



# THE UNITED STATES, ISRAEL & UNLAWFUL COMBATANTS

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**T**HIS ESSAY CONSIDERS how members of a terrorist organization should be categorized under international law when the organization is engaged in an armed conflict with a nation. In particular, the essay discusses whether these members can properly be categorized as a type of “combatant” or whether they must instead always be categorized as “civilians.” The proper categorization can have significant implications for the nation’s authority under international law (and potentially also domestic law) to subject members of a terrorist organization to military targeting and detention. The United States and Israel currently have different legal approaches to the question, and the essay will explore and comment on these differences.<sup>1</sup>

## BACKGROUND

**T**he usual starting point for thinking about the proper categorization of individuals involved in an armed conflict are the four Geneva Conventions that were negotiated shortly after World

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<sup>1</sup> I am assuming here, as have U.S. and Israeli courts, that an armed conflict can exist under certain circumstances between a nation and a non-state terrorist organization. See also, e.g., Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 9 (2003).

War II. The Third Geneva Convention, which governs the treatment of prisoners of war, and the Fourth Geneva Convention, which governs the treatment of civilians during wartime, are especially relevant. Both the United States and Israel ratified the Conventions in the 1950s. There are also two Additional Protocols to the Conventions that were negotiated in the 1970s. Although neither the United States nor Israel is a party to the Protocols, some provisions in the Protocols may reflect customary international law that is binding on non-parties.

According to many international law commentators, the Geneva Conventions allow for only two categories: lawful combatants, and civilians. Article 4 of the Third Geneva Convention states that prisoner of war (POW) protections apply to both the armed forces of a party to the Convention, as well as to a party's militia or other volunteer corps if they meet four conditions: they must be "commanded by a person responsible for his subordinates"; have a "fixed distinctive sign recognizable at a distance"; carry their arms openly; and conduct their operations "in accordance with the laws and customs of war." Those who argue that there are only two categories contend that anyone engaged in combat who does not qualify as a POW – in other words, anyone who is not a lawful combatant – is a civilian, and their treatment is regulated by the Fourth Geneva Convention.<sup>2</sup>

Not surprisingly, the standards for military targeting and detention differ between the categories of lawful combatants and civilians. For lawful combatants, a nation may target all members of the enemy's armed forces (except medical and religious personnel), regardless of whether they happen to be participating in hostilities at the time of targeting. In addition, the nation may capture and detain all members of the armed forces until the end of hostilities, without any individualized showing of necessity. International law thus allows for a membership-based approach to the targeting and

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<sup>2</sup> See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 409-10 (2d ed. 2005); Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L REV. RED CROSS 45 (2003); Ryan Goodman, *The Detention of Civilians in Armed Conflict,* 103 AM. J. INT'L L. 48 (2009).

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detention of lawful combatants. Civilians, by contrast, may be subjected to military targeting only “for such time as they take a direct part in hostilities.”<sup>3</sup> As for detention, civilians may be “interned” without trial “only if the security of the Detaining Power makes it absolutely necessary,” and the internee must be released “as soon as the reasons which necessitated his internment no longer exist.”<sup>4</sup>

### THE U.S. & ISRAELI APPROACHES

Both the United States and Israel have had to confront the question of how to categorize members of a terrorist organization, but their legal approaches have differed. After the September 11, 2001 attacks, the United States categorized members of the Al Qaeda terrorist organization as “unlawful combatants,” and the United States claimed that this categorization meant (among other things) that members of the organization could be subjected to military targeting and detention just like more traditional combatants, except that they were not entitled to the protections accorded to POWs under international law (such as immunity from prosecution for their combat activities). The United States thus contested the claim that anyone who does not qualify as a POW is automatically a civilian. According to the U.S. position, there are three categories in international humanitarian law rather than two: lawful combatants, unlawful combatants, and civilians.<sup>5</sup>

Despite imposing certain procedural restrictions on the government, U.S. courts have so far accepted this three-category approach. In *Hamdi v. Rumsfeld*, for example, a plurality of the Supreme Court stated that “[t]he capture and detention of lawful

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<sup>3</sup> First Additional Protocol to the Geneva Conventions, art. 51(3).

<sup>4</sup> Fourth Geneva Convention, arts. 42, 132; *see also id.* at art. 78 (allowing occupying power to subject civilians to assigned residence or internment for “imperative reasons of security,” subject to a right of appeal and periodic review).

<sup>5</sup> Alternatively, but to the same effect, the U.S. position could be characterized as recognizing two general categories – combatants and civilians – and as classifying unlawful combatants as a sub-group of the first category. The key point is that the U.S. position treats unlawful combatants as distinguishable from both lawful combatants and civilians.

combatants *and the capture, detention, and trial of unlawful combatants*, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”<sup>6</sup> This detention authority, the plurality further explained, lasts for “the duration of the relevant conflict.”<sup>7</sup> Similarly, in *Hamdan v. Rumsfeld*, despite invalidating on statutory grounds the military commission trial system that the Bush Administration had set up at Guantanamo, the Court made clear that it viewed the conflict between the United States and Al Qaeda as an “armed conflict” under international law, and the Court said that “[the petitioner] does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities.”<sup>8</sup>

In addition, although the Obama Administration has announced that it does not intend to use the term “enemy combatants” in defending its military detention policy, this labeling change appears limited to domestic constitutional issues rather than international law issues, and the Administration has continued to claim the right under international law to treat members of Al Qaeda as combatants rather than civilians. Thus, the Administration has argued that “Article 4 [of the Third Geneva Convention] does not purport to define all detainable persons in armed conflict” and instead simply “defines certain categories of persons entitled to prisoner-of-war treatment.”<sup>9</sup> A contrary conclusion, the Administration has contended, “would improperly reward an enemy that violates the laws of war by operating as a loose network and camouflaging its forces as civilians.”<sup>10</sup>

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<sup>6</sup> 542 U.S. 507, 518 (2004) (plurality) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)).

<sup>7</sup> *Id.* at 526.

<sup>8</sup> 548 U.S. 557, 635 (2006).

<sup>9</sup> Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay (March 13, 2009), at 8, In re Guantanamo Bay Detainee Litigation (D.D.C.), available at [www.usdoj.gov/opa/documents/memo-re-det-auth.pdf](http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf).

<sup>10</sup> *Id.* For recent decisions accepting this argument, see *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009); *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009).

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By contrast, the Israeli Supreme Court has endorsed the two-category approach. In its December 2006 decision in *Public Committee against Torture in Israel v. Government of Israel*, the court considered the legality of Israel's policy of targeted killing of members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel.<sup>11</sup> In rejecting the Israeli government's argument that the court should recognize an "unlawful combatant" category under international law, the court concluded that "the data before us are not sufficient to recognize this third category." The court then proceeded to consider the circumstances under which civilians may be subjected to targeted killings. In its June 2008 decision in *A. v. State of Israel*, the court addressed the legality of Israel's terrorist detention law, and it once again purported to apply a two-category approach.<sup>12</sup> Although Israel's detention statute specifically refers to "unlawful combatants," the court concluded that, under international law, individuals falling into that classification are simply within a sub-group of the category of civilians. The court then proceeded to consider the circumstances under which civilians may be detained.

### PROBLEMS WITH THE TWO-CATEGORY APPROACH

Although the two-category approach has substantial support among international law commentators, there are a number of reasons to question it. First, this approach may create perverse incentives. One of the central purposes of the laws of war is to encourage fighters both to distinguish themselves from civilians and to avoid attacking civilians. Under the two-category approach, however, a nation engaged in an armed conflict has *less* ability to target and detain fighters who fail to wear uniforms or who purposefully target civilians than if those fighters observe the principles of distinction. The two-category approach thus seems to reward the very

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<sup>11</sup> HCJ 769/02 (IsrSC 2006), available at [elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf).

<sup>12</sup> CrimA 3261/08 (IsrSC 2008), available at [elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf).

conduct that the laws of war are designed to prevent.<sup>13</sup>

Second, the conception of “civilians” in the Geneva Conventions does not fit well with the reality of an armed conflict with a terrorist organization. While the Conventions envision that civilians might sometimes take part in hostilities, they envision that this combatancy is a temporary deviation for these individuals, and that there is some separate group of full-time fighters. For a terrorist organization engaged in an armed conflict with a nation, however, the involvement of the members of such an organization in hostilities is not some temporary deviation from their normal circumstances. Thus, the time between terrorist attacks does not constitute a reversion to non-combatancy – rather, that time is simply part of the planning and waiting associated with the terrorism itself. Nor is there any separate set of full-time fighters – the members of the terrorist organization are themselves the full-time fighters.

Third, if members of a terrorist organization are considered to be civilians and thus immune from targeting except when directly participating in hostilities, it may be difficult to stop them from moving in and out of hostilities – the so-called “revolving door” problem.<sup>14</sup> The members of a terrorist organization thus may “enjoy the best of both worlds – they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out a terrorist act.”<sup>15</sup> For example, the two-

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<sup>13</sup> This problem would be exacerbated if, as the U.S. government and some commentators have maintained, the four requirements in Article 4 of the Third Geneva Convention apply even to regular armed forces. See, e.g., INGRID DETTER, *THE LAW OF WAR* 136-37 (2d ed. 2000); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 225 (2003). If so, a nation that decided to stop having its regular armed forces wear uniforms would thereby make it harder under the two-category approach for those forces to be targeted and detained, turning the usual assumptions of international humanitarian law on their head.

<sup>14</sup> See, e.g., Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683, 738-41 (2009) (discussing this problem); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 117-20 (1990) (same).

<sup>15</sup> David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 193 (2005).

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category approach might mean that Al Qaeda military recruits training in Afghanistan could not be targeted because they are not lawful combatants and have not yet directly participated in hostilities. To take an even more extreme example, the two-category approach might mean that, after the September 11 attacks, the United States lacked the power to target Osama bin Laden, because he was no longer directly participating in hostilities.<sup>16</sup>

Finally, the two-category approach threatens to undermine a nation's inherent right of self-defense. Both the UN Security Council and NATO appeared to recognize after the September 11 attacks that a nation's right of self-defense can be triggered, at least in some instances, by terrorist attacks.<sup>17</sup> But once the attack is over, the two-category approach seems to suggest that the attackers are no longer subject to a counter-attack because they are no longer directly participating in hostilities, thereby substantially reducing the value of the right of self-defense. As one commentator notes, under the two-category approach "the right of self-defence under Article 51 of the UN Charter following an armed attack by a terrorist group may become meaningless."<sup>18</sup>

### TEXT OF THE GENEVA CONVENTIONS

**W**e might need to accept these problematic consequences if the two-category approach were mandated by the relevant text of the Geneva Conventions, but it is not. In the four original Geneva Conventions, the strongest textual argument for the two-category approach comes from Article 4 of the Fourth Geneva Convention. That Article states that those who find themselves in the hands of a party to an armed conflict or an occupying power are "protected persons" covered by the Fourth Geneva Convention (that is, civilians). It then carves out from its coverage persons covered by the other Geneva Conventions, including POWs. The nega-

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<sup>16</sup> See R. J. Delahunty, *Is the Geneva POW Convention "Quaint"?*, 33 WM. MITCHELL L. REV. 1635, 1654 (2007).

<sup>17</sup> See Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 257 (2002).

<sup>18</sup> Kretzmer, *supra* note 15, at 193.

tive implication, the argument goes, is that if someone does not fall within the protections of the other Conventions, they are covered by the Fourth Geneva Convention as a civilian.

This textual argument does not work, however, in the context of a conflict against a terrorist organization, for two reasons. First, most of the Fourth Geneva Convention, including Article 4, applies only to armed conflicts between parties to the Convention and situations of military occupation in the territory of a party, and thus does not apply to a conflict between a party and a non-state terrorist organization. Second, Article 4 also carves out from its coverage individuals from states that have normal diplomatic relations with the detaining nation, something that will often be the case for members of a terrorist organization – it is generally the case, for example, in the conflict between the United States and Al Qaeda.<sup>19</sup>

The textual argument is also undercut by Common Article 3 of the Geneva Conventions, which regulates “non-international” armed conflicts. The two-category approach would suggest that everyone who fights in a non-international armed conflict (such as a civil war) is a civilian, since the POW provisions in the Third Geneva Convention apply only to conflicts between nations. Common Article 3, however, expressly envisions the detention of enemy armed forces: it states that its protections extend to persons, including “members of armed forces,” who have been taken out of combat for any reason, including “detention.” State practice since the adoption of the Geneva Conventions also provides many instances in which combatant detention frameworks have been used during non-international armed conflicts.<sup>20</sup> Moreover, even the International Committee of the Red Cross (ICRC) has recently acknowledged that members of an organized armed group engaged in a non-international armed conflict can be considered combatants rather than civilians.<sup>21</sup>

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<sup>19</sup> Accord George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 893 n.12 (2002).

<sup>20</sup> See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1086 (2008).

<sup>21</sup> See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*



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Provisions in the First Additional Protocol to the Geneva Conventions also appear to assume a third category. For example, Article 75 refers to individuals “in the power of a Party to the conflict” who are not entitled to the protections of the Conventions, and Article 45 provides that “[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.” These provisions seem clearly to envision that there will be individuals who are neither lawful combatants nor civilians.

### STRETCHING THE CIVILIAN CATEGORY

At least some of the problems associated with the two-category approach can be addressed by broadly interpreting the authority of a state to target and detain civilians, and this is essentially the path taken by the Israeli Supreme Court. In the *Public Committee Against Torture* decision, the court broadly interpreted the circumstances under which a member of a terrorist organization should be viewed as directly participating in hostilities and thus subject to targeting. Among other things, the court reasoned that this concept includes persons who plan and direct hostile actions as well as those who carry them out, and that those involved in ongoing terrorist activities are subject to targeting even during the time in between hostile acts. In the *A. v. State of Israel* decision, the court held that members of a terrorist organization can be subjected to administrative detention even if they have not participated in hostilities, as long as they have “made a significant contribution to the cycle of hostilities in its broad sense.” Applied aggressively, these standards come close to treating active members of a terrorist organization as equivalent to enemy armed forces in a traditional armed conflict, without the benefit of POW protections – that is, they come close to what is allowed under the three-category approach.

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*Under International Humanitarian Law* at 28-32 (2009), at [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609/\\$File/direct-participation-guidance-2009-ICRC.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609/$File/direct-participation-guidance-2009-ICRC.pdf).

While avoiding some of the anomalies discussed above, this stretching of the two-category approach has its own potential drawbacks. In particular, it poses the danger of undermining the protections of true non-combatants in more traditional conflicts – by, for example, exposing to military attack civilians suspected of conspiring with or giving support to the enemy. The protection of such non-combatants is one of the “cardinal principles” of modern international humanitarian law.<sup>22</sup> If concepts such as “direct participation” are expanded to accommodate the unique features of an armed conflict with a terrorist organization, this protection may be eroded.

This stretching is also likely to put the nation at odds with widespread views among international lawyers about the scope of military authority vis-à-vis civilians. Many commentators have a narrow view of concepts such as “direct participation in hostilities.”<sup>23</sup> This leaves a nation like Israel vulnerable to significant legal criticism for its targeted killing and detention policies.<sup>24</sup> Moreover, even after stretching the civilian category, a nation faced with an ongoing conflict with a terrorist organization may still find it necessary to deviate from the two-category approach. Many commentators in fact accuse Israel of doing precisely that – for example, in connection with military operations against Hamas in Gaza.<sup>25</sup> To take another example, it may be difficult to reconcile some of the U.S. Predator drone attacks in Afghanistan and Pakistan (a practice continued by the Obama Administration) with the two-category approach, since

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<sup>22</sup> *Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons* ¶ 78 (ICJ July 8, 1996), available at [www.icj-cij.org/docket/files/95/7495.pdf](http://www.icj-cij.org/docket/files/95/7495.pdf).

<sup>23</sup> See, e.g., HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* 230 (2005) (“Direct participation should be narrowly construed, and does not include for example support for, or affiliation to, the adversary.”); Yael Stein, *By Any Name Illegal and Immoral: Response to “Israel’s Policy of Targeted Killing”*, 17 *ETHICS & INT’L AFFAIRS J.* 127, 129 (2003) (arguing that “as soon as [civilians] cease [engaging in hostilities] they regain protection”).

<sup>24</sup> See, e.g., Kristen E. Eichensehr, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 *YALE L.J.* 1873 (2007).

<sup>25</sup> See, e.g., David Luban, *Was the Gaza Campaign Legal?*, 31 *ABA NAT’L SEC. LAW REPORT* 2, 5-6 (Jan./Feb. 2009).

many of the targets are not participating in hostilities at the time they are attacked.

One potential advantage of insisting on the two-category approach is that it seems to be more grounded in existing treaties – namely, the Geneva Conventions – and thus more respectful of international law. It is at least debatable, however, which is more respectful: stretching existing treaties in ways that many people find problematic, or acknowledging that the treaties have some limitations and that a new framework needs to be developed. As noted below, if done in a way that builds upon the agreed-upon principles in the treaties, the three-category approach may do more to promote international law than the two-category approach. Moreover, by acknowledging that the existing categories of lawful combatants and civilians do not answer the hard questions, a nation is likely to expose itself to greater scrutiny, and thus potentially more accountability, than if it purports to be operating under preexisting rules.

### LEGAL BLACK HOLE?

This takes us back to the three-category approach followed by the United States. This approach, too, is highly controversial. The biggest drawback to this approach is the possibility that it will result in a “legal black hole.” If members of a terrorist organization are neither POWs nor civilians, there is a danger that they might not have any legal protection at all. Some observers would cite abuses of terrorist detainees during the Bush Administration as confirmation of this danger. A related danger is that individuals with only tenuous connections to terrorism might be subject to targeting and detention; if so, this could itself seriously undermine the protection of civilians under international law. This overbreadth concern was highlighted by the alarming suggestion of a U.S. government lawyer in one case that even a “little old lady in Switzerland” who contributed money to a charity that turned out to support Al Qaeda could be held as a combatant.<sup>26</sup>

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<sup>26</sup> See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005), vacated *sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

As an initial matter, it is important to remember that the machinery for enforcing international law in this area is limited and highly dependent on domestic institutions. As a result, the danger of a legal black hole is likely to depend much more on the good faith of the nation involved, its sensitivity to international opinion, and its internal checks and balances than on the particular legal categorizations. Moreover, in a nation with a strong court system, which is true of both the United States and Israel, the government will likely need to sell its approach to the judiciary, and a legal black hole will not be acceptable to courts, something that became apparent during the Bush Administration.

In any event, there is nothing inherent in the three-category approach that leads to a legal black hole or undue overbreadth. Today there is general agreement, for example, that the protections listed in Common Article 3 of the Geneva Conventions apply in this context, at least as a matter of customary international law. These protections would guarantee minimum standards of humane treatment, such as protection from torture and a requirement of basic due process for criminal prosecution. The U.S. Supreme Court has in fact held that Common Article 3 applies to the conflict between the United States and Al Qaeda.<sup>27</sup> Many commentators also regard Article 75 of the First Additional Protocol to the Geneva Conventions (which contains a more extensive list of minimum protections) as reflecting customary international law. Some human rights treaties, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, will also likely apply and provide protections.

In addition, because a nation's authority to target and detain terrorists draws support from the international laws of war governing more traditional conflicts, the framework of those laws could be applied in a way that would impose genuine limitations. Thus, for example, in discerning who can be subjected to targeting and detention as unlawful combatants, an adjudicator might require as a prerequisite to combatant status that the individuals have attributes that

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<sup>27</sup> See *Hamdan*, 548 U.S. at 630-31.

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make them functionally analogous to traditional armed forces. As Jack Goldsmith and I have argued, “terrorist organizations do have leadership and command structures, however diffuse, and persons who receive and execute orders within this command structure are analogous to combatants” in more traditional armed conflicts.<sup>28</sup> Such a “command structure” test would exclude “the little old lady in Switzerland” and other problematic examples from the combatant category.<sup>29</sup> Importantly, the ICRC has recently moved in this direction, suggesting that those members of an organized armed group who have a “continuous combat function” can be considered combatants rather than civilians.<sup>30</sup>

Similarly, in discerning the appropriate length of detention, it may be appropriate to require a more individualized assessment of dangerousness than is required in more traditional armed conflicts. During a traditional conflict, enemy forces may be held until the end of active hostilities, and detention decisions are made on a class-wide basis. The operating assumptions are that detention is justified as a result of the danger that able-bodied enemy armed forces will return to the fight (perhaps even with the compulsion of their state), and that the detainees will be released once that danger has passed (due, for example, to a surrender by their government). In a conflict with a terrorist organization, however, detainees have no state obligation to return to hostilities if released, and their personal commitment to engage in such hostilities is likely to vary widely. Designation errors are also likely to be more common in this context, given the lack of uniforms and the lack of affiliation with an enemy state. Moreover, the conflict cannot be ended

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<sup>28</sup> Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2114-15 (2005).

<sup>29</sup> See *Gherebi*, 609 F. Supp. 2d at 68-69 (applying this test and concluding that “[s]ympathizers, propagandists, and financiers who have no involvement with this ‘command structure,’ while perhaps members of the enemy organization in an abstract sense, cannot be considered part of the enemy’s ‘armed forces’ and therefore cannot be detained militarily unless they take a direct part in the hostilities”).

<sup>30</sup> See ICRC, *Interpretive Guidance*, *supra* note 21, at 33-34.

through the defeat or surrender of a state and thus may last indefinitely, perhaps even for the detainee's lifetime. In this context, therefore, a regular, individualized assessment of the dangerousness of a detainee may be necessary.<sup>31</sup> In other words, the assessment of whether hostilities are still ongoing would be made with respect to the particular detainee rather than on a class-wide basis.

The U.S. government began moving towards such an individualized perspective on the end of hostilities in 2004, with the establishment at Guantanamo of Administrative Review Boards, which make yearly assessments of whether the detainees continue to pose a threat.<sup>32</sup> Through this process as well as other mechanisms, hundreds of detainees have been repatriated or released from Guantanamo, and an individualized assessment of the detainees is continuing under an Executive Order issued by President Obama.<sup>33</sup> The federal district court in D.C. recently made such an individualized perspective even more mandatory.<sup>34</sup>

Finally, it is analytically useful to separate the question of categorization from the question of process. To recognize a third category does not tell us what process is required in order to determine whether someone falls into that category (or the institutions that should administer this process). In light of the higher risk of misidentification and the potentially longer duration of detention, there may be strong arguments for requiring substantially more process in an armed conflict with a terrorist organization than in a more tradi-

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<sup>31</sup> See Bradley & Goldsmith, *supra* note 28, at 2124-26; see also John B. Bellinger, III, "Prisoners in War: Contemporary Challenges to the Geneva Conventions" (Dec. 10, 2007), at [www.usembassy.org.uk/ukpapress72.html](http://www.usembassy.org.uk/ukpapress72.html).

<sup>32</sup> See, e.g., Memorandum for Secretaries of the Military Departments, at [www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf](http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf).

<sup>33</sup> See Executive Order – Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities (Jan. 22, 2009), at [www.whitehouse.gov/the\\_press\\_office/ClosureOfGuantanamoDetentionFacilities/](http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/).

<sup>34</sup> See *Basardh v. Obama*, 612 F. Supp. 2d 30, 35 (D.D.C. 2009) (ordering release of detainee based on evidence suggesting that "any ties with the enemy have been severed, and any realistic risk that he could rejoin the enemy has been foreclosed").

tional conflict.<sup>35</sup> This emphasis on the need for sufficient process has in fact been the dominant theme of the U.S. Supreme Court's decisions in the area since the September 11 attacks. While process considerations are most obviously relevant to detention decisions, additional process might also be warranted with respect to targeting decisions, at least after the fact.

## CONCLUSION

Although the two-category approach might seem at first glance to be the most protective approach for civil liberties, it is not clear that this is the case with respect to an armed conflict between a nation and a terrorist organization. If such a conflict is pushed into the civilian category, it is very likely that this category will be stretched in order to accommodate the security needs of the nation. The net result may be a reduction in protection for true non-combatants. While the three-category approach is less anchored in existing treaties than the two-category approach, it allows for a more realistic description of how members of a terrorist organization operate. Moreover, depending on how it is defined, the third category could contain significant substantive and procedural protections that are similar to those available under the two-category approach.



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<sup>35</sup> See generally Bradley & Goldsmith, *supra* note 28, at 2121-23; see also Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) (discussing standards of certainty to be applied to detention decisions).