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Comparing Islamic and International Laws of War: Orthodoxy, "Heresy," and Secularization in the Category of Civilians†

This Article investigates how contemporary laws of war rationalize civilian deaths. I concentrate on two specific legal constructions in warfare: the definition of civilian/combatant and the principle of distinction. (The categories of civilian and combatant should be understood as dialogically constitutive and not entirely distinct. In addition, the category of "civilian" is a modern one and premodern legal sources often do not use one term to refer to noncombatants.) I focus on two significant parties in contemporary warfare: al-Qāʿidah (aka Al-Qaeda) and the U.S. military. Al-Qāʿidah diverges from orthodox Islamic law on these two legal issues, while remaining within the Islamic legal tradition. To scrutinize the nature of this divergence, I compare al-Qāʿidah's legal reasoning to the legal reasoning of the U.S. military. I demonstrate that the U.S. military diverges from orthodox international law in ways that parallel how al-Qāʿidah diverges from orthodox Islamic law. Specifically, both the U.S. military and al-Qāʿidah elide orthodox categories of civilians and expand the category of combatant, primarily by rendering civilians as probable combatants. Based on this comparative analysis, I argue that the legal reasoning of al-Qāʿidah (and other militant Islamist groups) is as secular as it is Islamic; I call this fusion secularislamized law.

Introduction

If there is an archetypical image of contemporary warfare, it is that of dead civilians, not dead soldiers. Along with the reluctance to publish images of dead soldiers, more pictures of dead civilians

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circulate because contemporary warfare *kills* far more civilians than soldiers.[1] The rate of civilian deaths in recent wars has been increasing, rather than decreasing.[2] Historical research indicates that from the eighteenth century to the twentieth century, wars resulted in more military deaths than civilian deaths.[3] A United Nations report published in 1996 estimated that "[i]n recent decades, the proportion of war victims who are civilians has leaped dramatically from 5 per cent to over 90 per cent."[4] While there are intense scholarly debates on how to calculate civilian deaths, most scholars agree that the proportion of civilian casualties is high and steadily increasing.[5] As Valerie Epps concluded, "since the turn of the twentieth century, civilian deaths have outnumbered military deaths in nearly all wars."[6] These general observations about warfare are also evident in contemporary state violence against "terrorism."[7] In 2015, Physicians for Social Responsibility estimated that "the war ['on terror,' begun in 2001] has, directly or indirectly, killed around 1 million people in Iraq, 220,000 in Afghanistan and 80,000 in Pakistan, i.e. a total of around 1.3 million."[8] The U.S. Department of Defense estimated that approximately 7,000 U.S. soldiers were killed during "war on terror" military operations between 2001 and 2021.[9] By comparison, the U.S. Department of State calculated that 235,769 people were killed globally by "terrorist" acts between 2006 and 2017.[10] Regardless of the

1. On images of dead civilians and dead soldiers, see Sarah Sentilles, *When We See Photographs of Some Dead Bodies and Not Others*, N.Y. TIMES (Aug. 14, 2018), www.nytimes.com/2018/08/14/magazine/media-bodies-censorship.html.

2. Commentary about how warfare is transforming the contemporary world is significant, but not directly relevant to this Article's objectives. See, by way of example, GRÉGOIRE CHAMAYOU, A THEORY OF THE DRONE (Janet Lloyd trans., The New Press 2015).

3. Valerie Epps, *Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule*, 41 GA. J. INT'L & COMP. L. 307, 326 (2013).

4. U.N. Secretary-General, *Impact of Armed Conflict on Children*, ¶ 24, U.N. Doc. A/51/306 (Aug. 26, 1996).

5. For a critique of the 90% civilian casualty rate, see Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?*, 52 SURVIVAL 115 (2010). For a discussion of "the tremendous variation in the proportion of civilian casualties," see Andrew Barros & Martin Thomas, *Introduction: The Civilianization of War and the Changing Civil–Military Divide, 1914–2014*, *in* THE CIVILIANIZATION OF WAR: THE CHANGING CIVIL–MILITARY DIVIDE, 1914–2014, at 1, 2 (Andrew Barros & Martin Thomas eds., 2018).

6. Epps, *supra* note 3, at 329.

7. On the problematics of the term, see Charles Tilly, *Terror, Terrorism, Terrorists*, 22 SOC. THEORY 5 (2004). *See also* Marie Breen Smyth et al., *Critical Terrorism Studies: An Introduction*, 1 CRITICAL STUD. TERRORISM 1 (2008); *Study: Threat of Muslim-American Terrorism in U.S. Exaggerated*, CNN (Jan. 6, 2010), http://edition.cnn.com/2010/US/01/06/muslim.radicalization.study.

8. PHYSICIANS FOR SOC. RESP. (PSR), BODY COUNT: CASUALTY FIGURES AFTER 10 YEARS OF THE "WAR ON TERROR" 15 (2015).

9. U.S. Dep't of Def., Casualty Status as of 10 a.m. EST Jan. 4, 2021, www.defense.gov/casualty.pdf.

10. U.S. Dep't of State, *Number of Casualties Due to Terrorism Worldwide Between 2006 and 2017*, STATISTICS PORTAL (2018), www.statista.com/statistics/202871/number-of-fatalities-by-terrorist-attacks-worldwide.

(in)accuracy of these numbers, more civilians are being killed by the "war on terror" than soldiers or victims of "terrorist" acts. Hence, contemporary *state violence* causes the deaths of more civilians than *nonstate violence*. The rates of civilian deaths from recent wars are so high that Epps concluded, "the overall civilian toll from warfare belies the notion that civilian war-related deaths and injuries are simply incidental (or collateral) to legitimate military destruction and death."[11] In addition to the staggering number of overall civilian deaths, the high number of children and other probable noncombatants who are killed suggests that these deaths are not incidental. Appropriately, Alexander Downes asserted, "state violence against noncombatants is largely the result of rational strategic calculations rather than emotion, dehumanization, or irrational hatred."[12] And Bruce Cronin determined, "most of the collateral damage inflicted by the Western powers occurred not during heated battles or under conditions of uncertainty brought about by the fog of war, but rather after careful deliberation and planning, under circumstances that were highly favorable to the attackers."[13] Civilian deaths are not incidental, whether a state intends civilian deaths or intends attacks with reckless disregard for "collateral" civilian deaths. Moreover, if "collateral" civilian deaths are not incidental, then either the laws of war disregard protecting civilian lives or those laws are being disregarded—or both.

This Article investigates how contemporary laws of war rationalize civilian deaths. I concentrate on two specific legal constructions in warfare: the definition of civilian/combatant and the principle of distinction. (The categories of civilian and combatant should be understood as dialogically constitutive and not entirely distinct.[14] In addition, the category of "civilian" is a modern one and premodern legal sources often do not use one term to refer to noncombatants.) I focus on two significant parties in contemporary warfare: al-Qāʿidah (aka Al-Qaeda) and the U.S. military. Al-Qāʿidah diverges from orthodox Islamic law on these two legal issues, while remaining within the Islamic legal tradition. To scrutinize the nature of this divergence, I compare al-Qāʿidah's legal reasoning to the legal reasoning of the U.S. military. I demonstrate that the U.S. military diverges from orthodox international law in ways that parallel how al-Qāʿidah diverges from orthodox Islamic law. Specifically, both the U.S. military and al-Qāʿidah elide orthodox categories of civilians and expand the category of combatant, primarily by rendering civilians as probable combatants. Based on this analysis, I argue that the legal reasoning

11. Epps, *supra* note 3, at 348.

12. Alexander B. Downes, Targeting Civilians in War 10 (2008).

13. Bruce Cronin, Bugsplat: The Politics of Collateral Damage in Western Armed Conflicts 131 (2018).

14. Helen Kinsella, The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian (2015) (demonstrating the difficulty and instability of distinguishing between civilians and combatants).

of al-Qāʿidah (and other militant Islamist groups) combines secular logics and Islamic themes; I call this fusion *secularislamized* law.[15]

Not all modern Islamic law is secularized. Secularislamized law is a hybrid form of modern Islamic law that is shaped by coloniality (i.e., colonial systems of power that continue even after the formal end of colonialism).[16] Coloniality generates a logic of extermination and dispossession; more specifically, coloniality invented a rationalization of civilian targeting that is premised on colonial difference. Coloniality also generates secularism; secularism, despite its local and historical variations, is a fluctuating ideology and array of practices that are neither neutral nor universalist.[17] This Article builds upon decolonial critique by delinking from Eurocentrism and secular prejudice in order to view laws of war from the perspective of colonized peoples.[18] Accordingly, I reject colonial/secular preconceptions in legal studies, such as hierarchizing between state law and non-state law or classifying legal traditions/systems exclusively based on geography or culture. Furthermore, decolonial theorists view the "freedom" and "progress" of colonial societies as established through the oppression of colonized societies.[19] Correspondingly, I illustrate that secular laws of war are legitimated through contemporary colonial violence.

By comparing state law and non-state law, this Article contributes to comparative law scholarship that moves beyond the state.[20] Nonetheless, this Article's decolonial approach is relatively new,

15. I developed this term/concept many years prior to learning about Sherman Jackson's coining of the term "Islamic secular." Jackson uses "Islamic secular" to "excavate" secular aspects of the historical Islamic tradition. However, since religion and secularism are not transhistorical categories, I contend that "Islamic secular" can only refer to modern phenomenon. More importantly, "secularislamized" is distinct from "Islamic secular." *See* Sherman Jackson, *The Islamic Secular*, 34 AM. J. ISLAMIC SOC. SCI., no. 2, at 1 (2018). In addition, I use the term "secularislamized" descriptively, rather than normatively. For an example of a political project of developing "Islamic secularism," see Heba Raouf Ezzat & Ahmed Mohammed Abdalla, *Towards an Islamically Democratic Secularism*, *in* FAITH AND SECULARISM 33 (Rosemary Bechler ed., 2004).

16. Noah De Lissovoy & Raúl Olmo Fregoso Bailón, *Coloniality*, *in* KEYWORDS IN RADICAL PHILOSOPHY AND EDUCATION 83 (Derek R. Ford ed., 2019).

17. *See* Lena Salaymeh, *The Eurocentrism of Secularism*, WEST WINDOWS (Sept. 14, 2020), www.uni-erfurt.de/philosophische-fakultaet/forschung/forschungsgruppen/was-ist-westlich-am-westen/west-windows/26-the-eurocentrism-of-secularism. On critical secularism theory, see TALAL ASAD, GENEALOGIES OF RELIGION (1993). On the relationship between secularism and colonialism, see TIMOTHY FITZGERALD, RELIGION AND THE SECULAR: HISTORICAL AND COLONIAL FORMATIONS (2007).

18. On decoloniality, see Walter D. Mignolo, *Delinking*, 21 CULTURAL STUD. 449 (2007).

19. Walter D. Mignolo, *Epistemic Disobedience and the Decolonial Option: A Manifesto*, 1 TRANSMODERNITY 44 (2011). Gurminder Bhambra explains, "that the modernity that Europe takes as the context for its own being is, in fact, so deeply imbricated in the structures of European colonial domination over the rest of the world that it is impossible to separate the two: hence, modernity/coloniality." *See* Gurminder Bhambra, *Postcolonial and Decolonial Dialogue*, 17 POSTCOLONIAL STUD. 115, 118 (2014).

20. On non-state law, see Ralf Michaels, *What Is Non-state Law?*, *in* NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM 41 (Michael A. Helfand ed., 2015).

because I juxtapose legal actors who are conventionally not compared and I compare their legal reasoning, rather than their legal rulings.[21] This Article elaborates why the presumed binary between secular law and religious law—two forms of modern law—is actually a symbiosis. In addition, this Article is part of a growing scholarly interest in comparative international law and in international legal pluralism.[22] Exploring both historical and contemporary international legal pluralism challenges the notion that only modern, colonial international law is legitimate.[23] This Article also contributes to the field of international law by demonstrating how contemporary international law continues to delegitimize anticolonial violence and promote a false equivalency between colonial and anticolonial violence.[24] I build upon existing scholarly literature that assesses contemporary laws of war and explores the colonial implications of modern international law.

For the field of Islamic studies, this Article offers a framework for analyzing the fuzzy and shifting boundaries of the Islamic tradition.[25] Building on my historical scholarship about delineating the Islamic legal tradition, the hybrid framework of secularislamization accounts for some secular aspects of modern Islamist movements. Many scholars have recognized that militant Islamist groups are modern and that they react against the modern nation-state. Faisal Devji argued that al-Qāʿidah's moral rhetoric and its lack of interest in establishing an Islamic state indicate that the group has much in common with modern, transnational social justice movements.[26] Mahmood Mamdani proposed that political Islam has secular roots.[27] Humeira Iqtidar illustrated how Islamist groups in Pakistan are unintentionally supporting secularization.[28] Christina Hellmich asserted that al-Qāʿidah reflects an "ongoing crisis of meaning of Islam

21. Ralf Michaels (Max Planck Institute for Comparative and International Private Law, Hamburg) and I are co-organizers of a research project on decolonial comparative law (www.mpipriv.de/decolonial); this Article is part of that ongoing effort.

22. *See, e.g.*, ANTHEA ROBERTS ET AL., COMPARATIVE INTERNATIONAL LAW (2018).

23. The modern international legal system is conventionally dated as beginning in 1648, with the Treaty of Westphalia.

24. I emphasize that this false equivalency is part of the logic of coloniality. For a demonstration of how the logic of coloniality shapes international legal historiography, see John T. Bennett, *The Forgotten Genocide in Colonial America: Reexamining the 1622 Jamestown Massacre Within the Framework of the UN Genocide Convention*, 19 J. HIST. INT'L L. 1 (2017); Aoife O'Donoghue & Henry Jones, *The Jamestown Massacre: Rigour & International Legal History*, CRITICAL LEGAL THINKING (Aug. 24, 2017), https://criticallegalthinking.com/2017/08/24/jamestown-massacre-rigour-international-legal-history.

25. When I use the terms structure, logics, and orientations, I am referring to traditions. *See* Mark Bevir, *On Tradition*, 13 HUMANITAS, no. 2, at 28 (2000).

26. FAISAL DEVJI, LANDSCAPES OF THE JIHAD: MILITANCY, MORALITY, MODERNITY (2005).

27. Mahmood Mamdani, *The Secular Roots of Radical Political Islam*, TURKISH POL'Y Q. 105 (Sept. 5, 2005), http://turkishpolicy.com/dosyalar/files/TPQ2005-2-mamdani.pdf.

28. HUMEIRA IQTIDAR, SECULARIZING ISLAMISTS? JAMA'AT-E-ISLAMI AND JAMA'AT-UD-DA'WA IN URBAN PAKISTAN (2011).

in the modern world."[29] Muʿtaz al-Khaṭīb demonstrated how militant Islamist groups manipulate orthodox Islamic jurisprudence in order to serve their modern objectives.[30] Jocelyne Cesari illustrated that political Islam is a response to modernization, Western colonialism, and Western influences.[31] Many scholars have observed that political Islamist groups often seek to establish Islamic governance in ways that conform to the modern nation-state system.[32] Building on existing scholarship and focusing on law, rather than political theory, I argue that militant Islamist groups place Islamic legal vocabularies in secular legal sentences.[33]

I. ORTHODOX LAWS OF WAR

In every legal tradition, there are groups or institutions that have more power than others to generate law or to claim what law should be. Legal orthodoxy refers to the power of some groups to claim authority within a legal tradition/system; it is a historically contingent and multivocal category. Non-orthodox groups within a tradition often allege that they apply or only slightly modify orthodox law in order to legitimate their legal opinions or acts through orthodox authority. Militant Islamist groups engage with and cite to orthodox, medieval Islamic laws of war in order to justify their acts.[34] Thus, to understand their legal arguments, it is necessary to have a basic understanding of orthodox Islamic legal ideas on warfare. Correspondingly, the U.S. government identifies itself as part of the modern international legal system and has ratified several international legal treaties relating to warfare. The United States engages with (even when explicitly overruling) orthodox international laws of armed conflict in order to justify its war practices.[35]

A. Orthodox Islamic Law

Islamic legal orthodoxy emerged in the medieval era and, although it continued to change, medieval orthodoxy remains authoritative

29. Christina Hellmich, *How Islamic Is al-Qaeda? The Politics of Pan-Islam and the Challenge of Modernisation*, 7 CRITICAL STUD. TERRORISM 241, 254 (2014).

30. *See, e.g.*, MUʿTAZ AL-KHAṬĪB, AL-ʿUNF AL-MUSTABĀH: "AL-SHARĪʿAH" FĪ MUWĀJIHAT AL-UMMAH WA'L-DAWLAH [PERMISSIBLE VIOLENCE: "SHARIA" CONFRONTING THE MUSLIM COMMUNITY AND THE STATE] (2016).

31. JOCELYNE CESARI, WHAT IS POLITICAL ISLAM? (2018).

32. For an overview, see Andrew F. March, *Political Islam: Theory*, 18 ANN. REV. POL. SCI. 103 (2015).

33. Another type of fusion, not explored here, involves secular vocabularies in Islamic legal sentences.

34. As will become clearer, I oppose the view that al-Qāʿidah generates "rhetoric," but not law. *See* Christina Hellmich, *Al-Qaeda: Terrorists, Hypocrites, Fundamentalists? The View from Within*, 26 THIRD WORLD Q. 39 (2005) (arguing that al-Qāʿidah does not implement Islamic law, but rather uses Islamic rhetoric to build support for its cause).

35. On the use and abuse of international law by U.S. lawyers, see Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC'Y J. 225 (2014).

within contemporary orthodox Islamic law. Canonized Islamic legal texts based on orthodox jurisprudential principles (*uṣūl al-fiqh*) are the sources of orthodox Islamic laws of war.[36] The objective of this subsection is to delineate the orthodox materials that contemporary Muslims draw upon; a historical chronology of Islamic legal orthodoxy or of orthodox Islamic laws of war is beyond the scope of this subsection.

There is a medieval, orthodox consensus that self-defense is a legitimate justification for initiating warfare; however, orthodox jurists disagreed on the possibility that disbelief (specifically, polytheism) could justify warfare.[37] The category of "civilian" was the subject of juristic dispute among medieval Muslim jurists.[38] Many Orthodox jurists cited a prophetic tradition-report that defines civilians as women, children, the elderly, clergy, and hired workers.[39] In addition, many orthodox jurists extended noncombatant immunity to the disabled and the mentally ill.[40] By way of example, Ibn Taymiyyah (d. 1328; Syria) explained, "[t]hose who normally do not fight or obstruct such as women, children, the hermit, the elderly, the blind, the disabled and anyone of similar status, according to the majority of jurists, they may not be killed unless they fight [Muslims] by word or act."[41] Many orthodox jurists asserted that women and minors who participated in combat lost their civilian status.[42] Still, some orthodox jurists objected to the killing of women and of minors even if they had participated in fighting.[43] This juristic disagreement reflects a difference of opinion among orthodox medieval Muslim jurists who identified a combatant because of his acts (i.e., ability to inflict harm) or because of his status (i.e., as the enemy).[44] In general, orthodox Muslim jurists

36. These texts were authored primarily by medieval Muslim jurists who were part of certain dominant Islamic legal schools; the orthodox surviving schools include Ḥanafī, Mālikī, Shāfiʿī, Ḥanbalī, and Imāmī Shīʿī. For the benefit of the general reader, I relied on translations whenever possible. For an overview of Islamic legal history and an explanation of Islamic legal orthodoxy, see LENA SALAYMEH, THE BEGINNINGS OF ISLAMIC LAW: LATE ANTIQUE ISLAMICATE LEGAL TRADITIONS (2016).

37. Khaled Abou El Fadl, *The Rules of Killing at War: An Inquiry into Classical Sources*, 89 MUSLIM WORLD 144, 152 (1999).

38. For an overview, see AHMED AL-DAWOODY, THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS 111–19 (2015).

39. *Id*. at 111. There is a different tradition-report that prohibits mutilation or the killing of children. *See* MUḤAMMAD IBN AL-ḤASAN AL-SHAYBĀNĪ [d. 804/5; Iraq], THE ISLAMIC LAW OF NATIONS: SHAYBĀNĪ'S SIYAR 76 (Majid Khadduri trans., Johns Hopkins Press 1966).

40. AL-DAWOODY, *supra* note 38, at 111–19.

41. Ibn Taymiyyah, *quoted in* Abou El Fadl, *supra* note 37, at 152.

42. ABŪ JAʿFAR MUḤAMMAD IBN JARĪR AL-ṬABARĪ [d. 923; Iraq], AL-ṬABARĪ'S *BOOK OF JIHĀD*: A TRANSLATION FROM THE ORIGINAL ARABIC 67 (Yasir S. Ibrahim trans., Edwin Mellen Press 2007); AL-SHAYBĀNĪ, *supra* note 39, at 87; AL-DAWOODY, *supra* note 38, at 111–14.

43. AL-ṬABARĪ, *supra* note 42, at 67.

44. *Id*. at 69. *See also* 1 ABŪ AL-WALĪD IBN RUSHD [d. 1198; Andalusia/Maghreb], THE DISTINGUISHED JURIST'S PRIMER: A TRANSLATION OF BIDĀYAT AL-MUJTAHID WA-NIHĀYAT AL-MUQTAṢID 460 (Muhammad Abdul Rauf ed., Imran Khan Nyazee trans., Garnet Publ'g 1994).

presumed that adult males (i.e., past puberty or over fifteen years old) who are physically able to engage in combat are not civilians.[45] (Generally, in the medieval era, adult males who were physically able to do so participated in armed struggles.[46]) By and large, orthodox jurists permitted "collateral damage" killing of civilians, so long as they are not targeted intentionally.[47] Some orthodox jurists permitted the usage of indiscriminate weapons that might kill women, children, the elderly, slaves, and Muslims.[48] Most orthodox jurists permitted attacking the enemy even if noncombatants or Muslims are being used as human shields.[49] However, al-Shāfiʿī (d. 820; Arabia/Egypt) prohibited shooting at Muslim or non-Muslim minors who are being used as shields.[50] In short, orthodox Islamic legal texts indicate two minimum guidelines: the category of civilians consists of individuals who are not involved in combat and the intentional targeting of civilians is prohibited. (It should be noted that enslavement of conquered peoples was an incentive not to kill civilians in the medieval era.)

B. Orthodox International Law

Orthodox sources of modern international laws of armed conflict include international agreements and customary practices. Chapter VII of the United Nations Charter (1945) prohibits warfare except in cases of self-defense or U.N. authorization. Even if the orthodox standard of *jus ad bellum* (law on the use of war) is not met, orthodox international law applies *jus in bello* (law in warfare) restrictions, including to unlawful parties.[51] The Geneva Conventions and their Additional Protocols are the key legal documents outlining orthodox international laws of war and setting standards by which state action

45. AL-ṬABARĪ, *supra* note 42, at 69; AL-SHAYBĀNĪ, *supra* note 39, at 87. *See also* El Fadl, *supra* note 37, at 151–52; AL-DAWOODY, *supra* note 38, at 112; MUHAMMAD HAMIDULLAH, MUSLIM CONDUCT OF STATE: BEING A TREATISE ON SIYAR 212 (Sh. Muhammad Ashraf 6th ed. 1973).

46. Premodern jurists, both Muslim and non-Muslim, defined "combatants" to reflect this historical reality. For example, Maimonides (d. 1204; Spain/Egypt) explicitly states (in Book 14 (*Judges*), Part 5 ("Laws of Kings and Their Wars"), Chapter 6, Section 4, that all males past majority should be killed in war, likely reflecting an assumption that all adult males are combatants. *See* MŪSÁ IBN MAYMŪN MAIMONIDES, THE CODE OF MAIMONIDES—BOOK FOURTEEN: THE BOOK OF JUDGES 220–21 (Abraham M. Hershman trans., Yale Univ. Press 1949). *See also* Michael J. Broyde, *Battlefield Ethics in the Jewish Tradition*, 95 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 92, 97 (2001) ("If one voluntarily stays in a city that is under siege, one has the status of combatant.").

47. AL-ṬABARĪ, *supra* note 42, at 65.

48. AL-SHAYBĀNĪ, *supra* note 39, at 101–02.

49. *Id*. at 102; AL-DAWOODY, *supra* note 38, at 116–18.

50. AL-ṬABARĪ, *supra* note 42, at 63.

51. Okimoto Keichiro explains, "two general principles governing the relationship between *jus ad bellum* and IHL were established: first, that *jus ad bellum* and IHL should be kept separate and, secondly, that IHL applies equally regardless of the status of the conflicting parties under *jus ad bellum*." Okimoto Keichiro, *The Relationship Between* Jus ad Bellum *and* Jus in Bello, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 1209, 1214 (Marc Weller ed., 2019).

is measured.[52] Article 48 of the Geneva Convention's Additional Protocol I requires all parties to distinguish between civilians and combatants.[53] Article 50 defines a civilian as "any person who does not belong to one of the categories of persons referred to" in the Third Convention[54] or Article 43 of Protocol I; those categories include members of armed forces, militias, and those who openly use arms to resist an invading force. Article 50 of Protocol I also declares: "In case of doubt whether a person is a civilian, that person shall be considered a civilian."[55] In addition, Article 50 warns: "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."[56] Protocol I identifies a target verification rule, requiring parties to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects."[57] The same rule requires parties to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[58] However, Article 51(3) permits targeting civilians who are directly participating in hostilities. Nonetheless, orthodox modern international law substantively outlines a category of civilians and identifies limitations on warfare based on the principle of distinction.

C. Limits of Orthodoxy

Both orthodox Islamic law and orthodox international law distinguish civilians and combatants based on some criterion of conduct and promote a principle of distinction in order to prevent civilian casualties. Orthodox Islamic law's construction of conduct as encompassing able-bodied men reflects the medieval reality of nearly all able-bodied men acting as soldiers. By comparison, orthodox international law bases its definition of conduct on the existence of modern armies. Despite being based on different sources of law and having entirely distinct histories, orthodox Islamic law and orthodox international law share a basic assumption that "civilians" are those who do not engage in combat and that they should not be targeted in warfare.

52. *See, e.g.*, Miles P. Fischer, *Applicability of the Geneva Conventions to "Armed Conflict" in the War on Terror*, 30 FORDHAM INT'L L.J. 509 (2007).

53. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

54. Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Oct. 21, 1940, 75 U.N.T.S. 135.

55. Protocol I, *supra* note 53, art. 50(1).

56. *Id*. art. 50(3).

57. *Id.* art. 57(2)(a)(i).

58. *Id*. art. 50(3).

II. "HERETICAL" LEGAL REASONING

Orthodox legal actors characterize the U.S. military and al-Qāʿidah as "heretics" who violate legal orthodoxy. (In the next Part, I will explain why I do not characterize these groups as "heretical.") Orthodox groups make similar claims about both: that they are not producing law, but rather political rhetoric; that they are political, rather than legal actors; that their statements are post-facto justifications of their war practices. In both cases, these assertions reinforce an idealized orthodoxy without justifying why these legal perspectives should be considered outside the Islamic legal tradition or international legal system. Al-Qāʿidah is engaged with the Islamic legal tradition, just as the U.S. military is engaged with the modern international legal system. When militant Islamist groups articulate Islamic justifications for their use of violence, they simultaneously turn inward, towards the Islamic legal tradition, and outward, towards their perceived enemies. In this Part, I outline how this dual orientation shapes the legal reasoning of al-Qāʿidah. I then shift to the legal reasoning of the U.S. military, which likewise turns inward, towards the international legal system, and outward, towards their perceived enemies.[59] When al-Qāʿidah and the U.S. military turn outward, they see each other, with direct implications for their views on law.

A. Legal Reasoning of Militant Islamist Groups

Al-Qāʿidah's legal claims diverge from orthodox Islamic legal definitions of civilians and the principle of distinction. First, al-Qāʿidah diverges from orthodox Islamic law by rejecting the category of civilians. A 1998 statement published by the World Islamic Front (an al-Qāʿidah-affiliated organization) calls for targeting the U.S. military and civilians.[60] While the statement cites to Ibn Taymiyyah, it does not engage his delineation of protected civilians. Indeed, the statement does not offer any Islamic legal precedents for targeting civilians. Instead, al-Qāʿidah "broadens the definition of active participation to include roles that indirectly assist the enemy."[61] An open letter authored by Bin Lādin in 2002 alleges that civilians support the U.S. military through representative governance and the paying of

59. The "war on drugs" is a likely precursor and internal parallel to the "war on terror"; there are similarities in how U.S. criminal law treats membership in a gang and how U.S. military law treats membership in a militant group. In both cases, racialized assumptions operate to dehumanize groups and to presume their guilt. Although there are important insights about how a state's foreign warfare reflects or shapes its internal governance, this topic is beyond the scope of this Article. *See* BERNARD E. HARCOURT, THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS (2018); CARL BOGGS, IMPERIAL DELUSIONS: AMERICAN MILITARISM AND ENDLESS WAR (2005).

60. AL QAEDA IN ITS OWN WORDS 55 (Gilles Kepel & Jean-Pierre Milelli eds., Pascale Ghazaleh trans., Harv. Univ. Press 2008).

61. Quintan Wiktorowicz & John Kaltner, *Killing in the Name of Islam: Al-Qaeda's Justification for September 11*, 10 MIDDLE E. POL'Y 76, 88 (2003).

taxes.[62] By enlarging the notion of indirect support to include financial and political support for U.S. colonialism, al-Qāʿidah effectively expands the definition of combatant to include any U.S. citizen.[63]

Second, al-Qāʿidah departs from orthodox Islamic law by dismissing the prohibition on intentionally killing civilians. Al-Qāʿidah bases its position on its enemy's war practices, repeatedly declaring that the U.S. targets Muslim civilians.[64] Bin Lādin described the U.N. as a "smoke screen" for U.S. colonialism in his 1996 legal decree.[65] In 2002, al-Qāʿidah issued a justification of the 9/11 attacks, arguing that civilians may be targeted according to Islamic law under certain conditions.[66] Al-Qāʿidah claimed that it was not possible to differentiate combatants from civilians in the sites attacked on 9/11 and that civilians used as "human shields" may be targeted.[67] Al-Qāʿidah further alleged that the principle of reciprocity in warfare supersedes the orthodox principle of distinction and referred to Qurʾān 2:194 ("attack your attacker in like manner") as permitting the reciprocal targeting of civilians.[68] (Using reciprocity as a legal justification for targeting civilians does not appear to have a historical precedent in premodern orthodox Islamic law.) In his 2004 "message to the American people," Bin Lādin declared that "killing innocent women and children is a deliberate American policy."[69] To support their acts further, al-Qāʿidah analogized its use of airplanes to the use of catapults, which was approved by Muḥammad at the battle of Ṭāʾif.[70]

Many orthodox Muslim jurists and public figures condemned the 9/11 attacks and al-Qāʿidah's ideology for failing to distinguish

62. MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN 164–65 (Bruce Lawrence ed., James Howarth trans., Verso 2005) [hereinafter MESSAGES TO THE WORLD].

63. Bin Lādin stated, "the American people, they are not exonerated from responsibility, because they chose this government and voted for it despite their knowledge of its crimes." *Id*. at 47. *See also* THE AL QAEDA READER 280–82 (Raymond Ibrahim ed. & trans., Doubleday 2007) (on U.S. democracy and the responsibility of citizens).

64. See, by way of example, a 2002 letter declaring, "whoever kills our civilians, then we have the right to kill theirs." MESSAGES TO THE WORLD, *supra* note 62, at 165.

65. AL QAEDA IN ITS OWN WORDS, *supra* note 60, at 47. Bin Lādin also asserted, "the blood of children and innocents has been deemed fair game . . . under the auspices of the United Nations . . . is not ashamed to talk about human rights!" *See* MESSAGES TO THE WORLD, *supra* note 62, at 96.

66. A short treatise attributed to Ayman al-Ẓawāhirī (al-Qāʿidah) includes a discussion of why killing civilians is permissible in a defensive war. *See* THE AL QAEDA READER, *supra* note 63, at 167–71. *See also* Wiktorowicz & Kaltner, *supra* note 61, at 80.

67. Wiktorowicz & Kaltner, *supra* note 61, at 87.

68. *Id*. at 86–87.

69. He continued:

> State terrorism is called freedom and democracy, while resistance is terrorism and intolerance. This means that millions of people must suffer oppression and embargo until death results, as inflicted by Bush Sr. in Iraq in the greatest mass slaughter of children ever. It means millions of children are subjected to mass bombardments . . . .

See AL QAEDA IN ITS OWN WORDS, *supra* note 60, at 72.

70. Wiktorowicz & Kaltner, *supra* note 61, at 89.

between civilians and combatants and for targeting civilians.[71] A large number of orthodox Muslim scholars issued a similar condemnation of Dāʿish (the Islamic State of Iraq and the Levant, ISIS), whose legal arguments overlap with al-Qāʿidah's legal arguments. In 2014, numerous orthodox Muslim jurists published an open letter criticizing Abū Bakr al-Baghdādī (Dāʿish's leader) and the followers of Dāʿish for certain perceived mistakes in legal reasoning.[72] They identified several "heretical errors," including decontextualizing qurʾānic verses by neglecting proper citation to other verses and historical materials, justifying the illegal targeting of non-combatants, misunderstanding war as an end in itself, rather than as a tool for establishing peace,[73] and mistaking war as a legitimate response to those with differing views or religions. These criticisms are evidence of a gap in the legal reasoning of militant Islamists and orthodox Muslim figures.

B. Legal Reasoning of U.S. Military

The U.S. government outlines its laws of war in the Department of Defense *Law of War Manual* (the *Manual*).[74] The *Manual* diverges from orthodox international law's definition of civilian and principle of distinction (specifically, the target verification requirement).

First, the *Manual* departs from the orthodox international legal category of civilian by expanding the category of combatants to include those (a) not involved in essential combat support and (b) not currently involved in combat. The first expansion of the combatant category is evident in the *Manual*'s definition of civilian combat support. The *Manual* interprets the orthodox international legal principle of "taking a direct part in hostilities" to include any "effective and substantial contribution to the ability to conduct or sustain combat operations."[75] By comparison, the International Committee of the Red Cross (ICRC) stated, "all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities."[76] International law specialist Adil Haque criticized the *Manual* for falsely asserting that it is "well established" in international

71. *See, e.g.*, Charles Kurzman, *Islamic Statements Against Terrorism*, https://kurzman.unc.edu/islamic-statements-against-terrorism (last updated Aug. 1, 2018).

72. *Risālah maftūḥah ilá Abū Bakr al-Baghdādī* (2014), Royal Islamic Strategic Stud. Ctr. (Sept. 19, 2014), https://rissc.jo/open-letter-to-al-baghdadi/?lang=ar. An English version may be found here: https://rissc.jo/open-letter-to-al-baghdadi.

73. Murad Idris, War for Peace: Genealogies of a Violent Ideal in Western and Islamic Thought (2019).

74. U.S. Dep't of Def., Law of War Manual (June 2015, updated Dec. 2016), https://bit.ly/2T9fR1o [hereinafter Law of War Manual].

75. *Id.* § 5.8.3.

76. Int'l Comm. Red Cross (ICRC), Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (2009), www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf.

law that when civilians provide support services, they are no longer "noncombatants" and may be attacked.[77] Haque suggested that, in contravention of international law, the *Manual*'s standards would deny civilian status to "civilians who build or repair infrastructure" or "a road repair crew."[78] International lawyer Gabor Rona asserted: "By using overly broad notions of who is targetable, the U.S. deliberately and unlawfully kills people who are, in fact, civilians."[79] The U.S. military's classification of civilians departs from orthodox international law.[80]

An additional expansion of the combatant category is evident in the *Manual*'s temporal extension of a civilian's loss of immunity. The *Manual* states: "[C]ivilians who have taken a direct part in hostilities must not be made the object of attack after they have permanently ceased their participation . . . . Persons who take a direct part in hostilities, however, do not benefit from a 'revolving door' of protection."[81] Haque clarified that the *Manual* permits the United States to:

> [A]ttack civilians who *are not taking* direct part in hostilities, if they determine that the civilians *have taken* direct part in hostilities in the past and *will take* direct part in hostilities in the future. These civilians are liable to attack not on the basis of their current conduct, but instead on the basis of their past conduct and (anticipated) future conduct.[82]

This regulation appears to be part of the United States' "preventive paradigm," a broader post-9/11 U.S. policy of imprisoning, torturing, and attacking individuals and groups who the United States suspects may commit a "terrorist" act.[83] The *Manual* thereby blurs the standard distinction between conduct and status by imputing future participation and removing the need for evidence of participation in

77. Adil Ahmad Haque, *Misdirected: Targeting and Attack Under the U.S. Department of Defense Law of War Manual*, *in* THE UNITED STATES DEPARTMENT OF DEFENSE LAW OF WAR MANUAL: COMMENTARY & CRITIQUE 225, 232 (Michael A. Newton ed., 2019).

78. *Id*. at 9.

79. Gabor Rona, Letter to the Editor, *Much More Iceberg Below the Surface on Civilian Casualties*, JUST SEC'Y (May 15, 2018), www.justsecurity.org/56133/letter-editor-iceberg-surface-civilian-casualties.

80. Haque, *supra* note 77, at 230 ("This novel legal standard departs sharply from the ordinary meaning of 'taking a direct part in hostilities.'").

81. LAW OF WAR MANUAL, *supra* note 74, § 5.8.4. Haque points out that the "Manual *never specifically discusses* the limitations that civilians lose their protection only *for such time as* they take a direct part in hostilities." Haque, *supra* note 77, at 238.

82. Haque, *supra* note 77, at 238.

83. David Cole, *Less Safe, Less Free: A Progress Report on the War on Terror*, 8 J. INST. JUST. & INT'L STUD. 1 (2008) (identifying imprisonment for potential future acts, torture, and war as components of the U.S. "preventative" strategy).

hostilities.[84] In effect, the *Manual* replaces the conventional conduct test with a status determination.

Second, the *Manual* differs from the orthodox international legal principle of "target verification," which requires verifying combatant status.[85] The *Manual* claims: "Under customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases."[86] This statement is misleading, since the Geneva Convention and customary international law affirm a default status of civilian unless proven otherwise and afford civilian status in cases of doubt.[87] In comparison, the ICRC stated:

> [F]or the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.[88]

Haque elaborated that, "while Protocol I clearly requires attackers to do everything feasible to *actively gather* information regarding a person's legal status prior to attack, the Manual requires only that attackers make the decision to attack based on the information *available*."[89] Consequently, the *Manual* gives broad permission for the U.S. military to attack an individual who they merely suspect is a combatant.[90] The *Manual* justifies its unorthodox target verification policy by referring to "the realities of war."[91] Arguably, the *Manual* obfuscates orthodox international legal distinctions between combatants and civilians because the U.S. government seeks to change international legal orthodoxy.[92]

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84. Haque contends:

> [A]ccording to the Manual, both combatants and civilians are liable to attack when they are not participating in hostilities if they have the intention—actual or imputed, conditional or unconditional, present or future—and capacity to participate in hostilities in the future . . . this view distorts the basic distinction between civilians and combatants at the heart of the modern law of war.

Haque, *supra* note 77, at 241.

85. As Haque pointed out, "the 1236-page *U.S. Department of Defense Law of War Manual* does not discuss the target verification rule even once." Adil Ahmad Haque, *Ambiguity in the Conduct of Hostilities*, Just Sec'y (May 10, 2018), www.justsecurity.org/56087/ambiguity-conduct-hostilities.

86. Law of War Manual, *supra* note 74, § 5.4.3.2.

87. For a discussion, see Haque, *supra* note 77, at 244–49.

88. ICRC, *supra* note 76, at 27.

89. Haque, *supra* note 77, at 245.

90. *Id*. at 248.

91. Haque observes, "the Manual implies that U.S. forces may lawfully attack a person or object even if they are *not* reasonably certain that the proposed target is a legitimate military target." *See id*. at 249.

92. Haque concludes that "the Manual's position effectively collapses the distinction between status-based targeting and conduct-based targeting, narrowing the distinction between combatants and civilians to a vanishing point." *See id*. at 240.

Some legal commentators validate the U.S. military's legal reasoning based on four problematic and inaccurate contentions. First, some scholars assert that the principle of distinction was based on nineteenth- and twentieth-century warfare and does not neatly apply to the contemporary situation of combatants embedded in civilian areas. From a historical perspective, it is improbable that the intermixing of combatants and civilians is a modern or new phenomenon.[93] Warfare has never been unambiguous and combatants often did not wear uniforms/insignia in the premodern era.[94] Indeed, the Geneva Conventions focused on combatants who wear uniforms/insignia because they were designed to deal with state actors, rather than non-state actors, in a situation of warfare between colonial powers, rather than warfare between colonial state armies and colonized peoples. In other words, it is not that warfare has changed, but rather that modern international law delegitimized non-state combatants. More importantly, the United States regularly deploys combatants who do not wear uniforms/insignia.[95] Consequently, both state and non-state actors do not strictly adhere to Geneva Convention protocols on combatant distinction. The U.S. government strategically exploits the presumption of a gap between orthodox international laws of war and contemporary war practices as an excuse for altering orthodox international law.

Second, some commentators assert that, despite its expansion of the category of combatant, the *Manual*—unlike al-Qāʿidah's statements—does include language about protecting civilian life. Although the *Manual* appears to outline a procedure for distinguishing between probable combatants and civilians, this procedure is performative. If U.S. legal reasoning were effective at differentiating between combatants and non-combatants, then the rate of civilian deaths would likely be lower. The proclamation of protecting civilian life is challenged by the facts on the ground of high civilian casualties and of reckless disregard for civilians on the part of the military.[96] The number of civilian

93. For a historical critique of the "new wars" thesis, see Edward Newman, *The "New Wars" Debate: A Historical Perspective Is Needed*, 35 Sec'y Dialogue 173 (2004). *See also* Samuel Moyn, *Drones and Imagination: A Response to Paul Kahn*, 24 Eur. J. Int'l L. 227, 229 (2013) ("[T]here is a continuum, not a break, between the aesthetics, subjectivity, and morality of colonial warfare and its successors today, including in drone campaigns.").

94. On the instrumentalization of "human shields," see Neve Gordon & Nicola Perugini, *Human Shields, Sovereign Power, and the Evisceration of the Civilian*, 110 Am. J. Int'l L. Unbound 329 (2017).

95. Burt and Wagner assert that "the CIA civilian drone operators who engage in armed attacks against members of al-Qaeda, the Taliban, and their associated forces might *share* the same legal status as the terrorists they combat." Andrew Burt & Alex Wagner, *Blurred Lines: An Argument for a More Robust Legal Framework Governing the CIA Drone Program*, 38 Yale J. Int'l L. Online 1, 2 (Oct. 3, 2012), https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2017/01/o-38-burt-wagner-blurred-lines-1b2apdr.pdf. *See also* Andrew Thomson, Outsourced Empire: How Militias, Mercenaries, and Contractors Support US Statecraft (2018).

96. On the civilian death toll and how the U.S. military determines an acceptable number of civilian casualties, see Nick McDonell, The Bodies in Person: An Account of Civilian Casualties in American Wars (2018). On the recklessness of the U.S. military, see the documentary Combat Obscura (Oscilloscope Lab. 2019).

deaths continues to increase while U.S. military secrecy about those deaths intensifies.[97] An investigative report found that "one in five of the coalition strikes . . . resulted in civilian death, a rate more than 31 times that acknowledged by the coalition . . . . In this system, Iraqis are considered guilty until proved innocent."[98] Marjorie Cohn observed: "The Obama administration has developed a creative method to count the civilian casualties from these assassinations. All military-age men killed in a drone strike zone are considered combatants 'unless there is explicit intelligence posthumously proving them innocent.'"[99] The *Manual*'s expansion of the category of combatants and dismissal of the target verification rule are evident in actual U.S. war practices. Contrary to its stated legal reasoning, the U.S. military kills civilians and then classifies those dead civilians as combatants.

Third, some legal scholars allege that states, unlike "terrorists," do not intend civilian deaths. Good intentions are not enough, and it is highly unlikely that states have good intentions. The notion that the U.S. military is a state institution with noble intentions is based on a hierarchy of state violence (military) over non-state violence ("terrorism"). The violence that is currently labeled as "terrorism" (regardless of how it is defined) is not new and has multiple historical precedents.[100] If "terrorism" is defined as "the reckless killing of civilians," then states commit state terrorism.[101] (Notably, indiscriminate military attacks are consistent with the history of U.S. war practices—including, but not limited to, the bombing of Japanese and German cities.[102]) If "terrorism" is defined as "violence perpetrated against civilians by non-combatants," then states commit state terrorism by heavily involving private contractors (or mercenaries) and intelligence officers in contemporary warfare.[103] Accordingly, presuming that non-state violence is "terrorism"—particularly if perpetrated by non-Westerners or people of color or Muslims—is a form of prejudicial

97. Margaret Sullivan, *Middle East Civilian Deaths Have Soared Under Trump: And the Media Mostly Shrug*, WASH. POST (Mar. 18, 2018), https://wapo.st/35QiETZ.

98. Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES (Nov. 16, 2017), www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html.

99. Marjorie Cohn, *Introduction* to DRONES AND TARGETED KILLING: LEGAL, MORAL, AND GEOPOLITICAL ISSUES 1, 1 (Marjorie Cohn ed., 2015).

100. GÉRARD CHALIAND & ARNAUD BLIN, THE HISTORY OF TERRORISM: FROM ANTIQUITY TO ISIS (updated ed. 2016). On how contemporary states frequently appeal to "terrorism" as an excuse to restrict basic freedoms, see LAURA WESTRA, FACES OF STATE TERRORISM (2012); RANDALL D. LAW, THE ROUTLEDGE HISTORY OF TERRORISM (2015).

101. On state terrorism, see Lee Jarvis & Michael Lister, *State Terrorism Research and Critical Terrorism Studies: An Assessment*, 7 CRITICAL STUD. TERRORISM 43 (2014). *See also* Melissa Finn & Bessma Momani, *Building Foundations for the Comparative Study of State and Non-state Terrorism*, 10 CRITICAL STUD. TERRORISM 379, 379 (2017) ("[S]tate and non-state terrorism are co-constituting and co-enabling phenomena.").

102. For an overview, see JOHN TIRMAN, THE DEATHS OF OTHERS: THE FATE OF CIVILIANS IN AMERICA'S WARS (2011).

103. *See supra* note 95.

Othering.[104] Rather than being motivated by ethical principles, the U.S. government has a strategic interest in *claiming* to minimize civilian casualties.[105] The myth of "a moral war" placates both U.S. soldiers and civilians.[106]

Fourth, some scholars maintain that the U.S. military uses sophisticated weapons to avoid civilian deaths. A state's use of "sophisticated" technology does not result in more precise violence than the violence of non-state actors, or in fewer civilian casualties, or in more precise records of civilian deaths.[107] Drones are an important example, despite the limited documentation.[108] Investigations of drone causalities indicate that U.S. policy results in a high proportion and number of civilian casualties.[109] Rona elaborated:

> Flowing logically from its rejection of any presumption of civilian status in case of doubt, the U.S. has pursued killing practices such as signature strikes (targeting persons because their behavior approximates that of terrorists, although their identity is unknown), "membership"-based targeting (regardless of whether there exists evidence that the individual is actually a fighter or directly participates in hostilities on behalf of the group in which he or she is suspected of being a member), and "material support"-based targeting (for example, of those suspected of providing financial support for terrorist activities). Targeting on the basis of these rationales, within the

104. Sarah Marusek, *Inventing Terrorists: The Nexus of Intelligence and Islamophobia*, 11 Critical Stud. Terrorism 65 (2018).

105. The Department of Defense noted:

> [T]he protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and enhance the legitimacy and sustainability of U.S. operations critical to U.S. national security.

See U.S. Dep't of Def., Report on Civilian Casualties in Connection With United States Military Operations in 2017 (2018), https://ogc.osd.mil/LoW/practice/DoDDocuments/2018_Annual_CIVCAS_Report.pdf. On minimizing civilian harm for the sake of strengthening U.S. strategic interests, see *The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts*, Open Soc'y Found., www.opensocietyfoundations.org/publications/strategic-costs-civilian-harm (updated June 22, 2016).

106. Samuel Moyn, *A War Without Civilian Deaths? What Arguments for a More Humane Approach to War Conceal*, The New Republic (Oct. 23, 2018), https://newrepublic.com/article/151560/damage-control-book-review-nick-mcdonell-bodies-person.

107. On technology's role in tracking civilian casualties, see Epps, *supra* note 3, at 342.

108. *See Out of Sight, Out of Mind*, Pitch Interactive (2015), http://drones.pitchinteractive.com. On the drone's challenge to orthodox legal ideas, see Paul W. Kahn, *Imagining Warfare*, 24 Eur. J. Int'l L. 199 (2013).

109. James Cavallaro, Stephan Sonnenberg & Sarah Knuckey, Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan (2012).

> context of war, carries a heavy risk of constituting war crimes where the target is a civilian who is not directly participating in hostilities. In what are known as "double tap" strikes, there have even been targeted killings of those who come to collect the dead and to aid those wounded by U.S. attacks.[110]

Generally, the U.S. military uses drones to kill "military-age men on battlefields around the world . . . even if American officials didn't know who the targets were—or if they were actively plotting against the United States."[111] Indeed, Mary Ellen O'Connell argued that "the availability of drones is resulting in resort to military force that would not otherwise occur."[112] It is probable that increasing state violence results in increasing non-state violence, but non-state groups cannot match the deadly power of states.[113]

C. "Heretical" Legal Reasoning?

I have presented two parallel frameworks demonstrating how al-Qāʿidah adapts orthodox Islamic law and how the U.S. military adapts orthodox international law. Whereas al-Qāʿidah claims that U.S. colonialism demands reciprocity, the U.S. military claims that al-Qāʿidah's "terrorism" demands changing warfare practices (in effect, reciprocity). The characterization of their legal reasoning as "heretical" reflects the perspective of orthodox groups and is inaccurate. Moreover, the label obfuscates the reality that "heresies" of today may become the orthodoxies of tomorrow. Orthodox legal positions are not as straightforward as orthodox legal actors claim them to be. A central legal strategy for al-Qāʿidah is arguing reciprocity, thereby permitting attacks against civilians when the enemy is targeting civilians; although there is no historical orthodox precedent, there are some contemporary orthodox jurists who apply this principle in one "exceptional" case.[114] Similarly, customary international law includes a principle of belligerent reciprocity that continues to influence contemporary laws of war.[115] Thus, both orthodox Islamic law and orthodox

110. Rona, *supra* note 79.

111. Dan De Luce & Paul McLeary, *Obama's Most Dangerous Drone Tactic Is Here to Stay*, Foreign Pol'y (Apr. 5, 2016), https://foreignpolicy.com/2016/04/05/obamas-most-dangerous-drone-tactic-is-here-to-stay.

112. Mary Ellen O'Connell, *Seductive Drones: Learning From a Decade of Lethal Operations*, 21 J.L. Info. & Sci. 116, 117 (2012).

113. On the use of drones as a form of state terrorism, see Marina Espinoza & Afxentis Afxentiou, *Editors' Introduction: Drones and State Terrorism*, 11 Critical Stud. Terrorism 295 (2018).

114. To my knowledge, the first known Islamic legal argument proposing reciprocity in the targeting of civilians is recent and limited to Israeli noncombatants because of their mandatory military service. This is why al-Qāʿidah criticized (orthodox) Muslim scholars who condemned the 9/11 attacks, but previously permitted the targeting of Israeli noncombatants, as hypocrites. Wiktorowicz & Kaltner, *supra* note 61, at 83.

115. Sean Watts, *Reciprocity and the Law of War*, 50 Harv. Int'l L.J. 365 (2009). *See also* Robbie Sabel, *The Legality of Reciprocity in the War Against Terrorism*, 43 Case W. Reserve J. Int'l L. 473 (2010).

international law acknowledge some form of reciprocity as a legal justification in warfare. What precisely is inside/outside orthodox law is both indefinite and shifting.

The key issue is not if al-Qāʿidah and the U.S. military are "heretical" legal actors, but rather what the portrayal of them by orthodox groups as "heretical" means. In the case of both al-Qāʿidah and the U.S. military, there does not appear to be a punishment for transgressing orthodox law. As a state actor, the U.S. government views itself as having an obligation to exercise force in ways that maintain its standing in the international community and its obligations towards its citizens. Since it is improbable that international legal institutions (such as the International Criminal Court) would sanction the United States for violating orthodox international laws of war, such transgressions would primarily affect the United States' international reputation and legitimacy. Correspondingly, as a non-state actor, al-Qāʿidah perceives itself as having an obligation to exercise force in ways that conform to orthodox Islamic law and maintain its standing within the abstract concept of the Muslim community. The primary repercussions for transgressions of orthodox Islamic law by al-Qāʿidah are public condemnation by orthodox Muslim figures and delegitimation within Muslim societies. Thus, for both al-Qāʿidah and the U.S. military, the allegation that they are "heretical" is a denial of legitimacy and an attempt to purify a legal tradition. State and non-state groups deal with analogous, though not identical, commitments and sociopolitical consequences. Nonetheless, branding al-Qāʿidah as "extremists" or "bad" Muslims reinforces a colonial politics of differentiating between "good" and "bad" Muslims.[116] Likewise, labeling the United States as a "bully" state obscures the international legal system's intertwinement with colonialism. In both cases, the accusation of "heresy" diverts attention away from the more profound question of the relationship between the "heretical" group and its legal tradition. Al-Qāʿidah and the U.S. military claim that they are upholding and modifying orthodox law because they seek orthodox legitimacy.

III. Legal Traditions

Thus far, I have presented al-Qāʿidah as engaging with and avoiding orthodox (medieval) Islamic law and the U.S. military as engaging with and avoiding orthodox (modern) international law. I have also suggested that their characterization by orthodox groups as "heretical" is polemical, rather than analytical. Accordingly, in this Part, I will explain what differentiates the Islamic legal tradition from the secular legal tradition and how we should identify both al-Qāʿidah

116. Mahmood Mamdani, Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror (2004). In addition, I avoid (mis)labeling militant Islamist groups as "jihadi" or as espousing "jihadi ideology": this language is exoticizing and unhelpful.

and the U.S. military in relation to these legal traditions. This Part is based on extensive historical and comparative research that is only summarized here.[117]

Neither Islamic law nor secular law has essential features; nonetheless, at a macro level, Islamic law and secular law both have logics or orientations that make them distinct from other legal traditions.[118] A legal tradition is a changing and pluralist assortment of legal ideas and legal practices engaged by groups over time. Law is a normative orbit, not necessarily the product of a state. Both states and non-state groups, legal professionals, and laypeople generate law. The Islamic legal tradition is the multivocal outcome of Muslims who study and interpret Islamic scriptural sources in an attempt to comprehend the abstract concept of (Islamic) divine law; Islamic law is law produced with the objective of being part of the Islamic movement. In the Islamic legal tradition, tradition is the centripetal force and contingent conditions are centrifugal forces. By comparison, secular law is the product of modern states and institutions; secular law is law produced in the service of secularism. In the secular legal tradition, the secular state is the centripetal force and contingent conditions are centrifugal forces. Notably, the identity of a legal actor does not determine the content of her legal opinions. Likewise, "secular" and "Islamic" are not mutually exclusive categories, which is why a law can simultaneously be secular and Islamic.

A. Islamic Legal Tradition: Tradition as Centripetal Force

The gap between orthodox Islamic law and contemporary militant Islamist legal decrees is the source of much confusion, angst, and debate. Generally, two questions are conflated: *Are militant Islamists Muslims?* and *Is the legal reasoning of militant Islamist groups part of the Islamic tradition?*

First, from a scholarly perspective, anyone who identifies as Muslim is Muslim because being Muslim does not entail any essential belief or practice. Thus, militant Islamists are Muslims so long as

117. On the Islamic legal tradition, see Lena Salaymeh, *"Comparing" Jewish and Islamic Legal Traditions: Between Disciplinarity and Critical Historical Jurisprudence*, 2 CRITICAL ANALYSIS L. 153 (2015) [hereinafter Salaymeh, *"Comparing" Jewish and Islamic Legal Traditions*]; Lena Salaymeh, *Taxing Citizens: Socio-Legal Constructions of Late Antique Muslim Identity*, 23 ISLAMIC L. & SOC'Y 333 (2016); SALAYMEH, *supra* note 36. On the secular legal tradition, see Lena Salaymeh, *Decolonial Translation: Destabilizing Coloniality in Secular Translations of Islamic Law*, J. ISLAMIC ETHICS (forthcoming 2021); Lena Salaymeh & Shai Lavi, *Secularism*, *in* KEY CONCEPTS IN THE STUDY OF ANTISEMITISM 257 (Sol Goldberg et al. eds., 2020) [hereinafter Salaymeh & Lavi, *Secularism*]; Lena Salaymeh & Shai Lavi, *Religion Is Secularized Tradition: Jewish and Muslim Circumcisions in Germany*, OXFORD J. LEGAL STUD. (forthcoming 2021) [hereinafter Salaymeh & Lavi, *Religion Is Secularized Tradition*].

118. I do not use the term tradition in the problematic Weberian sense of static or antimodern. On legal traditions, see Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237 (1986). *See also* Thomas Duve, *Legal Traditions: A Dialogue Between Comparative Law and Comparative Legal History*, 6 COMP. LEGAL HIST. 15 (2018).

they identify themselves as such. Islamic law specialist Anver Emon suggested eschewing the attempt to classify militant Islamist groups and, instead, to concentrate "on the contest over definition, why it matters as much as it does, and to whom."[119] Among Muslims, the definitional contest often reflects the dynamics of orthodoxy: orthodox Muslims frequently classify militant Islamists as heretics. While militant Islamists may be heretical from the perspective of orthodox groups, that does not mean that they are not Muslim. Labeling militant Islamist groups as heretics, "bad Muslims," or "not 'real' Muslims" is a form of apologetics. From a historical perspective, the claim that militant Islamist groups are unorthodox is not meaningful: orthodoxy forms through a gradual historical process, it changes, and it is not the essence of any tradition; thus, these militant Islamist groups may be changing Islamic orthodoxy.[120] (In addition, militant Islamists likely fulfill a prominent orthodox Muslim standard that anyone who testifies to the oneness of God and to the prophecy of Muḥammad is a Muslim.[121]) Among non-Muslims, the definitional contest often reflects problematic notions of authenticity ("militant groups are not 'real' Muslims") or islamophobia ("militant groups represent 'true' Islam"). Nevertheless, because individuals and groups have multiple identities, not everything a Muslim does is Islamic.

Second, the legal reasoning of militant Islamist groups may be Islamic, even if it is unorthodox. The wishful claim that militant Islamist groups are not generating Islamic law simply cannot be proven. The Islamic tradition has within it precedents and principles that can be interpreted as legitimating militant practices.[122] Furthermore, medieval orthodox Muslim jurists decontextualized Islamic precedents and doctrines by insufficiently considering historical conditions in ways that are analogous to contemporary militant Islamist groups.[123] (For instance, I have previously illustrated how medieval orthodox Muslim jurists permitted the execution of war prisoners, despite strong late antique historical evidence of prohibition.[124]) Orthodox Muslims may

119. Anver Emon, *Is ISIS Islamic? Why It Matters for the Study of Islam*, IMMANENT FRAME (Mar. 27, 2015), https://tif.ssrc.org/2015/03/27/is-isis-islamic-why-it-matters-for-the-study-of-islam.

120. For a critique of essentialization of Islamic law, see SALAYMEH, *supra* note 36.

121. For an overview of orthodox Muslim perspectives on Muslimness, see Hossein Modarressi, *Essential Islam: The Minimum that a Muslim Is Required to Acknowledge*, *in* ACCUSATIONS OF UNBELIEF IN ISLAM: A DIACHRONIC PERSPECTIVE ON *TAKFĪR* 393 (Camilla Adang et al. eds., 2016).

122. Khaled Abou El Fadl observed: "It would be disingenuous to deny that the Qur'an and other Islamic sources offer possibilities of intolerant interpretation. Clearly these possibilities are exploited by the contemporary puritans and supremacists. But the text does not command such intolerant readings." Khaled Abou El Fadl, *The Place of Tolerance in Islam: On Reading the Qur'an—And Misreading It*, BOS. REV. (Dec. 1, 2001), http://bostonreview.net/archives/BR26.6/elfadl.html.

123. For an extensive discussion of how militant Islamist groups decontextualize orthodox Islamic legal precedents and propose unconventional interpretations, see AL-KHAṬĪB, *supra* note 30, ch. 3.3.

124. See SALAYMEH, *supra* note 36, ch. 2.

find militant Islamist interpretations unconvincing or disturbing, but that does not mean they are not Islamic. Nonetheless, Islamic law, like any other legal tradition, is hybrid. To begin identifying the liminal space wherein contemporary Islamic law ends and non-Islamic law begins, we need to engage in comparisons with contemporaneous legal traditions.[125] Thus, to comprehend contemporary Islamic law fully, we should compare it to contemporary secular law.

B. Secular Legal Tradition: The (Colonial) State as Centripetal Force

As previously noted, among international law specialists, it is commonplace for the war practices of the U.S. government to be described as violations or misapplications of orthodox international law.[126] Consequently, it is important to consider whether *the legal reasoning of the U.S. military is part of the international legal system*. The United States considers itself to be a part of the international legal system and engages with international law. In addition, from a historical perspective, U.S. laws of war are consistent with the nineteenth-century beginnings of the modern laws of war. First, modern international law reflects a hierarchy of nation-states, with colonial states having the de facto power to dictate and to modify international law. The United States' construction of the category of "unlawful enemy belligerent" is an extension of international law's hierarchical differentiation between state and non-state conflicts.[127] Second, international law does not fully protect colonized peoples under the laws of war. Just as nineteenth-century international legal actors sought to exclude non-state, anticolonial groups from international legal protections, the U.S. excludes non-state, anticolonial groups from international humanitarian law. The U.S. classification of "unlawful enemy belligerent" functions to deny non-state groups international legal protections,

125. In my scholarship on the late antique and medieval periods, I focused on the relationships between Islamic and Jewish legal traditions, using the latter to identify the specificities of the former. *See* Salaymeh, *"Comparing" Jewish and Islamic Legal Traditions*, *supra* note 117; SALAYMEH, *supra* note 36; Lena Salaymeh, *Legal Traditions of the "Near East": The Pre-Islamic Context*, *in* ROUTLEDGE HANDBOOK OF ISLAMIC LAW 275 (Khaled Abou El Fadl et al. eds., 2019).

126. *See, e.g.*, Marjorie Cohn, *Human Rights: Casualty of the War on Terror*, 25 T. JEFFERSON L. REV. 317 (2003).

127. "Unprivileged enemy belligerent" is a slight modification of the term "unlawful enemy combatant" used in the 2006 Military Commission Act. The Act defines an unlawful enemy combatant as

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

rather than to deal with "changing" war practices. Third, international laws of war were spread through violent colonialism.[128] The United States is disseminating its interpretation of the categories of civilian and combatant through neocolonial, military interventions. (Indeed, al-Qāʿidah's legal reasoning on the civilian–combatant distinction is a direct reaction to U.S. colonialism.[129]) Therefore, the legal reasoning of the U.S. military is part of the international legal system.

What makes the international legal system secular? The modern international legal system is secular in both procedural and substantive terms. At the procedural level, the modern international legal system is built around secular institutions and secular treaties; moreover, the primary form of international legal enforcement is secular power. A significant aspect of the international legal system is differentiating between "civilized states" and "uncivilized states," which is analogous to colonizer states and colonized states. This differentiation is, as Frédéric Mégret argued, "a secularized version of the contrast between Christians and non-Christians."[130] In the secular legal tradition, colonial states are the centripetal force; correspondingly, in the international legal system, colonial states are the primary sources of law.[131]

At the substantive level, the modern international legal system conforms to and promotes secular law.[132] Secular law does not have essential characteristics and it is not homogenous. Secular law is not neutral or universalist because it was shaped by its historical beginnings in early modern, Western Europe. Despite the geographic and temporal particularities of secularism, there are identifiable patterns in secular law and secular state practices. Secular law shapes modern

Military Commissions Act, 10 U.S.C. §§ 948–949 (109th Cong. ed. 2006). The definition was not amended by the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009). *See also* Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45, 46 (2003) (noting that the terms "unlawful combatant" and "unprivileged combatant/belligerent" are unclear and do not appear in international legal agreements). The closest historically used term would be "brigands."

128. Frédéric Mégret, *From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other," in* International Law and Its Others 265, 310 (Anne Orford ed., 2006) ("[T]he worldwide expansion of the laws of war was a culturally violent, fundamentally imperialistic, and essentially militaristic phenomenon.").

129. Bin Lādin declared, "the US is responsible for any reaction, because it extended its war against troops to civilians." *See* Messages to the World, *supra* note 62, at 47.

130. Mégret, *supra* note 128, at 287.

131. *Id*. at 284 ("[T]he exclusion of non-European peoples from the laws of war was a direct function of the adoption by the nascent 'international community' of legal positivism, with its emphasis on the state as the sole source of law."). For a critique of the view that positivism—or the specific idea that rights could only be accorded through sovereign modern states—dominated nineteenth-century international legal thought, see Andrew Fitzmaurice, Sovereignty, Property and Empire, 1500–2000, at 274–75 (2014); Andrew Fitzmaurice, *Liberalism and Empire in Nineteenth-Century International Law*, 117 Am. Hist. Rev. 122 (2012).

132. On secular law, see sources cited *supra* note 117.

governance, even in states that may be perceived as "quasi-secular" or "religious." There is significant geographic diversity among secular states and temporal changes in secular law. There are, of course, variations in the European, North American, and other traditions of secularism. Secular states may have an established religion, no established religion, or be overtly anti-religion. Nonetheless, rather than removing religion from the public sphere, secular states regulate how and when "religion" appears in the public sphere. In the modern international legal system, secular law caricatures "religious violence" as "terrorism." As in colonial settings, "religion" is used to inscribe colonial hierarchies.

IV. Secular Legal Reasoning

The problematic characterization of al-Qāʿidah and the U.S. military as "heretical" reinforces a banal argument: that al-Qāʿidah and the U.S. military share a similar disregard for orthodox law. My argument moves beyond this banality; rather than being "heretical," I propose that the legal reasoning of al-Qāʿidah and of the U.S. military is parallel and secular.

In general, al-Qāʿidah followed a three-step legal reasoning process that does not conform to the orthodox Islamic jurisprudential methodology (*uṣūl al-fiqh*). First, al-Qāʿidah identified war as an obligatory form of self-defense because of exigent circumstances.[133] In a long, self-titled legal decree published in the Arabic-language newspaper *al-Quds al-ʿArabī* in 1996, Usāmah Bin Lādin outlined the urgent circumstances of U.S. occupation and colonialism that necessitated a declaration of war against the United States.[134] Many of the arguments are condensed and repeated in a 1998 legal decree published in *al-Quds al-ʿArabī* by Bin Lādin's World Islamic Front.[135] Second, al-Qāʿidah claimed that "combatants" is a broader category than understood in orthodox Islamic jurisprudence because of the enemy's war practices.[136] The decree argued for retaliation in the form

133. Bin Lādin described these exigent circumstances extensively. For instance, he asserted that the U.S. government "has committed acts that are extremely unjust, hideous, and criminal." Messages to the World, *supra* note 62, at 46.

134. Usāmah Bin Lādin, *al-Jihād ḍid al-amīrkiyīn al-muḥtalīn li-bilād al-ḥaramayn al-sharīfayn*, al-Quds al-ʿArabī (Aug. 1996), *translated in* Al Qaeda in Its Own Words, *supra* note 60, at 47–50 (excerpt). Bin Lādin discussed the need for self-defense from U.S. colonialism frequently in Messages to the World, *supra* note 62. On Bin Lādin's standing to make this war declaration and on the (in)validity of this declaration of (defensive) war according to orthodox Islamic law, see John Kelsay, *The New Jihad and Islamic Tradition*, 11 Foreign Pol'y Res. Inst. (FPRI) Wire (Oct. 2, 2003), www.fpri.org/article/2003/10/the-new-jihad-and-islamic-tradition.

135. Al-Jabhah al-Islāmiyyah al-ʿĀlimiyyah, *ʿIlān al-jihād ḍid al-yahūd wa al-ṣalībiyyīn*, al-Quds al-ʿArabī (Feb. 23, 1998), *translated in* Al Qaeda in Its Own Words, *supra* note 60, at 53–56.

136. Yūsuf al-ʿUyayrī, a leading figure in al-Qāʿidah, similarly denied the civilian status of women, children, and the elderly, who were among the 9/11 victims. *See* Roel Meijer, *Yūsuf al-'Uyairī and the Making of a Revolutionary Salafi Praxis*, 47 Die Welt des Islams 422, 454–55 (2007).

that corresponds to U.S. warfare in the region, which does not discriminate between combatants and civilians.[137] Third, al-Qāʿidah evaded orthodox legal definitions of civilians. The 1998 statement specifically called for targeting U.S. civilians and soldiers, wherever they may be found.[138]

The U.S. government also followed a three-step legal reasoning process. First, the U.S. government identified war as an obligatory form of self-defense because of exigent circumstances. Specifically, the United States declared a defensive, obligatory war in the aftermath of the 9/11 terrorist attacks.[139] Second, the U.S. government claimed that "combatants" is a broader category than understood in orthodox international law because of the enemy's war practices.[140] The U.S. government asserted that because "terrorists" intentionally mix with civilians, the orthodox international legal classification of combatants is insufficient.[141] Third, the U.S. government evaded orthodox legal definitions of civilians. The U.S. government coined the term "unprivileged enemy belligerent" to refer to non-state actors who commit, or are suspected of committing, violent acts.[142] "Unlawful enemy belligerent" not only blurs the boundary between civilian and combatant, it also functions as an expansion of the "combatant" category and a concomitant shrinkage of the "civilian" category.

Comparing the legal reasoning of al-Qāʿidah with that of the U.S. military reveals a parallel structure. These parallels illustrate a simple, three-step legal reasoning process shared by al-Qāʿidah and the U.S. government: first, the identification of war as an obligatory form of self-defense because of exigent circumstances; second, the claim that combatants is a broader category than that defined under orthodox law because of the enemy's war practices; third, the avoidance of orthodox legal definitions of civilians. The first step in this legal reasoning process announces that exigent circumstances require deviation from orthodox law. More specifically, the claim of self-defense appears to conform to orthodox Islamic and orthodox

137. Al-Jabhah, *supra* note 135.

138. Rosalind Gwynne, *Usama bin Ladin, the Qur'an and Jihad*, 36 RELIGION 61 (2006).

139. S.J. Res., 107th Cong., Pub. L. No. 107-40, 115 Stat. 224 (2001).

140. The U.S. government often characterizes its enemies as using civilian shields or disrespecting civilian life. *See, e.g.*, Off. of Glob. Comms., Apparatus of Lies: Saddam's Disinformation and Propaganda 1990–2003 (2003), www.hsdl.org/?view&did=521; Off. of the Press Sec'y, President Bush Participates in Joint Press Availability with NATO Secretary General de Hoop Scheffer (May 21, 2007), https://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070521-3.html; Julian Borger, *Rumsfeld Blames Regime for Civilian Deaths*, THE GUARDIAN (Oct. 15, 2001), www.theguardian.com/world/2001/oct/16/afghanistan.terrorism (Rumsfeld alleged that 200 Afghan civilians killed by U.S. bombs were involved in combat operations).

141. On how states exploit the notion of "human shields" to legitimate excessive military violence, see Neve Gordon & Nicola Perugini, *The Politics of Human Shielding: On the Resignification of Space and the Constitution of Civilians as Shields in Liberal Wars*, 34 ENV. & PLANNING D 168 (2016).

142. *See supra* note 127.

international ideas of *jus ad bellum*; yet, the simultaneous emphasis on exigent circumstances, or a state of emergency, is an implicit declaration that orthodox *jus in bello* does not apply. In other words, the first step is a proclamation for changing orthodox law. Overall, the three-step reasoning process results in comparable conclusions. Al-Qāʿidah's legal decree calls for the killing of Americans wherever they may be and regardless of their civilian status; implementing that proclamation results in disregarding civilian status. The U.S. government similarly calls for the killing of al-Qāʿidah and their allies wherever they may be; implementing that proclamation results in disregarding probable civilian status and rationalizing "collateral" civilian casualties. Al-Qāʿidah alleges that U.S. targeting of civilians demands reciprocity; the U.S. military alleges that the "reality of warfare" overrules the principle of distinguishing between civilians and combatants.

I contend that the three-step reasoning process is secular because it conforms to four corresponding and overlapping aspects of secular law. First, secular law is law of the modern nation-state, which means that the state is the centripetal force and law is produced in service of the state. In turn, a significant objective of the state's legal system is maintaining the state's monopoly on the use of violence against its existential enemy. From the perspective of the state at war and under "exigent circumstances," there are no civilians, there are only probable combatants. Second, secular law purports to be neutral and universal, but it perpetuates colonial hierarchies based on colonial categories (race, gender, religion, etc.).[143] Nineteenth-century legal actors developed an international legal system that they alleged would apply to everyone; they did not acknowledge that resistors of colonialism would be excluded. (There are other secular legal ideals that are also advertised as being universal, but are applied in prejudicial ways.[144]) Third, secular law is non-ethical, leaving the secular state to delineate ethics. A secular legal logic determines who will be considered a combatant based on the classification of the enemy, rather than considering the ethical issue of who is a civilian and how she or he will be protected. Ethics is secondary to the state's objectives. Fourth, secular law overrules orthodox law, such that orthodox definitions of civilians may be superseded by the state's objectives.[145] That is, when the state—rather than the jurists who generate orthodox law—is the final arbiter of the law, orthodox law is applied only if it conforms to the state's interests and only in the form that serves the state's interests. Accordingly, the

143. This aspect of secular law manifests the seduction of coloniality. *See* De Lissovoy & Bailón, *supra* note 16.

144. On the secular legal contradiction of "religious freedom," see Salaymeh & Lavi, *Religion Is Secularized Tradition*, *supra* note 117.

145. A parallel process occurs with "religious" citizens; secular states characterize specific minority groups (particularly Jews and Muslims) as threats to the public sphere because their traditions do not neatly correspond to the notion of "religion." *See* Salaymeh & Lavi, *Secularism*, *supra* note 117.

first step in the legal reasoning process collapses *jus ad bellum* and *jus in bello* in order to emphasize that orthodox legal restrictions on the conduct of warfare do not apply to the state of exception. This echoes Achille Mbembé's observation that "the state of exception and the relation of enmity have become the normative basis of the right to kill."[146] Al-Qāʿidah's legal reasoning structurally imitates the legal reasoning of the secular state that it targets.

Al-Qāʿidah and the U.S. military point to each other's warfare practices as legitimation of their unorthodox legal positions. In the contemporary moment, militant Islamist groups and secular states use each other to justify their violence, particularly their legal rhetoric surrounding violence. This symbiosis serves both states and militant groups by redeeming colonial violence as a form of self-defense and by legitimating militant violence as sanctioned by "religion."[147] Yet, when militant Islamist groups point to "religion" as justifying their acts, they are not pointing to historical traditions, but rather to the (contemporary) secular construction of "religion." Indeed, al-Qāʿidah and the U.S. military share the same understanding of "religion."

From the perspective of critical secularism theory, "religion" is not a trans-historical phenomenon, but rather a modern category that is produced by secularism. (This is why I do not use the term "religion" to refer to the Islamic tradition prior to the modern era.) States secularize traditions by defining them as "religions" and introducing them into legal discourse and state regulation through three dimensions that are simultaneously related and conflicting.[148] First, secular states define religiosity as private belief, individual right, and autonomous choice. Second, secular states define "religious law" as a positive legal code, with clear authority and unambiguous content. Third, secular states identify minority religious groups as threats to public order. These three dimensions of the "secularization triangle" conflict with the Islamic tradition (and other traditions). For present purposes, the key issue is that al-Qāʿidah's understanding of orthodox Islamic law is secularized.

Although al-Qāʿidah declares that their legal reasoning relies on the Qurʾān, the normative practice of Muḥammad, and the views of pious Muslims from the first three centuries of the Islamic movement, the legal decrees analyzed above indicate that their actual method of legal reasoning is quite distinct.[149] Specifically, al-Qāʿidah's method

146. Achille Mbembé, *Necropolitics*, 15 PUB. CULTURE 11, 16 (2003).

147. WILLIAM T. CAVANAUGH, THE MYTH OF RELIGIOUS VIOLENCE: SECULAR IDEOLOGY AND THE ROOTS OF MODERN CONFLICT (2009).

148. On how contemporary states secularize traditions, see Salaymeh & Lavi, *Religion Is Secularized Tradition*, *supra* note 117. Rather than ascribing agency to a state, I recognize that a state constitutes a "series of contingent and unstable cultural practices, which in turn consist of the political activity of specific human agents." MARK BEVIR & R.A.W. RHODES, THE STATE AS CULTURAL PRACTICE 1 (2010).

149. *See* ABŪ MĀRĪYAH AL-QARASHĪ, NŪR AL-YAQĪN: SHARḤ ʿAQĪDAT TANẒĪM AL-QĀʿIDAH FĪ BILĀD AL-RĀFIDĪN 28 (Dār al-Jabhah n.d.).

of legal reasoning is highly selective in its reliance on Islamic precedents and authoritative opinions. This is why Tamara Albertini noted that "although fundamentalists keep referring to 'tradition,' a key notion in their ideology, they actually prove to be 'anti-traditionalists' with respect to what has historically been the practice of Islam."[150] Similarly, Mohammad Fadel observed:

> [W]hile the Islamic State certainly appropriates well-known concepts from the Islamic tradition, it does so in a way that is not only strikingly divergent from the long-term historical development of those concepts, it also applies them in a way that seems self-serving and ignores the inner integrity of the very rules which it claims to espouse.[151]

As previously noted, medieval Muslim jurists were also selective in their use of Islamic precedents. However, whereas medieval jurists strategically used Islamic hermeneutic principles of abrogation and prophetic precedent, al-Qāʿidah introduces a legal principle (reciprocity) without justifying it in the Islamic tradition. Al-Qāʿidah does not proclaim that reciprocity comes from an Islamic source or is justified by an Islamic legal principle; instead, al-Qāʿidah alleges that reciprocity comes from its specific and fairly new reading of a qurʾānic verse. I propose that al-Qāʿidah's legal hermeneutics consists of *sola scriptura* in the service of the state. Put differently, the difference between medieval jurists and al-Qāʿidah is that the latter's understanding of tradition is not only unorthodox, but also, more importantly, secular.

Al-Qāʿidah selects parts of the Islamic legal tradition from which it constructs an Islamic legal code, rejecting much of the historical Islamic tradition in the process. In doing so, al-Qāʿidah demonstrates that its underlying conceptualization of law is positivist. Secularism (ideology and state) constructs "religious law" as a positive legal code. The secular state's construction of religious law as written code manifests the state's interest in legal certainty. The secular state's demand for positive Islamic law should be placed within a broader history of colonialism: the codification of Islamic law played an important role as a mechanism of colonial control.[152] Secularism is a modern, global

150. Tamara Albertini, *The Seductiveness of Certainty: The Destruction of Islam's Intellectual Legacy by the Fundamentalists*, 53 PHIL. E. & W. 455, 455 (2003).

151. Mohammad Fadel, *Experts Weigh in (Part 4): How Does ISIS Approach Islamic Scripture?*, BROOKINGS (May 7, 2015), www.brookings.edu/blog/markaz/2015/05/07/experts-weigh-in-part-4-how-does-isis-approach-islamic-scripture.

152. Under both colonial states of the past and contemporary states of the present, requiring Muslims to conform to legal positivism is a form of colonial control, as many scholars have demonstrated. *See, e.g.*, Scott Alan Kugle, *Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia*, 35 MOD. ASIAN STUD. 257 (2001); David S. Powers, *Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India*, 31 COMP. STUD. SOC'Y & HIST. 535 (1989).

condition; it is not limited to any geographic region, political structure, or social community.[153] Because secularism influences even contemporary societies or groups that are commonly perceived as "religious," al-Qāʿidah is secularislamized. Accordingly, the "war on terror" is not a war between secular states and militant Islamist groups; the "war on terror" is a secular war between a colonial state and a non-state group. (There is no clear counterpart to this process; there is no evidence that modern international law is becoming Islamized.)

V. Secular Warfare: The Colonial Tactic of Instrumentalizing "Terrorism"

Situating al-Qāʿidah and the U.S. military as secular legal actors appears to contravene a basic and prevalent notion about the "war on terror": that it is a conflict between a secular state and "religious" extremists. In this Part, I explain that this contemporary war is a conflict over colonial power. In turn, this conflict reinforces the legal logic of coloniality by justifying civilian targeting.

In the nineteenth century, international legal actors (in the West) initially applied international law to their states and their armies, not to the colonized peoples who lacked both states and armies.[154] Nineteenth century international legal actors differentiated between war and anticolonial resistance in order to justify colonialism.[155] Indeed, nineteenth century international law explicitly differentiated between "civilized" and "uncivilized" peoples.[156] Just as differentiating between warfare and anticolonial violence served colonialism, distinguishing between war and armed conflicts with non-state groups frequently serves colonialism. As Nathaniel Berman has illustrated, the distinction "between war and not-war" is "strategically instrumentalized."[157] Similarly, Downes argued that targeting civilians in warfare is caused by "desperation to win and to save lives on one's side" and by a desire for "territorial conquest."[158] States classify

153. On secularism and secularization, see generally José Casanova, Public Religions in the Modern World (1994); Jürgen Habermas & Joseph Ratzinger, The Dialectics of Secularization: On Reason and Religion (2007); Charles Taylor, A Secular Age (2007).

154. Mégret, *supra* note 128.

155. Berman explains:

> There is nothing in the fact of state control that makes an armed conflict uniquely international or its participants uniquely deserving of the combatants' privilege. Moreover, at least until the second half of the Twentieth Century, this normative bias has operated in the service of a very specific political cause, that of European colonialism.

Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 Colum. J. Transnat'l L. 1, 20 (2004). *See also* Mégret, *supra* note 128.

156. Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2012); Brett Bowden, *The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization*, 7 J. Hist. Int'l L. 1 (2005).

157. Berman, *supra* note 155, at 7.

158. Downes, *supra* note 12, at 3–4.

their violence as war/not-war based on their interests, rather than any substantive difference in the use of violence.

Interstate armed conflicts and armed conflicts between states and non-state groups have the same implications for civilians: both meet a political and sociological experience of war. Thus, although the "war on terror" is a manifestation of U.S. colonialism, it is also a war. War is an armed conflict, though not necessarily an interstate armed conflict. Often with the intention of protecting non-state actors, some contemporary scholars of international law allege that the "endless war on terror" does not meet the international legal definition of war because it is not an interstate conflict.[159] (Likewise, there is a legal debate about classifying terrorism as a crime, rather than as an act of war.[160]) While recognizing that international lawyers view limiting the category of war as a means of promoting human rights, I contend that this distinction has unintended, negative implications for non-state groups resisting colonialism. More precisely, just as with previous forms of colonialism, neocolonial military interventions constitute wars against civilian populations.

State violence is not a priori legitimate and non-state violence is not a priori illegitimate. In the nineteenth century, international legal actors alleged that "savages" do not differentiate between combatants and non-combatants and that their warfare practices are lawless.[161] Indeed, nineteenth-century Western governments promoted the laws of war not to protect civilians, but rather to protect combatants from civilians resisting colonialism.[162] By delegitimizing non-state violence as "uncivilized," international legal actors reinforced the sovereignty of the (colonial) state and invalidated anticolonial resistance. In the contemporary context, condemning non-state violence frequently delegitimizes the efforts of formerly colonized peoples to alter or to reject the states that were imposed upon them by colonial powers. More specifically, the contemporary category of "terrorism" is an updated rendering of the nineteenth-century international legal classification of

159. On the misapplication of laws of war to the "endless war on terror," see Mary Ellen O'Connell, *When Is a War Not a War: The Myth of the Global War on Terror*, 12 ILSA J. Int'l & Comp. L. 535 (2006).

160. Llobet explains: "[I]f terrorism is a crime, the fight against terrorism must be conducted within the legal mechanisms established by the Rule of Law to prevent and punish any crimes committed during peacetime; but, in case of it being a form of war, the provisions of the *Ius in Bello* should be applied." Mariona Llobet, *Chapter 5 Terrorism: Limits Between Crime and War: The Fallacy of the Slogan "War on Terror*," 14 Ius Gentium 101, 102 (2012). *See also* Sharon Harzenski, *Terrorism, a History: Stage One*, 12 J. Transnat'l L. & Pol'y 137, 145 (2003) ("Whether to treat terrorism as a crime or as an act of war is one of the debates pervading the literature of definition."); Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 Eur. J. Int'l L. 993 (2001).

161. Mégret, *supra* note 128, at 286–95.

162. Eyal Benvenisti & Doreen Lustig, *Taming Democracy: Codifying the Laws of War to Restore the European Order, 1856–1874* (Univ. of Cambridge Faculty of Law, Rsch. Paper No. 28/2017, June 15, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985781.

"uncivilized warfare." Mégret observed that "the rhetoric of the Bush Administration concerning 'unlawful combatants' [i.e., 'terrorists'] mimics in every shade . . . the earlier exclusion of non-Western peoples from the laws of war."[163] The category of "terrorism" can function in contemporary legal discourse as an excuse to deny non-state groups international legal protections. Thus, "terrorism" is part of the logics of coloniality.

Conclusion

The case study on al-Qāʿidah points to broader dynamics of secularislamization that encompass many other militant Islamist groups. Rather than presenting radical alternatives to secular law or simple continuations of historical Islamic legal traditions, militant Islamist groups espouse secular jurisprudence: they accept the modern nation-state as the source of law, they disavow ethics, and they employ a secular understanding of "religious law" as a positive legal code. Reflecting their secular positioning, many militant Islamist groups reject much of the Islamic legal tradition and advocate for state-enforced and univocal Islamic law. For example, when militant Islamist groups claim that premodern Muslim jurists "distorted" Islamic divine law (*sharīʿah*) through their elaboration of Islamic law (*fiqh*), they are adopting a secular jurisprudential bias. Thus, when these militant Islamist groups allege that "*sharīʿah*" is a divine code that must be applied by an "Islamic state," they accept the secular state's centralization and homogenization of law, the secular legitimation of authoritarian state law, and the secular construction of religious law as a legal code. Nonetheless, not all the law generated by militant Islamist groups is secularized. This case study highlights secularislamized law because it relies on a logic of coloniality—the state's monopoly on the use of violence, the univocality of law, and territorial sovereignty. Secularislamized law is a manifestation of the inextricability of contemporary Islamist movements from the modernity/coloniality matrix that they believe they are resisting. In our particular historical moment, it is possible to identify how secularislamized law uses the legal reasoning of coloniality. At some point in the future, secularislamized law may simply become Islamic.

The case study on the U.S. military likewise points to broader dynamics of coloniality in international law. The depiction of the U.S. military as exceptional or transgressing orthodox international law serves to legitimate the modern international legal system. Just as modern international law simultaneously developed laws of war to protect combatants and denied those protections to colonized peoples, the U.S. military claims to uphold the combatant–civilian distinction while rendering most civilians as "potential combatants" (or

163. Mégret, *supra* note 128, at 299.

"terrorists"). The U.S. military's simultaneous use of and disregard for international law is not exceptional. Instead, it is consistent with the coloniality of modern international law. Berman has suggested that "those with power seek to legitimate violations of international norms, *not by disregarding* international law but rather *by virtue of the very fact that their actions violate* international law."[164] The United States and other colonial states use the notion of "terrorism" to reinforce colonial difference and to justify changing orthodox international law.[165] Because modern international law perpetuates coloniality, decolonizing international law necessarily must begin with a radical reconfiguration of legitimate uses of violence.

Neither the Islamic legal tradition nor the secular legal tradition has essential characteristics, authentic dimensions, or recuperative potentials; both legal traditions are the products of the diverse and changing actors who build them. This Article has opposed attempts to reclaim or rediscover "true" or "good" Islamic, international, or U.S. laws of warfare. I do not have a false expectation that ethics, or respect for human rights, or the "rule of law" can somehow prevent the excessive use of violence in war. As an alternative to simplistic apologetics, this Article has analyzed the legal arguments that are marshaled to justify the killing of civilians. Al-Qāʿidah and the U.S. military identify similar targets, use analogous forms of violence, and offer comparable legal justifications for their use of force.[166] When it comes to warfare, the U.S. government does not appear to be more constrained by the "rule of law" than the militant groups they claim to be targeting.[167] The three-step legal reasoning process delineated above is a form of colonial logic that transforms civilians into probable combatants and rationalizes the targeting of civilians. The *Manual*'s legal sophistication—as compared to al-Qāʿidah's legal decrees—is a technology of the state, not a guarantee of justice and certainly not a means of protecting civilians. Both al-Qāʿidah and the U.S. military do not define who is a civilian in positive terms. The legal question that al-Qāʿidah and the U.S. military systematically ignore is: *When does the legal obligation to save a civilian life outweigh the legal permission to kill a combatant?*

164. Nathaniel Berman, *Legitimacy Through Defiance: From GOA to Iraq*, 23 WIS. INT'L L.J. 93, 94 (2005).

165. Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119.

166. Zarakol asserts: "[I]t is generally misleading to reduce the problem posed by terrorism to its methods, because there is no method that 'one could say has been exclusive and peculiar to those associations which are designated' as 'terrorist'." Ayşe Zarakol, *What Makes Terrorism Modern? Terrorism, Legitimacy, and the International System*, 37 REV. INT'L STUD. 2311, 2314 (2011).

167. On the "rule of law" and the "war on terror," see ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010).