord Robertson, available at <www.nato.int/docu/speech/2001/s011002a.htm> ("[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.").

But not all observers share the United States and NATO's view. The Security Council itself never specifically called the terrorist incidents an "armed attack." Instead, it issued a diplomatically worded statement both condemning the assaults and "[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter."³² The statement did not specifically say that the Charter authorized the use of force by the United States.³³

Professor Sean Murphy has offered an explanation for why some might consider the events of September 11th not to rise to the level of an armed attack.³⁴ Murphy notes that the terrorists did not operate as military or paramilitary units and that they were armed only with box cutters--"not weapons one would normally associate with military or paramilitary units."³⁵ Although he does not endorse the position, he raises the question whether "this was not an 'armed attack' but, rather, a use of force or intervention below the threshold of armed attack, which is perhaps better characterized as a conventional (albeit heinous) criminal act."³⁶

Example #3: In 1998, following attacks by al-Qaida on U.S. embassies in Kenya and Tanzania, the United States responded by firing missiles at suspected al-Qaida targets in Sudan

³²S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/Res/1368 (2001).

³³*See id.*

³⁴*See* Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41 (2002).

³⁵*Id.* at 45.

³⁶*Id.* at 46.

and Afghanistan.³⁷ The United States informed the Security Council, again as article 51 requires, that it was acting in self-defense to an armed attack.³⁸

But others disagree with this characterization of the bombings. Sudan has protested the action.³⁹ And some scholars have judged the United States in law enforcement terms; Professor Jules Lobel says: "It is self-serving hypocrisy for the United States to attack alleged terrorist facilities, violate other nations' sovereignty, and kill innocent civilians, using evidence that would not suffice to sustain a criminal prosecution."⁴⁰

Other extra-territorial uses of military force to respond to terrorist attacks have led to similar debates about the applicability of article 51. The United Nations General Assembly condemned the United States' 1986 strike on Libya in response to a nightclub bombing in Berlin.⁴¹ And the Security Council (with the United States abstaining) condemned Israel's 1985

³⁷See *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004), *cert. denied* 125 S. Ct. 2963 (2005) (discussing these attacks).

³⁸The second sentence of article 51 requires a nation exercising self-defense to notify the security council. See U.N. Charter art. 51 ("Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . ."). The United States fulfilled this requirement by sending a letter describing the reasons for the attacks in Sudan and Afghanistan. See Letter from Bill Richardson, U.S. Permanent Representative to the United Nations, to Danilo Turk, President, U.N. Security Council, U.N. Doc S/1998/780 (Aug 20, 1998).

³⁹See Craig Turner, *Sudan Gets Little Support for a U.N. Probe of U.S. Attack*, L.A. TIMES, Aug. 25, 1998, at A6.

⁴⁰See Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 551 (1999).

⁴¹The United States viewed the terrorist incident was an armed attack, and that it therefore concluded that it could use military force in self-defense under article 51. But the United Nations General Assembly passed a resolution that "[c]ondemns the military attack perpetrated against the Socialist People's Libyan Arab Jamahiriya on 15 April 1986, which

bombing of the Palestinian Liberation Organization (PLO) headquarters near Tunis in response to an attack on a Tunisian synagogue.⁴² In each of these many incidents, observers disagreed about the legality of a government response to terrorism because they disagreed about whether to characterize it as a response to crime or an act taken in an armed conflict.

B. *Authority to Use Force Domestically*

Is it lawful for a nation to use military force domestically in response to terrorism? The laws of each country will provide a different answer. But again the answer generally turns on whether the perpetrators are characterized as criminal suspects or as enemy combatants. Usually there are two bodies of law, one for law enforcement and one for armed conflicts, and governmental responses to terrorism must be pigeon-holed into one or the other whenever a legal dispute arises. In the United States, as in other countries, federal law limits the domestic use of military forces. The Posse Comitatus Act, in particular, makes it a crime for any government official to use the Armed Forces for law enforcement purposes.⁴³ The historic purpose of the Act

constitutes a violation of the Charter of the United Nations and of international law" G.A. Res. 38, U.N. GAOR, 41st Sess., 78th plenary mtg., U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

⁴²Israel asserted that it was acting in self-defense in response to an armed attack as permitted under article 51. But the Security Council (with the United States abstaining) passed a resolution saying that it "[c]ondemns vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations International Law and norms of conduct" S.C. Res. 573, U.N. SCOR, 2615th meeting, U.N. Doc. S/Res/573 (1985).

⁴³The Posse Comitatus Act says: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1385. A "posse comitatus" is a "group of citizens who are called together to assist the sheriff in keeping the peace." BLACK'S LAW DICTIONARY 1200 (Bryan A. Garner, ed., 8th ed. 1999).

was to end the use of federal troops in the former areas of the Confederacy after the Civil War."⁴⁴ But the law has modern justifications as well. The Act preserves federalism by making state and local governments responsible for most law enforcement. It also guards against the possibility that armed forces not specifically trained for law enforcement activities do not violate the civil liberties of citizens.

But is responding to terrorism a law enforcement measure or a military action? Two recent incidents have raised this question. One involves an American citizen named Jose Padilla. According to stipulated facts:

Padilla . . . associated with forces hostile to the United States in Afghanistan and took up arms against United States forces in that country in our war against al Qaeda. Upon his escape to Pakistan from the battlefield in Afghanistan, Padilla was recruited, trained, funded, and equipped by al Qaeda leaders to continue prosecution of the war in the United States by blowing up apartment buildings in this country. Padilla flew to the United States on May 8, 2002, to begin carrying out his assignment⁴⁵

Federal agents took Padilla into custody at Chicago's O'Hare airport.⁴⁶ They initially held him as a material witness to a grand jury proceeding.⁴⁷ But the President later designated him an

⁴⁴Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948), *cert. denied* 336 U.S. 918 (1949).

⁴⁵Padilla v. Hanft, 423 F.3d 386, 386 (4th Cir. 2005), , *cert. pet'n filed* Oct. 25, 2005.

⁴⁶*See id.*

⁴⁷*See id.* at 390.

"enemy combatant."⁴⁸ Afterward, with the blessing of the federal courts, the United States military has held Padilla in a naval brig.⁴⁹

In extensive and ongoing litigation, the federal courts have considered a number of issues regarding Padilla's confinement.⁵⁰ Padilla at one point challenged his custody as a violation of the Posse Comitatus Act.⁵¹ He alleged that military forces were aiding law enforcement by detaining him. But the United States District Court for the Southern District of New York did not see Padilla's detention as a law enforcement matter. It said:

Padilla is not being detained by the military in order to execute a civilian law or for violating a civilian law, notwithstanding that his alleged conduct may in fact violate one or more such laws. He is being detained in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active combat, and to prevent him from becoming reaffiliated with that organization.⁵²

The court therefore found no violation of the Posse Comitatus Act. Again, characterization determined which legal regime applied to the governmental action.

The second incident involved a pair of snipers who terrorized the District of Columbia, Maryland, and Virginia in 2002. John Muhammad and Lee Malvo drove through suburban areas, with one or both of them shooting people at random through a hole they had made in the

⁴⁸*See id.* at 388.

⁴⁹*See id.* at 390.

⁵⁰*See id.* at 397 (upholding Padilla's confinement).

⁵¹*See Padilla ex rel. Newman v. Bush*, 233 F. Supp.2d 564, 588 n.9 (S.D.N.Y. 2002), *rev'd on other grounds sub nom. Padilla v. Rumsfeld*, 352 F.3d 595 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004).

⁵²*Id.*

trunk of their car.⁵³ The attacks went on for weeks, with 11 persons shot and thousands terrified. Muhammad and Malvo never made their aims fully clear, although they did ask for money at one point.⁵⁴

In an effort to apprehend the snipers, the FBI requested assistance from the Department of Defense.⁵⁵ The Department of Defense responded by providing an Army surveillance airplane.⁵⁶ The aircraft had the ability to cover a large area and to use special electronic equipment to detect the heat and sound of small arms fire, possibly including shots fired by the snipers from their rifle.⁵⁷ If the Department of Defense could provide instantaneous information about the location of gun shots across the area, the FBI hoped that it could locate and apprehend the snipers.⁵⁸

⁵³See Adam Liptak, *Teenage Sniper to Plead Guilty in Two Shootings*, N.Y. TIMES, Sept. 24, 2004, at A10.

⁵⁴See Carol Morello, *Victims' Relatives Still Ask, "Why?"; Snipers' Motives Remain Unresolved*, WASH. POST, Mar. 11, 2004, at A11.

⁵⁵DoD News Briefing, Sec'y of Defense Donald Rumsfeld and Gen. Richard Myers, Oct. 17, 2002, available at <http://www.defenselink.mil/transcripts/2002/t10172002_t1017sd.html> [hereinafter DoD Sniper Briefing].

⁵⁶See Tom Bowman *et al.*, *Spy Planes to Hunt Sniper*, BALTIMORE SUN, Oct. 16, 2002, at 1A.

⁵⁷See Steve Vogel, *Military Aircraft With Detection Gear To Augment Police*, WASH. POST, Oct. 16, 2002, at A1.

⁵⁸See *id.*

Critics argued that the surveillance activity violated the Posse Comitatus Act because it was a form of military assistance to law enforcement.⁵⁹ But others disagreed; some supporters of the plan said that the Posse Comitatus Act does not prevent the military from engaging in "passive" support to law enforcement.⁶⁰ When asked at a Press Conference about the legality of the Army's assistance to the FBI, Secretary of Defense Donald Rumsfeld simply said: "We have looked at our assets and capabilities and tried to determine what we might do to be of assistance to them that's consistent with the law, the Posse Comitatus law. . . . We do know that what we're doing is fully consistent with the law, full stop."⁶¹ Secretary Rumsfeld also likened the action to "combat air patrols flying, looking for airplanes that might crash into the White House or the Capitol or the Pentagon or the World Trade Center."⁶² He said that military forces can prevent a "bad act" and "it's not quite law enforcement."⁶³

Thus, again, rather than attempting to view military responses to terrorism as a separate category, and to determine what rules should apply to that category, the disputants contested whether the responses should be viewed either as a law enforcement measure or as military actions taken in an armed conflict.

⁵⁹See Fred Kaplan & Lyle Denniston, *Army Plane Joins Sniper Hunt: Some Question Use of Surveillance Craft*, BOSTON GLOBE, Oct. 17, 2002, at A1; Adam Clymer, *Big Brother Joins Hunt for the Sniper*, N.Y. TIMES, Oct. 20, 2002, § 4, at 3...

⁶⁰See Kaplan, *supra* note 57, at A1.

⁶¹DoD Sniper Briefing, *supra* note 53.

⁶²*Id.*

⁶³*id.*

The United States is not alone in debating this kind of issue. In 1995, the Russian Constitutional Court had to decide whether Russia's constitution banned the use of military forces against Chechen rebels.⁶⁴ The Russian Federation was using military force pursuant to decrees issued by President Yeltsin and pursuant to resolutions of the State Duma (which is the lower house of Russia's bicameral parliament).⁶⁵ The Federation Council of the Russian Federation (which is the upper chamber of the parliament) and other plaintiffs challenged this domestic use of military force in the Russian Constitutional Court.⁶⁶

The Federation Council argued that the use of armed forces in Russia's territory under Russia's constitution is only permitted if the Federal Council declares a state of emergency or martial law.⁶⁷ In other words, the Federation Council argued that military measures could not be used because there was no recognized armed conflict. Presumably, the Federation Council believed that the Russian government could use only conventional law enforcement techniques to address the situation. But the Constitutional Court upheld the use of force.⁶⁸ It rejected the idea that only law enforcement agencies could respond to the crisis. The court noted that the Duma had concluded that "the disarmament of the unlawful armed militia raised in that republic, which were using tanks, missile launchers, artillery systems and war planes, 'was impossible in

⁶⁴See Judgment of the Constitutional Court of the Russian Federation on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya (1995) (available at <http://ks.rfnet.ru/english/decision/d310795e.htm>).

⁶⁵See *id.* ¶ 1.

⁶⁶See *id.*

⁶⁷See *id.*

principle without the use of regular troops."⁶⁹ The court thus saw the situation more like an armed conflict.

Once again, what neither side in the dispute considered was the possibility that terrorism might fall into a separate category. They appeared to view the question simply as whether terrorism amounted to an armed conflict or instead was just a matter for criminal law enforcement. They did not recognize the possibility that terrorism may lie somewhere in between war and crime, and that separate rules should determine the permissibility of using military force.

C. Targeted Killing

Targeted killing is the practice of shooting or using bombs or other methods to kill suspected terrorists without attempting to arrest them. Many nations have used targeted killing to dispense with suspected terrorists. Russia, as mentioned above, reportedly sent a poison letter to the person suspected of masterminding the 2000 Moscow apartment bombing.⁷⁰ The United States used a drone airplane in Yemen to kill a leader of the terrorist cell that struck the *U.S.S. Cole* as he was riding in a car.⁷¹ And Israel has killed scores of suspected members of Hamas,

⁶⁸*See id.* ¶ 6.

⁶⁹*Id.*

⁷⁰*See Baker, supra* note 14, at A13.

⁷¹*See James Risen & Judith Miller, Threats and Responses: Hunt for Suspects; C.I.A. is Reported to Kill a Leader of al Qaeda in Yemen*, N.Y. TIMES, Nov. 5, 2002, at A1.

using everything from helicopter gunships to exploding cell phones.⁷² Is the targeted killing of suspected terrorists lawful? At present, the answer, like so many answers, depends on whether the action is viewed as a law enforcement measure or as a step taken in an armed conflict. In general, the police cannot simply kill criminal suspects, but instead must arrest them. In contrast, the military usually can kill enemy combatants without attempting to arrest them unless they already have surrendered.

Consider first the rules regarding law enforcement. In the United States, the Fifth Amendment plainly says: "No person shall . . . be deprived of life, liberty, or property, without due process of law" ⁷³ And the Fourth Amendment similarly prohibits "unreasonable" searches and seizures.⁷⁴ Based on these provisions, our courts have held that a police officer may not "seize an unarmed, nondangerous suspect by shooting him dead."⁷⁵ Instead, the police are supposed to arrest suspects so that courts may determine their innocence or guilt and rule on their punishment.

Multilateral treaties embody similar protections. The International Covenant on Civil and Political Rights says: "Every human being has the inherent right to life. This right shall be

⁷²Between 2000 and mid-2003, the Israeli government reportedly engaged in the targeted killing of about 150 Palestinian militants. See Molly Moore, *Israel's Lethal Weapon of Choice: As Assassinations of Militants Increase, Citizens' Uneasiness Grows*, Wash. Post., Jul. 29, 2003, at A1.

⁷³U.S. Const. amend. 5.

⁷⁴*See id.* amend. 4.

⁷⁵*See Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

protected by law. No one shall be arbitrarily deprived of his life."⁷⁶ The European Convention on Human Rights says: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."⁷⁷ The European Convention contains exceptions allowing the police to kill criminal suspects, but only "in order to effect a lawful arrest or to prevent escape of a person lawfully detained."⁷⁸

The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials addresses the subject in detail.⁷⁹ Article 9 says that "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."⁸⁰ Article 10 further says that "law enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of

⁷⁶International Covenant on Civil and Political Rights, art. 6, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 53, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

⁷⁷Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, *opened for signature* Nov. 4, 1950, preamble, 213 U.N.T.S. 222 (Council of Europe) (entered into force Sept. 3, 1953) [hereinafter European Convention].

⁷⁸*Id.* art. 2(2)(b).

⁷⁹Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, UN Doc. A/CONF.144/28/Rev.1, at 112, para. 9 (1990), available at <http://www.unhchr.ch/html/menu3/b/h_comp43.htm> [hereinafter Basic Principles].

⁸⁰*Id.* art. 9.

death or serious harm to other persons"⁸¹ Under all of these various rules, targeted killing of criminal suspects is illegal.

But the laws governing armed conflict are different. The first rule of warfare, according to a not very humorous quip, is, "Thou shalt kill." When military forces are fighting a war, they may attack enemy forces wherever they find them without affording them an opportunity to surrender. This has been the law for a long time. In the United States, the Lieber Code of 1863 (promulgated as a military order to govern Union Forces during the Civil War) famously declared: "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"⁸² Still today, military forces may kill enemy combatants who have not surrendered,⁸³ and nothing in the law of armed conflict requires military forces to afford the enemy the opportunity to surrender before attacking them.

True, some prohibitions on assassination apply to the military. For example, the Annex to Hague Convention No. IV, Respecting the Laws and Customs of War on Land, says: "In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . [t]o

⁸¹*Id.* art. 10.

⁸²*See* Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 15 (Apr. 24, 1963) (military order of President Lincoln implementing rules drafted by Francis Lieber, LL.D), available at <<http://www.yale.edu/lawweb/avalon/lieber.htm>>.

⁸³*See* U.S. Army Field Manual 27-10, The Law of Land Warfare, ch. 2, sec. II, ¶ 29 (1956) (citing Annex to Hague Convention No. IV, Oct. 18, 1907, embodying the Regulations Respecting the Laws and Customs of War on Land, art. 23(c)).

kill or wound treacherously individuals belonging to the hostile nation or army"⁸⁴ The U.S. Army interprets this provision "as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'"⁸⁵ But the Army also says that the provision does not "preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere."⁸⁶ So under the U.S. view, military forces could kill suspected terrorists if they are enemy combatants.

Two recent disputes illustrate how the categorization of targeting killing affects the analysis of its legality. On November 3, 2002, the United States used an unmanned Predator aircraft to attack a car in Yemen.⁸⁷ The car was carrying six men, all of whom died in the attack. One of the men was Abu Ali al-Harithi, an al-Qaida member suspected of masterminding the October 2000 attack on the *U.S.S. Cole* in Yemen.⁸⁸ Another one of the men in the car was an American citizen named Ahmed Hijazi.⁸⁹ The United States and the government of Yemen worked together in planning and executing the attack.⁹⁰

⁸⁴Annex to Hague Convention No. IV, embodying the Regulations Respecting the Laws and Customs of War on Land, art. 23(c) (Oct. 18, 1907).

⁸⁵*See* U.S. Army Field Manual 27-10, *supra* note 81, ch. 2, sec. II, ¶ 31.

⁸⁶*Id.*

⁸⁷*See* Reuters, *supra* note 12, at A21.

⁸⁸*See* Michael Powell & Dana Priest, *U.S. Citizen Killed by CIA Linked to N.Y. Terror Case*, WASH. POST, at A1 (Nov. 9, 2002).

⁸⁹*See id.*

⁹⁰*See id.*

Subsequently, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions wrote a letter to the United States asking the government to explain the incident and justify the killing of the men in the car.⁹¹ The letter referred to the provisions of the International Covenant on Civil and Political Rights quoted above.⁹² In the letter, the Special Rapporteur said that the action "constitutes a clear case of extrajudicial killing."⁹³ In other words, the Special Rapporteur saw the incident as an impermissible method of law enforcement.

The United States had a different view. It saw the military action not as a law enforcement measure, but instead as a method of fighting a war against an armed enemy. In its response, the United States said: "The United States . . . disagrees with the premise of the letter and the conclusions contained in the report that military operations against enemy combatants could be regarded as 'extrajudicial executions by consent of Governments.'"⁹⁴ In its view, the "conduct of a government in legitimate military operations, whether against Al Qaida operatives or any other legitimate military target, would be governed by the international law of armed

⁹¹Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir: Addendum, Summary of Cases Transmitted to Governments and Replies Received, ¶¶ 611-613, E/CN.4/2004/7/Add.1 (March 24, 2004), available at <[http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/77B55485D5D112BBC1256E67004EADA3/\\$File/G0412275.pdf?OpenElement](http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/77B55485D5D112BBC1256E67004EADA3/$File/G0412275.pdf?OpenElement)>.

⁹²See Letter from Jeffrey De Laurentis, Chief of Section, Political and Specialized Agencies of the Permanent Mission of the United States of America to the United Nations Office at Geneva, to the secretariat of the Commission on Human Rights at 1 (April 14, 2003) [*hereinafter* U.S. Yemen Response] (describing the Special Rapporteur's letter), available at <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b67b6687466cfcac1256d2600514c7f/\\$FILE/G0313804.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b67b6687466cfcac1256d2600514c7f/$FILE/G0313804.pdf)>.

⁹³*Id.*

⁹⁴*See id.*

conflict."⁹⁵ Under that law, the United States said, "enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat."⁹⁶ Accordingly, the United States concluded, "Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances."⁹⁷

Litigants before the Israeli Supreme Court have engaged in a similar debate about the lawfulness of targeted killing. A human rights group called Public Committee Against Torture in Israel sued the government, seeking to enjoin the targeted killing of Palestinian activists.⁹⁸ Its brief described numerous incidents in which Israeli defense forces had located terrorists suspects and then shot them or killed them with explosives.⁹⁹

Like the Special Rapporteur in the Yemen incident, the Public Committee Against Torture in Israel viewed the targeted killings as an impermissible method of law enforcement. Its brief said: "The launching of missiles at a suspected terrorist, at a time when he does not pose immediate danger to another person, is an execution without a trial. The killing of a man by sniper fire, when that man is not engaged in specific activity that endangers the life of another

⁹⁵*Id.* at 5.

⁹⁶*Id.* *Hors de combat* means "out of the fight." The term usually refers to combatants who have become disabled by injury or illness.

⁹⁷*Id.*

⁹⁸*See* H.C. 769/02, Petition for Interim Order, Public Committee Against Torture in Israel v. Israel (2003), available at <<http://www.stoptorture.org.il/eng/images/uploaded/publications/17.doc>>

⁹⁹*See id.* at ¶ 33.

person, is an execution without a trial. Booby trapping the car of a person, as suspect as he may be, is an execution of a person that has not been convicted"100

But the Israeli government did not see it that way. It responded by saying that the laws of war allow the Israeli defense forces to attack enemy combatants. Its brief said: "there is no argument [but] that a person who takes a direct part in the hostilities is a legitimate target, whatever his formal characterization (member of a conscription army, uniformed, guerilla fighter, civilian, etc.) may be."¹⁰¹ No court issued a final ruling on the subject.¹⁰²

D. Detention

The rules that govern the detention of criminal suspects differ from the rules that govern the detention of enemy combatants. For this reason, the characterization of persons held as terrorists often is very important. If these persons are viewed as criminal suspects, they generally have greater rights than if they are viewed as enemy combatants in an armed conflict.

¹⁰⁰*Id.* at ¶ 14.

¹⁰¹H.C. 769/02, Brief for Appellants ¶ 18, Public Committee Against Torture in Israel v. Israel (2003), available at <<http://www.stoptorture.org.il/eng/images/uploaded/publications/57.pdf>> (quoting State Attorney's Office, Supplementary Statement (Feb. 3, 2003)).

¹⁰²The High Court of Justice declined to issue an interim order barring targeted killing. See Dan Izenberg, *High Court Refuses to Enjoin IDF from Continuing Targeted Assassinations*, JERUSALEM POST, Jul. 9, 2003, at 3. Prior to a final decision in the case, the Israeli government announced that it would halt targeting killing as part of an effort to establish better relations between the Israelis and Palestinians. See Steven Erlanger, *Urging New Path, Sharon and Abbas Declare Truce*, N.Y. TIMES, Feb. 9, 2005, at A1.

Under the domestic law of the United States, law enforcement agencies generally may detain criminal suspects only for the purpose of bringing them before a court for trial.¹⁰³ They are entitled to appear before a magistrate without unreasonable delay after they are arrested.¹⁰⁴ This magistrate must order them released if probable cause does not exist to believe that they have committed a crime.¹⁰⁵ Even if probable cause does exist, the suspects then have a right to a speedy trial.¹⁰⁶ If they do not receive a speedy trial, they are entitled to dismissal of any indictment and to release.¹⁰⁷

Similar rules govern law enforcement outside the United States. For example, article 5 of the European Convention on Human Rights provides: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (c) the

¹⁰³See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (ordinarily "government detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections").

¹⁰⁴See Fed. R. Crim. P. 5(a)(1)(A) ("A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer . . . unless a statute provides otherwise."); *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) (requiring probable cause hearing or arraignment within 48 hours of arrest).

¹⁰⁵See Fed. R. Crim. P. 5(b).

¹⁰⁶See U.S. Const. amend. 6 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."); 18 U.S.C. § 3161(c)(1) (ordinarily providing a right to a trial within 70 days after the defendants first appears before a judicial officer).

¹⁰⁷See Fed. R. Crim. P. 48(b)(3) (permitting dismissal of indictment for unreasonable delay in bringing a defendant to trial); 18 U.S.C. § 3164(c) ("No detainee . . . shall be held in custody pending trial after the expiration of [the Speedy Trial Act's] ninety-day period required for the commencement of his trial.").

lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence"¹⁰⁸

But the law of armed conflict differs in several very important ways when it comes to questions of detention. The law of armed conflict contemplates that in a war, a nation may need to capture numerous enemy combatants and may need to hold them for many years. The United States, for example, imprisoned hundreds of thousands of captured German, Italian, and Japanese soldiers during World War II.¹⁰⁹ Although litigants and commentators recently have disputed some of these points, the following rules appear to apply to the detention of enemy combatants:

First, the law of armed conflict apparently permits a government to detain all enemy belligerents regardless of whether they have committed any crimes. In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court concluded that the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"¹¹⁰ Justice Thomas, adding a fifth vote for this proposition, agreed that the government may detain captured belligerents without charges.¹¹¹

¹⁰⁸European Convention, *supra* note 75, art. 5.

¹⁰⁹*See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2106 n.271 (2005).

¹¹⁰542 U.S. 507, 518 (O'Connor, J.) (plurality opinion) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

¹¹¹*See id.* at 589 (Thomas, J., dissenting) ("I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants.")

This rule apparently applies regardless of the location in which the government captured the belligerent or whether the belligerent is a United States citizen.¹¹²

Second, the government apparently needs to follow only minimal procedures for initially determining who is an enemy combatant and who is not. These procedures apparently may place the burden of proof on the detainee.¹¹³ They may establish a presumption in favor of the government's evidence even if the evidence is based on hearsay.¹¹⁴ The government apparently also does not have to afford the detainee the right to counsel.¹¹⁵

Third, if the military determines that a person is a belligerent, it may detain him at least for the duration of the conflict in which he was captured.¹¹⁶ This rule allowed the United States to hold German, Italian, and Japanese prisoners in World War II until the hostilities ceased. The government does not have to release all detainees when the war ends; on the contrary, if the government convicts a detainee of war crimes, it may also imprison him or her as sentenced by a court just like any other criminal suspect.

¹¹²Padilla v. Hanft, 423 F.3d at 390 (interpreting *Hamdi*).

¹¹³*See Hamdi*, 542 U.S. at 534 (O'Connor, J.) (plurality opinion) ("[T]he Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.").

¹¹⁴*See id.* ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.").

¹¹⁵The plurality opinion in *Hamdi* did not reach this issue because Hamdi had counsel. *See id.* at 539. The United States military traditionally has not afforded counsel to detainees who dispute their status as combatants. *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997) (stating procedures for tribunals to use in deciding the status of persons detained in a conflict).

¹¹⁶*See Hamdi*, 542 U.S. at 518 (O'Connor, J.) (plurality opinion) (concluding that the United States may hold enemy combatants for the "duration of the relevant conflict").

As a result of these rules, suspected terrorists face very different treatment depending on whether they are viewed as criminal suspects or instead as enemy combatants. So naturally many debates have arisen over how to characterize suspected terrorists. An ongoing example of this debate concerns persons whom the United States has detained in its war on terror.

Consider again the case of Jose Padilla, the American citizen who fought against the United States in Afghanistan and who was captured at O'Hare airport in Chicago.¹¹⁷ When Padilla challenged the legality of his confinement in a naval brig without charges, a debate quickly arose over how to characterize him. The district court viewed Padilla as a criminal suspect. It said:

Simply stated, this is a law enforcement matter, not a military matter. The civilian authorities captured Petitioner just as they should have. At the time that Petitioner was arrested . . . any alleged terrorist plans that he harbored were thwarted. From then on, he was available to be questioned--and was indeed questioned--just like any other citizen accused of criminal conduct. This is as it should be.¹¹⁸

Because the government had not brought criminal charges against Padilla, the district court ordered Padilla released, just as it would order the release of any criminal suspect whom the government had not charged.¹¹⁹ The district court left open the possibility that the government could continue to hold Padilla if it were to bring criminal charges against him.¹²⁰

Outside organizations agree with this characterization of terrorist suspects. Amnesty International, for example, has declared that the detention of suspected terrorists without charges

¹¹⁷*See supra* part II.B.

¹¹⁸*See* 389 F. Supp.2d 678, 691 (D.S.C. 2005).

¹¹⁹*See id.*

by the United States is a "continuing violation of human rights standards which the international community must not ignore."¹²¹ It has urged that "detainees should be charged with recognisably criminal offences and tried within a reasonable time, or released."¹²²

But the Court of Appeals for the Fourth Circuit expressed a different view when it considered the *Padilla* case. It reversed the district court because it agreed that the President could characterize Padilla as an "enemy combatant" rather than as a mere criminal suspect.¹²³ The court then held: "Because Padilla is an enemy combatant, and because his detention is . . . necessary . . . in order to prevent his return to the battlefield, the President is authorized . . . to detain Padilla as a fundamental incident to the conduct of war."¹²⁴

The debate about whether to characterize persons accused of terrorism as criminal suspects or enemy combatants is not confined to the United States. For example, nearly five decades ago, the Irish government detained a man named Richard Lawless for several months without charges.¹²⁵ It justified this detention on grounds that Lawless was suspected of belonging to the Irish Republican Army (IRA), an organization described as "a secret army

¹²⁰*See id.* at 692, n.14.

¹²¹Amnesty International UK, *USA: One Year On--The Legal Limbo of the Guantanamo Detainees Continues*, <<http://www.amnesty.org.uk/deliver?document=14285>>.

¹²²*Id.* One difficulty, rarely mentioned, is that many of the detainees do not want to be released because they would face far worse treatment in their home countries. Amnesty International therefore has urged the United States not to release anyone who would be "returned to any country where they would be at risk of torture, execution or other serious human rights abuses." *Id.*

¹²³423 F.3d at 394-95.

¹²⁴*Id.* at 392.

engaged in unconstitutional activities and using violence to attain its purposes"¹²⁶ and blamed for an "alarming increase in terrorist activities."¹²⁷ The government contended that it needed to detain Lawless "to prevent the maintaining of military or armed forces other than those authorised by the Constitution."¹²⁸ Thus, just as the United States saw Jose Padilla as an enemy combatant belonging to al-Qaida, the Irish government saw Lawless as a soldier for the IRA.

Lawless had a different view. He saw himself as a mere criminal suspect, and argued that his detention without charges violated article 5 of the European Convention on Human Rights.¹²⁹ This provision as quoted above, prohibits arrests other than for the purpose of bringing a criminal suspect before a judge "on reasonable suspicion of having committed an offence"¹³⁰ Lawless argued that the Irish government had not brought him before a judge or asserted any charges against him.¹³¹

The European Court of Human Rights sided with Lawless's characterization, but it denied him any relief. It concluded that the detention was contrary to article 5 of the European Convention because the Irish government had not charged him with any offense.¹³² But it could

¹²⁵Lawless v. Ireland, 1 Eur. Ct. H.R. 15 (1961).

¹²⁶*Id.* ¶28.

¹²⁷*Id.*

¹²⁸*Id.* ¶ 43.

¹²⁹*Id.*

¹³⁰European Convention, *supra* note 77, art. 5(1)(c).

¹³¹*See* 1 Eur. Ct. H.R. 15, ¶¶ 10-15.

¹³²*See id.* ¶ 15.

offer no remedy because it concluded that the Irish government had followed the proper procedures for derogating from the European Human Rights Convention.¹³³

E. Trials

Criminal suspects have many rights when they come to trial in civilian courts. In the United States, for example, the Fifth Amendment grants criminal suspects a general right to due process and a specific right not to be tried absent a grand jury indictment,¹³⁴ and the Sixth Amendment affords them a right to have a speedy and public trial, to be tried by a jury, to be tried in the district where the crime occurred, and to confront the witnesses against them.¹³⁵ And multilateral treaties also require the United States and other nations to provide important trial rights. For example, the International Covenant on Civil and Political Rights mandates that criminal suspects have a trial before an independent judge¹³⁶ and appellate review by a separate appellate tribunal.¹³⁷

In contrast, some enemy combatants do not have the same rights when they come to trial before a "military commission." A military commission is a tribunal consisting of a panel of

¹³³*See id.* ¶ 47. The European Convention provides that "[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation" European Convention, *supra* note 77, at 15(1). But a nation must follow specific procedures to effect a derogation. *See id.* art. 15(3).

¹³⁴U.S. Const. amend. 5.

¹³⁵*See id.* amend. 6.

¹³⁶*See ICCPR, supra* note 76, art. 14(1).

¹³⁷*See id.* art. 15(4).

military officers or a combination of military officers and civilians.¹³⁸ The United States has used military commissions throughout its history to try persons accused of war crimes.¹³⁹ During and immediately after World War II, for instance, allied forces used military commissions to try many German soldiers and civilians accused of war crimes.¹⁴⁰ These war crimes included many different kinds of offenses, including the offense of fighting as an unlawful combatant.¹⁴¹

The Supreme Court has held that military commissions do not have to follow the same trial procedures that civilian criminal courts use. Military commissions, for example, need not provide persons suspected of war crimes with a trial by jury.¹⁴² They also do not have to state the charges against a suspect with the specificity of an ordinary criminal indictment.¹⁴³

Because criminal suspects have different rights from enemy combatants, the now familiar debate over characterization arises when nations want to try persons accused of committing terrorist acts. One side of the debate argues that these persons should be characterized as criminal defendants and should have all of the rights that criminal defendants enjoy. The other side argues that they can be characterized as enemy combatants and given trials by military commission for committing war crimes, such as fighting as an unlawful combatant.

¹³⁸See BLACK'S LAW DICTIONARY, *supra* note 43, at 1013.

¹³⁹See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831-45 (2d ed. 1920) (discussing the history of military commissions prior to World War II).

¹⁴⁰See MAGGS, *supra* note 1, at 383 & n.1 (2005) (describing these tribunals).

¹⁴¹See *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942).

¹⁴²See *id.* at 44.

This debate has gone on for several years in the United States. In November 2001, shortly after the infamous attacks of September 11th, President Bush ordered the creation of military commissions to try foreign terror suspects.¹⁴⁴ This order describes these suspects not as criminals but as persons engaged in an armed conflict against the United States.¹⁴⁵ The order guarantees them the right to a "full and fair" trial but does not guarantee them all the rights that criminal defendants in the United States would have.¹⁴⁶

Although no trials have yet taken place, persons facing trial by military commission under the President's order have challenged their constitutionality. In *Hamdan v. Rumsfeld*, for example, a suspected member of al-Qaida claimed that his trial by military commission would violate the Sixth Amendment right to a speedy trial that criminal suspects have in civilian courts.¹⁴⁷ The Supreme Court has granted review in this case, and soon will decide the issue.¹⁴⁸

The European Court of Human Rights has confronted a similar question of characterization. During the 1990s, Turkey used the "Ankara State Security Court" to try

¹⁴³*See* Application of Yamashita, 327 U.S. 1, 17 (1946).

¹⁴⁴Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

¹⁴⁵*See id.* § 1(a).

¹⁴⁶*See id.* § 4(c)(2).

¹⁴⁷*See Hamdan v. Rumsfeld* 344 F. Supp.2d 152, 173 (D.D.C. 2004). The court did not reach this issue in its decision because it concluded that the military commissions violated provisions of the Geneva Conventions. The Court of Appeals later reversed the district court on the Geneva Conventions issue. *See Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir.), *cert. granted* 2005 W.L. 2922488.

¹⁴⁸*See id.*

persons suspected of terrorism.¹⁴⁹ This court was not called a military commission but it resembled one because it included a military officer as one of its judges.¹⁵⁰ In 1994, this special court convicted Selim Sadak and several others of terrorist offenses in connection with their support for the banned Kurdish Workers Party.¹⁵¹ Sadak and the others subsequently sued Turkey in the European Court of Human Rights, claiming that the inclusion of a military officer on the Ankara State Security Court violated the European Convention on Human Rights.¹⁵²

The European Court of Human Rights agreed. In its view, Turkey had not given Sadak and the other applicants the rights owed to criminal defendants.¹⁵³ Article 6 of the European Convention provides that "[i]n the determination of . . . any criminal charge against him, everyone is entitled to a fair . . . hearing . . . by an independent and impartial tribunal" The Court concluded that the military officer, although trained as a judge, would feel pressure to convict the accused to satisfy the government, and thus that the court lacked impartiality.¹⁵⁴

Turkey had disagreed with the characterization of Sadak and the others as mere criminals. It argued that the nation was engaged in a military campaign against terrorism. "In view of the experience of the armed forces in the anti-terrorism campaign," the Turkish government explained, it "had considered it necessary to strengthen [the Ankara State Security Court] by

¹⁴⁹*See* Sadak v. Turkey, 36 Eur. Ct. H.R. 26, ¶¶ 39-40 (2003).

¹⁵⁰*See id.*

¹⁵¹*See id.* ¶16.

¹⁵²*See id.* ¶¶ 39-40.

¹⁵³*See id.*

¹⁵⁴*See id.* ¶¶ 39-40.

including a military judge in order to provide the court with the necessary expertise and knowledge of how to deal with threats to the security and integrity of the State."¹⁵⁵

Yet another example comes from Egypt. Throughout the 1990s, Egypt used military courts to try militants suspected of threatening the government with terrorist acts. Egypt has contended that these military courts are necessary for dealing with armed combatants.¹⁵⁶ Human rights groups, however, contend that they violate international standards for the treatment of criminal suspects.¹⁵⁷

F. *Search and Seizure*

The issue of whether to characterize terrorists as criminals or enemy combatants also arises in the context of search and seizure by the government. The characterization matters because criminal suspects have rights to privacy that enemy combatants traditionally have not had.

In the criminal law context, the Fourth Amendment imposes an important restriction on law enforcement activity by requiring that searches and seizures be reasonable.¹⁵⁸ The Supreme Court has held that a "search or seizure is ordinarily unreasonable in the absence of

¹⁵⁵*Id. id.* ¶ 34.

¹⁵⁶*See* Associated Press, *supra* note 6, at 12.

¹⁵⁷*See id.*

¹⁵⁸*See* U.S. Const. amend. 4 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

individualized suspicion of wrongdoing."¹⁵⁹ So the police cannot simply seize and search any homes, cars, and places of business merely in the hopes of finding evidence of criminal activity.

In contrast, when the military is fighting a war, it does not face similar constraints. The Supreme Court has held that the constitutional power to declare war necessarily "involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted."¹⁶⁰ Accordingly, the Court has reasoned, the federal government's war power "includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor."¹⁶¹ Indeed, the Court said: "This is and always has been an undoubted belligerent right."¹⁶²

So how do these general principles apply to searches and seizures made in response to terrorism? Consider the case of *United States v. Green*.¹⁶³ A woman named Green drove her car on a major road in San Antonio, Texas.¹⁶⁴ The road passed through Fort Sam Houston, an open military reservation through which the public could drive.¹⁶⁵ On the road, within the boundaries of the reservation, military police had set up a check point.¹⁶⁶ At this check point, the military

¹⁵⁹*City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

¹⁶⁰*Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870).

¹⁶¹*Id.*

¹⁶²*Id.*

¹⁶³293 F.3d 855 (5th Cir. 2002).

¹⁶⁴*See id.* at 856-57.

¹⁶⁵*See id.* at 861.

¹⁶⁶*See id.* at 856-857.

police were stopping every sixth car to search for terrorists, as a means of deterring terrorism.¹⁶⁷ Pursuant to this policy, the military police stopped Green's car. In the car, they found cocaine, and then arrested Green.¹⁶⁸

Green argued that this suspicionless stop violated the Fourth Amendment. Citing the rules summarized above, the court agreed that the search would have been unconstitutional if the military police had simply been searching for criminals or trying to prevent general criminal activity.¹⁶⁹ But the court held that the Fourth Amendment does not prohibit searches conducted by the military when it is engaged in "the protection of the nation's military installations from acts of domestic or international terrorism."¹⁷⁰ The court reasoned that looking for terrorists on a military reservation was more like this traditional military function than like criminal law enforcement.¹⁷¹ As a result of the court's characterizing the stop as a military action against terrorism instead of a law enforcement measure, Green could not rely on the protection of the Fourth Amendment.

¹⁶⁷*See id.* at 858. The military police were following the "Standard Operating Procedure for the Installation Force Protection Vehicle Checkpoints." *Id.* This document identified listed "protect[ing] national security by deterring domestic and foreign acts of terrorism" as the first goal of checkpoint stops. *Id.*

¹⁶⁸*See id.* at 857.

¹⁶⁹*See id.* at 858 (citing *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and other decisions).

¹⁷⁰*See id.* at 859.

¹⁷¹*See id.*

A similar situation arose in the European Court of Human Rights in *Murray v. United Kingdom*.¹⁷² The British Army went to the home of Murray to arrest her and question her about suspected terrorist activities, including financing the procurement of arms for the IRA.¹⁷³ Upon entering the home, they searched it for other occupants, and made all of Murray's family gather in one room.¹⁷⁴

Murray and her family challenged the army's action under article 8 of the European Convention.¹⁷⁵ This article, which resembles the Fourth Amendment, provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence" and it generally prohibits interference with this right except when "necessary" for law enforcement, public safety, and other purposes.¹⁷⁶ But the court disagreed, observing that this was not an ordinary law enforcement measure but instead a military security action. Citing the "responsibility of an elected government in a democratic society to protect its citizens and its institutions against the threats posed by organised terrorism and to the special problems involved in the arrest and detention of persons suspected of terrorist-linked offences" the court found the army's actions to satisfy article 8's requirement of "necessity."¹⁷⁷ So again, because the incident

¹⁷²19 Eur. Ct. H.R. 193 (1995).

¹⁷³*See id.* ¶ 11.

¹⁷⁴*See id.* at ¶ 12.

¹⁷⁵*See id.* ¶¶ 83-95.

¹⁷⁶European Convention, *supra* note 77, art. 8(1) & (2).

¹⁷⁷19 Eur. Ct. H.R. 193, ¶ 91.

was viewed as a military response rather than a law enforcement measure, Murray had different rights from those an ordinary criminal suspect would have.

G. Duty to Provide Security

The issue of whether to characterize terrorists as criminals or enemy combatants also arises in debates about the government's duty to provide security to potential victims of terrorism. At least as an abstract matter, governments have a duty both to prevent and punish crime and to protect their citizens from armed attacks. The preamble to the Constitution, for example, identifies insuring "domestic tranquility" and providing for "common defense" as two main objects of the federal government.¹⁷⁸

But these abstract duties are not necessarily enforceable in the courts. On the contrary, both in the United States and in foreign countries, the judiciary has shown a greater willingness to intercede into law enforcement matters than into military affairs. Accordingly, potential victims of terrorism may have a greater ability to obtain a judicial order directing the government to take actions against terrorism if terrorists are seen as criminals than if they are seen as enemy combatants.

Consider, for example, the case of *A. v. United Kingdom & Ireland*.¹⁷⁹ The case arose after IRA terrorists killed a reserve constable in Northern Ireland while he was tending to his family's dairy business.¹⁸⁰ The decedent's widow sued the United Kingdom in the European

¹⁷⁸See U.S. Const. pream.

¹⁷⁹8 Eur. Comm'n H.R. 49 (1986).

¹⁸⁰See *id.*

Court of Human Rights, claiming that the United Kingdom was violating article 2(1) of the European Convention on Human Rights.¹⁸¹ This article mandates that everyone's right to life "shall be protected by law."¹⁸² She asserted that the United Kingdom was not doing enough to provide security and demanded greater military involvement in the anti-terrorism campaign. She asked the court to require the United Kingdom to provide greater security from terrorist attacks "not only by criminal prosecution of offenders but also by such preventive control, through deployment of its armed forces, as appears necessary"¹⁸³

The European Commission on Human Rights, which handled the case for the court,¹⁸⁴ ruled against her. To the extent that the terrorists were seen as an enemy threat requiring a military response, the commission concluded that it could not act. The commission observed that the United Kingdom had committed military forces to Northern Ireland,¹⁸⁵ but the commission said that it could not be "its task" to assess the "appropriateness and efficiency" of this military force.¹⁸⁶

¹⁸¹*See id.* ¶ 17.

¹⁸²European Convention, *supra* note 77, art. 2(1).

¹⁸³8 Eur. Comm'n H.R. 49, ¶17.

¹⁸⁴Prior to 1998, the European Commission on Human Rights heard complaints concerning violations of the European Convention on Human Rights. If the Commission could not produce a settlement, it would prepare a report establishing the facts and expressing an opinion on the merits of the case. The European Court of Human Right then could consider the case. *See* European Court of Human Rights, *Historical Background* <<http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/>>

¹⁸⁵*See* 8 Eur. Comm'n H.R. 49, ¶ 20.

¹⁸⁶*Id.* ¶ 19.

In contrast, the commission apparently saw no difficulty in judging the United Kingdom's counter-terrorism law enforcement effort. It agreed that the United Kingdom had a duty to provide security against murder.¹⁸⁷ But it concluded that the applicant had no claim. The commission observed that the "the applicant does not suggest that there are no laws in Northern Ireland protecting the right to life, or that they are not applied."¹⁸⁸

Plaintiffs have had similar difficulty recovering from the United States for not providing security against terrorism. Sovereign immunity generally shields the federal government from liability in court.¹⁸⁹ The United States has waived some of its sovereign immunity in the Federal Tort Claims Act.¹⁹⁰ But it has retained immunity from lawsuits pertaining to a "discretionary function."¹⁹¹

The retention of immunity for discretionary functions generally blocks claims against the United States for failing to provide protection against armed attacks. For example, in *Macharia v. United States*, plaintiffs injured by the 1998 terrorist bombing of the United States embassy in

¹⁸⁷*See id.* ¶ 16.

¹⁸⁸*Id.*

¹⁸⁹*See* *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

¹⁹⁰*See* 28 U.S.C. § 1346(a)(2) (granting federal district courts jurisdiction over lawsuits "against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort").

¹⁹¹*See id.* § 2680(a).

Kenya sued the United States for failing to secure the embassy against a terrorist attack.¹⁹² The United States had provided a detachment of Marines to guard the facility, but they had not succeeded in stopping its bombing by agents of al-Qaida.¹⁹³ The court did not determine whether the U.S. had acted negligently because it held that the discretionary function exception to the Federal Tort Claims Act applied, and that the United States was therefore immune from liability.¹⁹⁴

But the discretionary function exception does not always shield the federal government from liability for failing to protect its citizens from terrorists when those acts are viewed as crimes. For example, in *Bergman v. United States*,¹⁹⁵ the plaintiffs participated in "Freedom Rides" in 1961.¹⁹⁶ They rode buses to cities in the southern United States to protest segregation. Unknown assailants subjected them to terror, assaults, and intimidation, causing various injuries.¹⁹⁷ The plaintiffs claimed in part that the FBI had negligently failed to protect them from the attacks that they endured.¹⁹⁸ The federal government in response argued that it had immunity from this lawsuit.¹⁹⁹ The court rejected this argument, concluding that once the FBI had

¹⁹²*Macharia v. United States*, 334 F.3d 61, 65-68 (D.C. Cir. 2003).

¹⁹³*See id.* at 64.

¹⁹⁴*See id.* at 65-68.

¹⁹⁵551 F. Supp. 407 (D. Mich. 1982).

¹⁹⁶*See id.* at 410-11.

¹⁹⁷*See id.*

¹⁹⁸*See id.* at 416.

¹⁹⁹*See id.*

undertaken to stop crime, it had a duty not to perform this undertaking in a negligent manner.²⁰⁰ It therefore allowed the plaintiffs to bring lawsuits under the Federal Tort Claims Act.²⁰¹ Although few other cases have reached this conclusion, the decision shows how judges may view the government's duty to provide protection against crimes as something different from the government's duty to provide protection against armed attacks.

H. *Compensation for Harm*

The government often uses violent measures to respond to terrorism. For example, as described in the section on targeted killing above,²⁰² military forces may fire missiles at a terrorist target with the aim of killing the terrorist suspects and destroying their property. Actions of this kind may cause three kinds of damage and injury. First, they may destroy actual terrorist targets, like installations that al-Qaida is using for training or operations. Second, they might damage things that the government believes are terrorist targets but which later turn out not to be. For example, armed forces may destroy a warehouse on the belief that it contains weapons, only to find out later that it contained civilian clothing. Third, they may cause "collateral damage." Collateral damage is "unavoidable and unplanned damage to civilian

²⁰⁰*See id.* at 419.

²⁰¹*See id.* The court did not decide whether the FBI in fact had acted negligently, leaving that matter for trial. *See id.*

²⁰²*See supra* part II.C.

personnel and property incurred while attacking a military objective."²⁰³ For example, when military forces fire missiles at suspected al-Qaida installations, the missiles may destroy not only their targets but also unintentionally wreck nearby structures, vehicles, or other items.

When the government destroys property in anti-terrorism operations, a question sometimes arises about whether the government has a duty to pay for it. The question is not difficult when military forces destroy actual terrorist targets: the government does not have to pay. As the United States Court of Appeals for the Federal Circuit has said: "A contrary rule that, by way of example, would require the government to provide compensation for the destruction of a vehicle (a tank, jet, etc.) used to engage United States armed forces in battle, strikes us as absurd in the extreme."²⁰⁴

But compensation for destruction of supposed terrorist targets that actually are unconnected with terrorism and compensation for collateral damage are more difficult issues. In the United States, the Fifth Amendment says that the government may not "take" private property for public use without paying just compensation to the owner.²⁰⁵ Governmental "taking" of property may consist of occupying, destroying, or sometimes merely preventing the owner from using the property.²⁰⁶ The rationale appears to be that taxpayers as a group should

²⁰³THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 14 (Joseph B. Berger *et al.* eds. 2004), available at <<http://fas.org/irp/doddir/army/law2004.pdf>>.

²⁰⁴*Id.*

²⁰⁵*See* U.S. Const. amend. 5.

²⁰⁶*See* JOHN E. NOWAK & RONALD E. ROTUNDA, CONSTITUTIONAL LAW § 11.12, at 438-439 (5th ed. 1995).

have to bear the costs of public projects, not just the people whose property is needed.²⁰⁷ The innocent owners of property destroyed in anti-terrorism operations thus have some argument that the public should share the expense of these operations. But whether that argument prevails or not depends in large part on whether the government was pursuing the anti-terrorism action as a military matter or as a law enforcement matter.

The case of *El-Shifa Pharmaceutical Industries Co. v. United States*,²⁰⁸ concerned an incident that occurred after the 1998 bombings of two United States embassies in Africa.²⁰⁹ In response to the bombings, the President ordered the Navy to fire Tomahawk missiles at a pharmaceutical factory in Sudan.²¹⁰ The missiles hit their target and destroyed the facility. The White House explained at the time that the factory had links to al-Qaida and that the factory possibly was producing a chemical used in the manufacture of nerve gas.²¹¹

The owner of the destroyed pharmaceutical plant subsequently sued the United States in the United States Court of Federal Claims, seeking compensation for the damage under the takings clause of the Fifth Amendment.²¹² The United States asked the court to reject the claim, citing among other principles the rule regarding the destruction of "enemy property" discussed

²⁰⁷See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Cost*, 67 U. Chi. L. Rev. 345, 391 (2000).

²⁰⁸378 F.3d 1346 (Fed. Cir. 2004), *cert. denied* 125 S. Ct. 2963 (2005).

²⁰⁹See *supra* part II.A. (discussing this incident in connection with the rules regarding the use of force in other countries).

²¹⁰See *id.* at 1349.

²¹¹See *id.*

²¹²See *id.* at 1355.

above.²¹³ Although the owner argued in response that the military exception should not apply because the factory actually had no connection to terrorism or nerve gas,²¹⁴ the court denied relief. It held that the issue of whether a target was actually enemy property or not was a political question and that the court had to defer to the President's judgment.²¹⁵

In contrast, at least in some jurisdictions, when law enforcement agencies are pursuing criminal suspects and they destroy property belonging to an innocent person, they must pay for the damage. For example, in *Wegner v. Milwaukee Mutual Insurance Co.*, a suspected drug dealer broke into a nearby home while fleeing from the police.²¹⁶ The police fired tear gas and concussion grenades into the home to force the suspect out, causing extensive damage to the building.²¹⁷ The Minnesota Supreme Court held that "where an innocent third party's property is damaged by the police in the course of apprehending a suspect," the government must pay just compensation to the property owner.²¹⁸

²¹³*See id.*

²¹⁴*See id.* at 1361.

²¹⁵*See id.* at 1365 ("We are of the opinion that the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies. In our view, the Constitution envisions that the political branches, directly accountable to the People, will adopt and promulgate measures designed to ensure that the President makes the right decision when, pursuant to his role as Commander-in-Chief, he orders the military to destroy private property in the course of exercising his power to wage war.").

²¹⁶479 N.W.2d 38, 41-42 (Minn. 1991).

²¹⁷*See id.* at 39.

²¹⁸*See id.* at 41-42.

Similarly, in *Steele v. City of Houston*,²¹⁹ a group of escaped prisoners hid out in a vacant home that they had chosen at random. To force them out, the police set fire to the building.²²⁰ The Texas Supreme Court required the city to pay the property owner for the damage.²²¹ The Court said: "We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the Constitution to compensation for their property."²²² As the New Jersey Supreme Court explained in a similar case when it required the police to pay for doors broken in the execution of a search warrant: "Since the damage was incurred for the public good, rather than for the benefit of the private individual, the public should bear the cost. The intended beneficiary of the police action was not [the innocent property owner], but society as a whole."²²³

These cases suggest that, if law enforcement officials had destroyed a facility that they thought belonged to a terrorist suspect but that actually belonged to an innocent party, the government would have to pay for the damage caused. The political question doctrine would not protect the government. So victims' rights differ substantially depending on whether the military is pursuing terrorists as enemy combatants or law enforcement agencies are going after terrorists

²¹⁹603 S.W.2d 786 (Tex. 1980).

²²⁰*See id.* at 789.

²²¹*See id.* at 791-92.

²²²*Id.* at 793.

²²³*Wallace v. City of Atlantic City*, 608 A.2d 480, 483 (N.J. Super. 1992). For decisions reaching contrary decisions to those described in this paragraph, see *Sullivant v. City of Oklahoma City*, 940 P.2d 220, 227 (Okla. 1997) (holding that a city does not have to pay for damage to innocent landlord's property and citing similar cases from California, George, Indiana).

as criminals.

I. What Dichotomous Characterization Does not Determine

The first claim in this article is that the dichotomous characterization of suspected terrorists as either criminal suspects or enemy combatants has become a central part of anti-terrorism law. The foregoing discussion has demonstrated the validity of this claim. It has shown how the results of characterization affect not just one or two areas, like detention and interrogation, but many different areas. And it has shown that this requirement of characterization has been important not just in recent years, but for decades. Yet it is important not to overstate the claim. Although characterization is important, it is not the only issue in determining the legality of governmental responses to terrorism. On the contrary, even if everyone were to agree on characterizing certain terrorists as enemy combatants rather than as ordinary criminal suspects, a number of other questions might arise. Some examples of the issues that would remain include:

- when enemy combatants have the rights of "prisoners of war" under Geneva Convention III when they are captured;²²⁴
- when enemy combatants are entitled to "combatant immunity," which is immunity for punishment for lawful acts of war;²²⁵
- how to measure the duration of an armed conflict against terrorism for determining how long enemy combatants may be detained;²²⁶

²²⁴Hamdan v. Rumsfeld, 415 F.3d 33, 41-42 (D.C. Cir.), *cert. granted* 2005 W.L. 2922488 (concluding that a detained enemy combatant did not have the rights of a prisoner of war).

²²⁵*See, e.g.*, United States v. Lindh, 212 F. Supp.2d 541, 554-558 (E.D. Va. 2002) (concluding that American citizen who was a member of the Taliban forces and was designated as an enemy combatant did not have combatant immunity).

- what trial procedures military commissions have to follow when they try enemy combatants,²²⁷
- what offenses may military commissions punish enemy combatants for having committed;²²⁸
- what interrogation methods may the military use in attempting to gain information from enemy combatants;²²⁹
- the extent to which persons held as enemy combatants have a constitutional right to due process,²³⁰ and
- the extent to which citizens who are enemy combatants have different rights from non-citizens.²³¹

²²⁶See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641-2642 (2004) (plurality opinion) (stating that the United States ordinarily may detain captured enemy combatants "for the duration of the relevant conflict" but that if "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war" a different rule might apply).

²²⁷*Hamdan v. Rumsfeld*, 344 F. Supp.2d 152, 160-61 (D.D.C. 2004)(holding that the Geneva Convention required a captured enemy combatant to be tried by essentially the same procedures used in courts-martial), *rev'd on other grounds*, 415 F.3d 33 (D.C. Cir. 2005).

²²⁸The Department of Defense has defined a set of offenses that military commissions may try. See U.S. Dep't of Defense, *Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission* (Apr. 30, 2003), available at <<http://www.dtic.mil/whs/directives/corres/mco/mci2.pdf>>. For a list of legal questions raised by this list of, see Human Rights Watch, *Commenting on Draft Military Commission Instruction on "Crimes and Elements for Trials by Military Commission"* (Mar. 14, 2003), available at <<http://www.hrw.org/press/2003/03/us031403.htm>>.

²²⁹See U.S. Dep't of Defense, *DoD Provides Details on Interrogation Process, News Release No. 596-04* (Jun. 22, 2004) (describing interrogation methods and responding to legal criticism), available at <<http://www.defenselink.mil/releases/2004/nr20040622-0930.html>>.

²³⁰*Compare* *Khalid v. Bush*, 355 F. Supp.2d 311, 323 (D.D.C. 2005) (dismissing challenges to the procedures) *with* *In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443, 465-66 (D.D.C. 2005) (concluding that the procedures did not meet the requirements of due process).

²³¹See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641-2642 (2004) (plurality opinion) (asserting the government may detain U.S. citizens who are enemy combatants in the same

But it is also important not to underestimate the current importance of characterization. Until an initial determination is made that suspected terrorists are enemy combatants, none of the issues listed immediately come into dispute.

III. THE PROBLEMS WITH DICHOTOMOUS CHARACTERIZATION

The previous part of this article has shown that legal systems around the world, for a long time and in a great many different subject areas, have depended on characterization to determine the legality of governmental responses to terrorism. Sometimes they characterize these responses as law enforcement measures and, at other times, they describe them as military efforts in an armed conflict. The characterization selected currently has important legal consequences. Armed forces involved in a war can take actions, such as targeted killing, that the police cannot.²³² And the police can carry out actions, such as law enforcement duties, that the armed forces cannot.²³³ This "military or law enforcement" classification system for determining the legality of governmental responses to terrorism has four substantial problems. First, no standard currently exists for deciding when terrorists are combatants as opposed to mere criminals, or when anti-terrorism actions are law enforcement measures as opposed to military actions in an armed conflict. Second, no clear standard is likely to emerge in the future because terrorists defy a simple characterization; they resemble criminal suspects in some respects, and

manner that it detains other enemy combatants) *with id.* at 2660-61 (Scalia, J., dissenting) (asserting that the government may detain U.S. citizens as enemy combatants only if it suspends the writ of habeas corpus).

²³²*See supra* part II.C.

²³³*See supra* part II.B.

enemy combatants in others. Third, even when dichotomous characterization is possible, using it to determine what laws should regulate governmental responses to terrorism often produces results that are objectionable on policy grounds. Fourth, the current system effectively gives governments extremely broad discretion to determine the legality of their own anti-terrorism actions because their control of the characterization process effectively allows them to select the applicable set of legal rules. The following discussion elaborates these points.

A. *No Standard for Characterization Exists*

One fundamental problem with attempting to decide what body of law regulates governmental responses to terrorism, is that no commonly accepted or consistently applied standard has developed for deciding whether to characterize terrorists as enemy combatants or ordinary criminals. In fact, disagreement currently exists at two levels.

First, there are opposing views about the fundamental question of whether terrorists who are not sponsored by a state can ever fall into the category of enemy combatants. As described above, components of the United Nations appear to reject the position of most of the world's leading democracies on this issue. The International Court of Justice, for example, said in the *Israeli Fence* case that terrorists cannot engage in "armed attacks" because they are not states.²³⁴ This position fundamentally conflicts with the unanimous view of all of the members of NATO, which viewed the attacks of September 11, 2001, as a armed attack.²³⁵

²³⁴*See supra* part II.A.

²³⁵*See id.*

Second, even those who agree that terrorists in proper circumstances can be viewed as enemy combatants have not established exactly what those circumstances are. The United States, for instance, repeatedly has seen terrorist strikes as acts of war.²³⁶ And yet the United States has not articulated a clear standard through which it has made that characterization. In domestic legal cases, the United States has consistently decided not to express a standard; instead, it has told the judiciary that it should defer to the determinations of Congress and the President.²³⁷ The federal courts generally have granted this deference.²³⁸ In international contexts, where the United States cannot rely on deference, the government has offered some brief substantive explanations for its characterization of terrorists as combatants. But these explanations lack definiteness. For example, as explained above, following the United States' targeted killing of al-Qaida suspects in Yemen, the United Nations Special Rapporteur for Extra-Judicial Killings demanded that the United States explain why the suspects should not have received ordinary criminal justice protections.²³⁹ In response, the United States offered this explanation: "Al Qaida and related terrorist networks are at war against the United States. They

²³⁶*See id.*

²³⁷*See* Brief for the Respondents at 20, *Hamdi v. Rumsfeld*, 2004 WL 724020 (U.S.) (No. 03-6696) (arguing that Congress had authorized the use of military force against terrorists in Afghanistan); *id.* at 25 ("The Executive's Determination That An Individual Is An Enemy Combatant Is Entitled To The Utmost Deference By A Court").

²³⁸*See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (U.S. 2004) (plurality opinion) (deferring to the President on the issue of whether a class of terrorists might be viewed as enemy combatants, but specifying procedures for determining whether an individual belongs to the class).

²³⁹*See supra* Part II.C.

have trained, equipped, and supported armed forces and have planned and executed attacks around the world against the United States *on a scale that far exceeds criminal activity.*"²⁴⁰

In the quoted passage, the United States appears to have taken the position that the magnitude of the terrorist incident or incidents determines whether law enforcement principles or the law of war govern anti-terrorism responses. A focus on the size of the terrorist attacks has some justification. Certainly, it accords with general understandings about one important difference between ordinary crimes and acts of war. And it can explain why the United States felt justified in using military actions in response to al-Qaida's destruction of the United States' embassies in Kenya and Tanzania in 1998, for the bombing of the *U.S.S. Cole* in 1998, and the attacks of September 11, 2001.²⁴¹ All of these incidents caused many deaths and great destruction of property.

But can a magnitude standard explain the United States' military assault on Libya in response to the 1985 bombing of the Berlin discotheque? That terrorist attack resulted in two deaths.²⁴² It thus does not appear to have had a "scale that far exceeds criminal activity." And if magnitude is the test, why did the United States not treat Timothy McVeigh or the 1993 World Trade Center bombers as enemy combatants? McVeigh's terrorist attack on the Murrah Federal Building in Oklahoma City killed 168 people,²⁴³ while the World Trade Center bombing caused

²⁴⁰U.S. Yemen Response, *supra* note 92, at 3.

²⁴¹Parts II.A & II.C. *supra* describe these incidents.

²⁴²*See* John Tagliabue, *2 Killed, 155 Hurt in Bomb Explosion at Club in Berlin*, N.Y. TIMES, Apr. 6, 1986, at 1.

²⁴³*See* United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998).

six deaths and hundreds of millions of dollars in property loss.²⁴⁴ Yet, the United States subjected the perpetrators of these terrorist incidents to ordinary criminal process.²⁴⁵ These questions remain unanswered.

In short, despite the great importance currently placed on characterization for determining governmental powers and individual rights, no international consensus exists on when to characterize terrorist suspects as enemy combatants as opposed to ordinary criminals. And the United States' proffered standard of magnitude is both under-inclusive and over-inclusive, at least in terms of the United States' past practice.

B. *Anti-Terrorism Measures Defy Simple Characterization*

Not only has no consensus developed on when to judge anti-terrorism responses as law enforcement measures and when to judge them as steps taken in an armed conflict, but it also seems unlikely that any agreement on a test ever will emerge. This prediction rests on the simple observation that most acts of terrorism have a dual nature: they resemble warfare in some respects and crimes in others. And this dual nature prevents dichotomous characterization of governmental responses. Most terrorist acts resemble crimes because they are crimes. Murder is murder, assault is assault, and kidnaping is kidnaping, regardless of whether a terrorist or a

²⁴⁴See *United States v. Salameh*, 152 F.3d 88, 108 (2d Cir. 1998).

²⁴⁵See *id.* (describing criminal charges); *McVeigh*, 153 F.3d at 1176-77 (same).

mobster or street thug commits them. Consequently, at least in the United States, prosecutors can and routinely do prosecute terrorists using ordinary criminal laws.²⁴⁶

Terrorists also often resemble criminals in terms of strategy. Terrorists, like most criminals, usually pick easy, high value targets. Unlike military forces, terrorists and criminals generally do not strive to use overwhelming force against the most significant enemy strengths with the goal of obtaining a clear and incapacitating victory. To succeed, terrorists generally do not need to cause crushing devastation any more than bank robbers need to destroy the banking system.

On the other hand, terrorist organizations have many features in common with military forces. First, terrorists commonly use military weapons to commit their acts. For example, members of the terrorist organization Hamas routinely hit Israeli targets using mortars and rockets located in the West Bank or in Gaza.²⁴⁷ Second, terrorists also tend to strike military targets that ordinary criminals would have little interest in assaulting. For example, no one but terrorists or an opposing Navy would have an interest in trying to sink the *U.S.S. Cole*. Third, terrorist organizations may have capabilities that outmatch those of law enforcement agencies. If the combined military forces of the United States and its many allies need years to subdue al-Qaida agents in Afghanistan, certainly no police force could accomplish the same mission. Fourth, in many instances, as the United States has argued,²⁴⁸ acts of terrorism exceed ordinary

²⁴⁶See MAGGS, *supra* note 1, at 5-10 (addressing the application of ordinary criminal laws to terrorists).

²⁴⁷Greg Myre, *Israel Carries Out First Airstrike, in Gaza, in 3 Months of Truce*, N.Y. TIMES, May 19, 2005, at A11.

²⁴⁸See *supra* part III.A.

criminal conduct in magnitude. Strikes like those of September 11, 2001, cause death and destruction far beyond anything a typical criminal would ever attempt. Fifth, terrorist organizations also often resemble military forces more than criminals in terms of their persistence and their depth of capacity. When a member of a terrorist organization is arrested or killed, instead of halting its operations, the organization generally finds a replacement and continues its plans. In contrast, if the police thwart a bank robbery by arresting the would-be perpetrator, often no subsequent robbery is likely to occur. This feature of terrorist organizations makes them much more difficult to eradicate. Sixth, terrorists routinely take credit for their actions. They want the world to know what they have done; that is the whole point of their infliction of pain. In this way, terrorists resemble armed forces more than criminals, who generally hope to avoid identification and blame.

Finally, and perhaps most significantly, most acts of terrorism resemble acts of wars more than criminal acts in terms of their most basic motivations. Governments fight wars in the belief that organized violence will accomplish political ends that diplomacy cannot. Although their methods are unlawful, terrorists generally act for similar reasons. But criminals generally have more selfish goals; they commit offenses to line their pockets with money or harm their personal enemies, but not to cause political change. In fact, some definitions of terrorism focus primarily on motivation to distinguish it from ordinary crime.²⁴⁹

Terrorists, acts of terrorism, and governmental responses to terrorism for these reasons all have a dual nature. They fall partly within the realm of crime and law enforcement and partly

²⁴⁹*See* United States v. Yousef, 327 F.3d 56, 107 n.42 (2d Cir. 2003).

within the realm of armed conflict and military force. They generally defy characterization as one or the other.

C. Unlimited Application of Either Body of Law

Even if a clear test emerged for deciding when terrorist acts move beyond being mere crimes and instead become acts of war, another difficulty would remain: In many situations, the unlimited application of either the laws of war or the laws regarding criminal law enforcement to counter-terrorism measures seems problematic from a policy perspective. The laws of war often appear to afford the government more power than it needs to combat terrorism, while the rules regarding law enforcement often provide too little.

To see this point, assume that the United States is correct that the various attacks perpetrated by al-Qaida do constitute acts of war. Using the dichotomous characterization approach, it follows then that members of al-Qaida are enemy combatants. And it further follows that the law of war governs their treatment.

Applying the law of war seems uncontroversial when the United States is attacking armed formations of al-Qaida forces in Afghanistan. For example, I predict that most would agree that the United States may use deadly force against these enemies without first trying to arrest them.²⁵⁰ Indeed, given that al-Qaida forces remain active in Afghanistan despite years of eradication attempts by 20,000 American and allied military personnel, any suggestion that the FBI as opposed to the Armed Forces should have gone to Afghanistan to arrest the perpetrators of the 9/11 attacks seems hopelessly unrealistic.

But even if members of al-Qaida are enemy combatants, it may not follow that the United States should, as a policy matter, have the power to use all of the military force against all al-Qaida members that the laws of war would allow it to use against more conventional enemy combatants. Consider again the case of Jose Padilla, the American citizen who according to stipulated facts went to Afghanistan, fought with al-Qaida against the United States, fled to Pakistan, and then returned to the United States, where U.S. marshals arrested him at Chicago's O'Hare airport.²⁵¹ A great deal of controversy has surrounded Padilla's prolonged detention. But ignore the detention issue for a moment and think instead about what the United States might have done at the airport when Padilla stepped off the airplane. If Padilla is truly an enemy combatant, then presumably the United States could have shot him immediately, without first attempting to arrest him. After all, that is what the law of war permits.

But I suspect that most people would think that simply shooting Padilla at the airport would be wrong. The United States did not take that action. And when asked during oral argument at the Supreme Court whether it could have done so, counsel for the government tactfully avoided the question.²⁵² Presumably the government also felt uncomfortable about the

²⁵⁰The laws of war long have permitted the killing of enemy forces, who have not already surrendered, without any resort to lesser messages. *See supra* part II.C.

²⁵¹*See id.* (discussing the *Padilla* case).

²⁵²During the Supreme Court oral argument in *Padilla v. Rumsfeld*, 524 U.S. 425 (2004), counsel for the United States, Deputy Solicitor General Paul D. Clement, argued that the Padilla could be treated just like any enemy combatant found in Afghanistan. This assertion prompted the following exchange between Justice Anthony M. Kennedy and Mr. Clement:

QUESTION: Would you shoot him when he got off the plane?

MR. CLEMENT: No, I don't think we could for good and sufficient reasons—

QUESTION: I assume that you could shoot someone that you had captured on the field of battle.

logical consequences of its contentions that Padilla is an enemy combatant and that the laws of war therefore should govern his treatment.

The dichotomous characterization approach also may fail to accord with widely accepted views when it prevents certain military responses to terrorism. For example, consider again the case of John Muhammad and Lee Malvo, the notorious "D.C. snipers."²⁵³ As described above, observers disagreed about whether the military was violating the Posse Comitatus Act by assisting law enforcement.²⁵⁴ But even assuming that everyone were to agree that the Army was assisting in law enforcement, most people would not consider this assistance inappropriate from a policy perspective. As one *New York Times* reporter put it, "[f]or thousands of people in the Washington region ducking behind their cars as they pump gas, keeping their children indoors or missing the high school football season, there is no limit to what should be done to thwart the sniper who has shot 11 people this month."²⁵⁵ Thus, the difficulty of classifying the antiterrorism measures is only part of the problem with the current legal rules. Another part of the problem is that the full application of either law enforcement rules or the laws of war often does not make sense from a policy perspective even if characterization can occur.

MR. CLEMENT: Not after we captured them and brought them to safety. And I think in every case, there are rules of engagement, there are rules for the appropriate force that should be used.

Tr. of Oral Arg., *Padilla v. Rumsfeld*, 2004 W.L. 1066129 (U.S.) (No. 03-1027). Notice that Mr. Clement did say whether the United States could have shot Padilla before he was captured; he avoided the question.

²⁵³*See supra* part II.B.

²⁵⁴*See id.*

D. *Discretion to Determine Legality*

A further problem with reliance on dichotomous characterization is that governments now have a great deal of discretion, after terrorist acts have occurred, to determine what law will apply to the government's anti-terrorism responses. This discretion has easily predicted consequences. If governments believe that rules governing law enforcement offer them an advantage, they will treat the matter as a criminal incident. But if they think that the law pertaining to military force will yield more favorable results, they will label the terrorists involved as enemy combatants and proceed accordingly.

The possibility that the government may have some choice over which body of law applies to a governmental action by itself is not alarming. On the contrary, this possibility exists in many different contexts. But generally, when the government has choices of this kind, it also faces tradeoffs; the government usually cannot have its cake and eat it too. For example, in the area of military justice, military commanders generally have a choice of referring charges of misconduct to a summary court-martial, a special court-martial, or a general court-martial.²⁵⁶ Each of these courts-martial operates under different procedures. At a summary court-martial, for instance, the charges are decided by a single military officer who generally is not a military judge.²⁵⁷ At a general court-martial, by contrast, the accused has a right to be tried by a court

²⁵⁵Adam Clymer, *Big Brother Joins the Hunt for the Sniper*, N.Y. TIMES, Oct. 20, 2002, at 4-1. At the time of this article, it was assumed there was just one sniper working alone.

²⁵⁶*See* 10 U.S.C. § 816.

²⁵⁷*Id.* § 816(3).

consisting of a military judge and not less than five service members.²⁵⁸ But a summary court-martial can impose only a limited range of punishments; it cannot order confinement for more than a month.²⁵⁹ A general court-martial, in contrast, can impose life imprisonment or even the death penalty.²⁶⁰

So a commander has a choice in referring charges to a court-martial but also faces a tradeoff. The summary court-martial has simpler and speedier procedures but is limited in its power, while the general court-martial has greater powers but affords the accused greater procedural protections. The existence of this tradeoff preserves flexibility, without giving commanders unlimited discretion at the expense of the accused.

This kind of tradeoff generally does not exist in the area of counter-terrorism. Consider once more the case of Jose Padilla, the American citizen who took up arms against the United States in Afghanistan before being captured in Chicago.²⁶¹ As noted, the government initially held him as a witness in a grand jury investigation. But when that law enforcement characterization was not sufficient to permit his continued detention, and the government apparently lacked probable cause to charge him with a crime, the President designated him as an enemy combatant. The federal courts subsequently have upheld his continued confinement

²⁵⁸*See id.* § 816(1)(A).

²⁵⁹*See id.* § 820.

²⁶⁰*See id.* § 818.

²⁶¹*See supra* part II.D.

under this designation.²⁶² There was never a tradeoff involved; the government did not have to give up anything.

In addition, in most other contexts in which the government has the power to exercise discretion, some legal standard governs the exercise of that discretion. In investigating criminal activity, for example, the government has discretion to decide what searches to conduct. It may choose to search some premises but not others. But in exercising this discretion, the government always faces a restriction. The Fourth Amendment imposes a standard of reasonableness on all searches.²⁶³ This standard, although open-ended, nevertheless constrains the government's choices.²⁶⁴ And courts stand ready to enforce this standard.²⁶⁵

But again nothing comparable exists when it comes to the characterization of governmental responses to terrorism as either law enforcement measures or actions taken in an armed conflict. The President simply decides whether to characterize a person as an enemy combatant as opposed to an ordinary criminal suspect. In the United States, the courts defer to

²⁶²Padilla v. Hanft, 423 F.3d at 389-90.

²⁶³See U.S. Const. amend. 4 (protecting a "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

²⁶⁴See, e.g., Bond v. United States, 529 U.S. 334, 335 (holding that "a law enforcement officer's physical manipulation of a bus passenger's carry-on luggage violated the Fourth Amendment's proscription against unreasonable searches").

²⁶⁵See Weeks v. United States, 232 U.S. 383, 391-92 (1914) (establishing an exclusionary rule for improperly obtained evidence as a means of enforcing the Fourth Amendment); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying this rule to the states).

this decision.²⁶⁶ And in the international sphere, although disagreements have arisen, the United States and other countries usually just ignore opposing views. For example, although the United Nations General Assembly condemned the United States' bombing of Libya, and the U.N. Special Rapporteur for Extra-Judicial Killings condemned its targeted killing of suspected members of al-Qaida, the United States government could and simply did disregard their views.²⁶⁷

In making these criticisms, I do not mean to suggest that the United States or other countries have made incorrect choices when exercising the discretion that they currently have. On the contrary, in the examples discussed, strong legal and policy arguments support the treatment of Jose Padilla as an enemy combatant, the bombing of Libya, and the targeted killing in Yemen.²⁶⁸ But even if governments make correct choices, they are still operating in a system that involves no tradeoffs, no standards, and not very much review. A system of this kind over time may give rise to abuse.

²⁶⁶See *Padilla v. Hanft*, 423 F.3d at 395 (reversing the district court, which attempted to curb the President's discretion by "effectively imposing upon the President the equivalent of a least-restrictive-means test").

²⁶⁷See *supra* part I.A.

²⁶⁸See *Padilla v. Hanft*, 423 F.3d at 395 (explaining why the President could designate Padilla as an enemy combatant and detain him); Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 374 (2005) (discussing the argument that the bombing of Libya could be justified provided that it was a response was aimed at preventing "planned future attacks and if the response had been against the source of the attacks").

III. THE ADVANTAGES OF CREATING SPECIALIZED LAWS TO REGULATE GOVERNMENTAL RESPONSES TO TERRORISM

The forgoing parts of this article have attempted to establish the validity of two claims. The first claim is that the legality of a wide range of governmental responses to terrorism depends, and for a long time and in many different countries has depended, on a question of characterization. What governments may and may not do turns on whether terrorists are seen as criminals or enemy combatants, whether their deeds are seen as crimes or acts of war, and whether the government responds with law enforcement officers or armed forces. The second claim is that this emphasis on dichotomous characterization presents various problems. No standard currently exists or in all likelihood will emerge for making the required characterization. Determining which law will apply by means of characterization often produces bad results from a policy perspective. And governments generally have broad, standardless, and effectively unreviewable discretion in characterization, making abuse possible.

This part of the article now makes a third claim: Creating specialized laws to regulate governmental responses to terrorism might provide a solution to the difficulties with the current system. New specialized laws could borrow from both the civilian law enforcement rules and the law of armed conflict. But its content would turn on deliberate policy choices of legislatures, and not on the awkward initial characterization of whether the terrorists are committing crimes or fighting a war.

A. The Benefits of Specialized Laws

Creating specialized laws to govern responses to terrorism could address problems with the current system in several ways. First, specialized laws would reduce or eliminate the

difficulties of determining the legality of governmental responses to terrorism based on the indeterminate task of characterizing terrorists as criminals or enemy combatants and characterizing their assaults as crimes or acts of war. Instead, specialized laws could view terrorists exactly for what they are: persons who share some of the characteristics of both criminals and enemy combatants.

Rather than specifying the legality of targeted killing, detentions, military trials, and other responses to terrorism based on dichotomous characterization, the legislators creating the specialized laws could determine when each response makes sense as a policy matter and when it does not. For example, after substantive debate of the merits, Congress might pass a law amending the Posse Comitatus Act to say that the military may assist law enforcement in tracking snipers suspected of having killed more than three persons. This law would not require decision makers to get into the question of whether snipers (like those who terrorized the Washington, D.C., area) are criminals or enemy combatants.²⁶⁹ Or the United Nations might change its interpretation of article 51 of its charter to permit the use of military force in foreign countries in self-defense in response to certain kinds of assaults by organizations that the security council previously has classified as terrorists.²⁷⁰ Debates about whether the use of force then would not depend on the difficult question of whether terrorist acts constitute "armed attacks" like those of armed forces.²⁷¹

²⁶⁹*See supra* parts II.B. & III.C. (discussing the D.C. sniper incident).

²⁷⁰*Cf.* 18 U.S.C. § 2339B(a)(1) (making it a federal crime to provide material support to an organization that the Secretary of State has designated as a terrorist organization).

²⁷¹*See supra* part I.A.

Second, specialized laws regulating governmental responses to terrorism could be written to apply only in situations that have policy justifications persuasive to legislators. Under the current system, as explained above, if a suspected terrorist is characterized as an enemy combatant, then the laws of war would appear to permit military forces to take any actions against him that they could take against any enemy combatant. To return to the Padilla example, military forces could not only detain him at a public airport, but also take the seemingly excessive measure of shooting him at the airport before he surrenders.²⁷² In contrast, a specialized law on targeted killing might establish more limited rules of engagement. For instance, it might specify that military forces cannot carry out a targeted killing against an unarmed suspect in the United States who does not pose an immediate threat.²⁷³

Third, specialized laws on terrorism could narrow the government's discretion to choose the law that applies to its own conduct. Rather than having the government decide on a case-by-case basis and in an unreviewable manner whether a person accused of terrorism is a criminal suspect or an enemy combatant--and in this way determine what legal rules will regulate the government's actions toward him or her--a specialized law might channel the government's actions. For example, a specialized law might allow the President to detain terrorist suspects as enemy combatants, but provide that detainees who could be charged with a crime have certain rights that criminal defendants enjoy. These rights might include, in perhaps a modified form, the right to appear before a magistrate or the right to remain silent. This kind of law would

²⁷²*See supra* part III.C.

²⁷³The Public Committee Against Terrorism in Israel essentially argued for this position in its brief before the Israeli Supreme Court. *See supra* part II.C.

narrow the differences in treatment of persons detained as enemy combatants and persons detained as criminal suspects.

B. *Creation of Specialized Laws*

Although this article has advocated the creation of specialized laws on terrorism, it cannot hope to specify the precise content of these specialized laws. What the new laws should say is a complicated subject that will require long debate and compromise, in Congress, in the negotiation of international treaties, and elsewhere. Further academic work may provide guidance in particular areas. But for now, here are four general thoughts regarding various aspects of the development of specialized laws.

First, lawmakers should base decisions regarding the content of any new specialized terrorism laws on policy considerations rather than on existing doctrinal categories. In general, they should seek to determine what rights terrorist suspects ought to have, and what powers military forces and government agencies should have, based on American values and the practical needs of the current situation.

For example, in enacting a new law regarding detention of terrorist suspects captured on the battlefield, Congress should consider as a policy matter how long the military actually needs to detain them in order to protect national security. It then should devise a rule that will meet this need while otherwise preserving the value of liberty. The rule need not specify that the military may hold the suspects for the duration of the conflict simply because the laws of war permit such detention.²⁷⁴

²⁷⁴See *Hamdi v. Rumsfeld*, 542 U.S. at 518 (plurality opinion).

By the same token, lawmakers generally should avoid creating antiterrorism rules based solely on legal precedent. Relying exclusively on precedent generally will not do much to address the problems, described above,²⁷⁵ that are associated with characterization. For example, a common form of argument, frequently heard in debates about antiterrorism policy, runs as follows: "In World War II, the United States lawfully did X to the Nazis because they were enemy combatants. Terrorists are also enemy combatants. Therefore the law should say that the United States can do X to terrorists." At present, the United States generally can justify its actions as a legal matter based on such reasoning,²⁷⁶ but shaping new specialized laws on precedent may simply replicate the difficulties that reliance on characterization currently is causing. Congress would do better to consider the needs of the current situation and act accordingly.

Second, the Constitution may impose some limits on the creation of specialized laws to regulate governmental responses to terrorism. For example, if the Fourth Amendment requires a search warrant in a particular situation, then Congress cannot pass a new antiterrorism law dispensing with the requirement. But this possibility should not preclude all new law development. Congress could grant additional rights to terrorists who are now classifiable as enemy combatants and who therefore enjoy limited, if any, protection of the Fourth Amendment.²⁷⁷ Congress also can alter or change existing statutory rules. For example, at present, the Posse Comitatus Act prohibits the military from helping civil agencies in searches

²⁷⁵See *supra* part III.B.

²⁷⁶See 542 U.S. at 518 (relying on World War II-era precedent regarding unlawful combatants).

and seizures for the purpose of law enforcement.²⁷⁸ But nothing in the Constitution would prevent Congress from creating exceptions to this statute.

International treaties also may restrict the United States in reforming its law. For example, the United Nations Charter imposes limitations on the use of force and the International Covenant on Civil and Political Rights specifies requirements for domestic trials.²⁷⁹ The United States cannot rewrite international treaties by itself. But it may have the options to withdraw from them, to derogate from their provisions, or to work with other signatories for their amendment or reinterpretation.

Third, past experience and other factors suggest that the United States in many instances should expect to lead the way in the creation of the specialized laws on terrorism. The United States developed individual domestic civil and political rights that subsequent international human rights agreements, like the International Covenant on Civil and Political Rights, later copied.²⁸⁰ Similarly, the United States' codification of the laws of war in the Lieber Code of

²⁷⁷See *supra* part II.F.

²⁷⁸See *supra* part II.B.

²⁷⁹See *supra* part II.A.

²⁸⁰David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: the Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1188-1189 (1993) ("almost all of the individual rights and freedoms embodied in the Covenant have long been enjoyed by Americans by virtue of the U.S. Constitution and the constitutions and laws of the states").

1863 provided the basis for subsequent international agreements on the subject.²⁸¹ If the United States chooses rules wisely, other nations are likely to follow them.

The United States ought to accept most of the burden of drafting and lobbying to bring into force new international rules regarding terrorism. It should take on these tasks because the world's other leading democracies simply have less experience and less at stake in dealing with terrorists outside of their borders. Even in Afghanistan, where allies from twenty nations are fighting the war against al-Qaida,²⁸² the ultimate responsibility for handling prisoners falls on the United States. Reported information reveals that besides the United States, only Canada (which has the second largest contingent of forces in Afghanistan²⁸³) has captured appreciable numbers of suspected terrorists in the country, and Canada turns these suspects over to the United States for detention and interrogation.²⁸⁴

In fashioning domestically applicable legal rules, the United States can and should draw from the experiences of other democracies. The United Kingdom, for example, has experimented with many new specialized legal rules in its efforts to combat terrorism in Northern Ireland. Israel has done the same with respect to terrorism within its borders. The

²⁸¹See Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC'Y INT'L L. PROC. 112, 114 (2001); Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224, 232 (1998).

²⁸²See Combined Forces Command-Afghanistan, Fact Sheet, available at <http://www.cfc-a.centcom.mil/Information/Coalition%20forces%20in%20Afghanistan.htm>.

²⁸³See American Forces Press Service, Canadian Military Assumes Command of Afghanistan PRT, available at http://www.defenselink.mil/news/Aug2005/20050817_2466.html (Oct. 19, 2005) (Canada has more than 1500 troops in Afghanistan).

²⁸⁴See Bruce Campion-Smith, *Elite Force in Afghan Terror Raids*, TORONTO STAR, Sept. 21, 2005, at A07.

United States may learn from the successes and missteps of these nations, and of other countries that have confronted the problems posed by terrorism.

Finally, the United States need not create a comprehensive new anti-terrorism legal regime all at once. This essay has identified difficulties in many different areas of the antiterrorism law that stem from a reliance on dichotomous characterization to determine the powers of the government. Congress could improve the law by addressing enacting reforms one at a time. For example, it might address the subject matter of interrogation first. Then later, it might tackle detentions or targeted killing. Gradually reforming different areas of the law, in fact, would reduce the risk that unintended consequences from reform would cause major problems. New laws regarding military trials, for example, likely would have little effect on the current proscription against military aid to law enforcement.

C. Consider the Alternatives

The idea of creating specialized laws applicable to terrorism initially may not appeal to those actively engaged in the ongoing debates about the lawfulness of military responses to terrorism. Human rights advocates and defense attorneys may fear that new specialized terrorism laws will provide fewer protections to suspected terrorists than the criminal justice system currently affords. Similarly, governments using military force to respond to terrorism may fear that, when dealing with terrorists, any departure from the laws governing armed conflict may limit their lawful range of action.

Both sides are probably correct if they hold these views. Any new law specifically addressing terrorism almost certainly will fall somewhere in the middle between the laws of war

and the rules governing criminal law enforcement. But opponents of the proposal on both sides should consider the alternative, which is maintaining the status quo.

The current system is dysfunctional for the reasons spelled out in this article. Governments for the most part dismiss critics who say that the law of war does not apply to terrorists. The United States, for example, has told pretty much anyone who has objected, that it will forge ahead with targeted killings, detentions, and military commissions because it views suspected terrorists as enemy combatants. But despite the steadfastness of the government's position, its opponents have had an impact. For example, although the President proposed using military commissions to try suspected terrorists in November 2001, the legal proceedings are only just beginning four years later. Why is that? Even though human rights groups have not been able to block the government's plans as a legal matter, they have caused enough commotion to grind the effort almost to a halt. Examples like this show that neither side really is winning in the on-going debate.

New laws that establish what governments can and cannot do in combating terrorist threats, without relying on the characterization of terrorists as criminals or enemy combatants, hold potential for ameliorating the situation. These new laws would require tradeoffs, but would provide greater certainty and less controversy. For example, under new laws aimed specifically at terrorism, the government might lose its ability to hold suspected terrorists indefinitely with no legislative or judicial oversight. Or it might lose its ability to conduct targeted killing missions at any time and in any place. But the laws might state clearly when the government might use military commissions to prosecute suspected terrorists, reducing much of the second guessing that now inhibits counter-terrorism responses.

D. *An Example of a Specialized Law*

Getting away from the current system, which relies on characterization of terrorist suspects as either enemy combatants or criminals, undoubtedly will prove difficult. Changing the rules in the middle of a war is worrisome because so much is at stake. But hope for progress does exist. At least one democratic nation already is taking steps in that direction.

The United Kingdom's "Terrorism Act of 2000" is an example of a specialized law on terrorism.²⁸⁵ Under the law, the police do not need a warrant to arrest a suspected terrorist.²⁸⁶ In specified circumstances, they may detain a suspected terrorist for up to 48 hours before allowing him or her to consult an attorney.²⁸⁷ And they may hold him or her for up to 28 days before bringing charges.²⁸⁸ But they may not hold suspected terrorists indefinitely without charging them or giving them access to counsel. In these ways, the Terrorism Act of 2000 gives suspected terrorist fewer rights than ordinary criminal suspects but more rights than enemy combatants.

Critics might fault the Terrorism Act from both sides. Some may see it as too harsh, eroding civil liberties that the criminal law ordinarily has afforded.²⁸⁹ Others may see it as too

²⁸⁵Terrorism Act, 2000, c. 11 (Eng.) (available at <http://www.opsi.gov.uk/acts/acts2000/20000011.htm>).

²⁸⁶*See id.* § 41(a).

²⁸⁷*See id.* sch. 8, § 8.

²⁸⁸*See id.* sched. 8, § 36(3). Under recently enacted amendments, the new period will rise to 28 days. *See* Mark Rice-Oxley, *How should Britain tackle terror?*, CHRIST. SCI. MONITOR, Nov. 15, 2005, at 7.

²⁸⁹Amnesty International, Media briefing -- UK Terrorism Act 2000 (Feb. 20, 2001), <http://web.amnesty.org/library/Index/ENGEUR450072001?open&of=ENG-2EU> (concluding

soft, depriving the government of some of the powers it needs to combat effectively any enemy force. In reality, the law reflects a compromise. It sees terrorism not merely as a crime, but not quite the same as a war against a foreign state. Instead of allowing existing law enforcement rules or the law of war to determine how the government can treat terrorist suspects, Parliament has attempted to create a new law that specifically addresses terrorists as terrorists.

Even if other nations disagree with the policy choices that the United Kingdom made, it seems likely that other nations will follow Parliament's general approach. In areas of detention, targeted killing, and so forth, they may adopt special laws--through a public political process--that determine how terrorists should be treated.

IV. CONCLUSION

At present, there is a specialized law addressing law enforcement agencies' treatment of criminal suspects. And there is a specialized law dealing with the military's treatment of enemy combatants. But with rare exceptions, there are no specialized laws governing military responses to terrorism. This lack of specialized laws necessitates judging the legality of governmental responses to terrorism by trying to characterize terrorists either as criminals or belligerents.

The characterization makes a great deal of difference because the laws applicable to criminal suspects differ a great deal from the laws applicable to enemy combatants. To repeat the clearest example, the former does not allow targeted killing, while the latter does. The question thus arises whether this approach produces satisfactory results.

that "provisions in the Terrorism Act contravene UK obligations under international human rights laws" applicable to criminal suspects).

This article has argued that it does not. No standard currently exists for correctly characterizing governmental responses to terrorism. Characterization often produces bad results from a policy perspective. And governments generally have broad, standardless, and effectively unreviewable discretion in making characterizations.

A solution to this problem may lie in creating new specialized laws to govern responses to terrorism. These laws would resemble the law of armed conflict in some respects, but would borrow from ordinary criminal law procedures in other respects. Creating the law would remove many doubts about the legality of military responses to terrorism and would allow policy considerations, rather than the vagaries of characterization, to determine what rules should apply.

Creating specialized laws will take time and it will be difficult. Some will object to limiting the rights currently enjoyed by criminal suspects, while others will lament the loss of authority that they believe the armed forces now enjoy. But as explained previously, both sides might benefit from compromise.

Fortunately, the new laws do not have to emerge all at once. Instead, new standards might emerge one at a time to regulate particularly important actions like detention or targeted killing. Already, this approach is occurring in some nations, such as the United Kingdom. They should continue.