

## EDITORIAL COMMENT

### THE DETENTION OF CIVILIANS IN ARMED CONFLICT

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In the armed conflict between the United States and Al Qaeda,<sup>1</sup> the legality of the government's detention scheme has been mired in confusion. The lack of clarity is especially acute with respect to the substantive criteria for defining who may be detained. A crucial determinant of the lawfulness of the scheme is whether international humanitarian law (IHL) permits the preventive detention of civilians, or particular groups of civilians. In addressing that issue, leading lawmakers, litigators, and adjudicators have misconstrued or misappropriated aspects of the IHL regime.<sup>2</sup> Indeed, the confusion surrounding the current and future direction of U.S. detention policy stems in significant part from those misconceptions or misuses of the law.

First, policymakers and advocates of U.S. practices improperly conflated two classes of individuals subject to detention: civilians who directly participate in hostilities ("unlawful combatants") and civilians who have not directly participated but nevertheless pose a security threat.<sup>3</sup> Congress and the Bush administration acted to detain the latter. They did so, however, by eschewing legal authority that clearly supports such detentions and by resorting, instead, to

\* I owe special thanks to Philip Alston, Gabriella Blum, Jack Goldsmith, Derek Jinks, and Gerald Neuman. I am also grateful to Laura Pedraza-Fariña for extraordinary background research, and to Katy Glenn, Laura Pedraza-Fariña, Julianne Stevenson, and the Harvard Law School Library for assistance during the publication process.

<sup>1</sup> I work with the assumption that since September 11, 2001, the United States and Al Qaeda have been engaged in an armed conflict that is regulated in part by international humanitarian law—a proposition that all three branches of the U.S. government have accepted. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 630–31 (2006); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§948a–950w and other sections of titles 10, 18, 28, and 42 (2006)); Deputy Secretary of Defense Gordon England, Memorandum for Secretaries of the Military Departments et al. (July 7, 2006), available at <<http://www.defenselink.mil/news/Aug2006/d20060814comm3.pdf>>; *cf.* Exec. Order, Ensuring Lawful Interrogations (Jan. 22, 2009), available at <[http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/)>.

Accepting the existence of an armed conflict for the purpose of this analysis is not meant to express any view on the merits of the war model versus the criminal law model. The existence of an armed conflict would not preclude the Obama administration from confronting the Qaeda threat through the criminal justice system and ordinary administrative measures rather than instruments of war. The administration might also take steps to alter the situation so that it is no longer classifiable as an armed conflict. Indeed, many of the indicia of an armed conflict in the present situation are the result of military and diplomatic actions adopted by the U.S. government after September 11. *See* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003). Some of those actions could be revised if not reversed. I take no position on those policy choices, which are beyond the scope of this essay.

For so long as the situation remains an armed conflict with Al Qaeda—whether in Afghanistan, Iraq, or globally—the present analysis of the IHL regime is relevant.

<sup>2</sup> Some of these errors may have understandably resulted from trepidation about approving the preventive detention of civilians, from the perceived novelty of a conflict with a transnational armed group, or from insufficient expertise in IHL. I am agnostic as to which (combination) of these or other reasons led to distorted representations of existing law.

<sup>3</sup> *See infra* text at notes 65–75.

excessively broad definitions of combatancy to reach the same individuals. Second, opponents, in response, improperly disaggregated or omitted actors. That is, they criticized the government for expansive definitions of combatancy without acknowledging the existing legal authority to detain the same individuals regardless of nomenclature.<sup>4</sup> Third, commentators on both sides have also improperly equated rules governing two coercive measures: administrative detention and military tribunals. A temptingly useful, but wholly distinct, set of norms concerns whether civilians can be tried before a military tribunal. Nevertheless, litigators and judges imported rules peculiar to that context into the separate domain of administrative detention.<sup>5</sup>

This essay is intended to shed greater light on the IHL regime that constitutes the legal background against which U.S. detention policies have been enacted and debated. Such an endeavor has special importance given the review of these issues by the Obama administration and by Congress, and the Supreme Court's decision to grant certiorari in *Al-Marri v. Pucciarelli*.<sup>6</sup> The central question is whether IHL prohibits the preventive detention of civilians who pose a security threat on account of their direct or indirect participation in hostilities. It bears noting, however, that the authority to detain does not depend only on the substantive criteria for detention. As Derek Jinks and I have argued elsewhere, IHL conditions the authority to detain on compliance with procedural guarantees and humane treatment of detainees.<sup>7</sup> For example, a party to a conflict that is unable or unwilling to respect the strictures of common Article 3 of the Geneva Conventions for the Protection of Victims of War with regard to conditions of confinement has no authority to detain. This essay pursues a separate question, however, by focusing on the scope of authority to detain particular groups of individuals. I argue that a careful analysis of the IHL regime should distinguish four classes of individuals (across a spectrum from combatants to "innocent civilians") and three coercive measures to restrain those actors (targeting, detaining, and prosecuting). Mapping these distinct actors and coercive measures, as well as their interconnections, helps to identify and correct existing category mistakes. Failure to do so—to appreciate and repair these persistent errors—threatens both humanitarian values and security interests in present and future conflicts.

In part I, I map the contemporary IHL regime, discussing features that pertain to detention of particular individuals in armed conflict. In part II, I analyze conceptual errors involving U.S. detention law and practice. And, in part III, I examine the humanitarian and security implications of the types of errors made by proponents and opponents of U.S. detention policy.

## I. THE STRUCTURE OF INTERNATIONAL HUMANITARIAN LAW AND DETENTION

### *Material Field of Application: Noninternational Armed Conflicts*

Status-based categories (such as prisoner of war) do not exist in noninternational armed conflict. And IHL treaty provisions regulating noninternational conflicts do not include or

<sup>4</sup> See *infra* text at notes 78–86.

<sup>5</sup> See *infra* text at notes 87–100.

<sup>6</sup> *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), cert. granted, 77 U.S.L.W. 3148 (U.S. Dec. 5, 2008) (No. 08-368).

<sup>7</sup> Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terror*, 118 HARV. L. REV. 2653, 2659–61 (2005). For example, detainees in all armed conflicts are at least protected by the fundamental humanitarian requirements of common Article 3. See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, Art. 3, Aug. 12, 1949, 6 UST 3516, 75 UNTS 135 [hereinafter Fourth Geneva Convention].

define the term “combatant.” Hence, throughout this essay I refer primarily to other classes of action and actors such as direct participation in hostilities and “civilians,” which have a basis in common Article 3 of the Geneva Conventions, Additional Protocol II to those Conventions, and elsewhere.<sup>8</sup> That said, the application of IHL to noninternational conflicts, and the conflict with Al Qaeda in particular, is often an exercise in analogical or deductive reasoning.

One reason to examine the rules that apply in international conflict is their use as an analogy. It is common for commentators to draw implicitly and explicitly on the Third and Fourth Geneva Conventions in discussing the conflict with Al Qaeda (e.g., with respect to detaining fighters and holding them until the cessation of hostilities). We must therefore understand the referent—the rules governing international conflict—simply to assess those types of claims. A stronger reason is that the Fourth Geneva Convention does generally contain the most closely analogous rules concerning the detention of civilians. It thus constitutes the best approximation of IHL rules when interpretive gaps arise.

More fundamentally, IHL in international armed conflict—and the Fourth Geneva Convention in particular—is directly relevant because it establishes an outer boundary of permissive action. States have accepted more exacting obligations under IHL in international than in noninternational armed conflicts. That is, IHL is uniformly less restrictive in internal armed conflicts than in international armed conflicts. Accordingly, if states have authority to engage in particular practices in an international armed conflict (e.g., targeting direct participants in hostilities), they a fortiori possess the authority to undertake those practices in noninternational conflict.<sup>9</sup> Simply put, whatever is permitted in international armed conflict is permitted in noninternational armed conflict.<sup>10</sup> Hence, if IHL permits states to detain civilians in the former domain, IHL surely permits states to pursue those actions in the latter domain.<sup>11</sup>

That same logic, however, does not apply to proscriptive rules. If IHL forbids states from engaging in particular actions in international armed conflicts, it does not necessarily follow that the same prohibition applies in a noninternational conflict. Nevertheless, as discussed below, once the permissive rules are established for our present purposes, not much is left open. What does remain—such as whether IHL prohibits the preventive detention of civilians who do not pose a security threat—is generally well answered by other sources of international law.

<sup>8</sup> Common Article 3 refers to “active” participation. See *infra* note 18 (discussing lack of difference between “active” and “direct” participation).

<sup>9</sup> The proposition here relates only to IHL. The application of other legal regimes—e.g., human rights law—might complicate this account, especially insofar as those rules impose obligations on the exercise of state power domestically and not extraterritorially.

<sup>10</sup> Related to this proposition is another axiom of the legal regime: IHL prohibitions that apply in noninternational armed conflict (e.g., common Article 3) a fortiori apply in international armed conflict. See Brief of Amici Curiae Professors Ryan Goodman, Derek Jinks & Anne-Marie Slaughter at 24–25, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184).

<sup>11</sup> Some commentators suggest, as an answer to this point, that domestic law, rather than IHL, provides the legal basis for detention of civilians in noninternational armed conflict. See, e.g., Gabor Rona, *An Appraisal of US Practice Relating to ‘Enemy Combatants,’* 2007 Y.B. INT’L HUMANITARIAN L. 232, 240–41, available at <<http://ssrn.com/abstract=1326551>>. Note, however, that that claim is analytically the same as the original point. Both of them contend that IHL does not constrain states’ detention power and that states are thus free to act in accordance with their own national law and policy choices.

That is, existing jurisprudence and the work of United Nations bodies concerning noninternational armed conflicts support the application of those fundamental prohibitions regardless of the conflict type.<sup>12</sup>

### *Substantive Rules*

I now turn to the structure of IHL with respect to the detention of civilians and relevant relationships with other parts of the IHL regime. As an initial matter, three coercive measures may usefully be distinguished—targeting, detention, and trial—as well as four groups of individuals—(A) regular armed forces and irregular armed forces that meet the criteria of the Third Geneva Convention or Additional Protocol I; (B) direct participants in hostilities; (C) civilians who are indirect participants in hostilities; and (D) civilians who are nonparticipants in hostilities.

A few explanatory notes deserve mention. First, the principle of distinction—a cornerstone of IHL—holds that parties to an armed conflict must distinguish between civilians and combatants in the use of military force. Civilians, however, lose their immunity from attack if they directly participate in hostilities (Group B).<sup>13</sup> By doing so, they effectively become “unlawful combatants” for illegally taking up arms.<sup>14</sup> Nevertheless, as a formal matter, Group B constitutes a subset of *civilians*, and they otherwise remain protected (e.g., by the Fourth Geneva Convention, Additional Protocol I, and Additional Protocol II). In short, for the purpose of targeting, the dividing line is clear: Groups A and B (lawful and unlawful combatants) are on one side and Groups C and D (indirectly participating and nonparticipating civilians) are on the other. Indeed, an important development in modern IHL is the acceptance of “a clear distinction between direct participation in hostilities and participation in the war effort. . . . Without such a distinction the efforts made to reaffirm and develop international humanitarian

<sup>12</sup> See *infra* note 23; see also Joanna Dingwall, *Unlawful Confinement as a War Crime: The Jurisprudence of the Yugoslav Tribunal and the Common Core of International Humanitarian Law Applicable to Contemporary Armed Conflicts*, 9 J. CONFLICT & SECURITY L. 133, 144 (2004) (analyzing jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in support of rule that “confinement of civilians in internal armed conflict is unlawful when civilians are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary”); LIESBETH ZEGVELD, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 65–66 (2002) (discussing examples from UN Commission on Human Rights); Inter-Am. Comm’n on Human Rights, Third Special Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, doc. 9, rev.1 (Feb. 26, 1999) (applying prohibition in Colombian civil war); cf. 1 INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 344, 347–49 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

<sup>13</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 51(3), June 8, 1977, 1125 UNTS 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, Art. 13(3), June 8, 1977, 1125 UNTS 609 [hereinafter Protocol II].

<sup>14</sup> Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. RED CROSS 45, 46 (2003) (“The terms ‘unlawful combatant’, ‘unprivileged combatant/belligerent’ . . . have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals and case law.”); Adam Roberts, Remarks, *in* Counterterrorism and the Laws of War: A Critique of the U.S. Approach (discussion at the Brookings Institution, Mar. 11, 2002), available at <<http://www.brookings.edu/comm/transcripts/20020311.htm>> (“There is a long record of certain people coming into the category of unlawful combatants—pirates, spies, saboteurs, and so on. It has been absurd that there should have been a debate about whether or not that category exists.”).

law could become meaningless.”<sup>15</sup> Groups C and D include individuals who contribute to the war effort, as well as those who make no tangible contribution. The difference between lawful and unlawful killing, therefore, rests on the distinction between those groups of individuals and individuals who directly participate in hostilities.

Direct participation is generally defined by geographic and temporal proximity to the damage inflicted on the enemy. According to the *Commentaries* on the Geneva Protocols published by the International Committee of the Red Cross (ICRC), “Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place,”<sup>16</sup> and it entails “a sufficient causal relationship between the act of participation and its immediate consequences.”<sup>17</sup> Notwithstanding some modest, if persistent, definitional squabbles,<sup>18</sup> it is well settled that providing some important logistical support to armed forces, even in a zone of active military operations, falls below the threshold for direct participation. IHL specifies that persons accompanying armed forces, such as “supply contractors [and] members of labour units or of services responsible for the welfare of the armed forces,” are noncombatants,<sup>19</sup> as are medical and religious personnel.<sup>20</sup> Individuals who perform these roles may risk incidental injury or

<sup>15</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, Commentary on Protocol I, Art. 51(3), at 619 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987).

<sup>16</sup> *Id.*, Commentary on Protocol I, Art. 43, at 516.

<sup>17</sup> *Id.*, Commentary on Protocol II, Art. 13, at 1453. W. Hays Parks—the leading proponent of a broad standard for participation—argues that customary international law supports a more expansive definition that would preclude civilians from providing functionally important, though less immediate, support to the military effort. The hypothetical that Colonel Parks uses to illustrate how his approach differs from the Protocol approach is “[a] civilian . . . driving a military truck filled with ammunition towards his front lines.” W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 134 (1990). That this is considered a hard case illustrates the substantial agreement between the two camps. Even on Colonel Parks’s view, civilians are not precluded from participating in “logistics support,” “national C3I [command, control, communications, and intelligence],” “war manufacturing,” “defense R&D,” or other war-related efforts. *Id.* at 122 fig. 1.

<sup>18</sup> There is some technical disagreement over whether the level of participation required is best characterized as “direct” or “active.” See, e.g., U.S. ARMY, SENIOR OFFICER LEGAL ORIENTATION DESKBOOK 43-8 to 43-14 (2005). However, the terms are generally considered synonymous and used interchangeably. Cf. *Prosecutor v. Akayesu*, No. ICTR-96-4-T, para. 629 (Sept. 2, 1998) (“These phrases are so similar that, for the Chamber’s purposes, they may be treated as synonymous.”); OPERATIONAL LAW HANDBOOK 14, 17, 78, 398 (Derek I. Grimes ed., 2005) (using terms “active” and “direct” interchangeably); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 334 (2008) (“[T]he consistent use of the phrase ‘*participant directement*’ in the same provisions of the equally authentic French treaty texts leaves no doubt that the English terms ‘direct’ and ‘active’ must be interpreted synonymously.”). The distinction, even when framed with great care, is dispositive only in a narrow range of cases, none of which has obvious strategic significance in the conflict with Al Qaeda. See, e.g., U.S. ARMY, SENIOR OFFICER LEGAL ORIENTATION DESKBOOK, *supra*, at 43-11 n.42 (“For instance, a civilian truck driver delivering ammunition from a stateside depot to an Army post with units preparing to deploy would likely not constitute taking an active part in hostilities. A civilian delivery of the same ammunition from a deployed forward supply point to the First Sergeant of a unit in contact and low on ammunition, however, would likely satisfy the active part test for taking part in hostilities.”).

<sup>19</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Art. 4(A)(4), Aug. 12, 1949, 6 UST 3316, 3320, 75 UNTS 135 [hereinafter Third Geneva Convention]; see also, e.g., JOINT CHIEFS OF STAFF, U.S. DEP’T OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE MARINE CORPS, JOINT PUB. 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 to -2 (2000) (defining the combatant category to exclude civilians performing such functions as maintenance of weapon systems, command-and-control infrastructure, and communication systems, as well as construction of roads, airfields, transportation services, and prison facilities); see also Protocol I, *supra* note 13, Art. 50(1) (defining civilians as “any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention”).

<sup>20</sup> See, e.g., Third Geneva Convention, *supra* note 19, Art. 33.

death due to their proximity to armed forces, and they may even have a “force multiplier effect [that] enhances . . . fighting capability,”<sup>21</sup> but they are not direct participants within the meaning of IHL. Also excluded in the case of conflicts involving irregularly constituted armed groups are “political and religious leaders . . . [and] financial contributors, informants, collaborators and other service providers without fighting function [who] may support or belong to an opposition movement or an insurgency as a whole, but can hardly be regarded as members of its ‘armed forces’ in the functional sense underlying IHL.”<sup>22</sup>

With regard to detention, a fundamental distinction separates civilians in Group C (indirect participants in hostilities) and those in Group D (nonparticipants in hostilities). The latter consists of individuals referred to, in some contexts, as “innocent civilians.” Indeed, a fundamental principle of modern IHL forbids the detention of civilians solely because they are nationals or part of the general population of the enemy power. Instead, IHL requires a specific determination that each civilian who is detained poses a threat to the security of the state.<sup>23</sup> Notably, the ICRC *Commentary* accepts that a security threat is defined more broadly than direct participation.<sup>24</sup> Individuals may constitute a threat to security either because of their direct participation in hostilities or because of their engagement in hostile action that falls short of direct participation. I refer to the latter, residual category as “indirect participation in hostilities.” The Fourth Convention, under Articles 5, 27, 41–43, and 78, plainly permits the detention, or internment, of civilians not according to status-based categories, but according to whether an individual poses a security threat.<sup>25</sup> In noninternational armed conflicts, international authorities have applied the same principle.<sup>26</sup> Thus, states may detain a civilian without finding that the individual directly participated in hostilities.

<sup>21</sup> JOINT CHIEFS OF STAFF, *supra* note 19, at V-1.

<sup>22</sup> MELZER, *supra* note 18, at 320.

<sup>23</sup> See ICRC, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, Art. 42, at 254 (Jean S. Pictet gen. ed., 1958) [hereinafter GENEVA IV COMMENTARY]; Prosecutor v. Kordić & Čerkez, No. IT-95-14/2-A, paras. 72–73, 620 (Dec. 17, 2004); Prosecutor v. Delalić, No. IT-96-21-A, para. 327 (Feb. 20, 2001); see also HCJ 593/82, Tsemel v. Minister of Defence, [1983] IsrSC 37(3) 365, reprinted in 1984 PAL. Y.B. INT’L L. 164, 171 (applying rule in conflict with terrorist organization); Inter-Am. Comm’n on Human Rights, *supra* note 12 (applying rule to actions of guerrilla force in civil war); see also *supra* note 12 (other sources there cited).

<sup>24</sup> See, e.g., GENEVA IV COMMENTARY, *supra* note 23, Art. 42, at 257 (“It did not seem possible to define the expression ‘security of the State’ in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence.”); *id.* at 258 (“Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances . . . . To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.”) (footnote omitted); cf. COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS, *supra* note 15, Commentary to Protocol I, Art. 43, at 516, quoted in text at note 16 *supra*; *id.*, Commentary to Protocol II, Art. 13, at 1453, quoted in text at note 17 *supra*; GENEVA IV COMMENTARY, *supra*, Art. 5, at 53–54, 56; Robert W. Gehring, *Loss of Civilian Protections Under the Fourth Geneva Convention and Protocol I*, 90 MIL. L. REV. 49, 85 (1980) (“It must be emphasized that the danger which is perceived by the state and which permits such restrictions [internment and assigned residence] is not limited to hostile activity, though that is certainly included. . . . Even Pictet . . . suggests that knowledge or qualifications may represent a real threat to the state’s present or future security.”).

<sup>25</sup> Fourth Geneva Convention, *supra* note 7. In international armed conflict, individuals who do not qualify as POWs (and would be detainable as such) are protected by the Fourth Geneva Convention. See, e.g., Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 380–409 (2004).

<sup>26</sup> See *supra* notes 12, 23.



An understanding of indirect participation can be derived in part from its comparison with direct participation (Group B) and nonparticipation (Group D). In contrast with direct participation, indirect participation does not imply a direct causal relationship or geographic proximity between the individual's activity and damage inflicted on the enemy. Indeed, the activity need not occur on a battlefield. Indirect participation includes "[s]ubversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power."<sup>27</sup> The type of assistance may include logistical support provided to fighters, such as through the activities covered under Article 4(A)4 of the Third Geneva Convention.<sup>28</sup> Indeed, that Convention obviously contemplates that individuals performing such functions will qualify for detention. And, as a leading treatise on noninternational armed conflict explains, "[c]ivilians who support the armed forces (or armed groups) by supplying labour, transporting supplies, serving as messengers or disseminating propaganda" are not direct participants, "but they remain amenable to domestic legislation against giving aid and comfort to domestic enemies."<sup>29</sup> In the current Iraq conflict, many of those functions are performed by private military contractors in U.S. employ, which the government contends fall short of direct participation.<sup>30</sup> Finally, with a qualification to be discussed shortly,<sup>31</sup> indirect participation also includes "members of organizations whose object is to cause disturbances."<sup>32</sup> In other words, it is not restricted to membership in the fighting force.

With respect to a lower threshold for indirect participation, it is useful to distinguish the category from nonparticipation. Having political sympathy or affiliation with the enemy power is wholly insufficient to qualify as indirect participation for the purpose of detention.<sup>33</sup> As indicated, the paradigmatic case involves "actions which are of direct assistance" to the enemy.<sup>34</sup> And although membership in an organization may constitute indirect participation,

<sup>27</sup> GENEVA IV COMMENTARY, *supra* note 23, Art. 42, at 258.

<sup>28</sup> See *supra* note 19.

<sup>29</sup> MICHAEL BOTHE, KARL JOSEF PARTSCH, & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 672 (1982) (discussing direct participation in context of Protocol II); see also Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 71 (1993) (quoting BOTHE, PARTSCH, & SOLF, *supra*, at 672, as quoted in text); A. P. V. ROGERS, LAW ON THE BATTLEFIELD 29 (2d ed. 2004) (listing a spectrum of actions from direct to indirect participation).

<sup>30</sup> See *supra* note 19 and corresponding text.

<sup>31</sup> See *infra* text at note 36.

<sup>32</sup> See *supra* note 24; cf. Prosecutor v. Kordić & Čerkez, No. IT-95-14/2-T, para. 284 (Feb. 26, 2001), *aff'd*, No. IT-95-14/2-A, *supra* note 23.

<sup>33</sup> See GENEVA IV COMMENTARY, *supra* note 23, Art. 5, at 56 (the standard "cannot refer to a political attitude towards the State, so long as that attitude is not translated into action"); Prosecutor v. Delalić, No. IT-96-21, para. 577 (Nov. 16, 1998), *aff'd*, No. IT-96-21-A, *supra* note 23; *id.*, para. 567; Kordić & Čerkez, *supra* note 32, para. 280; cf. GENEVA IV COMMENTARY, *supra*, Art. 42, at 258.

<sup>34</sup> GENEVA IV COMMENTARY, *supra* note 23, Art. 42, at 258; CrimA 3261/08, A. v. Israel, para. 21 (2008), available at <[http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf)> ("in order to detain a person it is not sufficient for him to have made a remote, negligible or marginal contribution to the hostilities"); see also Kordić & Čerkez, *supra* note 33, para. 280; *infra* notes 35-37 and corresponding text; cf. Delalić, *supra* note 33, para. 568.

Notably, some authorities suggest that an additional factor circumscribes the class of activities that might qualify as indirect participation: "it is almost certain that the condemned activity will in most cases be the subject of criminal punishment under national law." Delalić, *supra*, para. 568; see also Gehring, *supra* note 24, at 80 n.73; Kordić & Čerkez, *supra*, para. 280. It is unclear, however, whether this factor imposes any meaningful constraint. Cf. GENEVA IV COMMENTARY, *supra*, Art. 5, at 53 n.2.

there are strong reasons to conclude that mere membership is insufficient. In an insightful analysis, the Supreme Court of Israel recently upheld a detention law through a narrowing construction.<sup>35</sup> The Court interpreted the statute to comply with the following principles derived from IHL: “[I]t is insufficient to show any tenuous connection with a terrorist organization”; instead, the detaining power must rely on the individual’s particular “connection and contribution to the organization . . . that are sufficient to include him in the cycle of hostilities in its broad sense.”<sup>36</sup> Finally, the individual him- or herself must pose a threat to security. It would not constitute a valid security rationale, for example, to detain solely for intelligence-gathering purposes someone who has no meaningful connection to hostilities yet possesses information about enemy fighters.<sup>37</sup>

Finally, a couple of caveats should be noted. First, some of the above examples constitute indirect participation in the abstract. In the specific context of detention, a state needs to establish not only that an individual’s conduct amounts to indirect participation, but also that detention is the only means available—that detention is “absolutely necessary”<sup>38</sup>—to defend against the threat posed by the conduct. Second, according to the ICRC *Commentaries*, states have significant latitude in defining actions that constitute indirect participation.<sup>39</sup> However, that latitude is accompanied by constraints. As Richard Baxter noted, measures that abuse the state’s discretion are “*ultra vires* and may subject their authors to criminal penalties under the international law of war.”<sup>40</sup>

Table 1 (p. 56) represents the international legal regime that long preexisted September 11, 2001. The table helps show the regime with respect to different types of coercive measures and classes of actors. For students of international law, this scheme is relatively straightforward. It may be helpful, however, to explicate the table—hence the regime—by noting its consistency with various postulates concerning the application of IHL. Consider a few examples. First, it would be absurd to accept an interpretation of IHL that results in a state’s possessing the legal authority to kill actor *X* on purpose but lacking the legal authority to detain actor *X*.<sup>41</sup> States

<sup>35</sup> *A. v. Israel*, *supra* note 34.

<sup>36</sup> *Id.*, para. 21.

<sup>37</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (“Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”); UN Comm’n on Human Rights, Situation of Detainees at Guantanamo Bay, para. 23, UN Doc. E/CN.4/2006/120 (Feb. 27, 2006) (“The indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the provisions of the Geneva Conventions.”); Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantánamo Bay*, N.Y. TIMES, Oct. 10, 2003, at A1 (quoting Christophe Girod, senior Red Cross official in Washington).

There is a potential exception with respect to information, but of a wholly different character. An individual may possess information that makes her a danger to the detaining power (e.g., knowledge of vulnerabilities in the detaining power’s defense system). A plausible reading of the ICRC *Commentary* would permit the use of detention—if it is absolutely necessary—to prevent her from directly assisting the enemy with that type of knowledge. See GENEVA IV COMMENTARY, *supra* note 23, Art. 42, at 258 (“To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security”).

For an extended analysis of intelligence gathering as a ground for detention, see Ryan Goodman, *Rationales for Detention: Security Threats and Intelligence Value*, 85 INT’L L. STUD. (Naval War College, forthcoming 2009).

<sup>38</sup> Fourth Geneva Convention, *supra* note 7, Art. 42.

<sup>39</sup> See GENEVA IV COMMENTARY, *supra* note 23, Art. 42, at 257.

<sup>40</sup> Richard R. Baxter, *The Duty of Obedience to the Belligerent Occupant*, 1950 BRIT. Y.B. INT’L L. 235, 264; see also Fourth Geneva Convention, *supra* note 7, Art. 147 (unlawful confinement constitutes a grave breach).

<sup>41</sup> There may be an exception to this rule if (1) an individual’s mere membership in the armed forces renders her a legitimate military target, and (2) mere membership is insufficient and an additional inquiry into the nature and



TABLE 1.  
ACTIONS PERMITTED BY INTERNATIONAL LAW

		Coercive Measures		
		I. Targeting	II. Military Trial	III. Detention
Subjects	A. Members of regular armed forces and irregular forces that meet Geneva Convention III or Additional Protocol I criteria	(1) YES	(2) YES	(3) YES
	B. Direct participants in hostilities ("unlawful combatants")	(4) YES	(5) YES	(6) YES
	C. Indirect participants in hostilities (imperative security threats)	(7) NO	(8) NO?	(9) YES
	D. Nonparticipants in hostilities ("innocent civilians")	(10) NO	(11) NO?	(12) NO

would otherwise have a perverse incentive to kill individuals who pose a military threat if the alternative were to let them go free. Thus, if a cell in column I is positive (the state may kill), the corresponding cell in column III will also be positive (the state may detain). Second, if the law permits states to subject *lawful* combatants to measure *Y*, the law *a fortiori* permits states to subject *unlawful* combatants to that same measure.<sup>42</sup> Thus, if a cell in row A is positive (e.g., cell 1), the corresponding cell in row B (e.g., cell 4) will also be positive. Third, it is not illogical for a state to have the power to kill actor *X* deliberately, but to lack the power to prosecute actor *X*. Combatant immunity afforded a lawful combatant is a case in point. The proceedings of the ICRC–Asser Institute study on direct participation suggest another example: civilians taking weapons from a military warehouse may be subject to lethal attack.<sup>43</sup> However, if they lack a particular intent (e.g., they believed the property in the warehouse was abandoned), they may

scale of the individual's contribution is required for detention. The latter proposition was upheld in *A. v. Israel*, *supra* note 34, para. 21. Of course, one might argue that the holding is accordingly flawed because it violates the maxim that states cannot have the power to kill *X* person but lack the power to detain *X* person. Note also that the first proposition was recently qualified in an analysis of common Article 3 by the ICTY. Prosecutor v. Halilović, No. IT-01-48-T (Nov. 16, 2005); *id.*, para. 34 ("While membership of the armed forces can be a strong indication that the victim is directly participating in the hostilities, it is not an indicator which in and of itself is sufficient to establish this."); *id.* n.78 (providing examples of "a person [who] may be listed as a member of an armed force, without being mobilised . . . [and] that in a state of war, the civilian police by law [may] become part of the armed forces"). *But see* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 96–98 (Dieter Fleck ed., 2d ed. 2008).

<sup>42</sup> Two qualifications deserve mention. First, this general statement may turn on the scope of the temporal element of the direct participation standard. Members of the regular armed forces who are off duty or otherwise not participating in hostilities at the time of being attacked are nevertheless legitimate military targets. In contrast, according to some schools of thought, unlawful combatants may be subject to attack only "for so long as" those individuals are directly engaged in fighting or in the imminent stages of preparation. Second, all members of the armed forces, including noncombatant members of the armed forces, may be made the object of attack. In contrast, the members of irregular armed forces who perform noncombatant functions may be indirect participants and thus immune from attack. MELZER, *supra* note 18, at 320–21.

<sup>43</sup> ICRC & TMC Asser Inst., *Third Expert Meeting on the Notion of Direct Participation in Hostilities* 26–27, Oct. 23–25, 2005, available at <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf)>.

not be held criminally liable. Fourth, as discussed above, if states are permitted to exercise a power in international armed conflict (e.g., to detain civilians), states a fortiori are permitted to exercise that power in noninternational armed conflict.<sup>44</sup> Interpretations of IHL that contravene these general postulates should be considered suspect or implausible.

How clearly established is the content of the cells presented in table 1? The relationships between the cells—the macroconnections between classes of individuals and coercive measures—are generally clear and well settled. The internal content of some cells—e.g., who exactly satisfies the definition of a direct participant in hostilities—is less so. Nevertheless, as discussed above, definitional squabbles over “hard cases” should not obscure the fact that the internal content is generally straightforward and sufficiently clear for our purposes. Moreover, the questions addressed in this essay principally turn on an understanding of the macro-relationships between the cells, not the specifics of their internal content.

First, cells 6 and 9 are uncontroversial as a matter of international law. As discussed above, IHL provides that civilians who directly or indirectly participate in hostilities are clearly detainable under the circumstances and conditions set forth in Articles 5, 27, 41–43, and 78 of the Fourth Geneva Convention.<sup>45</sup> This may be the forgotten lesson of the Fourth Convention following September 11. Indeed, even decision makers who conclude that IHL permits the detention of civilians in the conflict with Al Qaeda neglect this aspect of the Convention. The judges in *Al-Marri*, for example, never mention or cite it. And Judge Wilkinson, in particular, engages in an unnecessary and elaborate “updating” of international law to arrive at a conclusion already provided for by the existing regime. Yet the articles listed above permit the detention, or internment, of civilians who pose a security threat (as long as such a “severe measure[ ]”<sup>46</sup> is “absolutely necessary”<sup>47</sup>). Furthermore, Article 4(A)(4) of the Third Convention, which has also been largely overlooked, contemplates the detention of indirect participants in the form of civilians accompanying armed forces.<sup>48</sup> These points of law are confirmed by the decisions of national and international tribunals—including the International Criminal Tribunal for the Former Yugoslavia and the Inter-American Human Rights Commission.<sup>49</sup> In addition, post-1949 U.S. practice in coalition and other military campaigns—including in Korea, Vietnam, Grenada, Panama, the first Persian Gulf war, Somalia, Haiti, Bosnia and Herzegovina, Kosovo,<sup>50</sup>

<sup>44</sup> See *supra* text at notes 9–11; see also note 9 (discussing applicability of human rights law).

<sup>45</sup> See *supra* notes 25–26 and corresponding text.

<sup>46</sup> GENEVA IV COMMENTARY, *supra* note 23, Art. 27, at 207.

<sup>47</sup> Fourth Geneva Convention, *supra* note 7, Art. 42.

<sup>48</sup> See *supra* note 19 and corresponding text.

<sup>49</sup> *Coard v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc.6 rev., para. 52 (1999) (“Under exceptional circumstances, international humanitarian law provides for the internment of civilians as a protective measure.”); *id.*, para. 50; *id.*, para. 53 (“The applicable provisions of the Fourth Geneva Convention provide the authorities substantial discretion in making the initial determination, on a case by case basis, that a protected person poses a threat to its security, and the record provides no basis to controvert the security rationale asserted in this case.”); *Delalić*, *supra* note 33, para. 576; *Tsemel v. Minister of Defence*, *supra* note 23, at 166–67.

<sup>50</sup> On Korea, see, for example, John Cranston, *Armistice Negotiations*, in *KOREAN WAR: AN ENCYCLOPEDIA* 24, 28 (Stanley Sandler ed., 2004); on Vietnam, see, for example, GUENTER LEWY, *AMERICA IN VIETNAM* 285–94 (1980); U.S. Military Assistance Command, Vietnam, Directive No. 381-11, *Exploitation of Human Sources and Captured Documents*, para. 5(a) (Aug. 5, 1968), reprinted in GEORGE S. PRUGH, *LAW AT WAR: VIETNAM 1964–1973*, App. D at 127 (1975); on Grenada, see, for example, *Coard v. United States*, *supra* note 49, at 21, 46, 48; on Panama, see, for example, John Embry Parkerson Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 68–69 (1991); on the first Gulf war,

and the current Iraq conflict<sup>51</sup>—has essentially treated civilian detention as an incident of waging war,<sup>52</sup> as has the practice of U.S. allies, enemies, and other states in historical and contemporary conflicts.<sup>53</sup> Even international human rights law—which one might expect to apply a heightened level of rights protection—does not foreclose the preventive detention of civilians under certain circumstances.<sup>54</sup>

Cell 4 is the central domain in the debate on the definition of direct participation in international legal circles. For instance, the ICRC–Asser Institute study has focused primarily on targeting issues. An exhaustive definition of direct participation has proven difficult to ascertain—at least in terms of its outer boundaries. However, as Derek Jinks and I have argued elsewhere, even the borderline cases show that the core content of the definition is already beyond dispute;<sup>55</sup> and, as the discussion above illustrates, the legal framework is sufficiently clear for present purposes.<sup>56</sup>

Finally, column II—on the jurisdiction of military tribunals—is well settled for some groups but not completely settled for others. With regard to cell 2, the Third Geneva Convention includes a clear textual presumption favoring military tribunals for the prosecution of prisoners of war.<sup>57</sup> No express language in the Fourth Convention or the Additional Protocols states whether civilians can be tried before military tribunals, with little exception.<sup>58</sup> The proviso in Article 5 of the Fourth Convention—which permits states to derogate from their obligations in exceptional circumstances as long as the “rights of fair and regular trial” are preserved—arguably opens another door to military tribunals.

see, for example, An Arrangement for the Transfer of Enemy Prisoners of War and Civilian Internees from the Custody of the British Forces to the Custody of the American Forces, Jan. 31, 1991, *reprinted in THE GULF WAR 1990–91 IN INTERNATIONAL AND ENGLISH LAW* 348, annex 1 (Peter Lowe ed., 1993); on Somalia, see, for example, Margaret B. Baines, *The “Legal Vacuum” of Detainee Rights* 3, 43 (Apr. 1997) (unpublished thesis, Judge Advocate General’s School); on Haiti, see, for example, *id.*; on Bosnia-Herzegovina, see, for example, Keith E. Puls, *The Principles of the Law of Peace Operations: A Practical Framework for Judge Advocates* 58–68 (2001) (unpublished thesis, Judge Advocate General’s School), *available at* <<http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA456598>>; and on Kosovo, see, for example, *id.*

<sup>51</sup> See, e.g., Dep’t of Defense, Information Paper: Detention of Civilians, *available at* <<http://www.aclu.org/projects/foiasearch/pdf/DOD046333.pdf>>; SC Res. 1546, pmb. & annex at 11, Letter from Colin Powell, U.S. Secretary of State, to Dr. Ayad Allawi, Prime Minister of the Interim Government of Iraq (June 8, 2004) (“Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include . . . internment where this is necessary for imperative reasons of security . . .”).

<sup>52</sup> See, e.g., U.S. Army, Reg. No. 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997).

<sup>53</sup> Anieszka Jachec-Neale, *Status and Treatment of Prisoners of War and Other Persons Deprived of Their Liberty*, in *PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 302, 311 (Elizabeth Wilmschurst & Susan Breau eds., 2007) (“In recent decades there have been numerous examples of restricting civilians’ personal liberty on the grounds of security such as the ongoing Israeli-Palestinian conflict or the 1991–92 Gulf War during which Iraqi nationals living in the United Kingdom, Italy and France were interned from the outset of the war.”); Jonathan F. Vance, *Civilian Internees—World War II*, in *ENCYCLOPEDIA OF PRISONERS OF WAR AND INTERNMENT* 79, 79 (Jonathan F. Vance ed., 2d ed. 2006) (“[T]housands of civilians found themselves facing internment during World War II in virtually every belligerent state.”); Jonathan F. Vance, *Civilian Internees—World War I*, in *id.* at 77, 77 (“All belligerent nations interned varying numbers of enemy civilians during World War I.”); Jonathan F. Vance, *Gulf War (1990–91)*, in *id.* at 168, 169.

<sup>54</sup> See, e.g., UN Comm’n on Human Rights, General Comment No. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001); *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. A) (1961).

<sup>55</sup> Goodman & Jinks, *supra* note 7, at 2654–58.

<sup>56</sup> See *supra* notes 17–18 and corresponding text.

<sup>57</sup> Third Geneva Convention, *supra* note 19, Art. 84.

<sup>58</sup> See Fourth Geneva Convention, *supra* note 7, Art. 66.

That said, emerging international standards appear to prohibit the prosecution of indirect participant and nonparticipant civilians before military tribunals with limited exceptions (cells 8 and 11). Military trials might be permitted only when civilian courts are closed or unavailable—in circumstances such as occupation or martial law—so that resort to the military system is essentially “unavoidable.”<sup>59</sup> Consistently with that standard, in *Ex parte Milligan* the U.S. Supreme Court appeared to suggest that the laws of war generally prohibit the trial of civilians before military tribunals.<sup>60</sup> Regardless of the accuracy of that interpretation of *Milligan*,<sup>61</sup> more recent Supreme Court opinions not only construe the case to stand for that proposition, but also consider it a settled understanding of contemporary IHL.<sup>62</sup> The Court’s conclusion is not without merit. In the past several years, various international authorities have essentially reached the same conclusion with reference to treaty law, emergent international norms, and widespread state practice.<sup>63</sup> Some of these authorities carefully note that a subgroup of

<sup>59</sup> See, e.g., UN Human Rights Comm., *Madani v. Algeria*, Comm. No. 1172/2003, para. 8.7, UN Doc. CCPR/C/89/D/1172/2003 (June 21, 2007); see *infra* sources at note 61.

<sup>60</sup> *Ex parte Milligan*, 71 U.S. 2, 121–22, 132 (1866).

<sup>61</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 571 (2004) (Scalia, J., dissenting) (disagreeing with this interpretation of *Milligan*, but acknowledging its acceptance in *Quirin*, *infra* note 62); Curtis A. Bradley, *The Story of Ex parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in *PRESIDENTIAL POWER STORIES* 93 (Christopher H. Schroeder & Curtis A. Bradley eds., 2008) (identifying and criticizing the modern understanding of the *Milligan* holding).

<sup>62</sup> See *Ex parte Quirin*, 317 U.S. 1, 45–46 (1942) (“We construe the Court’s statement as to the inapplicability of the law of war to *Milligan*’s case as having particular reference to the facts before it. From them the Court concluded that *Milligan*, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established. . . . We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries . . .”); *Hamdi*, 542 U.S. at 522–24 (plurality opinion); see also *Al-Marri v. Pucciarelli*, 534 F.3d 213, 230–31 (4th Cir. 2008) (en banc) (Motz, J., concurring).

<sup>63</sup> UN Sub-Comm’n on the Promotion and Protection of Human Rights, Issue of the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/Sub.2/2002/4 (July 9, 2002) (Louis Joinet) (collecting cases and documenting national state practice); UN Comm’n on Human Rights, Issue of the Administration of Justice Through Military Tribunals, para. 21, UN Doc. E/CN.4/2006/58 (Jan. 13, 2006) (Emmanuel Decaux) (stating that the “Human Rights Committee’s practice over the past 20 years . . . has only increased its vigilance, in order to ensure that the jurisdiction of military tribunals is restricted to offences of a strictly military nature committed by military personnel,” and listing in that regard “[m]any thematic or country rapporteurs” and the jurisprudence of the major regional human rights commissions and courts); UN Comm’n on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, para. 78, UN Doc. E/CN.4/1998/39/Add.1 (Feb. 19, 1998) (Param Kumaraswamy) (“In regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice.”); UN Human Rights Comm., General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, para. 22, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007) (“Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.”) (footnote omitted) (citing *Madani v. Algeria*, *supra* note 59, para. 8.7 to similar effect); Inter-Am. C.H.R., Report on Terrorism and Human Rights, para. 261, OEA/Ser.L/V/II.116, doc. 5, rev.1 corr. (Oct. 22, 2002) (“[M]ost fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law . . . includ[ing] the . . . right to be tried by a competent, independent and impartial tribunal in conformity with applicable international standards. In respect of the prosecution of civilians, this requires trial by regularly constituted courts that are demonstrably independent from the other branches of government . . . and generally prohibits the use of *ad hoc*, special, or military tribunals or commissions to try civilians.”); *id.*, Annex I, Resolution on Terrorism and Human Rights (Dec. 12, 2001) (including a more categorical prohibition: “According to the doctrine of the IACHR, military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible.”); *Ocalan v. Turkey*, 2005–IV Eur. Ct. H.R. 131, para. 116 (Grand Chamber); *id.*,

civilians—unlawful combatants (Group B)—may be subject to military trial (cell 5).<sup>64</sup> That qualification accords with the general principle that if states are permitted to subject lawful combatants to a coercive measure, states a fortiori can exercise the same power over unlawful combatants. At bottom, these finer points elucidate table 1 and demonstrate that the authority to prosecute and the authority to detain are not coextensive.

## II. CATEGORY MISTAKES: CONFLATION AND DISAGGREGATION IN THE LAW OF DETENTION

In part I, I described the existing and developing structure of IHL, especially as it pertains to the power to detain civilians. It is certainly appropriate to advocate changes to the legal regime that require equating rules in one domain with those in another, the disaggregation or assimilation of actors, and so on. The following instances, however, do not involve such normative projects. Instead, commentators and decision makers, working with an ostensibly fixed foundation of existing rules, have conflated or disaggregated domains of actors and powers without explanation or recognition of their (novel) analytic venture. In this part, I examine these occurrences in detail, and then address the nature of their implications in part III.

### *Actor Conflation: Lawmakers, Proponents, and Commentators on U.S. Detention Policy*

A fundamental category mistake involves grouping different actors under a heading that correctly applies to only some of them. For example, only Groups A and B include combatants. The U.S. government, however, has officially defined “combatants” to include individuals who do not directly participate in hostilities (Group C, indirect participants). The issue here is not whether IHL provides authority for the detention of such civilians. Indeed, in many cases, IHL clearly envisions their detention as “security detainees.” The relevant concern is whether the general categories are properly constructed. Improper construction has far-reaching consequences for potential operators and targets of coercive measures. Let us first consider the category mistakes.

The Department of Defense switched from a definition of enemy combatant limited to direct participants to one that improperly includes indirect participants. In its submission to

para. 8 (Wildhaber, Pres. & J., dissenting) (attempting to distinguish cases by reclassifying defendant as noncivilian); *Incal v. Turkey*, 1998–IV Eur. Ct. H.R. 1547 (Grand Chamber); cf. Gary D. Solis, Declaration, para. 6.f, *Boumediene v. Bush*, 583 F.Supp.2d 133 (D.D.C. 2008) (Civ. No. 04-1166 (RJL)), available in 2008 WL 5260271 (“Absent direct participation in hostilities a civilian is not a combatant . . . and he is not subject to prosecution in a military forum.”).

Some of these authorities rely on international human rights law or do not expressly distinguish international human rights and humanitarian law. The inclusion of human rights law may not be controversial in the present context, because the relevant IHL rules for fair trials (e.g., common Article 3) countenance reference to human rights standards. Additionally, state actions adopted during wartime constitute relevant practice for customary international law of both IHL and human rights law.

<sup>64</sup> See, e.g., Inter-Am. C.H.R., *supra* note 63, para. 232 (“Although . . . Article 75 of Additional Protocol I [and other provisions of IHL] do not specifically address the susceptibility of [unprivileged] combatants to trial by military courts, there appears to be no reason to consider that a different standard would apply as between privileged and unprivileged combatants.”); *id.*, para. 69 (defining “unprivileged combatants” to include civilian direct participants); see also Yoram Dinstein, *The System of Status Groups in International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 145, 153 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007) (“Although a captured unlawful combatant need not be put on trial at all, he is definitely susceptible to being prosecuted and punished by the domestic (civil or military) courts of the detaining State.”).



the Supreme Court in *Hamdi*, the government offered the Defense Department's existing definition of "enemy combatant." That definition was properly circumscribed by the direct participation standard, and the Court's plurality opinion adopted it: "an individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and who* 'engaged in an armed conflict against the United States' there."<sup>65</sup> That is, individuals must themselves be engaged in armed conflict with the United States to be deemed combatants. It does not suffice for an individual only to support others who are engaged in the conflict.

A few weeks after the ruling in *Hamdi*, however, the Defense Department issued the Order Establishing Combatant Status Review Tribunals, which subtly altered the definition such that the direct participation standard vanished. The order defines "enemy combatants" to include "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces *that are* engaged in hostilities against the United States or its coalition partners."<sup>66</sup> Thus, an individual who merely supports Al Qaeda or the Taliban may be defined as a combatant.<sup>67</sup> The significance of this change analytically tracks the distinction between direct participation in hostilities and participation in the war effort. That is, under the altered definition, the government need only establish by a group- or affiliation-based standard that an individual is a member of Al Qaeda in whatever capacity or that the individual has supported Al Qaeda's war effort.

Congress essentially ratified the Defense Department's new definition in the Military Commissions Act of 2006. The Act includes indirect participants as part of the statutory definition of combatants: "'unlawful enemy combatant' means . . . a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)."<sup>68</sup> That is, individuals need not have engaged in hostilities themselves.<sup>69</sup> As in the definition under the Order Establishing Combatant Status Review Tribunals, it is sufficient if an individual supports hostilities carried out by others.<sup>70</sup>

<sup>65</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (emphasis added) (internal quotation marks omitted) (quoting Brief for the Respondents at 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), available in 2004 WL 724020 (quoting U.S. Dep't of Defense, Fact Sheet: Guantanamo Detainees 5 (Feb. 13, 2004), available at <<http://www.defenselink.mil/news/Feb2004/d20040220det.pdf>>)).

<sup>66</sup> See Deputy Secretary of Defense Paul Wolfowitz, Memorandum to the Secretary of the Navy 1 (July 7, 2004) (emphasis added), available at <<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>>.

<sup>67</sup> *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 475 (D.D.C. 2005) (criticizing this definition).

<sup>68</sup> Military Commissions Act of 2006, 10 U.S.C. §948a(1)(i) (2006). Some commentators assert that the Act's definition pertains only to the personal jurisdiction of military commissions. See, e.g., *Al-Marri*, 534 F.3d 213, 328 n.9 (4th Cir. 2008) (Wilkinson, J., concurring in part, dissenting in part). However, sections of the Act concerning detention (and habeas rights in particular) expressly reference the statute's global definition of enemy combatants. See 28 U.S.C. §2241 (2006). The Military Commissions Act also refines and integrates the Detainee Treatment Act, and thus provides the most likely definition for those detention purposes. See also *infra* note 74 (legislative history concerning application of the Military Commissions Act's definition of enemy combatant to detention).

<sup>69</sup> The U.S. law could be compared with analogous legislation in Israel. The title of the Israeli statute similarly relates to "unlawful combatants," although its provisions encompass individuals who have taken indirect part in hostilities. Incarceration of Unlawful Combatants Law §2, 2002, SH 179, available at <<http://www.justice.gov.il/MOJHeb/HeskeminVeKishreiHutz/KishreiChutz/HukimEnglish>> (stating that "'unlawful combatant' means a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel").

<sup>70</sup> The phrase "purposefully and materially supported" does not impose a sufficient constraint. These elements are consistent with "direct assistance" in the indirect participation standard. And as the following analysis shows,



Furthermore, Congress drafted the Military Commissions Act against the background of the Defense Department's public announcement of "representative examples" of detainees held at Guantánamo Bay. That list included individuals who would not satisfy a direct participation standard.<sup>71</sup> The Military Commissions Act and its legislative history indicated no intent to disturb the military's practice. On the contrary, the Act also defined unlawful enemy combatants to include "a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal."<sup>72</sup> Additionally, one of the three principal sponsors of the legislation, Senator Lindsey Graham, stated at the time:

The enemy combatant definition . . . allows us to . . . try those people who intentionally and knowingly aid terrorism; materially support terrorism. To me, that makes sense. I want to prosecute the person who sells the guns to al-Qaida as much as the people who use the weapons. I want to go after the support network that supports terrorism.<sup>73</sup>

Dissenting senators criticized the failure to restrict the definition to "traditional notions of enemy combatants" and specifically decried the consequent expansion of preventive detention in the conflict with Al Qaeda.<sup>74</sup> The majority of senators who voted for the Military Commissions Act chose to override those concerns.

The expansiveness of the official U.S. approach has been exacerbated by definitions adopted by U.S. legal counsel in litigation. An infamous exchange with Judge Joyce Green of the Federal District Court for the District of Columbia contains the following passage:

In response to the hypotheticals, counsel for the [government] argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity

the intent and effect of the statute do not preclude the detention of indirect participants. See *infra* text at notes 71–74.

<sup>71</sup> Dep't of Defense, *supra* note 65, at 2 (including among "representative examples" of detained combatants individuals "involved in terrorist financing," "with links to a financier of the September 11th plots," and "who served as an al Qaida translator and managed operating funds"). Also consider the principal charges against individuals held at Guantánamo and later designated for prosecution before military commissions. According to the initial charge sheets, one detainee allegedly served as an "accountant and treasurer" and "provided logistical support such as food, shelter and clothing"; he also "assisted in loading and transporting" weapons and ammunition. Charge Sheet at 3, *United States v. Al Qosi* (U.S. Mil. Comm'n 2004), available at <<http://www.defenselink.mil/news/Jun2004/d20040629AQCO.pdf>>. A second detainee "created several instructional and motivational recruiting video tapes." Charge Sheet at 3, *United States v. Al Bahlul* (U.S. Mil. Comm'n 2004), available at <<http://www.defenselink.mil/news/Jun2004/d20040629ABCO.pdf>>. These allegations alone clearly would not support a finding of direct participation under IHL. Instead, these facts fall squarely within expressly identified examples of indirect participation or nonparticipation. See NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 29, at 672 (noting that "transporting supplies, serving as messengers or disseminating propaganda" does not constitute direct participation).

<sup>72</sup> 10 U.S.C. §948a (2006).

<sup>73</sup> 152 CONG. REC. S10,251 (daily ed. Sept. 27, 2006) (statement of Sen. Graham); see also *id.* at S10,250 (statement of Sen. Warner) ("It is only directed at aliens—aliens, not U.S. citizens—bomb-makers, wherever they are in the world; those who provide the money to carry out the terrorism, wherever they are . . .").

<sup>74</sup> *Id.* at S10,356 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy); *id.* at S10,244 (daily ed. Sept. 27, 2006) (statement of Sen. Levin) (describing the changes in the bill from one that "defined the term 'unlawful combatant' in accordance with the traditional law of war" to one that classifies an individual as an enemy combatant "regardless of whether that person actually meets the test of engaging in hostilities against the United States or purposefully and materially is supporting such hostilities"); *id.* at S10,400 (statement of Sen. Kennedy) ("The bill . . . works profound and disastrous changes in our law. This legislation sets out an overly broad definition of unlawful enemy combatant.").

that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,” a person who teaches English to the son of an al-Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.<sup>75</sup>

Notably, the clarity of the U.S. position has not been helped by independent analyses of U.S. law. The ICRC’s 2005 study on customary international humanitarian law suggests that the official U.S. definition of “direct participation” for the purpose of targeting includes indirect participation. The ICRC study presents an unusual depiction of “U.S. practice,” claiming that civilians lose immunity from direct attack “by bearing arms or by aiding the enemy with arms, ammunition, supplies, money or intelligence information or even by holding unauthorized intercourse with enemy personnel.”<sup>76</sup> That excerpt, however, appears to have been lifted from Article 104 of the Uniform Code of Military Justice, which penalizes aiding the enemy.<sup>77</sup> Article 104 does not aspire—and has never otherwise been understood—to take a position on IHL rules concerning direct participation, whether for purposes of military targeting or more generally.

#### *Actor Disaggregation: Opponents of U.S. Detention Policy*

A second category mistake involves the failure to recognize that certain distinct categories of individuals are all lawfully subject to the same coercive measure. For example, it would be improper to suggest that states can lawfully target Group A, but not Group B. In the detention context, opponents criticize the government’s expansive definitions of “combatant” for including civilians who do not meet the direct participation standard. Yet the opponents do not acknowledge that IHL permits the detention of the very same individuals (Group C) regardless of nomenclature. Moreover, some opponents contend that only combatants (Groups A and B) are detainable. As I discuss in part III, more viable legal and policy frames could be invoked to reach the same conclusion—that Group C should not be detained.<sup>78</sup> For now, however, consider the legal validity of the disaggregation approach.

First, in *Al-Marri*, Judge Diana Motz’s opinion (joined in this part by three other judges<sup>79</sup>) states: “The law of war provides clear rules for determining an individual’s status during an international armed conflict, distinguishing between ‘combatants’ (members of a nation’s military, militia, or other armed forces, and those who fight alongside them) and ‘civilians’ (all other persons).”<sup>80</sup> Judge Motz then contends:

<sup>75</sup> *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 475 (D.D.C. 2005) (citations omitted).

<sup>76</sup> 2 ICRC, *supra* note 12, at 113.

<sup>77</sup> 10 U.S.C. §904 (2006).

<sup>78</sup> See *infra* p. 70.

<sup>79</sup> *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (Motz, J., concurring). Judge Motz’s opinion was formally designated the “plurality opinion” because it represented the largest number of judges supporting the judgment to reverse the district court. That is, Judge Motz’s opinion supported the holding that the petitioner had not been afforded sufficient process to challenge his designation as an enemy combatant. However, the court of appeals also held—contra Judge Motz’s opinion—that Congress had empowered the president to detain the petitioner as an enemy combatant. Notably, Judge Motz’s conclusion that traditional law-of-war principles do not authorize the detention of civilians also commanded a plurality of the court. However, that legal question constituted a subissue that was not critical to either holding.

<sup>80</sup> *Id.* at 227.

Thus, “civilian” is a term of art in the law of war, not signifying an innocent person, but rather someone in a certain legal category who is *not* subject to *military* seizure or detention. So, too, a “combatant” is by no means always a wrongdoer, but rather a member of a different “legal category” who *is* subject to *military* seizure and detention. . . . Nations in international conflicts can summarily remove the adversary’s “combatants,” i.e., the “enemy combatants,” from the battlefield and detain them for the duration of such conflicts, but no such provision is made for “civilians.”<sup>81</sup>

This analysis (including its allusions to the law of international armed conflict) is especially remarkable for its omission of provisions that contemplate the detention of civilians in the Third and Fourth Conventions.

Plaintiffs and amici have similarly construed the international legal framework—suggesting that civilians are not detainable under IHL—in briefs submitted to courts of appeal and the Supreme Court. Appellants in *Al-Marri v. Wright* stated:

The President’s detention of Hamdi was permissible . . . , the Court concluded, because it was consistent with “longstanding law-of-war principles” which permit the detention of enemy soldiers captured on a battlefield. *By contrast, arresting civilians in their homes inside the United States, far from any active battlefield, and detaining them in military custody, is not a fundamental incident of war. . . .*

. . . [C]ivilians may be treated as lawful targets of attack only “for such time as they take a direct part in hostilities.” Such individuals, moreover, do not become combatants; they remain “unprivileged belligerents” . . . . If such unprivileged belligerents are arrested, they may be criminally prosecuted for having engaged in combat . . . . But they are not combatants under the law of war and are not subject to detention on that basis.<sup>82</sup>

The petition for certiorari in *Al-Marri v. Pucciarelli* asserted as follows:

Hewing to the laws of war, this Court’s decisions consistently construe *military detention power* in light of this law-of-war principle, allowing military jurisdiction to be exercised *only* over members of an enemy nation’s military, militia, or other armed forces, and those who fight alongside them on a battlefield, such as al Qaeda fighters in the war in Afghanistan.<sup>83</sup>

Petitioners in *Boumediene v. Bush* reasoned that

*Hamdi* emphasizes that military detention is justified only “to prevent a *combatant’s* return to the battlefield.” 542 U.S. at 519 (emphasis added). Civilians who do not directly participate were never on the “battlefield” in the first place, and therefore there is no justification for treating them as “combatants” who might return. *Of course, civilians may be*

<sup>81</sup> *Id.* at 228 n.11.

<sup>82</sup> Corrected Brief of Appellants at 21–22, *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427), available at <[http://brennan.3cdn.net/13fea8775860ad6389\\_fhm6vr5ks.pdf](http://brennan.3cdn.net/13fea8775860ad6389_fhm6vr5ks.pdf)> (emphasis added) (citations omitted); see also Brief for Center for National Security Studies et al. Supporting Petitioner and Reversal at 6–7, 12, *Al-Marri v. Wright*, *supra*, available in 2006 WL 3670672.

<sup>83</sup> Petition for Writ of Certiorari at 27, *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2006), *petition for cert. filed*, 77 U.S.L.W. 3184 (U.S. Sept. 19, 2008) (No. 08-368), available at <[http://brennan.3cdn.net/945b94058fce3863a4\\_tqm6iiowu.pdf](http://brennan.3cdn.net/945b94058fce3863a4_tqm6iiowu.pdf)> (emphasis added); see also *id.* at 29 (“Neither this Court’s decisions nor established law-of-war principles allow the government to expand military jurisdiction to reach a person lawfully residing in the United States who is unaffiliated with the armed wing of an enemy government and who was never present, let alone participated in hostilities, on a battlefield where U.S. or allied forces were engaged in military operations.”).

*punished for activity short of direct participation in hostilities, even though they cannot be targeted with military force or subjected to military detention.*<sup>84</sup>

Finally, an amicus brief in the same case argued that

the fundamental problem is that the [Combatant Status Review Tribunals] employed a definition of “combatant” that is overly broad, and so it is impossible to determine based on their findings which individuals have been properly detained. The [Combatant Status Review Tribunal] definition encompasses many individuals who are not members of the armed forces of a nation-state, who did not participate directly in hostilities, and who never committed any belligerent act. Such individuals are civilians under the law of war. They may be arrested and punished under other laws, but they do not fall within Congress’s authorization for “necessary and appropriate” military force.<sup>85</sup>

Scholars have similarly criticized the government for proffering expansive definitions of combatancy for the purpose of detention, without acknowledging that IHL provides for the detention of the very same individuals under different nomenclature.<sup>86</sup>

### *Power Conflation: Proponents and Opponents of U.S. Detention Policy*

Proponents and opponents of U.S. detention policy have conflated the powers to prosecute and to detain. Before examining instances of conflation, one should note that, under the IHL regime (and human rights law as well), detention is generally treated as a less restrictive means than trial. Regime architects presumably adopted that approach because of the punitive nature of the latter and the possibility of capital punishment. In this framework, criminal sentences short of capital punishment are also considered final compared to preventive detention. That is, sentences for crimes often involve imprisonment without further review. Preventive detention, at least for civilians, requires continual review.<sup>87</sup> One can discern this structural relationship between preventive detention and trials from the more extensive and stringent limitations that IHL (and human rights law) places on the latter than on the former. It is accordingly not obvious that a given rule can be applied uniformly across coercive measures.

One could argue, of course, that the approach adopted by the IHL regime is normatively defective. For example, the system arguably fails to consider situations in which preventive detention imposes greater deprivations on liberty than trial owing to the unusual temporal nature of a conflict or the material capacity of states to avoid oversight of detention conditions.<sup>88</sup> Such arguments, however, are not tethered to the existing regime and thus fall beyond

<sup>84</sup> Brief for the Petitioners at 41–42, *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) (No. 06-1195), available at <[http://www.wilmerhale.com/files/upload/Boumediene\\_vBush\\_WH2.pdf](http://www.wilmerhale.com/files/upload/Boumediene_vBush_WH2.pdf)> (emphasis added); see also *id.* at 43 n.44 (stating that “it is far from clear that the laws of war authorize indefinite military detention of civilians under any circumstances”) (citing Brief Amicus Curiae of National Institute of Military Justice, *infra* note 85).

<sup>85</sup> Brief Amicus Curiae of National Institute of Military Justice in Support of Petitioners at 21, *Boumediene v. Bush*; *Al-Odah v. United States*, 128 S.Ct. 2229 (2008) (Nos. 06-1195, 06-1196), available at <[http://www.mayerbrown.com/public\\_docs/probono\\_NIMJ\\_final.pdf](http://www.mayerbrown.com/public_docs/probono_NIMJ_final.pdf)>.

<sup>86</sup> See, e.g., John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 773, 814–16 (2007).

<sup>87</sup> See Fourth Geneva Convention, *supra* note 7, Arts. 43, 78, 132; Protocol I, *supra* note 13, Art. 75(3).

<sup>88</sup> For example, the conflict with Al Qaeda and its affiliates may last decades. Even though continual review may occur for individual detainees, the outer limit—permitting their detention until the cessation of hostilities—may result in confinement that lasts longer than most criminal sentences because of the nature of the particular conflict. Notably, some of these concerns may be ameliorated by decisions of the Obama administration to conform to other

the scope of our discussion. If such an argument could be raised as part of the existing regime, it would have to be constructed as a special exception. Even then, jurists should not import rules from one coercive domain (trials) into another (detention) without acknowledging the inherent difficulties in doing so or justifying the transposition in light of the overarching structural commitments of the regime.

Multiple instances of conflation of coercive domains have taken place without sufficient consideration or explanation. First, consider instances in support of U.S. detention policy. In *Hamdi*, the plurality transposed the Court's earlier holding in *Ex parte Milligan*<sup>89</sup>—which concerned the legality of a military tribunal—onto questions about detention. The *Hamdi* plurality drew the following connection:

*Ex parte Milligan* does not undermine our holding about the Government's authority to seize enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict . . . .<sup>90</sup>

This reference to coercive measures across dissimilar circumstances is perhaps harmless if one accepts the logic that the greater power (to prosecute) includes the lesser power (to detain). In other words, if the government had the authority to try the petitioner, it would have had the authority to detain him preventively. In that respect, *Hamdi*'s analysis helps to highlight the reverse mistake: assuming that a prohibition on military trials (the greater power) means that military detention (the lesser power) is prohibited as well.

Consider some examples of this mistake made in opposition to U.S. detention policy. Dissenting in *Hamdi*, Justice Antonin Scalia appears to recognize some of the difficulty in transposing the rules across different coercive domains, but he still does it:

*Milligan* is not exactly this case, of course, since the petitioner was threatened with death, not merely imprisonment. But the reasoning and conclusion of *Milligan* logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than Milligan's trial by military tribunal.<sup>91</sup>

Judge Motz's opinion in *Al-Marri* commits a similar error. Invoking historical practice, Judge Motz contends that "subjecting [al-Marri] to military detention . . . is at odds with the Government's repeated recognition that criminal terrorist conduct . . . merits punishment by a

aspects of the IHL regime such as introducing (externally verifiable) safeguards for conditions of confinement and meaningful review of individual cases. Those considerations, however, are beyond the scope of the present discussion. See *supra* note 7 and corresponding text (explaining conditions of confinement and procedural safeguards as a separate prerequisite for detention authority).

<sup>89</sup> *Ex parte Milligan*, 71 U.S. 2 (1866).

<sup>90</sup> *Hamdi*, 542 U.S. 507, 522 (2004) (citations omitted); see also *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005).

<sup>91</sup> *Hamdi*, 542 U.S. at 567–68 (Scalia, J., dissenting).

civilian court.”<sup>92</sup> Judge Motz then proceeds to document prior instances of the government’s prosecution of individuals before civilian tribunals, and also notes that “[e]ven the civilian coconspirators of the *Quirin* petitioners were tried for their crimes in civilian courts.”<sup>93</sup> Turning to legal precedent, Judge Motz states that *Ex parte Milligan* held that “Milligan was a ‘non-belligerent’ and so ‘not subject to the law of war,’ ” which, she suggests, stands for the proposition that “civilians within this country (even ‘dangerous enemies’ . . . who perpetrate ‘enormous crime[s]’ on behalf of ‘secret’ enemy organizations bent on ‘overthrowing the Government’ of this country) may not be subjected to military control.”<sup>94</sup> The generic reference to “military control” involves significant slippage. It treats trial (Milligan’s predicament) and detention (al-Marri’s predicament) as one and the same.<sup>95</sup> And even if Judge Motz were correct—that IHL precludes “military control” of the detention of civilians—it would prove little. It would foreclose only *military* detention, not preventive detention under civilian control.

Notably, Judge Motz’s analysis might be salvaged if she were correct on another point—that *Ex parte Milligan* also held that the government could not detain Milligan without trial because of his nonbelligerent status. Judge Motz submits that the *Milligan* Court “*unequivocally* rebuffed an argument *precisely parallel* to the one the Government makes here—that an unarmed civilian captured in his home in the United States, rather than while ‘carrying a rifle . . . on a . . . battlefield,’ could be ‘detained under military authority for the duration of the conflict.’ ”<sup>96</sup> The *Hamdi* plurality also implies that only if the Court had deemed Milligan a prisoner of war, or belligerent, could he have been detained without trial.<sup>97</sup> *Milligan*, however, was hardly unequivocal in those respects.

Although the *Milligan* Court held that the petitioner could not be detained without trial as a prisoner of war, the Court concluded that Milligan should be released through a statutory scheme that provided for preventive detention of citizens who were held “otherwise than as prisoners of war.”<sup>98</sup> That is, the Court concluded that Milligan could seek a discharge from detention under the terms of the governing congressional act. Those terms stipulated that “no person shall be discharged” unless a court accepts an oath of allegiance and commitment that “he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion, or the supporters thereof.” The judge was empowered, “if the public safety shall require it,” to compel “him or her to enter into recognizance, with or without surety . . . to keep the

<sup>92</sup> *Al-Marri*, 534 F.3d 213, 237 n.19 (4th Cir. 2006).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 230–31. A similar analytic move occurs in the appellants’ brief on behalf of al-Marri. Corrected Brief of Appellants, *supra* note 82, at 31–32 (“*Quirin* reinforces *Milligan*’s core holding that military jurisdiction over individuals in the United States requires that they be combatants under longstanding law of war principles. The *Quirin* saboteurs were admitted combatants; Milligan was not and al-Marri is not.”); see also Brief for the Petitioners (*Boumediene*), *supra* note 84, at 37 n.34; Brief for Center for National Security Studies et al. Supporting Petitioner and Reversal, *supra* note 82, at 9–10, 12.

<sup>95</sup> See also *Al-Marri*, 534 F.3d at 235–36 & 236 n.18 (arguing that artificially defining a civilian as a combatant for detention purposes is the same as artificially defining a civilian as a combatant for military trial); see also Petition for Writ of Certiorari (*Al-Marri*), *supra* note 83, at 29.

<sup>96</sup> *Al-Marri*, 534 F.3d at 237 (quoting *Hamdi*, 542 U.S. at 522) (emphasis added). Judge Motz also refers to “the *Milligan* Court’s express rejection of the Government’s argument that Milligan, even if not subject to military trial, could be held by the military as a prisoner of war during the duration of hostilities.” *Id.* at 236–37 (citing *Milligan*, 71 U.S. at 131).

<sup>97</sup> *Hamdi*, 542 U.S. at 522.

<sup>98</sup> An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, §2, 12 Stat. 755 (1863).



peace and be of good behavior.”<sup>99</sup> The Supreme Court well understood that those stipulations would apply to Milligan; the majority referred directly to those provisions as applying to the petitioner.<sup>100</sup> The broader point deserves emphasis: the same Court that held a civilian could not be tried before a military court also permitted his continued detention as long as he failed to meet judicially administered conditions. *Milligan* thus demonstrates the error in assuming that a status prohibition in the criminal trial context readily translates into the same status prohibition for administrative detention.

Finally, opponents and proponents of U.S. detention policy have also conflated the powers to target and to detain. Litigators and scholars, in opposition to U.S. policy, suggest that civilians who are subject to detention would also be subject to direct targeting. One form of this error is by omission: their analyses do not acknowledge that a broad class of civilians are detainable but not, as a result, legitimate military targets.<sup>101</sup> Examples of such individuals (indirect participants in hostilities) include civilians engaged in logistical transport and civilians who indirectly aid and abet terrorist acts committed by a military force. Other opponents (and supporters<sup>102</sup>) of U.S. policy suggest that the power to detain is derivative of, or coextensive with, the power to kill.<sup>103</sup> As table 1 demonstrates, however, indirect participants are detainable but not targetable. Of course, IHL could have drawn a different normative line—permitting the

<sup>99</sup> *Id.* These conditions on detention and release of individuals who aided and abetted the enemy were unexceptional. A year earlier, an order of the Department of the Pacific directed that military commanders “will promptly arrest and hold in custody all persons against whom the charge of aiding and abetting the rebellion can be sustained, and under no circumstances will such persons be released without subscribing the oath of allegiance to the United States.” WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 827 (2d rev. ed. 1920); cf. Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism*, 31 VT. L. REV. 447, 476 n.137 (2007) (stating that “General Wright, head of the Department of the Pacific, ordered the arrest and detention—but not the trial—by military authorities of persons ‘aiding and abetting the rebellion’” (emphasis added)). The Lieber Code, published in 1863, also provided that “[t]he commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it he may arrest, confine, or detain them.” U.S. War Dep’t, *Instructions for the Government of the Armies of the United States in the Field by Order of the Secretary of War*, General Orders No. 100, Art. 134 (Apr. 24, 1863); see also Samuel Klaus, *Introduction to THE MILLIGAN CASE* 3, 10 (Samuel Klaus ed., 1929).

<sup>100</sup> *Milligan*, 71 U.S. at 131 (“If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the act of Congress of March 3d, 1863. . . . [T]he court was required to liberate him on taking certain oaths prescribed by the law, and entering into recognition for his good behavior.”); see also *id.* at 135 (Chase, C.J., dissenting).

<sup>101</sup> Corrected Brief of Appellants, *supra* note 94, at 22 (“If al-Marri is a ‘combatant,’ as the President claims, he—and anyone else the President alleges is ‘associated with al Qaeda’—could lawfully be shot in broad daylight on the streets of the United States.”); Brief for the Petitioners (*Boumediene*), *supra* note 84, at 42–43; cf. Brief Amicus Curiae of National Institute of Military Justice in Support of Petitioners, *supra* note 85, at 17–18, 21, 25.

<sup>102</sup> *Al-Marri*, 534 F.3d at 315 (Wilkinson, J., concurring in part, dissenting in part) (“The principle of discrimination requires warring nations to limit their military targets to those persons who actually pose a military threat. At the same time, it allows warring nations to detain those who do represent a military threat, ensuring that such persons, but only those persons, are removed from the field of conflict.”); *id.* at 319 (Wilkinson, J.) (“[O]nly enemy combatants, both lawful and unlawful, (and civilians who take a direct part in hostilities) may be detained by the military in accordance with the laws of war.”).

<sup>103</sup> Brief of Petitioner-Appellee at 32, *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005) (No. 05-6396), available in 2005 WL 1410172 (“Where the military has authority to shoot enemy soldiers, such as on the battlefield in Afghanistan, the military has power to capture and detain those soldiers instead for some period of time. But unless the government genuinely contends it had the right to shoot Padilla where he was seized by the military—in a jail cell in Manhattan—there is no necessarily-included power to detain him militarily instead, let alone a clearly stated power to do so.”); Brief for the Petitioners (*Boumediene*), *supra* note 84, at 36 (“The [Authorization for Use of Military Force’s] implied authorization to detain, however, does not extend to persons who could not properly be subjected to military force (including the imposition of detention) under the long-understood laws of war.”); *id.* at 40,

lethal targeting of indirect participants. Part III discusses the consequences of eroding that distinction.

### III. THE IMPACT OF CONFLATION AND DISAGGREGATION

The Obama administration will have to reconsider the U.S. detention scheme in light of the existing legal debates. This part analyzes the intended and unintended consequences of the category mistakes made in those debates: the introduction of unnecessary ambiguity into the international legal regime, and the legal and policy impacts of the specific positions that have been taken in support and in repudiation of U.S. detention practices.

#### *General Costs of Misclassification*

All the category mistakes discussed above undercut the clarity of law. Opponents and proponents of U.S. policy have jumbled the characteristics of classes of actors subject to different coercive measures. In some instances, litigants' claims and judges' conclusions have glossed over the lack of support for a course of action (restricting U.S. detention policy). In other instances, the government has eschewed the solid legal foundation for a course of action—detaining civilians who have not directly participated in hostilities—choosing instead to break apart the well-settled classificatory scheme. As a result of all these maneuvers, the clarity of IHL has suffered.

Introducing such indeterminacy into the law produces undesirable results, most especially for long-term compliance with the law. One reason concerns the normative foundation of legal compliance, which turns on law's legitimacy. According to widely accepted theories of compliance, clarity is central to the legitimacy of international law; when the legitimacy of international law erodes, its operators are more likely to refrain from applying and enforcing it, and its subjects are more likely to resist its dictates.<sup>104</sup> A second reason concerns the rational underpinnings of compliance, which place a premium on clearly defining those actions that constitute cooperative and noncooperative behavior.<sup>105</sup> On this logic, ambiguity in the law—whether on targeting, detention, or trials—undermines the conveyance of information required for a system of incentives to operate effectively. Actors who are subject to a coercive measure should be given notice and information specifying inappropriate behavior and its consequences. If individuals lack clear information, they will not alter their behavior accordingly. The question for both of these bases for compliance turns, in part, on the threshold of legitimacy or of information required to promote compliance, and whether the misclassifications pose a significant threat to meeting the threshold. In that respect, some of the distortions of IHL are more egregious than others.

42–43, 43 n.44. *But cf. id.* at 41 n.41. In contrast, for an example of an analysis that is conscious of potential differences between targeting and detention and, therefore, argues primarily on normative grounds for importing some rules from one domain into the other, see Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008).

<sup>104</sup> THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 52 (1990); *cf.* ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 10, 126–27 (1995).

<sup>105</sup> Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1863 (2002); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 427 (2000).

*Consequences of Opponents' Positions*

The positions taken by opponents of U.S. policy risk numerous negative consequences. As mentioned above,<sup>106</sup> I do not scrutinize the motivations of either proponents or opponents of these policies. That said, it seems clear that opponents were not necessarily trying to confuse existing categories and were certainly not trying to undermine the legitimacy of IHL. Instead, they may very well have attempted to redraw a line (which they may not fully understand) so as to construct a regime that would be more protective, as they see it, of civilians. Their arguments nevertheless produce results that undercut other positions and interests that they value.

One set of consequences results from the lack of legal support for some of the opponents' positions (e.g., the notion that IHL forbids the detention of civilians). Indeed, the framing of their positions may create the misimpression that a solid legal edifice supports their claims. Accordingly, insufficient attention has been paid to alternative legal and policy grounds for developing principled constraints on security detentions. More viable approaches may be found in political struggle and policy changes, not litigation; or in constitutional law, not IHL directly.

Indeed, although IHL does not draw a line between Groups B and C with regard to the authority to detain, a line between those groups may have significance for domestic law. An important constitutional distinction may separate "combatants"—including "unlawful *combatants*" (direct participants in hostilities)—from civilians with respect to classes of individuals that may be subject to military control. U.S. constitutional law could refer to IHL to define those group boundaries. Indeed, if the Supreme Court reaches the merits in *Al-Marri*, the Justices may require Congress to pass legislation explicitly subjecting "civilians" (e.g., indirect participants) to detention if Congress wishes to include that group. The government would be forced to hold its political feet to the fire—to issue a plain statement that it is invoking the authority to detain civilians who do not directly participate in hostilities—as a precondition to availing itself of such extraordinary constitutional power. But such a plain statement rule would derive from domestic law. The argument that IHL itself precludes the detention of civilians pursues the wrong line of argument.

Positions adopted by opponents endanger other interests that they highly value. First, maintaining the position that detention is permissible only for direct participants (and members of armed forces) exerts pressure on U.S. authorities to develop expansive definitions of direct participation. As I explain below, a broad definition of direct participation—or "combatancy"—leads to unintended consequences in the targeting context. Chief among them is that it may, in effect, expand the range of civilians who lose their immunity from attack.

Second, a restrictive definition of direct participation has significant implications for actors outside of the targeting context. For example, under a restrictive definition, private military contractors whose activities constitute indirect participation would not be detainable. That outcome is inconsistent with the views and objectives of those opponents who would be understandably concerned about the potential security threats posed by such actors. The result could also vex military commanders who need to detain enemy private contractors during hostilities. Indeed, the Third Geneva Convention and past practice clearly contemplate the need to detain

<sup>106</sup> See *supra* note 2.

such individuals.<sup>107</sup> Similarly, a narrow definition may have rights-restricting effects in other areas of concern to opponents—such as the recruitment of child soldiers. Parties to a conflict are prohibited from using children to participate directly in hostilities. The narrower the general definition of direct participation, the wider the loophole in the child soldiers regime becomes.<sup>108</sup>

Third, the conflation of trial and detention powers can exert pressure on decision makers who exercise power in defining the content of trial rights (e.g., judges and administration officials). Such actors would have to worry that their decisions in the trial context might have spillover effects in the detention regime. Restricting the military's administration of trials, for example, would potentially limit the military's detention powers as well. Such spillover effects could upset the balance of security interests and rights protections in the detention context. Restrictions on the government's ability to confine particular individuals may also lead to expansive definitions of criminal liability to compensate for the loss of detention authority.<sup>109</sup>

One would thus have to worry about two types of problems. First, some decision makers might be reluctant to permit progressive developments in the trial context for fear of such effects. Second, other decision makers might engineer or support developments in the trial context so as to produce effects on detention. It would be better if decision makers in both situations struck the appropriate balance strictly with respect to fair-trial criteria—without either fear or hope that their choices would affect detention rights.<sup>110</sup> Maintaining a barrier between the two coercive domains removes the pressure on decision makers to act otherwise.

Finally, the conflation of targeting and detention powers may result in self-fulfilling consequences in terms of who can be subject to lethal force. Opponents have suggested that if the government can detain particular civilians (indirect participants), it could also shoot them on sight. In other words, these opponents have asserted that detention and targeting authority are coextensive. If opponents lose their one claim (and indirect participants are thus subject to detention), they will have unintentionally lent support to the result that such individuals are now legitimate military targets. That outcome is a product of the logical structure of their argument. Of course, other institutional actors may work to counteract such a "logical" effect by drawing different lines. This essay provides guidance for the lines that should be drawn in accordance with IHL.

### *Consequences of Proponents' Positions*

Actors who have crafted and supported U.S. detention policies have employed justifications that can also lead to unintended and undesirable consequences.

<sup>107</sup> See *supra* note 19.

<sup>108</sup> See *infra* note 119 and corresponding text (discussing in particular U.S. obligations under the new Protocol on Children in Armed Conflict).

<sup>109</sup> For example, if the government is disabled from preventively detaining individuals, the administration and receptive judges might support theories of criminal liability for mere membership in an organization or they might support the expansion of conspiracy charges in general. An amicus brief on behalf of detainees, oddly enough, suggests pursuing the latter path. Brief for Center for National Security Studies et al. Supporting Petitioner and Reversal, *supra* note 82, at 15 ("The government need not wait for an actual attack to occur before intervening to apprehend a suspected terrorist. That is what the law of criminal conspiracy is for.")

<sup>110</sup> These situations assume that the decision makers exercise some control over fair-trial rights but cannot expect to exercise direct control over detention rights. Consider, for example, a judge on a military commission, a federal district court judge presented with a case involving jurisdiction of military courts, or an administration official drafting new procedures for terrorism trials.

First, the government's expansive definition of "unlawful combatants" may spill into the targeting domain. Such spillover effects may be intended and welcomed in some quarters.<sup>111</sup> Nevertheless, by officially designating indirect participants as "combatants," the government now appears to license the targeting of a broad category of civilians who would otherwise be immune from attack. Are all "combatants" under the Military Commissions Act also legitimate military targets? Consider the implication of applying the Act's general definition to situations of defending U.S. interests from attack. Would not the faculty and students at U.S. military academies constitute lawful targets of attack? Would private military contractors not lose their immunity from attack under the logic of the Act's definition of combatants?<sup>112</sup> As these examples indicate, the U.S. position introduces unnecessary, if not dangerous, confusion into the law on targeting. Furthermore, a recent report by the well-respected UN special rapporteur on terrorism and human rights suggests that the U.S. targeting of terrorists exceeds the limits of direct participation.<sup>113</sup> The government issued an official reply to that suggestion: "Narrowly focused military operations against *enemy combatants* are clearly consistent with the law of armed conflict."<sup>114</sup> The reply, however, is ambiguous and unconvincing in light of the government's exorbitant definitions of combatancy elsewhere.

Second, expansive notions of "combatancy" undermine counterterrorism efforts by cropping the definition of terrorism. Several international and domestic laws and policies define terrorism as violence committed against two groups: "noncombatants" and civilians who do not actively or directly participate in hostilities. The more narrowly the definitional boundary of those groups is drawn, the wider the range of actions that would not count as terrorism.<sup>115</sup> Yet U.S. detention policy draws an exceptionally narrow boundary. As a result of its application to the counterterrorism context, attacks on propagandists, financiers, and logistical workers would not technically be covered by the prohibition on terrorism. These results spell trouble for existing codifications of terrorism in the International Convention for the Suppression of the Financing of Terrorism,<sup>116</sup> UN Security Council resolutions,<sup>117</sup> and U.S. federal law for administrative agencies.<sup>118</sup> In particular, it took years of diplomacy to secure those international agreements. The erosion of the clarity of existing definitions of terrorism is thus especially unsettling at this juncture.

<sup>111</sup> The U.S. government may independently be interested in watering down the direct participation limit on targeting. As the discussion in the text suggests, those efforts risk dangerous and unjustified expansions of targeting authority.

<sup>112</sup> The temporal element of the direct participation standard—civilians lose immunity from attack only "for such time" as they directly participate in hostilities—has arguably been eliminated or softened in targeting contexts. Hence, the spillover consequences are even greater than one might otherwise imagine.

<sup>113</sup> UN Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, para. 42, UN Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007) ("emphasiz[ing] that while the targeting of a combatant directly participating in hostilities is permitted under the laws of war, there are no circumstances in which the targeting of any other person can be justified").

<sup>114</sup> U.S. Diplomatic Mission to the UN in Geneva, United States Comments on the Report on the Mission to the United States of America of the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, at 16, para. 42, available at <<http://geneva.usmission.gov/Press2007/Scheinin-Response-HRC.pdf>> (emphasis added).

<sup>115</sup> Criminal defendants charged for acts of "terrorism," for example, could argue that the targets of their violence contributed to the enemy's war effort.

<sup>116</sup> International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 ILM 270 (2000).

<sup>117</sup> See, e.g., SC Res. 1566 (Oct. 8, 2004).

<sup>118</sup> See, e.g., 22 U.S.C. §2656f(d)(2) (2006) ("the term 'terrorism' means premeditated, politically motivated violence perpetrated against *noncombatant targets* by subnational groups or clandestine agents") (emphasis added).

Third, expansive definitions of direct participation interfere with legal positions that the United States holds outside of the targeting and terrorism contexts. For example, the government's employment of private military contractors is premised on a narrow conception of direct participation. If these private contractors were considered direct participants, the present U.S. force structure would be fundamentally illegal. Additionally, expansive definitions of direct participation complicate U.S. treaty commitments under the Protocol on children in armed conflict. In ratifying the Protocol, the United States submitted an "Understanding" disfavoring a broad definition of direct participation to ensure that the government's recruitment, training, and deployment practices did not run afoul of the treaty.<sup>119</sup> The understanding, however, is inconsistent with U.S. definitions of direct participation that have been advanced in the conflict with Al Qaeda.<sup>120</sup>

Finally, a classification of detainees that fails to differentiate direct and indirect participants may imperil the fair treatment of differently situated individuals under confinement. In particular, there may be sound normative and instrumental reasons to differentiate the treatment of the two groups. The U.S. scheme, however, subjects all security detainees to a uniform process and standard of treatment. The concern about that undifferentiated approach would be overcome if the system accorded all civilian detainees the highest legally available standards of protection. It might be argued that current U.S. practice achieves that result.<sup>121</sup> But U.S. military commissions clearly do not. Indeed, a fundamental problem is that civilians—regardless of whether they are direct or indirect participants—are subject to military commissions under the broad definition of combatants. Once an individual is designated an "enemy combatant," the government submits him or her to the same trial process. The UN counterterrorism rapporteur recently criticized this feature of the combatant classification with regard to military commissions,<sup>122</sup> and the government's reply was nonresponsive, stating: "The United States may not under our law try any civilian before a military commission. Rather, jurisdiction is limited to unlawful *enemy combatants*. As a result, we question whether speculation about an

<sup>119</sup> The Protocol requires states to ensure that children under the age of eighteen "do not take a direct part in hostilities." Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Art. 1, May 25, 2000, S. TREATY DOC. NO. 106-37, at 32, 33 (2000), 39 ILM 1285, 1287 (2000). Upon ratification, the United States adopted the following understanding:

the phrase "direct part in hostilities"—

(i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and

(ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.

UN, Multilateral Treaties Deposited with the Secretary-General (as of Jan. 2, 2009), available at <<http://treaties.un.org/>>; cf. Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735, §2442(d) (2008). The U.S. letter of submittal makes plain that the definition in the Protocol and understanding is indistinguishable from the IHL direct participation standard. See S. TREATY DOC. NO. 106-37, *supra*, at 37 (the "term 'direct' has been understood in the context of treaties relating to the law of armed conflict (including [ICRC] commentaries on the meaning of the provisions of Protocol I to the Geneva Conventions)"); *id.* at 38.

<sup>120</sup> See also Goodman & Jinks, *supra* note 7, at 2656.

<sup>121</sup> Cf. Coard v. United States, *supra* note 49, para. 48 (discussing such a solution in an analogous context).

<sup>122</sup> UN Human Rights Council, *supra* note 113, para. 30 ("In the case of persons who might be categorized by the United States as unlawful enemy combatants but who in fact were not involved as combatants in an armed conflict, the possibility arises that civilians [may] be tried by a military commission.").



individual being misclassified warranted inclusion in the [UN] report.”<sup>123</sup> The U.S. definition of unlawful enemy combatants, however, clearly sweeps in civilians. The government’s reply thus begs the question of the legality of that element of its judicial system.

#### IV. CONCLUSION

The U.S. detention of civilians in the conflict with Al Qaeda has sparked enormous controversy. The Obama administration will no doubt want to learn from these debates, and the Supreme Court will necessarily confront them if it reaches the merits in *Al-Marri v. Pucciarelli*. In ascertaining the best legal and policy responses to challenges that have arisen following September 11, proponents and opponents of U.S. detention practices have veered far from the IHL regime. These distortions of IHL have led the nation down troubling paths. They sacrifice compliance with the international legal regime and they threaten humanitarian and security interests in present and future conflicts. The Supreme Court, the Obama administration, Congress, and legal advocates now have a new opportunity to decide whether and how to align U.S. legal discourse and policy with the longstanding international legal framework.

<sup>123</sup> U.S. Diplomatic Mission to the UN in Geneva, *supra* note 114, at 12, para. 30 (emphasis added).