

ARTICLES

ASSESSING THE LEGALITY OF COUNTERTERRORISM MEASURES WITHOUT CHARACTERIZING THEM AS LAW ENFORCEMENT OR MILITARY ACTION

*Gregory E. Maggs**

TABLE OF CONTENTS

I.	INTRODUCTION.....	662
II.	HOW DEBATES OVER THE LEGALITY OF COUNTERTERRORISM MEASURES NOW TURN ON WHETHER THE MEASURES ARE CHARACTERIZED AS LAW ENFORCEMENT OR MILITARY ACTION	665
	A. <i>Authority to Use Force in Foreign Countries</i>	666
	B. <i>Authority to Use Force Domestically</i>	669
	C. <i>Targeted Killing</i>	673
	D. <i>Detention</i>	677
	E. <i>Trials</i>	681
	F. <i>Search and Seizure</i>	684
	G. <i>Duty to Provide Security</i>	687
	H. <i>Compensation for Harm</i>	689
	I. <i>Other Issues</i>	692
III.	THE PROBLEMS WITH DETERMINING THE LEGALITY OF COUNTERTERRORISM MEASURES BY ATTEMPTING TO CHARACTERIZE THEM AS LAW ENFORCEMENT OR MILITARY ACTIONS	693
	A. <i>No Standard for Making the Characterization Exists</i>	694
	B. <i>Counterterrorism Measures Fit Neither Characterization Perfectly</i>	696

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

C.	<i>Either Characterization Sometimes Produces Unfavorable Results</i>	697
D.	<i>The Current System Gives the Government Considerable Discretion to Determine the Legality of Its Own Action</i>	699
IV.	THE ADVANTAGES OF SEEING COUNTERTERRORISM MEASURES AS A SEPARATE FORM OF GOVERNMENTAL ACTION.....	702
A.	<i>Benefits of Judging Counterterrorism Measures as Counterterrorism Measures</i>	702
B.	<i>How to Change the Current Approach</i>	704
C.	<i>For the Skeptical: Consider the Alternatives</i>	706
D.	<i>Emerging Examples of the Recommended Approach</i>	707
V.	CONCLUSION	709

I. INTRODUCTION

Nations around the world are responding to terrorism with a combination of law enforcement measures and military action.¹ In the United States, for example, the federal government has prosecuted terrorists responsible for the 1993 World Trade Center bombing,² the 1998 assaults on U.S. embassies in Kenya and Tanzania,³ and the attacks of September 11, 2001.⁴ At the same time, the government also has been using its armed forces against al Qaeda terrorists in Afghanistan, Iraq, Sudan, Yemen, and other places.⁵ Other countries also are fighting terrorism with both criminal proceedings and military force, including Egypt,⁶ Israel,⁷ Russia,⁸ Turkey,⁹ and the United Kingdom.¹⁰

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

2. *United States v. Salameh*, 152 F.3d 88, 108 (2d Cir. 1998) (describing prosecution of terrorists who detonated van full of explosives under one World Trade Center tower in New York City, killing six, injuring more than one thousand, and causing damages amounting to “hundreds of millions of dollars”).

3. Transcript of Sentencing Hearing at 80, *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001) (No. S(7), 98 Cr. 1023), available at <http://cryptome.org/usa-v-ubl-78.htm> (sentencing of terrorists who participated in bombing of American embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, killing 214 people and wounding many others).

4. See Neil A. Lewis, *Moussaoui Given Life Term by Jury over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1 (reporting conviction of Zacarias Moussaoui for conspiracy with hijackers involved in 9/11 attacks).

5. See generally U.S. Department of Defense, Official Website, <http://www.defenselink.mil> (last visited May 26, 2008) for complete official news on the military campaign being fought by the United States against terrorism. See *infra* Part II for a discussion of several military responses.

6. See, e.g., Associated Press, *Egypt Sentences 6 to Death for Attacks*, N.Y. TIMES, Jan. 14, 1996, at 12 (describing military process used against suspected terrorists); Susan Sachs, *An Investigation in Egypt Illustrates Al Qaeda's Web*, N.Y. TIMES, Nov. 21, 2001, at A1 (describing major antiterrorism prosecutions in Egypt).

7. See, e.g., Uri Dan, *Israel Blows Away 2 Top Terrorists*, N.Y. POST, Nov. 2, 2005, at 30

When governments respond to terrorism using military force, a debate often arises about the legality of the steps taken. As this Article will show with numerous examples, the debate has familiar contours. Opponents of military counterterrorism measures typically argue that they violate legal guarantees designed to protect criminal suspects. They assert, for instance, that domestic and international laws do not permit the government simply to shoot suspected terrorists or to detain them indefinitely or to try them outside of ordinary courts.¹¹ But governments and their supporters have a standard reply to this objection. They assert that they are not merely addressing crime, but instead are fighting a war against terrorism, and that the law applicable to armed conflict allows them to employ the military measures that they have used.¹² In the United States, the familiar refrain is: we took these kinds of actions in World War II when we were fighting the Nazis and the Japanese, and therefore we can take them in the war that we are fighting against al Qaeda.¹³

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

(describing targeted killing of suspected terrorists); Charles A. Radin, *Palestinian Leader Convicted in Israel: Five Life Terms Sought in Killings*, BOSTON GLOBE, May 21, 2004, at A8 (describing prosecution of terrorists in Israel).

8. See, e.g., Nadezhda Gaisenkova & Alexander Shashkov, *Russia Court to Examine Appeal of 3 Chechens Convicted for Terror*, ITAR-TASS (Russ.), Nov. 9, 2005, at 27 (discussing criminal prosecution of terrorists in Russia); David Holley, *Separatists Tied to '99 Bombings*, L.A. TIMES, May 1, 2003, at A5 (discussing Russian military responses to terrorist bombings of apartment buildings in Moscow).

9. See, e.g., Sam Cohen, *Turkey's Military Rulers Post a Sharp Decline in Terrorism*, CHRISTIAN SCI. MONITOR, Nov. 25, 1980, at 6 (addressing Turkey's military responses to terrorism); Andrew Finkel, *A Foregone Conviction: The Trial of Kurdish Leader Abdullah Ocalan Is Set to Begin in Turkey amid Questions of Fairness*, TIME INT'L, June 7, 1999, at 39 (discussing anticipated trial of Kurdish leader).

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

11. See *infra* Parts II.C-E for an examination of the arguments of those who oppose targeted killing, indefinite detention, and special tribunals for suspected terrorists.

12. See *infra* Parts II.A-H for a discussion of the government's arguments with respect to the use of military force against terrorists, the targeted killing of terrorists, the indefinite detention of terrorists, and other antiterrorism measures.

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

Take the issue of targeted killing. A country engages in targeted killing when it locates and summarily kills a suspected terrorist. The United States has engaged in this practice in its struggle against terrorism. For example, in the summer of 2006, the Air Force killed Abu Musab al-Zarqawi, the leader of al Qaeda in Iraq, by locating his safe house and then dropping bombs on his house.¹⁴ A few years earlier, the Central Intelligence Agency (“CIA”) fired missiles at suspected members of al Qaeda in Yemen, without trying to bring them into custody.¹⁵ Israel also has done targeted killing, attacking Palestinians in the West Bank, Syria, and other places.¹⁶ And Russia reportedly once sent a poisonous letter to kill a Chechen leader.¹⁷

Is the targeted killing of suspected terrorists lawful? As explained more fully below,¹⁸ everyone agrees that ordinary law enforcement rules in the United States (and in most other places) do not generally permit the police simply to kill criminal suspects. Instead, they must attempt to arrest them. The police can use deadly force only to prevent a suspect from escaping, and even then only if the suspect poses a threat of serious physical harm to others and, if feasible, the police previously have given the suspect a warning.¹⁹ In contrast, long-established principles of the law of war say that military forces generally may target and kill enemy forces in the course of a lawful armed conflict wherever they find them, and without giving them a chance to surrender, unless the enemy forces already have laid down their weapons and given themselves up.²⁰

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

14. See Farnaz Fassih et al., *Fateful Strike: Zarqawi's Death, Completion of Cabinet Raise Hopes in Iraq*, WALL ST. J., Jun. 9, 2006, at A1 (describing air strike and related raids).

15. Reuters, *Rights Group Questions Attack: Amnesty Says U.S. Missile Strike in Yemen May Be Illegal*, WASH. POST, Nov. 9, 2002, at A21 (describing incident in which CIA killed persons suspected of participating in bombing of USS *Cole*). For further discussion of this dispute in Yemen, see *infra* Part II.C.

16. E.g., Joel Greenberg, *Palestinian Militant Slain in Damascus: Israel Blamed; Revenge Vowed*, CHI. TRIB., Sept. 27, 2004, § 1, at 3 (describing Israel's practice of targeted killing).

17. Peter Baker, *Russia Moving to Eliminate Chechen Rebel Leaders*, WASH. POST, Apr. 20, 2004, at A13 (detailing reports that Russia killed guerrilla called “Khattab” in 2002 with poisoned letter).

18. See *infra* Part II.C for a description of legal rules that may apply to targeted killing.

19. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (rejecting unqualified use of deadly force against fleeing felony suspects).

20. See U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE ¶ 29 (1956) (citing Convention Respecting the Laws and Customs of War on Land, Annex art. 23(c), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631).

In this Article, I make three claims concerning this issue. In Part II, I claim that characterizing counterterrorism measures as either law enforcement efforts or military actions for the purpose of determining their legality is now, and long has been, a central feature of counterterrorism law. Disputes over characterization have arisen in no fewer than eight different subject areas, ranging from targeted killing to the responsibility of the government to provide compensation to persons inadvertently injured by the governmental action. Disagreements about characterization have arisen not only in the United States but also in many foreign countries. And these disputes are not new; they have occurred for many decades.

In Part III, I claim that determining the legality of governmental responses to terrorism by attempting to characterize counterterrorism measures as either law enforcement or military action is not a good system. Terrorists, and counterterrorism efforts, generally defy simple characterization into one category or another because terrorists resemble enemy combatants in some ways and criminal suspects in others. In addition, the different subject areas in which the issue of characterization arises vary from each other in so many respects that a characterization that makes sense in one area does not necessarily make sense in another. In fact, as the Article will show, the United States has found it difficult to take a consistent view on characterization, despite the centrality of the question.

In Part IV, I claim that the law would be improved by moving to a system that judges counterterrorism measures as counterterrorism measures without trying to characterize them as either law enforcement actions or military actions. In other words, the United States and other nations ought to develop new standards to regulate governmental responses to terrorism rather than debating whether the laws of war or the rules of law enforcement should apply. Already imperfect examples of this alternative approach are emerging. They include both the Israeli Supreme Court's 2006 decision on targeted killing and, to some extent, the thinking behind the Military Commissions Act of 2006.²¹

II. HOW DEBATES OVER THE LEGALITY OF COUNTERTERRORISM MEASURES NOW TURN ON WHETHER THE MEASURES ARE CHARACTERIZED AS LAW ENFORCEMENT OR MILITARY ACTION

The following demonstrates how, for many years, courts and others have judged the legality of counterterrorism measures by characterizing them as law enforcement or military action.²² This observation holds true for a wide variety of different kinds of responses to terrorism in domestic, foreign, and international law.

21. See *infra* Part IV.D for a discussion of examples that illustrate efforts to address counterterrorism measures as counterterrorism measures.

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

A. *Authority to Use Force in Foreign Countries*

May a nation lawfully respond to a terrorist incident by using military force in a foreign country? This question often has great importance. Terrorist organizations sometimes have foreign bases of operation. In addition, after committing their assaults, terrorists often flee across borders. For these reasons, the United States and other nations may wish to make counterattacks abroad. The UN Charter²³ generally forbids nations to use military force in foreign countries. Article 2(4) says: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."²⁴ But the UN Charter has an exception in Article 51 recognizing that nations have a right to use force when responding in self-defense to an "armed attack."²⁵

So the precise legal issue is this: if a nation responds to a terrorist incident by using military force in a foreign country, does that violate the UN Charter? If the terrorist incident was an "armed attack" within the meaning of Article 51, then the response may be lawful. But if the terrorist incident was not an "armed attack," but instead merely a crime, then the response would violate the prohibition in Article 2(4).

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

First, in 2004, at the request of the United Nations General Assembly, the International Court of Justice issued an advisory opinion on the legality of a lengthy fence or separation barrier constructed by Israel.²⁶ Israel built the barrier to block terrorists from entering Israel.²⁷ The barrier partially follows Israel's internationally recognized borders, but in many places it also runs through the occupied territory of the West Bank.²⁸

The International Court of Justice considered, among other issues, whether Article 51 could excuse Israel's use of force (i.e., the building of the fence)

23. U.N. Charter art. 2, para. 4.

24. *Id.*

25. *Id.* art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . .").

26. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 201 (July 9) (concluding that construction of wall by Israel was "contrary to international law").

27. *Id.* at 182.

28. *Id.* at 184.

outside of its borders as a measure taken in self-defense.²⁹ The court concluded that it could not,³⁰ giving two alternative reasons. First, the court said that “Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State” and that “Israel does not claim that the attacks against it are imputable to a foreign State.”³¹ Second, the court said that the threat originated from territory that Israel controls, and that Article 51 therefore does not apply.³²

In other words, the court concluded that Israel cannot use force but must instead use ordinary law enforcement measures to deal with the terrorist threat.³³ Praising the decision, Professor Mary Ellen O’Connell wrote:

[T]he situation Israel faced at the time of the Advisory Opinion was more akin to terrorist attacks perpetrated by the state’s own nationals within the state’s own territory because of the measure of control Israel exercises over the occupied territories. Terrorist attacks by nationals within their own state have invariably been treated as criminal.³⁴

But not everyone agrees with this position. Judge Buergenthal of the International Court of Justice filed a separate declaration in the case. Although he principally asserted that the court should not have exercised jurisdiction,³⁵ he also specifically disagreed with the court’s reasons for rejecting Israel’s self-defense argument. He asserted that the UN Charter does not permit self-defense only against armed attacks from other nations and that it was “irrelevant” whether Israel controlled the occupied territories.³⁶ In his view, in assessing Israel’s position under Article 51, the court should have judged Israel’s actions by their “necessity and proportionality.”³⁷ In other words, Judge Buergenthal did not think that nations were necessarily restricted to using only law enforcement measures against terrorist acts.

Second, on September 11, 2001, members of al Qaeda infamously hijacked and crashed four aircraft in the United States. The United States responded by

29. *See id.* at 194 (noting that Israel made this contention in its report to Secretary General). Israel did not press a substantive argument before the court. It contended that the General Assembly had acted in an ultra vires manner in seeking an advisory opinion because the Security Council was actively addressing the Israeli-Palestinian conflict. *Id.* at 148. In addition, because the General Assembly was seeking an advisory opinion and had not named Israel as party to the lawsuit, Israel had no duty to make a substantive argument. 2004 I.C.J. at 245 (declaration of Judge Buergenthal). But the court noted that Israel previously told the United Nations General Assembly that it was constructing the fence in self-defense. *Id.* at 194 (advisory opinion) (citing S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001)).

30. *Id.* at 194.

31. *Id.*

32. *Id.*

33. *See* Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT’L L. 435, 451 (2005) (summarizing court’s reasoning in rejecting Israel’s position).

34. *Id.*

35. 2004 I.C.J. at 240 (declaration of Judge Buergenthal).

36. *See id.* at 242-43 (analyzing both issues).

37. *Id.*

using military force against al Qaeda in Afghanistan. In pursuing this action, the United States took the position that it was responding to an “armed attack” (as opposed to a mere criminal act) and that it was justified in using military force in self-defense.³⁸ The United States also persuaded the North Atlantic Treaty Organization (“NATO”) to agree to this characterization of the terrorist attacks.³⁹

But not all observers share the United States’ and NATO’s view. The Security Council itself never specifically called the terrorist incidents an “armed attack.” Instead, it issued a diplomatically worded statement both condemning the assaults and “[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter.”⁴⁰ The statement did not specifically say that the Charter authorized the use of force by the United States.⁴¹

Professor Sean Murphy has offered an explanation for why some might consider the events of September 11 not to rise to the level of an armed attack.⁴² Murphy notes that the terrorists did not operate as military or paramilitary units and that they were armed only with box cutters—“not weapons one would normally associate with military or paramilitary units.”⁴³ Although he does not endorse the position, he raises the question whether “this was not an ‘armed attack’ but, rather, a use of force or intervention below the threshold of armed attack, which is perhaps better characterized as a conventional (albeit heinous) criminal act.”⁴⁴ If that is the correct characterization, then only law enforcement measures would be permissible.

Third, in 1998, following attacks by al Qaeda on U.S. embassies in Kenya and Tanzania, the United States responded by firing missiles at suspected al Qaeda targets in Sudan and Afghanistan.⁴⁵ The United States informed the Security Council, again as Article 51 requires, that it was acting in self-defense to

38. See, e.g., Letter from the Permanent Representative of the United States of America to the United Nations, Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) (“In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.”); see also U.N. Charter art. 51 (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . .”).

39. Lord Robertson, NATO Sec’y Gen., Statement of NATO Support of the United States Following September 11, 2001 (Oct. 2, 2001) (transcript available at <http://www.nato.int/docu/speech/2001/s011002a.htm>) (declaring that 9/11 attacks on United States would be regarded as “armed attack” on NATO member, justifying full NATO response).

40. S.C. Res. 1368, *supra* note 29.

41. See *id.* (articulating Security Council’s unequivocal condemnation, expression of deepest sympathy, enjoiner to all states to “bring to justice” those responsible and to cooperate to prevent future terrorism, and expression of readiness, though remaining “seized of the matter”).

42. See Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 45-51 (2002) (discussing factors that can make terrorist attack reach threshold of “armed attack”).

43. *Id.* at 45.

44. *Id.* at 45-46.

45. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1349 (Fed. Cir. 2004).

an armed attack.⁴⁶

But others disagree with this characterization of the bombings. Sudan has protested the action.⁴⁷ And some scholars have judged the United States in law enforcement terms; Professor Jules Lobel has said: “It is self-serving hypocrisy for the United States to attack alleged terrorist facilities, violate other nations’ sovereignty, and kill innocent civilians, using evidence that would not suffice to sustain a criminal prosecution.”⁴⁸

Other extraterritorial uses of military force to respond to terrorist attacks have led to similar debates about the applicability of Article 51. The United Nations General Assembly condemned the United States’ 1986 strike on Libya in response to a nightclub bombing in Berlin.⁴⁹ And the Security Council (with the United States abstaining) condemned Israel’s 1985 bombing of the Palestinian Liberation Organization headquarters near Tunis in response to an attack on Israeli tourists in Cyprus.⁵⁰ In each of these many incidents, observers disagreed about the legality of a government response to terrorism because they disagreed about whether to characterize it as a response to crime or an act taken in an armed conflict.

B. Authority to Use Force Domestically

Is it lawful for a nation to use military force domestically in response to terrorism? The laws of each country may provide a slightly different answer. But again the issue generally turns on whether the perpetrators are characterized as criminal suspects or as enemy combatants and thus whether the government in

46. The second sentence of Article 51 requires a nation exercising self-defense to notify the Security Council. U.N. Charter art. 51. The United States fulfilled this requirement by sending a letter describing the reasons for the attacks in Sudan and Afghanistan. Letter from the Permanent Representative of the United States of America to the United Nations, Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998).

47. See Craig Turner & Doyle McManus, *Sudan Gets Little Support for a U.N. Probe of U.S. Attack*, L.A. TIMES, Aug. 25, 1998, at A6 (reporting on Sudan’s attempt to involve United Nations in dispute).

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

49. The United Nations General Assembly passed a resolution that “[c]ondemns the military attack perpetrated against the Socialist People’s Libyan Arab Jamahiriya on 15 April 1986, which constitutes a violation of the Charter of the United Nations and of international law.” G.A. Res. 38, ¶ 1, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/38 (Nov. 20, 1986). The United States had viewed the terrorist incident as an armed attack and had argued that it could use military force in self-defense under Article 51. See Letter from the Acting Permanent Representative of the United States of America to the United Nations, Addressed to the President of the Security Council, U.N. Doc. S/17990 (Apr. 14, 1986) (reporting justification for attack to Security Council).

50. See Associated Press, *Israel Calls Bombing a Warning to Terrorists*, N.Y. TIMES, Oct. 2, 1985, at A8 (reporting on attack and Israel’s hopes for its effects). Israel asserted that it was acting in self-defense in response to an armed attack as permitted under Article 51. *Id.* But the Security Council (with the United States abstaining) passed a resolution saying that it “[c]ondemns vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct.” S.C. Res. 573, ¶ 1, U.N. Doc. S/RES/573 (Oct. 4, 1985).

responding is fighting crime or fighting a war. Usually there are two bodies of law, one for law enforcement and one for armed conflicts, and governmental responses to terrorism must be pigeonholed into one or the other whenever a legal dispute arises. In the United States, as in other countries, federal law limits the domestic use of military forces. The Posse Comitatus Act,⁵¹ in particular, makes it a crime for any government official to use the armed forces for law enforcement purposes.⁵² The historic purpose of the Act was to end the use of federal troops in the former areas of the Confederacy after the Civil War.⁵³ But the law has modern justifications as well. The Act preserves federalism by making state and local governments responsible for most law enforcement. It also ensures that soldiers who lack training for law enforcement activities do not violate the civil liberties of citizens.

But is responding to terrorism a law enforcement measure or a military action? Two recent incidents have raised this question. One involves an American citizen named Jose Padilla. According to facts stipulated (but not proved):

Padilla . . . associated with forces hostile to the United States in Afghanistan and took up arms against United States forces in that country in our war against al Qaeda. Upon his escape to Pakistan from the battlefield in Afghanistan, Padilla was recruited, trained, funded, and equipped by al Qaeda leaders to continue prosecution of the war in the United States by blowing up apartment buildings in this country. Padilla flew to the United States on May 8, 2002, to begin carrying out his assignment⁵⁴

Federal agents took Padilla into custody at Chicago's O'Hare International Airport.⁵⁵ They initially held him as a material witness to a grand jury proceeding.⁵⁶ But the President later designated him an "enemy combatant."⁵⁷ Afterward, with the blessing of the federal courts, the U.S. military held Padilla in a naval brig for several years.⁵⁸ Still later, the United States indicted Padilla and took him into criminal custody.⁵⁹

51. 18 U.S.C. § 1385 (2000).

52. The Posse Comitatus Act says:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

Id. A "*posse comitatus*" is a "group of citizens who are [sic] called together to help the sheriff keep the peace or conduct rescue operations." BLACK'S LAW DICTIONARY 1200 (8th ed. 2004).

53. *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948).

54. *Padilla v. Hanft*, 423 F.3d 386, 388 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006).

55. *Id.*

56. *Id.* at 390.

57. *Id.*

58. *Id.*

59. *Padilla v. Hanft*, 126 S. Ct. 1649, 1650 (2006) (Kennedy, J., concurring in denial of certiorari) (describing Padilla's classification and reclassification).

In extensive litigation, the federal courts considered a number of issues regarding Padilla's confinement.⁶⁰ Padilla at one point challenged his custody by the military as a violation of the Posse Comitatus Act.⁶¹ He alleged that military forces were aiding law enforcement by detaining him.⁶² But the United States District Court for the Southern District of New York did not see Padilla's detention as a law enforcement matter. It said:

Padilla is not being detained by the military in order to execute a civilian law or for violating a civilian law, notwithstanding that his alleged conduct may in fact violate one or more such laws. He is being detained in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active combat, and to prevent him from becoming reaffiliated with that organization.⁶³

The court therefore found no violation of the Posse Comitatus Act.⁶⁴ Again, characterization determined which legal regime applied to the governmental action.

The second incident involved a pair of snipers who terrorized the District of Columbia, Maryland, and Virginia in 2002. John Muhammad and Lee Malvo drove through suburban areas with one or both of them shooting people at random through a hole they had made in the trunk of their car.⁶⁵ The attacks went on for weeks with ten people killed and thousands terrified.⁶⁶ Muhammad and Malvo never made their aims fully clear, although they did ask for money at one point.⁶⁷

In an effort to apprehend the snipers, the Federal Bureau of Investigation ("FBI") requested assistance from the Department of Defense.⁶⁸ The Department of Defense responded by providing an Army surveillance airplane.⁶⁹

60. See *Padilla*, 423 F.3d at 397 (upholding Padilla's confinement).

61. See *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 588 n.9 (S.D.N.Y. 2002) (discussing merits of Padilla's claim that United States violated Posse Comitatus Act by detaining him), *rev'd sub nom.* *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

62. *Padilla*, 233 F. Supp. 2d at 588 n.9.

63. *Id.*

64. *Id.*

65. See James Dao, *Rifle Is Being Used as Linchpin in Sniper Case*, N.Y. TIMES, Nov. 7, 2003, at A25 (describing rifle shooters used to aim through hole in car's trunk); Adam Liptak, *Teenage Sniper to Plead Guilty in Two Shootings*, N.Y. TIMES, Sept. 25, 2004, at A10 (reporting on plea agreement reached with younger shooter).

66. Carol Morello, *Va. Court Upholds Muhammad Sentences: Sniper Could Be Sent to Another State*, WASH. POST, Apr. 23, 2005, at B1.

67. See Carol Morello, *Victims' Relatives Still Ask, 'Why?': Snipers' Motives Remain Unresolved*, WASH. POST, Mar. 11, 2004, at A11 (speculating on motives of snipers).

68. Donald H. Rumsfeld, Sec'y of Def., & Gen. Richard Myers, Chairman of the Joint Chiefs of Staff, News Briefing at the Department of Defense (Oct. 17, 2002) (transcript available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3793>) [hereinafter DoD Sniper Briefing].

69. See Del Quentin Wilber et al., *Spy Planes to Hunt Sniper*, BALT. SUN, Oct. 16, 2002, at 1A (reporting on Defense Secretary Rumsfeld's approval of use of military planes carrying nonmilitary law enforcement personnel).

The aircraft had the ability to cover a large area and to use special electronic equipment to detect small arms fire, possibly including shots fired by the snipers from their rifle.⁷⁰ If the Department of Defense could provide instantaneous information about the location of gun shots across the area, the FBI hoped that it could locate and apprehend the snipers.⁷¹

Critics argued that the surveillance activity violated the Posse Comitatus Act because it was a form of military assistance to law enforcement.⁷² But others disagreed; some supporters of the plan said that the Posse Comitatus Act does not prevent the military from engaging in “passive” support to law enforcement.⁷³ When asked at a press conference about the legality of the Army’s assistance to the FBI, Secretary of Defense Donald Rumsfeld simply said: “We have looked at our assets and capabilities and tried to determine what we might do to be of assistance to them that’s consistent with the law, the Posse Comitatus law. . . . We do know that what we’re doing is fully consistent with the law, full stop.”⁷⁴ Secretary Rumsfeld also likened the action to “combat air patrols flying, looking for airplanes that might crash into the White House or the Capitol or the Pentagon or the World Trade Center.”⁷⁵ He said that military forces can prevent a “bad act” and “it’s not quite law enforcement.”⁷⁶ Thus, again, rather than attempting to view military responses to terrorism as a separate category, and to determine what rules should apply to that category, the disputants contested whether the responses should be viewed either as law enforcement measures or as military actions taken in an armed conflict.

The United States is not alone in debating this kind of issue. In 1995, the Russian Constitutional Court had to decide whether Russia’s constitution banned the use of military forces against Chechen rebels.⁷⁷ The Russian Federation was using military force pursuant to decrees issued by President Yeltsin and pursuant to resolutions of the State Duma (which is the lower house

70. See Steve Vogel, *Military Aircraft with Detection Gear to Augment Police*, WASH. POST, Oct. 16, 2002, at A1 (reporting on technical capabilities of military aircraft in which civilian law enforcement personnel flew).

71. See *id.* (detailing cooperation between FBI and military).

72. See, e.g., Adam Clymer, *Big Brother Joins the Hunt for the Sniper*, N.Y. TIMES, Oct. 20, 2002, at C3 (discussing wisdom and legality of tasking aircraft to this purpose); Fred Kaplan & Lyle Denniston, *Army Plane Joins Sniper Hunt: Some Question Use of Surveillance Craft*, BOSTON GLOBE, Oct. 17, 2002, at A1 (noting disagreement among analysts as to legality of operation).

73. See, e.g., Kaplan & Denniston, *supra* note 72 (making distinction between active and passive support).

74. DoD Sniper Briefing, *supra* note 68.

75. *Id.*

76. *Id.*

77. See Judgment of the Constitutional Court of the Russian Federation of 31 July 1995 on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya (1995), translation available at [http://www.venice.coe.int/docs/1996/CDL-INF\(1996\)001-e.asp](http://www.venice.coe.int/docs/1996/CDL-INF(1996)001-e.asp) (considering constitutionality of decree issued by President Yeltsin to use military force against Chechen rebels) [hereinafter Judgment concerning the situation in Chechnya].

of Russia's bicameral parliament).⁷⁸ The Federation Council of the Russian Federation (which is the upper chamber of the parliament) and other plaintiffs challenged this domestic use of military force in the Russian Constitutional Court.⁷⁹

The Federation Council argued that the use of armed forces in Russia's territory under Russia's constitution is only permitted if the Federal Council declares a state of emergency or martial law.⁸⁰ In other words, the Federation Council argued that military measures could not be used because there was no recognized armed conflict. Presumably, the Federation Council believed that the Russian government could use only conventional law enforcement techniques to address the situation. But the Russian Constitutional Court upheld the use of force.⁸¹ It rejected the idea that only law enforcement agencies could respond to the crisis.⁸² The court noted that the Duma had concluded that "the disarmament of the unlawful armed militia raised in that republic, which were using tanks, missile launchers, artillery systems and war planes, was impossible in principle without the use of regular troops."⁸³ The court thus saw the situation more like an armed conflict.

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

C. *Targeted Killing*

Targeted killing is the practice of shooting or using bombs or other methods to kill suspected terrorists without attempting to arrest them. The United States has used this counterterrorism measure a number of times. In June 2006, the United States killed the al Qaeda leader in Iraq, Abu Musab al-Zarqawi, by dropping two 500-pound bombs on what al-Zarqawi thought was a safe house.⁸⁴ In January 2006, the United States attempted to kill Ayman al-Zawahiri, reputedly Osama bin Laden's chief lieutenant, by destroying a house in Pakistan.⁸⁵ As it turned out, Al-Zawahiri was not in the building, but the strike killed other suspected terrorists (as well a large number of women and

78. *Id.* ¶ 1.

79. *Id.*

80. *Id.*

81. *Id.* ¶ 6.

82. Judgment concerning the situation in Chechnya, *supra* note 77, ¶ 6.

83. *Id.* (internal quotation marks omitted).

84. John F. Burns, *After Long Hunt, U.S. Bombs Kill Al Qaeda Leader in Iraq*, N.Y. TIMES, June 9, 2006, at A1 (reporting successful killing of al-Zarqawi by air strike).

85. See Carlotta Gall & Douglas Jehl, *U.S. Raid Killed Qaeda Leaders, Pakistanis Say*, N.Y. TIMES, Jan. 19, 2006, at A1 (detailing air strikes in northeastern Pakistan).

children).⁸⁶ In December 2004, the United States killed al Qaeda operations chief Hamza Rabia with a missile near the Afghanistan and Pakistan border.⁸⁷ In November 2002, the United States fired a missile at and killed Qaed Salim Sinan al-Harethi, the senior al Qaeda leader based in Yemen, as he was riding in a car in Yemen.⁸⁸ In fact, these five incidents actually represent only a small fraction of the total number of suspected terrorists targeted by the United States. The *Los Angeles Times* reported in January 2006 that “the United States is expanding a top-secret effort to kill suspected terrorists with drone-fired missiles as it pursues an increasingly decentralized Al Qaeda.”⁸⁹ The details concerning the number of strikes apparently are classified, but the reporter counted a total of nineteen separate targeted killings that have occurred so far.⁹⁰

Other nations also have used targeted killing to dispense with suspected terrorists. Russia, as mentioned above, reportedly sent a poison letter to the person suspected of masterminding the 1999 Moscow apartment bombing.⁹¹ Israel has killed scores of suspected members of Hamas, using everything from helicopter gunships to exploding cell phones.⁹²

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

Consider first the rules regarding law enforcement. In the United States, the Fifth Amendment plainly says: “No person shall . . . be deprived of life, liberty, or property, without due process of law”⁹³ And the Fourth Amendment similarly prohibits “unreasonable searches and seizures.”⁹⁴ Based on these provisions, our courts have held that “[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead.”⁹⁵ Instead, the police are supposed to arrest suspects so that courts may determine their innocence or guilt

86. *See id.* (reporting that strike killed two senior al Qaeda leaders as well as eighteen civilians).

87. Mohammed Khan & Douglas Jehl, *Attack Kills a Top Leader of Al Qaeda, Pakistan Says*, N.Y. TIMES, Dec. 4, 2005, § 1, at 24.

88. James Risen & Judith Miller, *C.I.A. Is Reported to Kill a Leader of Qaeda in Yemen*, N.Y. TIMES, Nov. 5, 2002, at A1.

89. Josh Meyer, *CIA Expands Use of Drones in Terror War*, L.A. TIMES, Jan. 29, 2006, at A1.

90. *Id.*

91. *Chechnya Vow Cast a Long Shadow*, MOSCOW TIMES, Feb. 26, 2008, available at 2008 WLNR 3691248.; *see also* Baker, *supra* note 17 (discussing Russian efforts to thwart Chechen rebel movement).

92. Between 2000 and mid-2003, the Israeli government reportedly engaged in the targeted killing of about 150 Palestinian militants. Molly Moore, *Israel's Lethal Weapon of Choice: As Assassinations of Militants Increase, Citizens' Uneasiness Grows*, WASH. POST, June 29, 2003, at A1 (reporting Israeli use of “targeted killings”).

93. U.S. CONST. amend. V.

94. *Id.* amend. IV.

95. *E.g.*, *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (discussing constitutionality of use of deadly force to prevent escape of felony suspects).

and rule on their punishment.

Multilateral treaties embody similar protections. The International Covenant on Civil and Political Rights, which the United States and most other nations have ratified, says: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁹⁶ The European Convention on Human Rights says: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”⁹⁷ The European Convention contains exceptions allowing the police to kill criminal suspects but only “in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.”⁹⁸

The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials⁹⁹ addresses the subject in detail. Paragraph 9 says that “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”¹⁰⁰ Paragraph 10 further provides:

[L]aw enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons¹⁰¹

Under all of these various rules, targeted killing of *criminal suspects* is illegal.

But the laws governing armed conflict are different. When military forces are fighting a war, they may attack enemy forces wherever they find them without affording them an opportunity to surrender.¹⁰² True, some prohibitions on assassination apply to the military. For example, the Annex to Hague Convention Number IV, Respecting the Laws and Customs of War on Land, says: “In addition to the prohibitions provided by special Conventions, it is

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

97. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

98. *Id.* art. 2(2)(b).

99. Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27 – Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 112, U.N. Doc. A/CONF.144/28/Rev.1 (1991), available at <http://www.asc41.com/undocs.htm> (follow “Eighth UN Congress on the Prevention of Crime and Treatment of Offenders” hyperlink; then follow A/CONF.144/28/REV.1 hyperlink).

100. *Id.* at 112, ¶ 9.

101. *Id.* at 112, ¶ 10.

102. See U.S. DEP’T OF ARMY, *supra* note 20, ¶ 29 (1956) (addressing acceptable force after enemies surrender (citing Convention Respecting the Laws and Customs of War on Land, Annex art. 23(c), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631)). This has been the law for a long time. In the United States, the Lieber Code of 1863 (promulgated as a military order to govern Union forces during the Civil War) famously declared: “Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war” ADJUTANT GEN.’S OFFICE, GENERAL ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 15 (Gov’t Printing Office 1898) (1863), available at <http://www.yale.edu/lawweb/avalon/lieber.htm>.

especially forbidden . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army . . .”¹⁰³ The U.S. Army interprets this provision “as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy ‘dead or alive.’”¹⁰⁴ But the army also says that the provision does not “preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.”¹⁰⁵ So under the U.S. view, military forces could kill suspected terrorists if they were enemy combatants.

A recent dispute illustrates how the categorization of targeting killing affects the analysis of its legality. In November 2002, as mentioned above, the United States used an unmanned Predator aircraft to attack a car in Yemen.¹⁰⁶ The car was carrying six men, all of whom died in the attack.¹⁰⁷ One of the men was Abu Ali al-Harithi, an al Qaeda member suspected of masterminding the October 2000 attack on the USS *Cole* in Yemen.¹⁰⁸ Another one of the men in the car was an American citizen named Kamal Derwish, also known by the alias Ahmed Hijazi.¹⁰⁹ The United States and the government of Yemen worked together in planning and executing the attack.¹¹⁰

Subsequently, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (“UN Special Rapporteur”) wrote a letter to the United States asking the government to explain the incident and justify the killing of the men in the car.¹¹¹ The letter referred to the provisions of the International Covenant on Civil and Political Rights quoted above.¹¹² In the letter, the UN Special Rapporteur said that the action “constitutes a clear case of extrajudicial killing.”¹¹³ In other words, the UN Special Rapporteur saw the

103. Convention Respecting the Laws and Customs of War on Land, Annex art. 23(c), Oct. 18, 1907, 36 Stat. 2277, 2302, 1 Bevans 631.

104. U.S. DEP’T OF ARMY, *supra* note 20, ¶ 31.

105. *Id.*

106. Reuters, *supra* note 15.

107. *Id.*

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

109. *Id.*

110. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Asma Jahangi, Addendum: Summary of Cases Transmitted to Governments and Replies Received*, ¶¶ 611-12, U.N. Doc. 2004/7/Add.1 (Mar. 24, 2004); U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, Asma Jahangi, Submitted Pursuant to Commission on Human Rights Resolution 2002/36*, ¶ 37, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (prepared by Asma Jahangir), available at http://www.extrajudicialexecutions.org/reports/E_CN_4_2003_3.pdf [hereinafter *Report of the Special Rapporteur*].

111. *Report of the Special Rapporteur*, *supra* note 110, ¶ 37.

112. See Letter from Jeffrey De Laurentis, Chief of Section, Political & Specialized Agencies of the Permanent Mission of the U.S.A. to the U.N. Office at Geneva, to the Secretariat of the Comm’n on Human Rights, 2, U.N. Doc. E/CN.4/2003/G/80 (Apr. 22, 2003), available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=3500 (follow “E/CN.4/2003/G/80” hyperlink) [hereinafter *U.S. Yemen Response*] (describing Special Rapporteur’s letter).

113. *Id.* (quoting U.N. Doc. E/CN.4/2003/3, *supra* note 110, ¶ 39).

incident as an impermissible method of law enforcement.

The United States had a different view. It saw the military action not as a law enforcement measure but instead as a method of fighting a war against an armed enemy. In its response, the United States said: “The United States . . . disagrees with the premise of the letter and the conclusions contained in the report that military operations against enemy combatants could be regarded as ‘extrajudicial executions by consent of Governments.’”¹¹⁴ In its view, the “conduct of a government in legitimate military operations, whether against Al Qaida operatives or any other legitimate military target, would be governed by the international law of armed conflict.”¹¹⁵ Under that law, the United States said, “enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat.”¹¹⁶ Accordingly, the United States concluded, “Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.”¹¹⁷

D. Detention

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

Under the domestic law of the United States, law enforcement agencies generally may detain criminal suspects only for the purpose of bringing them before a court for trial.¹¹⁸ Suspects are entitled to appear before a magistrate without unreasonable delay after they are arrested.¹¹⁹ This magistrate must order them released if probable cause does not exist to believe that they have committed a crime.¹²⁰ Even if probable cause does exist, the suspects then have a right to a speedy trial.¹²¹ If they do not receive a speedy trial, they are entitled to dismissal of any indictment and to release.¹²²

114. *Id.* (quoting U.N. Doc. E/CN.4/2003/3, *supra* note 110, ¶ 39).

115. *Id.* at 2-3.

116. *Id.* at 5. *Hors de combat* means “out of the fight.” The term usually refers to combatants who have become disabled by injury or illness.

117. Letter from De Laurentis, *supra* note 112, at 5.

118. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (stating that under Constitution, government may not detain individuals without adequate procedural protections).

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

120. See FED. R. CRIM. P. 5(b) (acknowledging probable cause filing requirement when suspect has been arrested without warrant).

121. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”); 18 U.S.C. § 3161(c)(1) (2000) (providing right to trial, ordinarily within seventy days after defendant first appears before judicial officer).

122. See 18 U.S.C. § 3164(c) (“No detainee . . . shall be held in custody pending trial after the

Similar rules govern law enforcement outside the United States. For example, Article 5 of the European Convention on Human Rights provides: “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence”¹²³

But the law of armed conflict differs in several very important ways when it comes to questions of detention. The law of armed conflict contemplates that in a war, a nation may need to capture numerous enemy combatants and may need to hold them for many years. The United States, for example, imprisoned hundreds of thousands of captured German, Italian, and Japanese soldiers during World War II.¹²⁴ Although litigants and commentators recently have disputed some of these points, the following rules appear to apply to the detention of enemy combatants.

First, the law of armed conflict apparently permits a government to detain all enemy belligerents regardless of whether they have committed any crimes. In *Hamdi v. Rumsfeld*,¹²⁵ a plurality of the Supreme Court concluded that the “capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] [of] war.’”¹²⁶ Justice Thomas, a fifth vote for this proposition, agreed that the government may detain captured belligerents without charges.¹²⁷ This rule apparently applies regardless of the location in which the government captured the belligerent or whether the belligerent is a United States citizen.¹²⁸

Second, the government apparently needs to follow only minimal procedures for initially determining who is an enemy combatant and who is not. These procedures seem to place the burden of proof on the detainee.¹²⁹ They may establish a presumption in favor of the government’s evidence even if the evidence is based on hearsay.¹³⁰ It may also be that the government does not

expiration of such ninety-day period required for the commencement of his trial.”); FED. R. CRIM. P. 48(b)(3) (permitting dismissal of indictment for unreasonable delay in bringing defendant to trial).

123. European Convention, *supra* note 97, art. 5.

124. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2106 n.271 (2005) (discussing enemy combatants taken by United States during World War II).

125. 542 U.S. 507 (2004) (plurality opinion).

126. *Hamdi*, 542 U.S. at 518 (first alteration in original) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)).

127. See *id.* at 589 (Thomas, J., dissenting) (expressing agreement with plurality that government can detain enemy combatants).

128. See *Padilla v. Hanft*, 423 F.3d 386, 391-92 (4th Cir. 2005) (interpreting Supreme Court’s definition of “enemy combatant” set forth in *Hamdi* to include U.S. citizen captured on U.S. soil), *cert. denied*, 126 S. Ct. 1649 (2006).

129. See *Hamdi*, 542 U.S. at 534 (plurality opinion) (discussing habeas petitioner’s burden to rebut government evidence that he is enemy combatant).

130. See *id.* at 533-34 (noting that government may use hearsay to establish enemy combatant status).

have to afford the detainee the right to counsel.¹³¹

Third, if the military determines that a person is a belligerent, it may detain him at least for the duration of the conflict in which he was captured.¹³² This rule allowed the United States to hold German, Italian, and Japanese prisoners in World War II until the hostilities ceased.

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

Consider again the case of Jose Padilla, the American citizen who fought against the United States in Afghanistan and who was captured at O'Hare International Airport in Chicago.¹³³ When Padilla challenged the legality of his confinement in a naval brig without charges, a debate quickly arose over how to characterize him. The district court viewed Padilla as a criminal suspect. It said:

Simply stated, this is a law enforcement matter, not a military matter. The civilian authorities captured Petitioner just as they should have. At the time that Petitioner was arrested . . . any alleged terrorist plans that he harbored were thwarted. From then on, he was available to be questioned—and was indeed questioned—just like any other citizen accused of criminal conduct. This is as it should be.¹³⁴

Because the government had not brought criminal charges against Padilla, the district court ordered Padilla released, just as it would order the release of any criminal suspect whom the government had not charged.¹³⁵ The district court left open the possibility that the government could continue to hold Padilla if it were to bring criminal charges against him.¹³⁶

Outside organizations agree with this characterization of terrorist suspects. Amnesty International, for example, has declared that the detention of suspected terrorists without charges by the United States is a “continuing violation of human rights standards which the international community must not

131. The plurality opinion in *Hamdi* did not reach this issue because Hamdi had counsel. *Id.* at 539. The United States military traditionally has not afforded counsel to detainees who dispute their status as combatants. See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997) (stating procedures for tribunals to use in deciding status of persons detained in conflict and making no provision for counsel); see also Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351, 409 (2006) (noting that “there is no historical precedent for the appointment of counsel to enemy prisoners of war in order to challenge the legality of their confinement”).

132. See *Hamdi*, 542 U.S. at 518 (plurality opinion) (concluding that United States may hold enemy combatants for “duration of the particular conflict”).

133. See *supra* notes 54-64 and accompanying text for a discussion of the facts and the decision in the *Padilla* case.

134. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 691 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006).

135. See *id.* at 692 (ordering release of Padilla).

136. See *id.* at 692 n.14 (noting government could still bring charges against Padilla).

ignore.”¹³⁷ It has urged that “detainees should be charged with recognisably criminal offences and tried within a reasonable time, or released.”¹³⁸

But the Court of Appeals for the Fourth Circuit expressed a different view when it considered the *Padilla* case. It reversed the district court because it agreed that the President could characterize Padilla as an “enemy combatant” rather than as a mere criminal suspect.¹³⁹ The court then held: “Because . . . Padilla is an enemy combatant, and because his detention is . . . necessary . . . in order to prevent his return to the battlefield, the President is authorized . . . to detain Padilla as a fundamental incident to the conduct of war.”¹⁴⁰ The Supreme Court never resolved this issue because, before it could review the decision, the United States obtained an indictment against Padilla and began treating him as an ordinary criminal suspect, thus mooted the question.¹⁴¹

The debate about whether to characterize persons accused of terrorism as criminal suspects or enemy combatants in determining whether the government has the power to detain them is not confined to the United States. For example, nearly five decades ago, the Irish government held a man named Gerard Richard Lawless for several months without charges.¹⁴² It justified this detention on grounds that Lawless was suspected of belonging to the Irish Republican Army (“IRA”), an organization described as “a secret army engaged in unconstitutional activities and using violence to attain its purposes”¹⁴³ and blamed for an “alarming increase in terrorist activities.”¹⁴⁴ The government contended that it needed to detain Lawless “to prevent the maintaining of military or armed forces other than those authorised by the Constitution.”¹⁴⁵ Thus, just as the United States saw Jose Padilla as an enemy combatant belonging to al Qaeda, the Irish government saw Lawless as a soldier for the IRA.

Lawless had a different view. He saw himself as a mere criminal suspect, and he argued that his detention without charges violated Article 5 of the European Convention on Human Rights.¹⁴⁶ This provision, as quoted above, prohibits arrests other than for the purpose of bringing a criminal suspect before

137. Amnesty International UK, *USA: One Year On – The Legal Limbo of the Guantanamo Detainees Continues*, Jan. 10, 2003, http://www.amnesty.org.uk/news_details.asp?NewsID=14285.

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

139. *Padilla*, 423 F.3d at 394-95.

140. *Id.* at 392.

141. See *Padilla v. Hanft*, 126 S. Ct. 1649, 1650 (2006) (Kennedy, J., concurring) (discussing Court’s denial of certiorari due to Padilla’s status as criminal suspect).

142. *Lawless v. Ireland* (No. 3), 1 Eur. Ct. H.R. 15, 17 (1961).

143. *Id.* at 31.

144. *Id.* at 32.

145. *Id.* at 35 (internal quotation marks omitted).

146. *Id.* at 21-28.

a judge “on reasonable suspicion of having committed an offence.”¹⁴⁷ Lawless argued that the Irish government had not brought him before a judge or asserted any charges against him.¹⁴⁸

The European Court of Human Rights sided with Lawless’s characterization, but it denied him any relief. It concluded that the detention was contrary to Article 5 of the European Convention because the Irish government had not charged him with any offense.¹⁴⁹ But it could offer no remedy because it concluded that the Irish government had followed the proper procedures for derogating from the European Human Rights Convention.¹⁵⁰

E. Trials

Criminal suspects have many rights when they come to trial in civilian courts. In the United States, for example, the Fifth Amendment grants criminal suspects in federal court a general right to due process and a specific right not to be tried absent a grand jury indictment,¹⁵¹ and the Sixth Amendment affords them a right to have a speedy and public trial, to be tried by a jury, to be tried in the district where the crime occurred, and to confront the witnesses against them.¹⁵² Multilateral treaties also require the United States and other nations to provide important trial rights. For example, the International Covenant on Civil and Political Rights mandates that criminal suspects have a trial before an independent judge¹⁵³ and appellate review by a separate appellate tribunal.¹⁵⁴

In contrast, some enemy combatants do not have the same rights when they come to trial before a “military commission.” A military commission is a tribunal consisting of a panel of military officers or a combination of military officers and civilians.¹⁵⁵ The United States has used military commissions throughout its history to try persons accused of war crimes.¹⁵⁶ During and immediately after World War II, for instance, Allied forces used military commissions to try many

147. European Convention, *supra* note 97, art. 5(1)(c). The provision also allows for arrest if “reasonably considered necessary” to prevent commission of an offense, or to prevent fleeing after the commission of an offense. *Id.* These exceptions to the arrest prohibition were not at issue in *Lawless*.

148. *See Lawless*, 1 Eur. Ct. H.R. at 17, 21-28 (discussing argument in relation to Article 5 of European Convention).

149. *See id.* at 27-28 (explaining why Lawless’s detention was contrary to Article 5).

150. *See id.* at 47 (noting measures taken by Irish government to derogate properly from European Convention). The European Convention provides that “[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.” European Convention, *supra* note 97, art. 15(1). But a nation must follow specific procedures to effect a derogation. *Id.* art. 15(3).

151. U.S. CONST. amend. V.

152. *Id.* amend. VI.

153. ICCPR, *supra* note 96, art. 14(1).

154. *Id.* art. 14(5).

155. BLACK’S LAW DICTIONARY, *supra* note 52, at 1013.

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

German soldiers and civilians accused of war crimes.¹⁵⁷ These war crimes included many different kinds of offenses, including the offense of fighting as an unlawful combatant.¹⁵⁸

The Supreme Court has held that military commissions, absent contrary legislation, do not have to follow the same trial procedures that civilian criminal courts use.¹⁵⁹ Military commissions, for example, need not provide persons suspected of war crimes with a trial by jury.¹⁶⁰ They also do not have to state the charges against a suspect with the specificity of an ordinary criminal indictment.¹⁶¹

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

This debate has gone on for several years in the United States. In November 2001, shortly after the infamous attacks of September 11, President Bush ordered the creation of military commissions to try foreign terror suspects now held at Guantánamo Bay, Cuba.¹⁶² This order described these suspects not as criminals but as persons engaged in an armed conflict against the United States.¹⁶³ The order guaranteed them the right to a “full and fair” trial but did not guarantee them all the rights that criminal defendants in the United States would have.¹⁶⁴ As a result, great controversy arose over the legality of this counterterrorism measure. One of the detainees facing trial by military commission, Salim Ahmed Hamdan, argued before the Supreme Court that if he is accused of terrorist violence, he should be treated as a criminal suspect and charged in a federal civilian court.¹⁶⁵ The government, in contrast, contended

157. See MAGGS, *supra* note 1, at 383 & n.1 (noting prominent use of military tribunals after World War II and describing these tribunals).

158. See *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) (discussing various types of violations of laws of war).

159. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2788-91 (2006) (recognizing that procedures used in post-World War II military commissions, established in common law fashion, did not follow civilian or military procedures, but holding that Congress by statute now has mandated procedures military commission must follow).

160. *Ex parte Quirin*, 317 U.S. at 44 (noting that no jury is required for trial by military tribunal).

161. See *In re Yamashita*, 327 U.S. 1, 17 (1946) (noting war crime charges tried by military tribunals need not be as specific as those for common law indictments).

162. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001) (authorizing and describing military commissions).

163. See *id.* at 57,833 (describing actions of international terrorists and United States' obligation to respond).

164. See *id.* at 57,834-35 (describing military commissions, their procedures, and rights afforded to war criminals).

165. See Brief for Petitioner Salim Ahmed Hamdan at 9, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (noting United States' limited use of military commissions and traditions favoring

that he was an enemy combatant and that a military trial therefore could charge him.¹⁶⁶

The Supreme Court avoided resolving the basic question of characterization raised in this debate. In *Hamdan v. Rumsfeld*,¹⁶⁷ the Court held that even if Hamdan were an enemy combatant and could be tried by a military commission, the President had improperly constituted the military commissions at Guantánamo.¹⁶⁸ The Court ruled that procedural and evidentiary rules violated a provision of the Uniform Code of Military Justice that it interpreted to require the rules of military commissions to be uniform with the rules of courts-martial unless the President finds uniformity impracticable.¹⁶⁹ (As explained below, Congress has responded by enacting a new law to govern military commissions.¹⁷⁰)

The European Court of Human Rights has confronted a similar question of characterization. During the 1990s, Turkey used the Ankara State Security Court to try persons suspected of terrorism.¹⁷¹ This court was not called a military commission but it resembled one because it included a military officer as one of its judges.¹⁷² In 1994, this special court convicted Selim Sadak and several others of terrorist offenses in connection with their support for the banned Kurdistan Workers' Party ("PKK").¹⁷³ Sadak and the others subsequently sued Turkey in the European Court of Human Rights, claiming that the inclusion of a military officer on the Ankara State Security Court violated the European Convention on Human Rights.¹⁷⁴

use of civilian courts).

166. Brief for Respondents at 28-29, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (arguing that Hamdan's characterization as enemy combatant allowed for trial by military commission).

167. 126 S. Ct. 2749 (2006).

168. *Hamdan*, 126 S. Ct. at 2786-98 (arguing that commissions, as created by President, did not comply with American common law of war and therefore lacked power to try Hamdan).

169. *Id.* at 2790-91 (discussing uniformity code). Article 36(a) of the Uniform Code of Military Justice gives the President authority to promulgate rules of evidence and procedures for various military tribunals including courts-martial and military commissions. 10 U.S.C. § 836(a) (2000). But Article 36(b) requires all rules promulgated to "be uniform insofar as practicable." *Id.* § 836(b). The Supreme Court interpreted the term "uniform" in Article 36(b) to mean that rules for different types of tribunals must be uniform; it rejected the dissent's view that the uniformity requirement meant that the rules for each type of tribunal must be uniform for each armed service (e.g., the Army, Navy, Air Force, etc.). *See Hamdan*, 126 S. Ct. at 2791 & n.50 (rejecting Justice Thomas's view that Article 36(b) requires uniformity only across military branches, not between court-martial and other types of tribunals).

170. *See infra* notes 339-44 and accompanying text for a discussion of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered titles and sections of U.S.C.).

171. *See Sadak & Others v. Turkey*, 36 Eur. Ct. H.R. 431, 437-38 (2003) (describing use of Ankara State Security Court to try petitioning parties of treason against state integrity).

172. *See id.* at 442 (finding that presence of military judge justified applicants' fears of lack of impartiality and independence).

173. *Id.* at 437.

174. *Id.* at 442.

The European Court of Human Rights agreed. In its view, Turkey had not given Sadak and the other applicants the rights owed to criminal defendants.¹⁷⁵ Article 6 of the European Convention provides that “[i]n the determination of . . . any criminal charge against him, everyone is entitled to a fair . . . hearing . . . by an independent and impartial tribunal.”¹⁷⁶ The court concluded that the military officer, although trained as a judge, might become unduly influenced by considerations not relevant to the case and, thus, that the court lacked impartiality.¹⁷⁷

Turkey disagreed with the characterization of Sadak and the others as mere criminals. It argued that the nation was engaged in a military campaign against terrorism. The court observed that due to “the experience of the armed forces in the anti-terrorism campaign,” the Turkish government “had considered it necessary to strengthen [the Ankara State Security Court] by including a military judge in order to provide [it] with the necessary expertise and knowledge of how to deal with threats to the security and integrity of the State.”¹⁷⁸

Yet another example comes from Egypt. Throughout the 1990s, Egypt used military courts to try militants suspected of threatening the government with terrorist acts. Egypt has contended that these military courts are necessary for dealing with armed combatants.¹⁷⁹ Human rights groups, however, contend that they violate international standards for the treatment of criminal suspects.¹⁸⁰

F. Search and Seizure

The issue of whether to characterize counterterrorism measures as law enforcement or military action arises in the context of search and seizure by the government. The characterization matters because criminal suspects have rights to privacy that enemy combatants traditionally have not had. For example, in the criminal law context, the Fourth Amendment imposes an important restriction on law enforcement activity by requiring that searches and seizures be reasonable.¹⁸¹ The Supreme Court has held that a “search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”¹⁸² So the police cannot simply seize and search any homes, cars, and places of business merely in the hope of finding evidence of criminal activity.

175. *Id.* at 443-44.

176. European Convention, *supra* note 97, art. 6(1).

177. *Sadak*, 36 Eur. Ct. H.R. at 443-44.

178. *Id.* at 442.

179. See Associated Press, *Egypt Sentences 6 to Death for Attacks*, N.Y. TIMES, Jan. 14, 1996, at § 1, 12 (describing Egypt’s assertion that terrorist groups smuggle men and arms across border of Sudan).

180. See *id.* (noting human rights groups’ condemnation of these military trials as they provide harsh sentences with no possibility of appeal).

181. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

182. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997)).

In contrast, when the military is fighting a war, it does not face similar constraints. The Supreme Court has held that the constitutional power to declare war necessarily “involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.”¹⁸³ Accordingly, the Court has reasoned, the federal government’s war power “includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor.”¹⁸⁴ Indeed, the Court said: “This is and always has been an undoubted belligerent right.”¹⁸⁵

These two differing sets of rules again lead to characterization disputes. In *American Civil Liberties Union v. National Security Agency*,¹⁸⁶ the American Civil Liberties Union (“ACLU”) challenged a secret surveillance program. The National Security Agency, at the direction of the President, secretly listened to telephone calls between persons in the United States and suspected members of al Qaeda.¹⁸⁷ The ACLU argued that the program violated the Fourth Amendment, analogizing it to eavesdropping on persons during a criminal investigation without a warrant.¹⁸⁸ But the United States argued that it was a proper exercise of military force not addressed by the Fourth Amendment.¹⁸⁹ The district court sided with the ACLU on this question of characterization. According to the district court, although Congress authorized the President to use “all necessary and appropriate force” against the persons responsible for the attacks of September 11, 2001, this authorization “says nothing whatsoever of intelligence or surveillance.”¹⁹⁰ Therefore, in the court’s view, the President could not be exercising military force lawfully.¹⁹¹ (The Court of Appeals for the Sixth Circuit subsequently reversed the decision without reaching the merits on grounds that the plaintiffs lacked standing.¹⁹²)

Another example of a disagreement over characterization occurred in *United States v. Green*.¹⁹³ A woman named Green drove her car on a major road in San Antonio, Texas.¹⁹⁴ The road passed through Fort Sam Houston, an open

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

184. *Id.*

185. *Id.*

186. 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

187. *ACLU*, 438 F. Supp. 2d at 758.

188. Plaintiffs’ Motion for Partial Summary Judgment at 25-28, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 2:06-cv-10204), 2006 WL 1868159.

189. Memorandum of Points and Authorities in Support of the United States’ Assertion of the Military and State Secrets Privilege; Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants’ Motion to Stay Consideration of Plaintiffs’ Motion for Summary Judgment at 32-39, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 2:06-cv-10204), 2006 WL 1868156.

190. *ACLU*, 438 F. Supp. 2d at 779 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001)).

191. *Id.*

192. *ACLU v. NSA*, 493 F.3d 644, 673-74 (6th Cir. 2007), *cert. denied* 128 S. Ct. 1334 (2008).

193. 293 F.3d 855 (5th Cir. 2002).

194. *Green*, 293 F.3d at 856-57.

military reservation through which the public could drive.¹⁹⁵ On the road, within the boundaries of the reservation, the post's military police had set up a checkpoint.¹⁹⁶ At this checkpoint, the military police were stopping every sixth car to search for terrorists as a means of deterring terrorism.¹⁹⁷ Pursuant to this policy, the military police stopped Green's car. After arresting Green for attempting to flee, officers found cocaine in her car.¹⁹⁸

Green argued that this suspicionless stop violated the Fourth Amendment.¹⁹⁹ Citing the rules summarized above, the court agreed that the search would have been unconstitutional if the military police simply had been searching for criminals or trying to prevent general criminal activity.²⁰⁰ But the court held that the Fourth Amendment does not prohibit searches conducted by the military when it is engaged in "the protection of the nation's military installations from acts of domestic or international terrorism."²⁰¹ The court reasoned that looking for terrorists on a military reservation was more like the traditional military function than like criminal law enforcement.²⁰² As a result of the court's characterizing the stop as a military action against terrorism instead of a law enforcement measure, Green could not rely on the protection of the Fourth Amendment.²⁰³

A similar situation arose in the European Court of Human Rights in *Murray v. United Kingdom*.²⁰⁴ The British Army went to the home of Murray to arrest her and question her about suspected terrorist activities, including financing the procurement of arms for the IRA.²⁰⁵ Upon entering the home, they searched it for other occupants and made Murray's family gather in one room.²⁰⁶ Murray and her family challenged the army's action under Article 8 of the European Convention.²⁰⁷ This Article, which resembles the Fourth Amendment, provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence" and it generally prohibits interference with this right except when "necessary" for law enforcement, public safety, and other purposes.²⁰⁸ But the court disagreed, observing that this was not an ordinary law

195. *Id.* at 861.

196. *Id.* at 856-57.

197. *Id.* at 856, 858. The military police were following the "Standard Operating Procedure for the Installation Force Protection Vehicle Checkpoints." *Id.* at 858. This document listed "protect[ing] national security by deterring domestic and foreign acts of terrorism" as the first goal of checkpoint stops. *Green*, 293 F.3d at 858.

198. *Id.* at 857.

199. *Id.*

200. *Id.* at 858 (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000)).

201. *Id.* at 859.

202. *Green*, 293 F.3d at 858-59.

203. *Id.* at 862.

204. 19 Eur. Ct. H.R. 193 (1994).

205. *Murray*, 19 Eur. Ct. H.R. at 197-98.

206. *Id.*

207. *Id.* at 232.

208. European Convention, *supra* note 97, art. 8(1)-(2).

enforcement measure but instead a military security action. Citing the “responsibility of an elected government in a democratic society to protect its citizens and its institutions against the threats posed by organised terrorism and . . . the special problems involved in the arrest and detention of persons suspected of terrorist-linked offences,”²⁰⁹ the court found the army’s actions to satisfy Article 8’s requirement of “necessity.”²¹⁰ So again, because the incident was viewed as a military response rather than a law enforcement measure, Murray had different rights from those an ordinary criminal suspect would have.

G. Duty to Provide Security

The issue of whether to characterize counterterrorism responses as law enforcement or military action also arises in debates about the government’s duty to provide security to potential victims of terrorism. At least as an abstract matter, governments have a duty both to prevent and punish crime and to protect their citizens from armed attacks. The preamble to the Constitution, for example, identifies ensuring “domestic Tranquility” and providing for the “common defence” as two main objects of the federal government.²¹¹

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

Consider, for example, the case of *X v. United Kingdom & Ireland*.²¹² The case arose after IRA terrorists killed a reserve constable in Northern Ireland while he was tending to his family’s dairy business.²¹³ The decedent’s widow sued the United Kingdom in the European Court of Human Rights, claiming that the United Kingdom was violating Article 2(1) of the European Convention on Human Rights.²¹⁴ This Article mandates that “[e]veryone’s right to life shall be protected by law.”²¹⁵ She asserted that the United Kingdom was not doing enough to provide security and demanded greater military involvement in the antiterrorism campaign.²¹⁶ The court noted that she asked that the United Kingdom be required to provide greater security from terrorist attacks “not only by criminal prosecution of offenders but also by such preventive control, through deployment of its armed forces, as appears necessary.”²¹⁷

209. *Murray*, 19 Eur. Ct. H.R. at 234.

210. *Id.* at 234.

211. U.S. CONST. pmbi.

212. App. No. 9825/82, 8 Eur. H.R. Rep. 49 (1985).

213. *X*, 8 Eur. H.R. Rep. at 49.

214. *Id.* at 52.

215. European Convention, *supra* note 97, art. 2(1).

216. *X*, 8 Eur. H.R. Rep. at 52.

217. *Id.*

The European Commission on Human Rights, which handled the case for the court,²¹⁸ ruled against her.²¹⁹ To the extent that the terrorists were seen as an enemy threat requiring a military response, the Commission concluded that it could not act.²²⁰ The Commission observed that the United Kingdom had committed military forces to Northern Ireland,²²¹ but the Commission said that it could not be “its task” to assess the “appropriateness and efficiency” of this military force.²²²

In contrast, the Commission apparently saw no difficulty in judging the United Kingdom’s counterterrorism as a law enforcement effort. It agreed that the United Kingdom had a duty to provide security against murder.²²³ But it concluded that the applicant had no claim.²²⁴ The commission observed that “[t]he applicant does not suggest that there are no laws in Northern Ireland protecting the right to life, or that they are not applied.”²²⁵

Plaintiffs have had similar difficulty recovering from the United States for not providing security against terrorism. Sovereign immunity generally shields the federal government from liability in court.²²⁶ The United States has waived some of its sovereign immunity in the Federal Tort Claims Act.²²⁷ But it has retained immunity from lawsuits pertaining to a “discretionary function.”²²⁸

The retention of immunity for discretionary functions generally blocks claims against the United States for failing to provide protection against armed attacks. For example, in *Macharia v. United States*,²²⁹ plaintiffs injured by the 1998 terrorist bombing of the United States embassy in Kenya sued the United States for failing to secure the embassy against a terrorist attack.²³⁰ The United States had provided a detachment of Marines to guard the facility, but they had

218. Prior to 1998, the European Commission on Human Rights heard complaints concerning violations of the European Convention on Human Rights. If the Commission could not produce a settlement, it would prepare a report “establishing the facts and expressing an opinion on the merits of the case.” European Court of Human Rights, Historical Background, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (last visited June 2, 2008). The European Court of Human Right then could consider the case. *Id.*

219. *X*, 8 Eur. H.R. Rep. at 53.

220. *Id.* at 52.

221. *Id.* at 52-53.

222. *Id.* at 52.

223. *Id.*

224. *X*, 8 Eur. H.R. Rep. at 53.

225. *Id.* at 52.

226. *See, e.g.,* *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (explaining that court may not exercise jurisdiction unless United States consents to suit).

227. *See* 28 U.S.C. § 1346(a)(2) (2000) (granting federal district courts jurisdiction over lawsuits “against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort”).

228. *Id.* § 2680(a).

229. 334 F.3d 61 (D.C. Cir. 2003).

230. *Macharia*, 334 F.3d at 65-68.

not succeeded in stopping a bombing by agents of al Qaeda.²³¹ The court did not determine whether the United States had acted negligently because it held that the discretionary function exception to the Federal Tort Claims Act applied and that the United States was therefore immune from liability.²³²

But the discretionary function exception does not always shield the federal government from liability for failing to protect its citizens from terrorists when those acts are viewed as crimes. For example, in *Bergman v. United States*,²³³ the plaintiffs participated in the “Freedom Rides” of 1961.²³⁴ They rode buses to cities in the southern United States to protest segregation.²³⁵ Unknown assailants subjected them to terror, assaults, and intimidation, causing various injuries.²³⁶ The plaintiffs claimed, in part, that the FBI had negligently failed to protect them from the attacks that they endured.²³⁷ The federal government in response argued that it had immunity from this lawsuit.²³⁸ The court rejected this argument, concluding that once the FBI had undertaken to stop crime, it had a duty not to perform this undertaking in a negligent manner.²³⁹ It therefore allowed the plaintiffs to bring lawsuits under the Federal Tort Claims Act.²⁴⁰ Although few other cases have reached this conclusion, the decision shows how judges may view the government’s duty to provide protection against crimes by criminals as something different from the government’s duty to provide protection against armed attacks by the enemy.

H. Compensation for Harm

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

231. *Id.* at 63.

232. *Id.* at 65-68.

233. 551 F. Supp. 407 (W.D. Mich. 1982).

234. *Bergman*, 551 F. Supp. at 410-11.

235. *Id.* at 410.

236. *Id.* at 410-11.

237. *Id.* at 416.

238. *Id.*

239. *Bergman*, 551 F. Supp. at 419.

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

objective.”²⁴¹ For example, when military forces fire missiles at suspected al Qaeda installations, the missiles may destroy not only their targets but also unintentionally wreck nearby structures, vehicles, or other items.

When the government destroys property in antiterrorism operations, a question sometimes arises about whether the government has a duty to pay for it. The question is not difficult when military forces destroy actual terrorist targets: the government does not have to pay. As the United States Court of Appeals for the Federal Circuit has said: “A contrary rule that, by way of example, would require the government to provide compensation for the destruction of a vehicle (a tank, jet, etc.) used to engage United States armed forces in battle, strikes us as absurd in the extreme.”²⁴²

But compensation for destruction of supposed terrorist targets that actually are unconnected with terrorism and compensation for collateral damage are more difficult issues. In the United States, the Fifth Amendment says that the government may not take private property for public use without paying just compensation to the owner.²⁴³ Governmental “taking” of property may consist of occupying, destroying, or sometimes merely preventing the owner from using the property.²⁴⁴ The rationale appears to be that taxpayers as a group should have to bear the costs of public projects, not just the people whose property is needed.²⁴⁵ The innocent owners of property destroyed in antiterrorism operations thus have some argument that the public should share the expense of these operations. But whether that argument prevails depends in large part on whether the government was pursuing the antiterrorism action as a military matter or as a law enforcement matter.

The case of *El-Shifa Pharmaceutical Industries Co. v. United States*²⁴⁶ concerned an incident that occurred after the 1998 bombings of two United States embassies in Africa.²⁴⁷ In response to the bombings, the President ordered the Navy to fire Tomahawk missiles at a pharmaceutical factory in Sudan.²⁴⁸ The missiles hit their target and destroyed the facility.²⁴⁹ The White House explained at the time that the factory had links to al Qaeda and that the factory possibly

241. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 14 (Joseph B. Berger III et al. eds., 2004), available at <http://fas.org/irp/doddir/army/law2004.pdf>.

242. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1355-56 (Fed. Cir. 2004).

243. U.S. CONST. amend. V.

244. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.12, at 438-39 (5th ed. 1995) (recognizing nonacquisitive governmental actions as taking for Fifth Amendment purposes).

245. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 391 (2000) (discussing idea that spreading takings risk among all taxpayers through insurance premiums enhances efficiency).

246. 378 F.3d 1346 (Fed. Cir. 2004).

247. See *supra* notes 45-48 and accompanying text for a discussion of this incident in connection with the rules regarding the use of force in other countries.

248. *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 753 (Fed. Cl. 2003), *aff’d*, 378 F.3d 1346 (Fed. Cir. 2004).

249. *El-Shifa*, 378 F.3d at 1349.

was producing a chemical used in the manufacture of nerve gas.²⁵⁰

The owner of the destroyed pharmaceutical plant subsequently sued the United States in the United States Court of Federal Claims, seeking compensation for the damage under the Takings Clause the Fifth Amendment.²⁵¹ The United States asked the court to reject the claim, citing among other principles the rule regarding the destruction of “enemy property” discussed above.²⁵² Although the owner argued in response that the military exception should not apply because the factory actually had no connection to terrorism or nerve gas, the court denied relief.²⁵³ It held that the issue of whether a target was actually enemy property was a political question and that the court had to defer to the President’s judgment.²⁵⁴

In contrast, at least in some jurisdictions, when law enforcement agencies are pursuing criminal suspects and they destroy property belonging to an innocent person, they must pay for the damage. For example, in *Wegner v. Milwaukee Mutual Insurance Co.*,²⁵⁵ a suspected drug dealer broke into a nearby home while fleeing from the police.²⁵⁶ The police fired tear gas and concussion grenades into the home to force the suspect out, causing extensive damage to the building.²⁵⁷ The Minnesota Supreme Court held that “where an innocent third party’s property is damaged by the police in the course of apprehending a suspect,” the government must pay just compensation to the property owner.²⁵⁸

Similarly, in *Steele v. City of Houston*,²⁵⁹ a group of escaped prisoners hid out in a vacant home that they had chosen at random. To force them out, the police set fire to the building.²⁶⁰ The Texas Supreme Court required the city to pay the property owner for the damage.²⁶¹ The Court said: “We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the Constitution to compensation for their property.”²⁶² As the New Jersey Superior Court explained in a similar

250. *Id.*

251. *Id.* at 1348-49.

252. *Id.* at 1355.

253. *Id.* at 1361.

254. See *El-Shifa*, 378 F.3d at 1365 (“We are of the opinion that the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation’s friends and which belong to its enemies. In our view, the Constitution envisions that the political branches, directly accountable to the People, will adopt and promulgate measures designed to ensure that the President makes the right decision when, pursuant to his role as Commander-in-Chief, he orders the military to destroy private property in the course of exercising his power to wage war.”).

255. 479 N.W.2d 38 (Minn. 1991).

256. *Wegner*, 479 N.W.2d at 39.

257. *Id.*

258. *Id.* at 41-42.

259. 603 S.W.2d 786 (Tex. 1980).

260. *Steele*, 603 S.W.2d at 789.

261. *Id.* at 791-92.

262. *Id.* at 793.

case when it required the police to pay for doors broken in the execution of a search warrant: “Since the damage was incurred for the public good, rather than for the benefit of the private individual, the public should bear the cost. The intended beneficiary of the police action was not [the innocent property owner], but society as a whole.”²⁶³

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

I. *Other Issues*

The first claim in this Article is that the dichotomous characterization of counterterrorism measures as either law enforcement or military action has become a central part of antiterrorism law. The foregoing discussion has demonstrated the validity of this claim. It has shown how the results of this characterization affect not just one or two areas of counterterrorism, like detention and interrogation, but many different areas. And it has shown that the law enforcement or military action characterization has been important not just in recent years but for decades, both in the United States and abroad.

Yet it is important not to overstate the claim. Although characterization is important, it is not the only issue in determining the legality of governmental responses to terrorism. On the contrary, even if everyone were to agree on how to characterize counterterrorism actions, a number of other questions might arise. Some examples of the issues that would remain include when enemy combatants have rights under the Geneva Convention III;²⁶⁴ when enemy combatants are entitled to “combatant immunity,” which is immunity from punishment for lawful acts of war;²⁶⁵ how to measure the duration of an armed conflict against terrorism for determining how long enemy combatants may be detained;²⁶⁶ what trial procedures military commissions have to follow when they

263. *Wallace v. City of Atlantic City*, 608 A.2d 480, 483 (N.J. Super. Ct. Law Div. 1992). For decisions contrary to those described in this paragraph, see *Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okla. 1997), which held that a city did not have to pay for damage to an innocent landlord’s property and cited similar cases from California, Georgia, and Indiana. *Id.* at 226-27.

264. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794-96 (2006) (concluding that members of al Qaeda have limited rights afforded by Common Article 3 of Third Geneva Convention).

265. See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541, 554-58 (E.D. Va. 2002) (concluding that American citizen who was member of Taliban forces and was designated as enemy combatant did not have combatant immunity).

266. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (stating that United States ordinarily may detain captured enemy combatants “for the duration of the relevant conflict” but that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war” then different rule might apply).

try enemy combatants;²⁶⁷ what offenses may military commissions punish enemy combatants for having committed;²⁶⁸ what interrogation methods may the military use in attempting to gain information from enemy combatants;²⁶⁹ the extent to which persons held as enemy combatants have a constitutional right to due process;²⁷⁰ and the extent to which citizens who are enemy combatants have different rights from noncitizens.²⁷¹

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

III. THE PROBLEMS WITH DETERMINING THE LEGALITY OF COUNTERTERRORISM MEASURES BY ATTEMPTING TO CHARACTERIZE THEM AS LAW ENFORCEMENT OR MILITARY ACTIONS

The previous part of this Article has shown that legal systems around the world, for a long time and in a great many different subject areas, have depended on characterization to determine the legality of governmental responses to terrorism. Sometimes they characterize these responses as law enforcement measures and, at other times, they describe them as military efforts in an armed conflict. The characterization selected currently has important legal consequences. Armed forces involved in a war can take actions, such as targeted killing, that the police cannot.²⁷² And the police can carry out actions, such as law enforcement duties, that the armed forces cannot.²⁷³

This “military or law enforcement” classification system for determining the legality of governmental responses to terrorism has four substantial problems. First, no standard currently exists for deciding when terrorists are combatants as opposed to mere criminals or when antiterrorism actions are law enforcement

267. See *Hamdan*, 126 S. Ct. at 2786-98 (concluding that military commission’s procedures were improper).

268. See *id.* at 2775-86 (concluding that military commission could not try suspected terrorist for conspiracy to commit war crimes).

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

270. Compare *Khalid v. Bush*, 355 F. Supp. 2d 311, 323 (D.D.C. 2005) (dismissing challenges to procedures), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007), with *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465-66 (D.D.C. 2005) (concluding that procedures did not meet requirements of due process), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).

271. Compare *Hamdi*, 542 U.S. at 520-21 (asserting that government may detain U.S. citizens who are enemy combatants in same manner that it detains other enemy combatants), with *id.* at 554-55 (Scalia, J., dissenting) (asserting that government may detain U.S. citizens as enemy combatants only if it suspends writ of habeas corpus).

272. See *supra* Part II.C for an overview of targeted killing.

273. See *supra* Part II.B for an overview of the use of force domestically and the separate bodies of law governing law enforcement and armed conflicts.

measures as opposed to military actions in an armed conflict. Second, no clear standard is likely to emerge in the future because terrorists defy a simple characterization; they resemble criminal suspects in some respects and enemy combatants in others. Third, even when characterization is possible, using it to determine what laws should regulate governmental responses to terrorism often produces results that are objectionable on policy grounds. Fourth, the current system effectively gives governments extremely broad discretion to determine the legality of their own antiterrorism actions because their control of the characterization process allows them to select the applicable set of legal rules.

A. *No Standard for Making the Characterization Exists*

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

First, there are opposing views about the fundamental question of whether terrorists who are not sponsored by a state can ever fall into the category of enemy combatants. As described above, components of the United Nations appear to reject the position of most of the world's leading democracies on this issue.²⁷⁴ The International Court of Justice, for example, said in the case concerning Israel's construction of a security barrier that terrorists cannot engage in "armed attacks" because they are not states.²⁷⁵ This position fundamentally conflicts with the unanimous view of all of the members of NATO, which viewed the attacks of September 11, 2001 as an armed attack.²⁷⁶

Second, even those who agree that terrorists, in proper circumstances, can be viewed as enemy combatants have not established exactly what those circumstances are. The United States, for instance, repeatedly has seen terrorist strikes as acts of war.²⁷⁷ And yet the United States has not articulated a clear standard through which it has made that characterization. In domestic legal cases, the United States has consistently decided not to express a standard; instead, it has told the judiciary that it should defer to the determinations of Congress²⁷⁸ and the President.²⁷⁹ The federal courts generally have granted this

274. See *supra* Part II.A for a discussion of the United Nations' opposition to the position of most nations that terrorist actors without a state affiliation may still be characterized as enemy combatants.

275. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. No. 136, 139 (July 9) (noting that Israel could not claim to be exercising self-defense because it was not subject to armed attack by foreign state and because threat originated from inside territory controlled by Israel). See *supra* notes 26-37 and accompanying text for a discussion of this opinion.

276. See *supra* notes 38-39 and accompanying text for a discussion of NATO's response to the terrorist hijackings of September 11, 2001.

277. See *supra* Part II.A for a discussion of two instances in which the United States declared terrorist strikes to be acts of war.

278. See *Brief for the Respondents at 20*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696),

deference.²⁸⁰ In international contexts, where the United States cannot rely on deference, the government has offered some brief substantive explanations for its characterization of terrorists as combatants. But these explanations lack definiteness. For example, as explained above, following the United States' targeted killing of al Qaeda suspects in Yemen, the UN Special Rapporteur demanded that the United States explain why the suspects should not have received ordinary criminal justice protections.²⁸¹ In response, the United States offered this explanation: "Al Qaida and related terrorist networks are at war against the United States. They have trained, equipped, and supported armed forces and have planned and executed attacks around the world against the United States *on a scale that far exceeds criminal activity.*"²⁸²

In the quoted passage, the United States appears to have taken the position that the magnitude of the terrorist incident or incidents determines whether law enforcement principles or the law of war govern antiterrorism responses. A focus on the size of the terrorist attacks has some justification. Certainly, it accords with general understandings about one important difference between ordinary crimes and acts of war. And it can explain why the United States felt justified in using military actions in response to al Qaeda's destruction of the United States' embassies in Kenya and Tanzania in 1998, for the bombing of the USS *Cole* in 1998, and for the attacks of September 11, 2001.²⁸³ All of these incidents caused many deaths and great destruction of property.

But can a magnitude standard explain the United States' military assault on Libya in response to the 1985 bombing of the Berlin discotheque? That terrorist attack resulted in two deaths.²⁸⁴ It thus does not appear to have had a "scale that far exceeds criminal activity."²⁸⁵ And if magnitude is the test, why did the United States not treat Timothy McVeigh or the 1993 World Trade Center bombers as enemy combatants? McVeigh's terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City killed 168 people,²⁸⁶ while the World Trade Center bombing caused six deaths and hundreds of millions of dollars in property loss.²⁸⁷ Yet, the United States subjected the perpetrators of these terrorist incidents to

2004 WL 724020, at *20 (arguing that Congress had authorized use of military force against terrorists in Afghanistan).

279. *See id.* at 25 ("The Executive's Determination That An Individual Is An Enemy Combatant Is Entitled To The Utmost Deference By A Court[.]").

280. *See, e.g., Hamdi*, 542 U.S. at 516 (accepting government's proffered definition of "enemy combatant" for this particular case even after noting that government has never furnished any court with full criteria for such characterization).

281. *See supra* notes 106-117 and accompanying text for a discussion of the United States' use of targeted killing.

282. U.S. Yemen Response, *supra* note 112, at 3 (emphasis added).

283. *See supra* Parts II.A, C for a discussion of these incidents.

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

285. U.S. Yemen Response, *supra* note 112, at 3.

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

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

ordinary criminal process.²⁸⁸ These questions remain unanswered.

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

B. Counterterrorism Measures Fit Neither Characterization Perfectly

Not only has no consensus developed on when to judge antiterrorism responses as law enforcement measures and when to judge them as steps taken in an armed conflict, but it also seems unlikely that any agreement on a test ever will emerge. This prediction rests on the simple observation that most acts of terrorism have a dual nature: they resemble warfare in some respects and crimes in others. And this dual nature prevents easy characterization of governmental responses. Most terrorist acts resemble crimes because they are crimes. Murder is murder, assault is assault, and kidnapping is kidnapping, regardless of whether a terrorist or a mobster or street thug commits these acts. Consequently, at least in the United States, prosecutors can, and routinely do, prosecute terrorists using ordinary criminal laws.²⁸⁹

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

On the other hand, terrorist organizations have many features in common with military forces. First, terrorists commonly use military weapons to commit their acts. For example, members of the terrorist organization Hamas routinely hit Israeli targets using mortars and rockets located in the West Bank or in Gaza.²⁹⁰ Second, terrorists also tend to strike military targets that ordinary criminals would have little interest in assaulting. For example, no one but terrorists or an opposing Navy would have an interest in trying to sink the USS *Cole*.²⁹¹ Third, terrorist organizations may have capabilities that outmatch those of law enforcement agencies. If the combined military forces of the United States and its many allies need years to subdue al Qaeda agents in Afghanistan,

288. See *McVeigh*, 153 F.3d at 1176-77 (describing criminal charges); *Salameh*, 152 F.3d at 108 (same).

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

290. See Greg Myre, *Israel Carries out First Airstrike, in Gaza, in 3 Months of Truce*, N.Y. TIMES, May 19, 2005, at A11 (noting Hamas fired dozens of mortar rounds and two rockets at Israeli targets in Gaza in single day).

291. See *supra* notes 88, 108-17 for a discussion of the attack on the USS *Cole*.

certainly no police force could accomplish the same mission. Fourth, in many instances, as the United States has argued, acts of terrorism exceed ordinary criminal conduct in magnitude.²⁹² Strikes like those of September 11, 2001, cause death and destruction far beyond anything a typical criminal would ever attempt. Fifth, terrorist organizations also often resemble military forces more than criminals in terms of their persistence and their depth of capacity. When a member of a terrorist organization is arrested or killed, instead of halting its operations, the organization generally finds a replacement and continues its plans. In contrast, if the police thwart a bank robbery by arresting the would-be perpetrator, often no subsequent robbery would be likely to occur. This feature of terrorist organizations makes them much more difficult to eradicate. Sixth, terrorists routinely take credit for their actions. They want the world to know what they have done—that is the whole point of their infliction of pain. In this way, terrorists resemble armed forces more than criminals, who generally hope to avoid identification and blame.

Finally, and perhaps most significantly, most acts of terrorism resemble acts of war more than criminal acts in terms of their most basic motivations. Governments fight wars in the belief that organized violence will accomplish political ends that diplomacy cannot. Although their methods are unlawful, terrorists generally act for similar reasons. But criminals generally have more selfish goals; they commit offenses to line their pockets with money or harm their personal enemies but not to cause political change. In fact, some definitions of terrorism focus primarily on motivation to distinguish terrorism from ordinary crime.²⁹³

Terrorists, acts of terrorism, and governmental responses to terrorism for these reasons all have a dual nature. They fall partly within the realm of crime and law enforcement and partly within the realm of armed conflict and military force. They generally defy characterization as one or the other.

C. Either Characterization Sometimes Produces Unfavorable Results

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

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

292. See *supra* Part III.A for a discussion of the inherent difficulties of deciding whether terrorists should be legally characterized as enemy combatants or ordinary criminals.

293. See *United States v. Yousef*, 327 F.3d 56, 107 n.42 (2d Cir. 2003) (recognizing lack of consensus about definition of terrorism and considering motivation-based definition of terrorism).

Applying the law of war seems uncontroversial when the United States is attacking armed formations of al Qaeda forces in Afghanistan. For example, most would agree that the United States may use deadly force against these enemies without first trying to arrest them.²⁹⁴ Indeed, given that al Qaeda forces remain active in Afghanistan despite years of eradication attempts, with approximately 28,000 American troops currently stationed in Afghanistan as well as military personnel from allied nations,²⁹⁵ any suggestion that the FBI as opposed to the armed forces should have gone to Afghanistan to arrest the perpetrators of the 9/11 attacks seems hopelessly unrealistic.

But even if members of al Qaeda are enemy combatants, it may not follow that the United States should, as a policy matter, have the power to use all of the military force against all al Qaeda members that the laws of war would allow it to use against more conventional enemy combatants. Consider again the case of Jose Padilla, the American citizen who, according to stipulated facts, went to Afghanistan, fought with al Qaeda against the United States, fled to Pakistan, and then returned to the United States, where U.S. marshals arrested him at Chicago's O'Hare International Airport.²⁹⁶ A great deal of controversy has surrounded Padilla's prolonged detention.²⁹⁷ But ignore the detention issue for a moment and think instead about what the United States might have done at the airport when Padilla stepped off the airplane. If Padilla was truly an enemy combatant, then one school of thought might say that the United States could have shot him immediately, without first attempting to arrest him. After all, the laws of war permit this kind of force—targeted killing—against enemy combatants.

But I suspect that most people would think that simply shooting Padilla at the airport would be wrong. The United States did not take that action. And when asked during oral argument at the Supreme Court whether it could have done so, counsel for the government tactfully avoided the question.²⁹⁸

294. The laws of war long have permitted the killing of enemy forces who have not already surrendered without any resort to lesser measures. See *supra* notes 93-117 and accompanying text for a discussion of the differences between the laws of war and the rules of law enforcement.

295. See CBS/Associated Press, *Bush's War on Terror Shifting Targets: Officials Say Pakistan, and Again, Afghanistan at Center of Fight Against Militancy*, CBS NEWS, Jan. 28, 2008, www.cbsnews.com/stories/2008/01/28/terror/main3757858.shtml (reporting growth in U.S. troops in Afghanistan from 20,000 to current total 28,000 and reporting plans to deploy another 3200 Marines to Afghanistan); *Gates Backpedals on NATO Comments*, CNN.COM, Jan. 17, 2008, <http://www.cnn.com/2008/POLITICS/01/17/gates.nato.backtrack/> (reporting on U.S. Defense Secretary Robert Gates's statement about United States' plan to deploy 3200 more Marines to Afghanistan in spring of 2008).

296. See *supra* notes 54-64 and accompanying text for a discussion of the *Padilla* line of cases.

297. See *Padilla v. Hanft*, 126 S. Ct. 1649, 1651 (2006) (Ginsburg, J., dissenting) (describing importance of question of Padilla's detention).

298. During the Supreme Court oral argument in *Padilla v. Rumsfeld*, 542 U.S. 426 (2004), counsel for the United States, Deputy Solicitor General Paul D. Clement, argued that Padilla could be treated just like any enemy combatant found in Afghanistan. This assertion prompted the following exchange between Justice Anthony M. Kennedy and Mr. Clement:

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

Presumably the government also felt uncomfortable about the logical consequences of its contentions that Padilla was an enemy combatant and that the laws of war therefore should govern his treatment.

The “either law enforcement or military action” approach also may fail to accord with widely accepted views when it prevents certain military responses to terrorism. For example, consider again the case of John Muhammad and Lee Malvo, the notorious “D.C. snipers.”²⁹⁹ As described above, observers disagreed about whether the military was violating the Posse Comitatus Act by assisting law enforcement.³⁰⁰ But even assuming that everyone were to agree that the army was assisting in law enforcement, most people would not consider this assistance inappropriate from a policy perspective. As one *New York Times* reporter put it, “[f]or thousands of people in the Washington region ducking behind their cars as they pump gas, keeping their children indoors or missing the high school football season, there is no limit to what should be done to thwart the sniper who has shot 11 people this month.”³⁰¹ Thus, the difficulty of classifying the antiterrorism measures is only part of the problem with the current legal rules. Another part of the problem is that the full application of either law enforcement rules or the laws of war often does not make sense from a policy perspective even if characterization can occur.

D. The Current System Gives the Government Considerable Discretion to Determine the Legality of Its Own Action

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

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

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

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

Transcript of Oral Argument at 21, *Padilla*, 542 U.S. 426 (No. 03-1027), 2004 WL 1066129, at *17-18. Notice that Mr. Clement did not say whether the United States could have shot Padilla before he was captured; he avoided the question.

299. See *supra* notes 65-76 and accompanying text for a discussion of the controversy surrounding the military’s use of an army surveillance airplane to assist law enforcement in locating and apprehending the D.C. snipers.

300. See *supra* notes 72-76 and accompanying text for a discussion of the argument regarding the Posse Comitatus Act and the search for the D.C. snipers.

301. Clymer, *supra* note 72. At the time of Clymer’s article, it was assumed there was just one sniper working alone.

The possibility that the government may have some choice over which body of law applies to a governmental action by itself is not alarming. On the contrary, this possibility exists in many different contexts. But generally, when the government has choices of this kind, it also faces trade-offs; the government usually cannot have its cake and eat it too. For example, in the area of military justice, military commanders generally have a choice of referring charges of misconduct to a summary court-martial, a special court-martial, or a general court-martial.³⁰² Each of these courts-martial operates under different procedures. At a summary court-martial, for instance, the charges are decided by a single military officer who generally is not a military judge.³⁰³ At a general court-martial, by contrast, the accused has a right to be tried by a court consisting of a military judge and not less than five service members.³⁰⁴ But a summary court-martial can impose only a limited range of punishments; it cannot order confinement for more than a month.³⁰⁵ A general court-martial, in contrast, can impose life imprisonment or even the death penalty.³⁰⁶ So a commander has a choice in referring charges to a court-martial but also faces a trade-off. The summary court-martial has simpler and speedier procedures but is limited in its power, while the general court-martial has greater powers but affords the accused greater procedural protections. The existence of this trade-off preserves flexibility without giving commanders unlimited discretion at the expense of the accused.

This kind of trade-off generally does not exist in the area of counterterrorism. Consider once more the case of Jose Padilla, the American citizen who took up arms against the United States in Afghanistan before being captured in Chicago.³⁰⁷ As described above, the government initially held him as a witness in a grand jury investigation. But when that law enforcement characterization was not sufficient to permit his continued detention, and the government apparently lacked probable cause to charge him with a crime, the President designated him as an enemy combatant. The federal courts subsequently upheld his continued confinement under this designation.³⁰⁸ But then, inexplicably, the government reclassified him as a criminal suspect and brought criminal charges against him.³⁰⁹ There was never any trade-off involved because the government did not have to give up anything; it was free to switch between one characterization and the other as it wished.

In addition, in most other contexts in which the government has the power to exercise discretion, some legal standard governs the exercise of that

302. 10 U.S.C. § 816 (Supp. II 2002).

303. *Id.* § 816(3).

304. *Id.* § 816(1)(A).

305. *Id.* § 820.

306. *Id.* § 818.

307. See *supra* notes 54-64, 133-41 and accompanying text for a summary of the *Padilla* line of cases.

308. *Padilla v. Hanft*, 423 F.3d 386, 389-90 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006).

309. See *Padilla v. Hanft*, 126 S. Ct. 1649, 1651 (2006) (Ginsburg, J., dissenting) (noting that government recently brought charges against Padilla in civilian court).

discretion. In investigating criminal activity, for example, the government has discretion to decide what searches to conduct. It may choose to search some premises but not others. But in exercising this discretion, the government always faces a restriction. The Fourth Amendment imposes a standard of reasonableness on all searches.³¹⁰ This standard, although open ended, nevertheless constrains the government's choices.³¹¹ And courts stand ready to enforce this standard.³¹²

But again nothing comparable exists when it comes to the characterization of governmental responses to terrorism as either law enforcement measures or actions taken in an armed conflict. The President simply decides whether to characterize a person as an enemy combatant as opposed to an ordinary criminal suspect. In the United States, the courts defer to this decision.³¹³ And in the international sphere, although disagreements have arisen, the United States and other countries usually just ignore opposing views. For example, although the United Nations General Assembly condemned the United States' bombing of Libya, and the UN Special Rapporteur condemned its targeted killing of suspected members of al Qaeda, the United States government could, and simply did, disregard their views.³¹⁴

In making these criticisms, I do not mean to suggest that the United States or other countries have made incorrect choices when exercising the discretion that they currently have. On the contrary, in the examples discussed, legal and policy arguments may support the characterization of Jose Padilla either as an enemy combatant or as a criminal suspect;³¹⁵ arguments can also be made in support of the bombing of Libya and the targeted killing in Yemen.³¹⁶ But even if governments make correct choices, they are still operating in a system that involves no trade-offs, no standards, and not very much review. A system of this kind over time may give rise to abuse.

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

311. See, e.g., *Bond v. United States*, 529 U.S. 334, 335 (2000) (holding that "a law enforcement officer's physical manipulation of a bus passenger's carry-on luggage violated the Fourth Amendment's proscription against unreasonable searches").

312. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that evidence obtained by illegal searches and seizures is inadmissible in state courts); *Weeks v. United States*, 232 U.S. 383, 391-92 (1914) (establishing exclusionary rule for improperly obtained evidence as means of enforcing Fourth Amendment).

313. See, e.g., *Padilla*, 423 F.3d at 395 (reversing district court on grounds that it did not give President sufficient deference when "effectively imposing upon the President the equivalent of a least-restrictive-means test").

314. See *supra* Part II.A for an overview of the United States' authority to use force in foreign nations.

315. See *Padilla*, 423 F.3d at 395 (explaining why President could designate Padilla as enemy combatant and detain him).

316. See, e.g., Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 373-74 (2005) (discussing argument that bombing of Libya could be justified provided that it was response aimed at preventing "planned future attacks and if the response had been against the source of the attacks").

IV. THE ADVANTAGES OF SEEING COUNTERTERRORISM MEASURES AS A SEPARATE FORM OF GOVERNMENTAL ACTION

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

This part of the Article now makes a third claim: in the future, it would be better to view counterterrorism measures as a separate form of governmental action, a form which is not law enforcement and also not military action. The legality of counterterrorism measures then should be judged by new standards, not the rules of criminal procedure and not the laws of war. What are these new standards? They have not been developed yet. Whoever creates them could borrow from both the civilian law enforcement rules and the law of armed conflict or could make altogether new rules. But the content would turn on deliberate policy choices and not on the awkward initial characterization of whether the terrorists are committing crimes or fighting a war.

A. Benefits of Judging Counterterrorism Measures as Counterterrorism Measures

Creating specialized standards to assess the legality of governmental responses to terrorism could address problems with the current system in several ways. First, specialized standards would reduce or eliminate the difficulties associated with the indeterminate task of characterizing terrorists as criminals or enemy combatants and characterizing their assaults as crimes or acts of war. Instead, specialized standards could view counterterrorism measures for what they are: actions taken against persons who share some of the characteristics of both criminals and enemy combatants. These examples illustrate the need for specialized standards.

First, suppose a terrorist group launches a terrorist strike against Americans and their property and then flees to a well-known terrorist training camp in a foreign country. The United States fires a missile at the camp and kills the perpetrators. Currently, the legality of this action would depend on its characterization. Is the United States using military force extraterritorially in response to a mere crime? Is it killing criminal suspects without attempting to arrest them? Or is it fighting a war against enemy combatants? Those are the

questions that are now asked.³¹⁷ But would it not be a better system to have a specific standard for judging the legality of this kind of governmental response to terrorism—a standard developed after careful consideration as to whether it would be a good idea for a nation to have the power to launch missile strikes against suspected terrorists located in a foreign country?

Second, suppose that the Department of Defense adopts a new regulation saying that the military may assist law enforcement in tracking snipers suspected of having killed more than three persons (like the snipers who terrorized the Washington, D.C. area in 2002).³¹⁸ Someone then immediately questions the legality of this regulation. Under existing law, a court would decide the question by formalistically determining whether the military is engaged in a law enforcement action (which might violate the Posse Comitatus Act) or a military action (which would not violate the Act). Would it not be better to have a system that requires judging the legality of the regulation on the basis of general rules and principles, developed after careful policy determinations, for determining what kinds of counterterrorism measures should be permitted?

Third, to return to the Jose Padilla example, suppose military forces shot him at O'Hare International Airport as he stepped off the plane. Is this action lawful? If it is a law enforcement action, it is not. But if it is a military action, perhaps it is.³¹⁹ But rather than trying to fit the actions against Padilla into one of these two categories, neither of which fits very well, could Congress create a third standard to regulate force against terrorists? This third standard, for instance, might say that—regardless of what the police can do to criminals and the military can do to enemy combatants—the government cannot carry out a targeted killing against an unarmed terror suspect in the United States who does not pose an immediate threat.³²⁰

Viewing counterterrorism as counterterrorism could narrow the government's discretion to choose the law that applies to its own conduct. Rather than having the government decide on a case-by-case basis and in an unreviewable manner whether a person accused of terrorism is a criminal suspect or an enemy combatant—and in this way determine what legal rules will regulate the government's actions toward him or her—a specialized law might channel the government's actions. For example, a specialized law might allow the President to detain terrorist suspects as enemy combatants but provide that detainees who could be charged with a crime have certain rights that criminal

317. See *supra* Part II.A for an overview of the United States' authority to use force in foreign nations.

318. See *supra* notes 65-76, 299-301 and accompanying text for a discussion of the D.C. sniper incident.

319. See *supra* note 298 for a relevant portion of the oral argument transcript from *Padilla v. Rumsfeld*, 542 U.S. 426 (2004).

320. The Public Committee Against Torture in Israel essentially argued for this position in its brief before the Israeli Supreme Court. See Brief for Petitioner for Interim Order ¶ 18, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] IsrCt [hereinafter Brief for Interim Order] (noting that taking part in hostilities does not make it legal to assassinate someone regardless of his status as legal or unlawful combatant).

defendants enjoy. These rights might include, in perhaps a modified form, the right to appear before a magistrate or the right to remain silent. This kind of standard would narrow the differences in treatment of persons detained as enemy combatants and persons detained as criminal suspects.

B. How to Change the Current Approach

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

First, those nations and organizations that make the standards should base their content on policy considerations rather than on existing doctrinal categories. In general, they should seek to determine what rights terrorist suspects ought to have and what powers military forces and government agencies should have, based on American values and the practical needs of the current situation.

For example, suppose a new treaty is negotiated regarding detention of terrorist suspects captured on the battlefield. The drafters should consider as a policy matter how long the military actually needs to detain them. They then should devise a rule that will meet this need while otherwise preserving the value of liberty. The rule need not specify that the military may hold the suspects for the duration of the conflict simply because the laws of war would permit such detention if terror suspects were ordinary enemy combatants.³²¹

By the same token, lawmakers generally should avoid creating antiterrorism rules based solely on legal precedent. Relying exclusively on precedent generally will not do much to address the problems, described above, that are associated with the current characterization system.³²² For example, a common form of argument, frequently heard in debates about antiterrorism policy, runs as follows: "In World War II, the United States lawfully did X to the Nazis because they were enemy combatants. Terrorists are also enemy combatants. Therefore, the law should say that the United States can do X to terrorists." At present, the United States generally can justify its actions as a legal matter based on such reasoning,³²³ and shaping new specialized laws on precedent may simply replicate the difficulties that reliance on characterization currently is causing. It

321. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (discussing necessity, in times of war, of detaining enemy combatants for duration of conflict in order to keep them from further combat).

322. See *supra* Part III.B for further discussion of the difficulties inherent in trying to categorize counterterrorism measures as either strictly law enforcement or strictly military responses.

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

would be better to consider the needs of the current situation and act accordingly.

Second, the Constitution may impose some limits on the creation of specialized standards to regulate governmental responses to terrorism. For example, if the Fourth Amendment requires a search warrant in a particular situation, then Congress cannot pass a new antiterrorism law dispensing with the requirement. But this possibility should not preclude all new law development. Treaties or legislation always could grant additional rights to terrorists who are now classifiable as enemy combatants and who therefore enjoy limited, if any, protection of the Fourth Amendment.³²⁴ Congress also can alter existing statutory rules. For example, at present, the Posse Comitatus Act prohibits the military from helping civilian agencies in searches and seizures for the purpose of law enforcement.³²⁵ But nothing in the Constitution would prevent Congress from creating exceptions to this statute for terrorism cases.

International treaties also may restrict the United States in reforming its law. For example, the United Nations Charter imposes limitations on the use of force and the International Covenant on Civil and Political Rights specifies requirements for domestic trials.³²⁶ The United States cannot rewrite international treaties by itself. But it may have the option to withdraw from them, to derogate from their provisions, or to work with other signatories for their amendment or reinterpretation.

Third, past experience and other factors suggest that the United States in many instances should expect to lead the way in the creation of the specialized laws on terrorism. The United States developed individual domestic civil and political rights that subsequent international human rights agreements, like the International Covenant on Civil and Political Rights, later copied.³²⁷ Similarly, the United States' codification of the laws of war in the Lieber Code of 1863 provided the basis for subsequent international agreements on the subject.³²⁸ If the United States chooses rules wisely, other nations are likely to follow it.

324. See *supra* Part II.F for an example of how the military is not as constrained as law enforcement by the search and seizure mandates of the Constitution.

325. 18 U.S.C. § 1385 (2000).

326. See *supra* notes 23-24, 96 and accompanying text for discussions of the limitations imposed on the United States by these international agreements.

327. See David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1188-89 (1993) (“[A]most all of the individual rights and freedoms embodied in the Covenant have long been enjoyed by Americans by virtue of the U.S. Constitution and the constitutions and laws of the states.”).

328. See Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224, 230-32 (1998) (praising Lieber Code as “a contribution by the United States to the stock of common civilization” and tracing its subsequent influence over Hague Convention IV of 1907 (quoting Letter from Francis Lieber to Gen. Halleck (May 20, 1863), in George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, AM. J. INT'L L. 13, 19 (1907)); Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC'Y INT'L L. PROC. 112, 114 (2001) (commenting on successes of Lieber Code as both “authoritative exposition of the laws of war” in U.S. and in “influenc[ing] similar codifications” in other states and nations).

The United States ought to accept most of the burden of drafting and lobbying to bring into force new international rules regarding terrorism. It should take on these tasks because the world's other leading democracies simply have less experience and less at stake in dealing with terrorists outside of their borders. Even in Afghanistan, where allies from more than twenty nations are fighting the war against al Qaeda,³²⁹ the ultimate responsibility for handling prisoners falls on the United States. Reported information reveals that besides the United States, only Canada (which has more than 2500 troops in Afghanistan³³⁰) has captured appreciable numbers of suspected terrorists in the country, and Canada reportedly turns these suspects over to the United States for detention and interrogation.³³¹

Finally, no one needs to create a comprehensive new antiterrorism legal regime all at once. This Article has identified difficulties in many different areas of antiterrorism law that stem from a reliance on a law enforcement versus military action characterization to determine the powers of the government. Coming up with standards to judge the legality of counterterrorism responses could occur gradually. For example, new standards first might address the subject matter of interrogation. Then later, they might be crafted for detentions or targeted killing.

C. For the Skeptical: Consider the Alternatives

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

Both sides are probably correct if they hold these views. Any new law specifically addressing terrorism almost certainly will fall somewhere in the middle between the laws of war and the rules governing criminal law enforcement. But opponents of the proposal on both sides should consider the alternative, which is maintaining the status quo.

The current system is dysfunctional for the reasons spelled out in this Article. Governments for the most part dismiss critics who say that the law of war does not apply to terrorists. The United States, for example, has told pretty

329. Harlan Ullman, Op-Ed., *Securing Afghanistan's Future: We Are Running out of Time*, WASH. TIMES, Nov. 6, 2006, at A19 (noting that thirty-seven nations are in Afghanistan).

330. INTERIM REPORT OF THE STANDING SENATE COMMITTEE ON NATIONAL SECURITY & DEFENCE, CANADIAN TROOPS IN AFGHANISTAN: TAKING A HARD LOOK AT A HARD MISSION (2007), available at <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/defe-e/rep-e/repFeb07-e.pdf> (reporting that Canadian forces in Afghanistan total approximately 2500).

331. Bruce Champion-Smith, *Elite Force in Afghan Terror Raids*, TORONTO STAR, Sept. 21, 2005, at A7.

much anyone who has objected that it will forge ahead with targeted killings, detentions, and military commissions because it views suspected terrorists as enemy combatants. But despite the steadfastness of the government's position, its opponents have had an impact. For example, although the President proposed using military commissions to try suspected terrorists in November 2001, the legal proceedings are only just beginning six years later. Why is that? Even though human rights groups have not been able to block completely the government's plans as a legal matter, they have caused enough commotion to grind the effort almost to a halt. Examples like this show that neither side really is winning in the ongoing debate.

New treaties and other laws that establish what governments can and cannot do in combating terrorist threats, without relying on the characterization of terrorists as criminals or enemy combatants, hold potential for ameliorating the situation. These new standards would require trade-offs, but would provide greater certainty and less controversy. For example, under new laws aimed specifically at terrorism, the government might lose its ability to hold suspected terrorists indefinitely. Or it might lose its ability to conduct targeted killing missions at any time and in any place. But the laws might state clearly when the government may use military force as a counterterrorism measure or when it can engage in searches and seizures to catch terrorists.

D. Emerging Examples of the Recommended Approach

Getting away from the current system undoubtedly will prove difficult. But two recent examples illustrate how it might happen. Both of these emerging examples are imperfect, but they do show the general idea.

Litigants before the Israeli Supreme Court recently disputed the lawfulness of targeted killing. A human rights group called Public Committee Against Torture in Israel sued the government, seeking to enjoin the targeted killing of Palestinian activists.³³² Its petition for an interim order described numerous incidents in which Israeli defense forces had located terrorist suspects and then shot them or killed them with explosives.³³³ Like the UN Special Rapporteur in the Yemen incident, the Public Committee Against Torture in Israel viewed the targeted killings as an impermissible method of law enforcement. Its petition said:

The launching of missiles at a suspected terrorist, at a time when he does not pose *immediate* danger to another person, is an execution without a trial. The killing of a man by sniper fire, when that man is not engaged in specific activity that endangers the life of another person, is an execution without a trial. Booby trapping the car of a person, as suspect as he may be, is an execution of a person that has not been

332. See Petition for a conditional order (Order Nisi) and for an interim order ¶¶ 5-10, 14-15, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] IsrCt (petitioning Israel to end its "policy of liquidations" or "focused preventions" that allow for targeted killing of suspects that do not pose "*immediate danger*" (internal quotation marks omitted)).

333. See *id.* ¶ 33 (listing liquidation methods used by Israel Defense Force).

convicted³³⁴

But the Israeli government did not see it that way. It responded by saying that the laws of war allow the Israeli defense forces to attack enemy combatants. It asserted that “*there is no [dispute] that a person who takes a direct part in the hostilities is a legitimate target, whatever his formal characterization (member of a conscription army, uniformed, guerilla fighter, civilian, etc.) may be.*”³³⁵

The High Court of Justice did not accept either view.³³⁶ Instead, it adopted a middle ground. It said that terrorists should be viewed not just as civilians and not just as enemy combatants but instead as a third category that more correctly captures what they are—citizens sometimes taking part in the hostilities.³³⁷ The court said that the government may use targeted killing against them when they are engaged in hostilities but not at other times.³³⁸ That is a different standard from either what the government advocated based on the laws of war or what the petitioners said about law enforcement rules.

This decision is not a perfect example. It still relies on the military versus law enforcement characterization to some extent. It just suggests that the characterization may change over time, depending on what the terrorist is doing. But it is still a good example because it recognizes that the current system is defective and that governmental counterterrorism action does not neatly fit into the category of law enforcement or military action. Rather than sticking with the old rules, the court tried to think of what made the most sense in judging counterterrorism measures.

Another example is the Military Commissions Act of 2006,³³⁹ which Congress passed following *Hamdan v. Rumsfeld*.³⁴⁰ This Act establishes military commissions for trying terror suspects.³⁴¹ It is not a perfect illustration of what this Article is talking about because the Act is itself a counterterrorism measure rather than a new standard for judging the legality of counterterrorism measures. But the Act does view counterterrorism as something distinct from either law enforcement or military action. The terrorists tried by military commissions have rights that criminal suspects have, such as a right to appeal to an Article III

334. *Id.* ¶ 14.

335. Brief for Interim Order, *supra* note 320, ¶ 18 (quoting State Attorney’s Office, Supplementary Statement ¶ 152, HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Israel* [2006] IsrCR).

336. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Israel* [2006] IsrCR ¶ 61, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf. *Id.* ¶ 61 (determining that “preventative strikes upon terrorists in the *area* which cause their deaths are a necessary means from the military standpoint”).

337. *Id.* ¶ 31.

338. *Id.* ¶ 38.

339. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered titles and sections of U.S.C.).

340. 126 S. Ct. 2749 (2006).

341. See Military Commissions Act of 2006, § 3(a)(1), 120 Stat. at 2607 (to be codified at 10 U.S.C. § 948b(b)) (authorizing establishment of military commissions for trying certain offenses committed by terrorists).

court.³⁴² But the Act also treats suspects somewhat like enemy combatants in the sense that it does not give them the benefits of all the rules applicable to ordinary criminal trials.³⁴³ And Congress specifically denied enemy combatants the ability to invoke the Geneva Conventions as a source of rights.³⁴⁴ Congress wanted courts to judge the Act as a unique counterterrorism measure, not strictly as a law enforcement action and not strictly as a military action. Regardless of whether Congress made all the right choices, more efforts to see counterterrorism measures not simply as either law enforcement or military action should occur in the future.

V. CONCLUSION

At present, a specialized body of law addresses law enforcement agencies' treatment of criminal suspects. And a specialized body of law governs the military's treatment of enemy combatants. But with rare exceptions, there are no specialized standards for assessing governmental responses to terrorism. This lack of specialized standards necessitates judging the legality of governmental counterterrorism measures by trying to characterize them either as law enforcement or military action. This necessary characterization makes a significant difference because the laws applicable to criminal suspects differ a great deal from the laws applicable to enemy combatants. To repeat the clearest example, the former does not allow targeted killing, while the latter appears to do so.

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

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

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

342. *See id.* § 3(a)(1), 120 Stat. at 2622 (to be codified at 10 U.S.C. § 950g) (allowing for “[r]eview by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court”).

343. *See id.* § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(2)(A)) (allowing admission of all probative evidence against accused, without very many specific evidentiary rules).

344. *See id.* § 3(a)(1), 120 Stat. at 2602 (to be codified at 10 U.S.C. § 948b(g)) (providing that “no alien unlawful enemy combatant” could invoke Geneva Conventions as source of rights).

fortunately, the new laws do not have to emerge all at once. Instead, new standards might emerge one at a time to regulate particularly important actions like detention or targeted killing. Israel and the United States have already successfully begun to use this approach.