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THE RULE OF LAW, WAR, OR TERROR

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INTRODUCTION

Technological change and ideological confrontation made the twentieth century one of the most violent in recorded human history. Yet, one of its greatest legacies is the primacy of law, manifested both in the development of human rights norms and humanitarian law. Furthermore, the end of the Cold War and the collapse of state socialism produced a new wave of constitutionalism and the assertion of the centrality of the rule of law in both national and transnational affairs. The idea of the rule of international law was strengthened further in the last decade of the century with the advent of a reinvigorated multilateralism, particularly in the United Nations’ endorsement of the Gulf War and later NATO’s humanitarian intervention in the Balkans. It is this legacy of the exercise of power within a generally accepted, human rights oriented, legal framework that is now facing its greatest challenge through a combination

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of what Richard Falk has termed "megaterrorism" and the Bush administration’s new war on terror.

While a vigorous U.S. response to the horrific events of September 11, 2001, was both expected and fully justified, it is the subsequent trajectory of U.S. policy and action that raises the question of whether the primacy of law will be sustained in the face of an untrammeled assertion of unilateral power. Both at home and abroad, the period since September 11 has been marked by the Bush administration’s determination to pursue a range of policy options—from the unilateral use of force to expedient deportation proceedings to increasing restrictions on civil liberties—all under the cover of the war on terror. Although there was immense sympathy for the United States in the wake of the attacks, there is growing international concern that instead of these events heralding a period of collective action against the use of violence by those seeking to achieve ideological, religious, and political goals, the United States has seized this moment as an opportunity to assert its hegemony. The horrendous acts of terror in New York, Washington D.C., and in the skies above Pennsylvania pose a serious challenge to the notion of law and the idea that international conflicts must be peaceably resolved. Yet it does not necessarily follow that the United States, as a de facto imperial power, should assert itself as the ruler of a "new kind of empire." Furthermore, the important question is not whether the United States possesses the requisite power and status as the remaining twentieth-century superpower, but rather how power and violence to be managed in a world changed by the events of September 11.

Despite wide consensus that law provides a central prerequisite to the ideal of justice, and that it serves as a frail but central cord in the project to regulate power in human society, it is not often recognized that law has increasingly played a part in the conduct of war—in regulating even those moments in which the assertion of power seems most naked. However, it is in the realm of war in particular that the claim of lawfulness provides a necessary precept to any attempt to claim moral justification for the use of force. This dynamic tension between rules of law and war is not new. Since the nineteenth century there has been a growing body of rules and institutions focused on managing the use of military power, both in relation to the general practice of war as well as in relation to the combatants involved and the civilians or non-combatants affected by military action. By the end of the twentieth century there was a well-established body of international law consolidated in the Hague and Geneva Conventions as well as rules prohibiting wars of aggression, which are treated collectively as the law of war.

The basic premise of these international rules, formally governed by principles of national sovereignty, comity, and reciprocity between nation-states, is that all states, regardless of their relative power on the international stage, consider themselves equally bound. While there is often debate about the nature of international law, particularly when compared to domestic law, there are few who would suggest today that international law does not give rise to legal obligations. These obligations are, however, realized in most cases through the voluntary acquisitiveness of individual nation-states. It is only in the exception, in that small number of cases considered to be binding on all—including war crimes, crimes against humanity, and threats to international peace and security—that the international community has come to accept notions of individual responsibility and collective enforcement. The system thus remains premised on the voluntary acceptance of the rules by states, facilitated by the ability of individual states to reserve their interests in particular circumstances and in the ability of all states to change the rules by mutual agreement.

Based on mutual recognition and consent, the rule of law in the

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9 See Editorial, A Crippling Blow to World Order, MAIL & GUARDIAN, Feb 10, 2003 ("Most of the world understood American anger in the wake of the September 11 attacks. But the bellicose rhetoric that has been emanating from the White House should be of grave concern to all who hoped that the end of the Cold War would herald a unified approach to the building of a just world order"), available at http://archive.eg.co.za/MSArchive.
11 See Pacific Settlement of International Disputes (Hague 1), Oct. 18, 1907, 36 Stat. 2199, 1 BEVANS 575
international arena remains both a fragile achievement and an important source of common understanding and stability in efforts to address global problems—including the threat of "megaterrorism." I will argue that today this legacy, premised on the primacy of law, is threatened. The threat is posed both by the horrendous acts of September 11 as well as by a response to those acts that is undermining the fundamental sense of comity and reciprocity, which underlies a commitment to achieving legitimate aims through law, rather than resorting to war. In discussing this threat, I will review the legacy of law, especially in the attempt to control the practice of war and use of force, and then proceed to discuss the actions, strategies, and policy of the present Bush administration. Finally, I will employ an incident approach as a means to view the primacy of law question through an analysis of the United States' use of armed drones in the new war on terror. In conclusion, I will consider the relative value of a reliance on law, and the alternatives to war this might invite in the campaign against terror, before arguing that despite the seriousness of the threat of megaterrorism, the international law project remains the best hope for a sustainable future.

I. LEGACY OF THE TWENTIETH CENTURY—LAW, WAR, AND POWER

At the end of the twentieth century the formal primacy of law in the international arena was institutionalized through the United Nations and manifested not only in the decisions of the U.N. Security Council but also through the creation and public operation of special tribunals to address human rights violations resulting from conflicts in the former Yugoslavia and Rwanda. At the same time, there was increasing public awareness of


26. See generally Steve Weber, Shaping the Postwar Balance of Power: Multilateralism in NATO, in MULTILATERALISM MATTERS, supra note 4, at 233–92

way for the formulation and adoption in 1907 of the Hague Conventions, which addressed various aspects of the practice of war by focusing on the behavior of belligerents. The Geneva Conventions are closely related but considered by some commentators to be conceptually separate because they deal with protection of persons or more specifically the treatment of victims of armed conflicts. Together these conventions—Hague and Geneva—provide the law of war, including rules concerning banned weapons, permissible strategies, tactics and targets, and humanitarian rules concerning the treatment of the wounded, prisoners, and the civilian populations affected by hostilities. This basic legal framework has been elaborated over the course of twentieth-century conflicts. Thus, while the numbers of victims of war have continued to increase so has the coverage of law and even the prosecution of war criminals, culminating most recently in the creation of the International Criminal Court with jurisdiction to prosecute individuals for genocide, crimes against humanity, and war crimes.

Prohibition of the use of force is, however, a relatively recent development. Prior to World War I, states regularly asserted their sovereign right to wage war, even if at times they couched their claims in the language of "self-preservation and the related tangle of doctrine concerning necessity and intervention." It was in the shadow of the enormous loss of life during World War I that states began to fashion agreements for the peaceful settlement of disputes, a process which eventually led to the Kellogg-Briand Pact or General Treaty for the Renunciation of War in August 1928. While violated in practice during World War II, the Pact’s outlawing of war as an instrument of national policy became an important source of law for the prosecution at the trial of German Major War Criminals, who were charged with committing crimes against peace, "in that the defendants planned, prepared, initiated and waged wars of aggression, which were also wars in violation of international treaties, agreements or assurances." Principles later incorporated in the U.N. Charter’s explicit prohibition of the use of force.

Although war was not ended by such agreement, the nature of war over the latter half of the twentieth century was profoundly shaped by efforts to define military action as acts of self-defense or even as humanitarian interventions and to seek, where possible, endorsement by the United Nations—as in the Korean and Gulf wars—as basic grounds for claiming the legitimate use of force.

The legitimate use of force remains, however, further constrained by the laws of war. Despite the prohibition on the use of force, states have continued to develop the laws of war over the twentieth century by negotiating and making agreements designed to regulate the practice of war and to protect specific categories of persons in situations of armed conflict or their aftermath. In the United States, the Vietnam War, and the 1968 My Lai massacre in particular, led to significant changes in the role of lawyers within the military, who were required for the “first time to review combat plans for compliance with international conventions and treaties.” Since the 1980s, military lawyers have not merely applied military discipline and advised commanders on the laws of war at the Joint Chiefs of Staff level. Instead there has emerged a field of “operational law” in which lawyers have become engaged at every level from “mission planning” to battlefield target vetting, with the aim of ensuring that anticipated civilian deaths and property damage are not disproportionate to the military advantage gained. While the lawyers only advise and do not have the authority to dictate, Professor Paust argues that “[a] smart commander listens to input from all of his staff on legal matters, as well as logistics and intelligence . . . You don’t want anyone in your command accused of war crimes.”

War crimes and related human rights violations became, by the end of the twentieth century, a key focus of international attention, leading both to

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36 U N CHARTER art 2 para 4
39 The earlier role of military lawyers in relation to international law and outside of the realm of internal discipline or military justice is reflected in Gordon Baldwin, The International Law of the Armed Forces Abroad, NAVAL WAR C REV., Nov 1965, at 6.
42 Professor Jordi Pauet. Former International Law Professor at the Army JAG School, quoted in Smith, supra note 41.
the creation of a permanent international criminal court with jurisdiction over such crimes and a clear sense of the primacy of law. The arrest of General Pinochet in London and the subsequent decision by the Law Lords denying that a former head of state has immunity against prosecution for human rights violations further strengthened the sense of law's reach.\footnote{See Regina v Bow St. Metro. Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 2), [2000] 1 A C. 147 (1999)}

Even today, the establishment of the International Criminal Court, over the resistance of the United States, promises an era in which the authority of law will overcome simple claims of state sovereignty. Yet given the realities of unequal power, this promise remains premised on the continued recognition of comity, based on the formal equality of peoples and states, and on the exercise of restraint. President Truman captured the meaning of such comity and restraint when he told the final plenary session of the founding meeting of the United Nations that “[w]e all have to recognize—no matter how great our strength—that we must deny ourselves the license to do always as we please. No one nation, no regional group, can or should expect any special privilege which harms any other nation.”\footnote{President Harry S. Truman, Address at the Final Plenary Session. U N Conf on Int'l Org (June 26, 1945), in Dep't St. Bull., July 1945, at 3, 4.} Despite the continuing prevalence of armed conflict, this legacy of the twentieth century, of international peace based on comity among nations and the promise of law over war, is still reflected in global public opinion as witnessed most recently in the extraordinary transnational demonstrations for peace and against the unilateral use of force.\footnote{See Jonathan Schell, The Will of the World, NATION, Mar. 10, 2003, at 3}

II. THE BUSH ADMINISTRATION'S RESPONSE—WAR, TERROR, AND THE LIMITS OF LAW

In stark contrast to the millions of people marching for peace across the globe, the Bush administration has insisted that it has the right to wage war on terrorism without defining or limiting the terrain, duration, or means of such a war. A sympathetic world community seems to have accepted that the campaign to remove the Taliban regime in Afghanistan was justified as an act of self-defense under Article 51 of the U.N. Charter, given the Taliban's support for al Qaeda. There is much less support, however, and indeed deep concern about the intent to wage a more generalized war on terror as outlined by President George W. Bush on September 20, 2001, when he argued that “[e]very nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.”\footnote{President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), in 37 Wkly. Comp. Pres. Doc. 1347, 1349} In this latter formulation, the right to self-defense has been transformed into a justification for global intervention. Indeed the description of Iraq, Iran, and North Korea as an “axis of evil” is a categorization that has perpetuated policies inducing tension and the threat of armed conflict from the Middle East to the Korean peninsula. As the war on terror is being transformed into a policy of global reordering, even the traditionally hawkish Henry Kissinger has expressed concern, calling the new approach “revolutionary,” and arguing that “regime change as a goal for military intervention challenges the international system established by the 1648 Treaty of Westphalia.”\footnote{See Jonathan Schell, Letter From Ground Zero: The Path to Point B. Nation, Sept. 23, 2002, at 13 (quoting Henry Kissinger).}

The Bush administration's unilateral reshaping of the rules is manifested not only at the broadest level of policy and international diplomacy but also at the individual level in the recasting of humanitarian and civil rights law with respect to prisoners of war and detainees.\footnote{See Duncan Campbell, U S Interrogators Turn to 'Torture Lite', Mail & Guardian (online), Jan. 25, 2003, at http://www.mail.co.za (“The United States is condoning the torture and illegal interrogation of prisoners held in the wake of September 11, in defiance of international law and its own constitution, according to lawyers, former US intelligence officers and human rights groups”); see also Lisa Anderson, Amnesties: Cnticts U S on Detainees, Chi Trib., Mar. 15, 2002, at 9} Over a year since the removal of the Taliban regime, the United States continues to hold approximately 625 prisoners at Camp X-Ray in Guantnamo Bay, Cuba, in conditions that do not meet the basic rules of the Geneva Conventions. As a panel of three senior British judges stated in a case brought in the United Kingdom by Jamirati Juma, the mother of detainee Feroz Abassi, the detention of prisoners at Guantnamo "appeared to be a violation of both international law and the concept of habeas corpus [as it] created an unacceptable 'legal black hole.'”\footnote{British Judges Criticize U S on the Prisoners Held at Guantnamo. N Y Times, Nov. 9, 2002, at A11} Lord Phillips—master of the rolls—argued that “[w]hat appears to us to be objectionable is that Mr. Abassi is subject to indefinite detention in territory over which the United States has exclusive control, with no opportunity to challenge the legitimacy of his detention before any court or tribunal.”\footnote{Id} Instead of clarifying the status of individual prisoners as required by international law, the Bush administration has merely asserted that those being held are “unlawful combatants” and that they are being treated in accordance with standards of the Geneva Conventions. Even if such a claim may be sustained in part in the case of al Qaeda captives, as Richard Falk points out, the failure of the United States to offer "reasoned explanation[s] for its action are as consequential for the weakening of international humanitarian law as the claims themselves."
law as its substantive disregard of legal restraints on its behavior."51

Unfortunately, this failure to abide by recognizable legal restraints is also impacting the civil rights of people within the United States. In the weeks following the attacks of September 11, over a thousand individuals were detained in the United States in an effort to apprehend those responsible.52 Targeted because of their religion, ethnicity, or nationality,53 the treatment of many of these detainees raises questions about the violation of their human and civil rights. Abdullah Higazy, arrested in New York where he was mistakenly identified as having stayed in the hotel room in which an aviation radio had been left by an airline pilot, complained that the agent interrogating him "threatened the safety and security" of his family members in Egypt and the United States and that he felt he had no choice but to make an admission "to remove his family from harm's way."54 Commenting on the experience of another detainee, Hady Hassan Omar who was arrested on September 12, 2001, and held for seventy-three days, one government official told the press that: "IF your subject has a complete breakdown ... the barriers to resistance are lessened. Once a person is at that point, he has lost the will to deceive, and you can be pretty certain that he's not lying."55 Finally, the administration has gone so far as to invent its own version of a traditional category, that of "enemy combatant," in order to justify the incommunicado detentions of U.S. citizens such as Yaser Esam Hamdi,56 who was captured in Afghanistan, and José Padilla,57 who was arrested on arrival at Chicago's O'Hare International Airport.

Articulating its justification for the assertion of such unlimited power at home and abroad, the Bush administration has devised a new National Security Strategy of the United States, which was submitted to Congress on September 20, 2002. This strategy contains two central doctrines which seem more closely related to an ambitious project of global reordering than to a proportional response to the postmodern phenomena of globalized and networked terrorism. Instead of focusing on the multitude of tasks that might be considered essential to the isolation and defeat of this non-state-based network of militantly violent actors, the new policy remains trapped in a rhetoric of interstate conflict, maintaining as its central pillars: "preserving overwhelming American military superiority indefinitely"; and "preemptively attacking nations deemed threatening rather than relying on traditional deterrence or containment."58 When considered in the light of the administration's broader policy agenda—the vast expansion of military spending, including the procurement of new weapon systems with increased reliance on new generations of military technology like precision-guided weaponry, unmanned aircraft, and special forces—this new strategy seems less a response to the events of September 11 than the seizing of an opportunity to pursue a preexisting agenda aimed at securing a place of enduring dominance on the global stage.59

It is this unarticulated strategy of global reordering that poses the greatest challenge to humanitarian law and civil rights both within and beyond the borders of the United States. In fact, the basic feature of this strategy, the administration's assertion of a unilateral approach to international issues was evident well before September 11. Shortly after assuming office, the Bush administration began to assert a unilateral stance in international negotiations, obstructing and reversing multilateral initiatives that had taken years to negotiate. Key actions in this vein include: rejecting the Kyoto Protocol on global warming; withdrawing from the Anti-Ballistic Missile Treaty; and rejecting the International Criminal Court by denying the effect of the United States' own prior signing as well as campaigning to obtain agreements from other nations not to extradite to the court U.S. government employees accused of war crimes and other violations under the Rome Statute. This rejection of international processes has generated a degree of uncertainty, which stands in stark contrast to the confidence building measures so important to stable international relations. As U.S. Senator Robert Byrd stated in a speech in the U.S. Senate on the war against Iraq:

This nation is about to embark upon the first test of a revolutionary doctrine applied in an extraordinary way at an unfortunate time—the doctrine of preemption, no small matter—the idea that the United States or any other nation can legitimately attack a nation that is not imminently threatening but may be threatening in the future ... Is a radical, new twist on the traditional idea of self defense. It appears to be in

51. Richard Falk, supra note 7, at 118.
52. Lawyers Committee for Human Rights, supra note 8, at 13.
53. See id at 15.
contravention of international law and the U.N. Charter. And it is being tested at a time of worldwide terrorism, making many countries around the globe wonder if they will soon be on our hit list. . . . High-level administration figures recently refused to take nuclear weapons off the table when discussing a possible attack against Iraq. What could be more destabilizing . . . [and] unwise then this type of uncertainty, particularly in a world where globalization has tied the vital economic and security interests of so many nations so closely together? . . . Anti-Americanism based on mistrust, misinformation, suspicion, and alarming rhetoric from U.S. leaders is fracturing the once solid alliance against global terrorism which existed after September 11, 2001.60

III EXTRAJUDICIAL KILLINGS—LAW OR TERROR?

Another way to consider the threat to a law-based international order is to study particular incidents or processes "for the purpose of monitoring the genesis, modification and termination of international norms."61 The decision by the United States to use armed unmanned drones or Unmanned Aerial Vehicles (UAVs) to target and eliminate particular individuals provides a rich context in which to explore the administration's destabilization of fundamental principles of international law, while paradoxically viewing examples of the most advanced application and explicit engagement with the law of war from within the U.S. armed forces. The legal issues implicated in these incidents raise questions about the validity of particular targets, avoiding civilian casualties, the legality of assassinations, the use of a new type of weapon, and the role of operational lawyers in the decision to fire. Unlike traditional military situations, the nature of this technology means that the target may be viewed in real time so that the actual consequences of an attack are readily foreseeable before the decision to fire is made. The rules of war have attempted to reduce the impact of military conflict on non-combatants, and the idea of proportionality,62 in the context of self-defense, seeks to reduce the harm more generally by favoring capturing over killing and imposing limitations on the use of force and the exclusion of targets offering unclear military utility or advantage. The advent of sophisticated technology capable of identifying individual targets and pinpointing the use of force, then, seems to raise the bar on what should be considered legitimate acts of war, rather than terror.

While Predator UAVs have now been deployed in numerous attacks,63 there are three separate incidents that provide the particular context in which to explore the relevant legal issues. The first case, near Kandahar, Afghanistan, occurred in late September or October 2001, and involved the targeting of jeeps ferrying Taliban leader Mullah Mohammed Omar. U.S. Central Command's senior operational lawyer Navy Captain Shelly Young advised against firing the missile at the jeeps.64 Captain Young's decision to advise against the strike is reported to have been based on concern that killing Omar would violate the Geneva Convention's prohibition on assassinations and on the grounds that the Predator UAV had not been vetted by legal staff for use as a weapon. In this case the jeeps escaped by the time the UAV operators were given the go ahead, raising questions about the role of lawyers in military operations,65 a function that has expanded dramatically since a Joint Chiefs of Staff memorandum in the 1980s "required that all operational plans, contingency plans and rules of engagement be reviewed by lawyers for compliance with the international Law of War and with U.S. domestic law."66 Despite assurances that military lawyers are "never in a position to 'stop' any attack," and it is not even certain what role Young's advice played in General Tommy Franks' decision to hold fire,67 it was later revealed that Secretary of Defense Rumsfeld expressed great irritation at the fact that the military had hesitated and thus failed to get Omar when they thought they had him in their sights.68

The second case involved the firing of a hellfire missile which killed three people, one of whom the operators of the Predator UAV thought might be Osama bin Laden.69 At about 3 p.m. on the afternoon of February 4, 2002, three men were standing on a bluff above the Zawara

62 See Brownlie, supra note 31, at 261-64.
caves, the site of an old anti-Soviet guerrilla camp, when the missile struck without warning out of a clear sky. 70 The CIA operators of the drone had been monitoring the area when they spotted the men—Daraz Khan, Jehangir Khan, and Mumir Ahmed—and because Daraz Khan was tall (5'11'') and seemed to be treated with deference by the others in the drone's viewer, it was decided that he might be bin Laden (who is supposed to be about 6' 4''), and the order to fire the missile was given. 71 Pentagon spokeswoman Victoria Clarke first reported that the attack had "killed several Al Qaeda leaders." 72 However, three days later, after a fifty-person U.S. investigation team had visited the site, General Tommy Franks acknowledged that "he did not know who they [the victims] were," 73 Clarke told Pentagon reporters that "[i]t is difficult for me to talk about what led into that strike . . . [that wasn't the U.S. Military]." 74 When reporters later made their way to the scene they reported that the three dead men were local villagers collecting scrap metal from the abandoned guerrilla camp, and local villagers denied that any al Qaeda people had been in the area. 75

The third incident occurred on November 3, 2002, when a CIA Predator drone flying near Marib, Yemen, fired a missile at a car killing six men. 76 The target of the attack was reported to be Ali Qaed Sunan al-Harithi, described variously as a bin Laden bodyguard, 77 one of bin Laden's key lieutenants in Yemen, 78 a high ranking militant, suspected of involvement in the plot to bomb the destroyer U.S.S. Cole in the port of Aden in October 2000, 79 and an individual wanted for questioning by law enforcement officials investigating the Cole bombing. 80 Of the five others in the car, one is thought to have been a U.S. citizen, Ahmed Hijazi (who might have been one of the two alleged members of the Buffalo, New York, al Qaeda cell—Ramar Derwish and Jaber Elbaneh—believed to be at large in Yemen), while the identities of the other four have remained unknown but with them being described variously as henchmen, important terrorists, al Qaeda suspects, or al Qaeda operatives. 81 The strike in this case was never officially acknowledged by the CIA, although senior Bush administration officials claimed credit off the record and noted that President Bush has "authorised the CIA to kill around two dozen alleged terrorists on a secret hit list and any others it considers to be 'enemy combatants'." 82 The New York Times quoted anonymous U.S. officials saying that "approval of the list did not abolish a long-standing presidential executive order banning assassinations, as the terrorists are defined as 'enemy combatants' and thus legal targets." 83

The designation, by an attacker, of individuals as "enemy combatants" does not however resolve the question of whether they are legally considered to be legitimate targets of military action. Both the Geneva Conventions 4 and U.S. domestic law 84 explicitly prohibit extrajudicial killings, which are generally defined as the arbitrary deprivation of life "without a judgment by a competent and independent court or any recourse

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71 Id.
73 Niles Latham, Commandos Hunt Al Qaeda Corpses, N.Y. Post, Feb 8, 2002, at 12.
75 Sayed Salahuddin, Attack Prompts Rumours of Bin Laden's Death, Independent (London), Feb 8, 2002, at 18; see also Burns, supra note 70.
77 Id.
78 Id.
80 A senior law enforcement official told The New York Times that "[a]lthough investigators wanted to question Mr. Harithi about the Cole bombing, the CIA did not consult law enforcement officials before the Yemeni operation" David Johnston & David E. Sanger, Fatal Strike in Yemen Was Based on Rules Set Out by Bush, N.Y. Times, Nov 6, 2002, at A16.
82 David Tenet, CIA Authorised to Target and Kill al-Qaeda Members, Guardian, Dec 16, 2002.
84 See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug 12, 1949, art. 3, 75 U N T S 31. 32 ("Persons taking no active part in the hostilities shall in all circumstances be treated humanely."); see also Camargo v Colombia. 1 Selected Decisions H R C 112 (1982) ([It] is evident from the fact that seven persons lost their lives as a result of deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victim and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions.")
85 The Torture Victim Protection Act of 1991 provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture or extrajudicial killing shall be liable in civil action to that individual or the individual's legal representative..." Pub. L. No. 102-255, 106 Stat. 73 (1992).
to processes of law,\textsuperscript{86} while the laws of war have historically made a distinction between potential and actual combatants. Even members of the armed forces, "do not become ‘actual combatants’ for the purposes of the application of the laws of war unless there are hostilities of a certain intensity."\textsuperscript{87} Although the laws of war have evolved to give ever greater legal protection to non-combatants, including combatants who are hors de combat,\textsuperscript{88} Protocol I of 1977, which extends the definition of combatant to irregular forces (and to which the United States is not a party), nevertheless "affords no protection for terrorists."\textsuperscript{89} It is in this context that concern has been expressed over the use of the UAVs, particularly in killing specific individuals in countries where there is no war. Vienna Colucci of the U.S. section of Amnesty International has argued, "[i]f the suspects did not pose an immediate threat, and were deliberately killed in lieu of arrest, then Amnesty International would consider these killings to be extra-judicial executions, which are prohibited in all circumstances under international human rights law."\textsuperscript{90} Describing the use of the UAVs as the "beginning of robotic warfare," Clifford Beal, editor of Jane’s Defence Weekly, told the Reuters news agency that "[t]here is underlying tension in the military about using it. The CIA does not have any qualms,"\textsuperscript{91} while the Swedish Foreign Minister, Anna Lindh, told the Swedish news agency TT that "[i]f the USA is behind this with Yemen's consent, it is nevertheless a summary execution that violates human rights. If the USA has conducted the attack without Yemen's permission it is even worse. Then it is a question of unauthorised use of force."\textsuperscript{92}

IV. THE THREAT OF TERROR AND THE PROMISE OF LAW

Heralded as a breakthrough in technology, the marriage of the hellfire anti-tank missile and the Predator UAV created the capacity to identify targets in real time and to deliver a powerful blow without the target often even being aware of the UAV’s presence; however, it has also produced yet another set of challenges to the law of war. While visual contact may provide the right information when an armored vehicle is spotted hidden in a civilian area or the occupants of a convoy of vehicles may be identified as carrying combat troops, already the limits of this technology have been revealed in the mistaken identity of the three Afghani peasants, where the relative stature of one individual led the operators to believe it may have been bin Laden and resulted in the illegal killing of three non-combatants. Even when the specific target was correctly identified, as in the case of al-Harathibi in Yemen, the fact that the decision to fire was based on the certain knowledge that the other four unidentified occupants of the vehicle would also be killed, as well as the general question of whether al-Harathibi could be considered an enemy combatant at that moment, raise serious questions of legality. Although war was not officially declared, few would question the designation of Afghanistan as a theater of combat during the period in which the UAV incidents under discussion took place. By contrast, there were no ongoing hostilities in Yemen, and there are indications that al-Harathibi had been under surveillance for some time before the strike. Finally, the refusal to officially acknowledge responsibility for the attack by a particular chain of command raises questions about the decision-making process leading up to this attack, especially when compared to the first incident where operational lawyers were not only consulted but seem to have played an important part in evaluating the situation and requiring a more careful consideration of the target and the possible consequences of firing the missile.

Given the obviously increased commitment in the preparation and practice of the armed forces of the United States to abide by the laws of war, once called into action,\textsuperscript{93} it is possible to identify a number of key legal issues raised by the use of the Predator drones to kill targeted individuals, including the definition of a combatant, the designation of the area and duration of military conflict, and finally, whether the identification, location, and decision to act against a legitimate target may apply to a particular individual rather than enemy combatants in general.

The structure and effectiveness of the laws of war are premised firstly on making a clear distinction between combatants and non-combatants—only combatants and related facilities are considered legitimate targets of deadly force. While "collateral damage" is acknowledged as an inevitable consequence of military action, a unique feature of "smart" weapons, and particularly the Predator UAV, is that the individual target is identified and hit in real time with a degree of certainty rare in the history of modern warfare. Outside of a theater of combat—defined by time and place—the targeting of individuals for elimination, particularly if they are not openly

\textsuperscript{86} Detter de Lupis, supra note 13, at 106.
\textsuperscript{87} Id. at 243
\textsuperscript{88} Id at 116
\textsuperscript{90} US Wages War by Remote Control, MAIL & GUARDIAN (online), Nov 7, 2002, at http://www.mg.co.za.
\textsuperscript{91} Id.
\textsuperscript{92} Operational law is focused on the rules of war or jus in bello and shies away from an evaluation of whether the overall decision to wage war is legal—jus ad bellum—which in the U.S. context seems to be considered a political/legal question for the Commander in Chief/President. This may be understood from the perspective that JAG lawyers are not really enforcing international norms but rather those international standards incorporated into domestic U.S. law including the Department of the Army Field Manual, FM 27-10 (1956), amended by Change No 1, 1976.
armed or engaged in a certain level of hostilities at the time, without an attempt to apprehend them or to give them a chance to surrender, could be considered murder under the Geneva Conventions. This analysis applies also to those unidentified individuals who are killed because of their proximity to the targeted individual. While terrorists may receive no protection under the Geneva Conventions, the rules of war attempt to protect all non-combatants against the use of force, which means that the only effect of being an "illegal" combatant is that the individual is not granted the rights of a combatant but is instead treated as a common, or in the case of terrorists, an international criminal. It is in this context that one may appreciate the concern of the operational lawyer when faced with the use of this new technology.

In practice, the Bush administration attempts to resolve these problems in three distinct ways: first, the whole globe, including the United States, 93 has been declared a theater of war; second, it has been asserted that the war is of indeterminate duration; and third, the administration seems to have bypassed the military's operational lawyers completely by designating the CIA as the relevant operational branch in the hunting down and killing of listed individuals. These strategies do not resolve the question of whether these actions violate either domestic or international law, despite the argument of some claiming that international law changes through practice, and therefore the fact that the United States is taking such action and considers it legal means that such action against terrorists is consistent with evolving international law. Customary international law does change over time through a coincidence of new practice and concomitant opinio juris, but this does not change established domestic or treaty law—including the Geneva Conventions—which through ratification are part of the domestic law of the United States. Even if it may be argued that these killings are an example of changing international practice, it is unlikely that the practice of two states, condemned by others as violating international law, is sufficient evidence of the emergence of a new norm of customary international law. One conclusion may therefore be that the use of a UAV to kill a designated individual outside of the battlefield or area of significant hostilities is an extrajudicial killing in violation of both international and domestic law. In response, the Bush administration asserts a new category of "unlawful enemy combatants," who are neither combatants or non-combatants under the Geneva Conventions, nor criminals—whether liable for crimes against humanity or terrorism—thus creating a legal "black hole" which is justified on the ground that the attacks of September 11 have changed everything, launching a borderless, timeless, and unbounded war.

While the Bush administration's response has been embraced by a number of countries who are now justifying their own violations of human rights in terms of the war on terrorism, other states, including many European countries have responded by pursuing criminal investigations and in some cases tightening existing criminal laws designed to address terrorism. The first conviction for participation in the September 11 attacks, for example, was obtained by German prosecutors in Hamburg. Moreover, the Dutch authorities have made a string of arrests, including seven men in Rotterdam, Den-Helder, and Eindhoven said to be involved in recruiting and providing logistical support to al Qaeda, as well as a twenty-two-year-old Moroccan who the Dutch believe was preparing a suicide attack. 94 These successes suggest that internationally coordinated criminal investigations and prosecutions may provide an important plank of an alternative counter-terrorism strategy—one based on bilateral cooperation and the strengthening of the law, rather than on unilateral actions that undermine long-established rules of war and humanitarian law.

In fact, prior to September 11, the United States had been actively involved in making agreements providing for collaborative policing between U.S. law enforcement and foreign police forces. As of July 1, 2001, the United States had negotiated forty-three Mutual Legal Assistance Treaties. 95 For a policing strategy to be successful it will have to be supplemented by a range of policies and programs designed both to address the social and political conditions that facilitate the recruitment and survival of individuals and groups committed to global terrorism, as well as new methods of intelligence gathering that will enable authorities to intercept those preparing to commit acts of megaterrorism. While the European constitutional and human rights landscape incorporates counterterrorism rules that enable states to gather domestic intelligence and to limit the space of ideological propaganda through limits on hate-speech, the constitutional traditions of individual civil rights, including privacy and free speech, make this a more difficult strategy to pursue in the United States. However, instead of reconceptualizing the existing civil rights framework to address concerns of individual privacy and to confront the teaching of hatred as matters of political and constitutional choice, the Bush administration has embraced the metaphors of state security and unlimited war. This promotes an agenda of global and domestic reordering far broader than the task of discrediting, isolating, and bringing to justice the

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94 Dutch Say Arrest Foiled Suicide Strike, N Y TIMES, Nov 8, 2002, at A13

adherents of global terrorism. It is this choice of unilateralism, national security, and war over multilateralism, cooperative criminal investigation, and the rule of law that today poses a major threat to the future of the international system. While the threat of megaterrorism does justify significant attention and even the possible reconceptualization of some approaches to civil rights so as to enable authorities to gather the information required to isolate and apprehend those committed to global terrorism, there are important consequences in the choices being made. The Bush administration's reliance on a national security paradigm frames the threat of terrorism in terms of a global war of indeterminate duration. This framing leads to a reordering of global relations in which the preeminence and prerogatives of the United States are considered primary in any engagement. Now, instead of building upon the global sympathy that followed the attacks on September 11 in order to promote common values of democracy, equality, and the rule of law, the prospect of an undefined war framed by the United States in terms of its own interest, is producing fear and loathing among those who feel excluded or pressured into compliance. On the threshold of the twenty-first century, just when it seemed that law could provide the foundation for greater human security through global interaction, unilateral assertions of power and interest are threatening the fragile threads of comity and reciprocity which provide the means to manage the realities of increasing global integration. Instead of working to build law in the face of terror, there is a danger that in the name of an illusory "civilization" or "empire," war and terror may come to be relied upon as the only means of maintaining an increasingly unsustainable global order.