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# The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone

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## ARTICLE

### THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE “HOT” CONFLICT ZONE

JENNIFER C. DASKAL<sup>†</sup>

*The U.S. conflict with al Qaeda raises a number of complicated and contested questions regarding the geographic scope of the battlefield and the related limits on the state’s authority to use lethal force and to detain without charge. To date, the legal*

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and policy discussions on this issue have resulted in a heated and intractable debate. On the one hand, the United States and its supporters argue that the conflict—and broad detention and targeting authorities—extend to wherever the alleged enemy is found, subject to a series of malleable policy constraints. On the other hand, European allies, human rights groups, and other scholars, fearing the creep of war, counter that the conflict and related authorities are geographically limited to Afghanistan and possibly northwest Pakistan. Based on this view, state action outside these areas is governed exclusively by civilian law enforcement, tempered by international human rights norms.

*This Article breaks through the impasse. It offers a new and comprehensive law-of-war framework that mediates the multifaceted security, liberty, and foreign policy interests at stake. Specifically, the Article recognizes the state's need to respond to the enemy threat wherever it is located, but argues that the rules for doing so ought to distinguish between the so-called "hot battlefield" and elsewhere. It proposes a set of binding standards that would limit and legitimize the use of targeted killings and law-of-war detention outside zones of active hostilities—subjecting their use to an individualized threat assessment, a least-harmful-means test, and significant procedural safeguards. The Article concludes by describing how and why this approach should be incorporated into U.S. and international law and applied to what are likely to be increasingly common threats posed by transnational non-state actors in the future.*

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## INTRODUCTION

On April 19, 2011, U.S. military forces captured Ahmed Abdulkadir Warsame in the Arabian Gulf region and placed him aboard a naval ship.<sup>1</sup> He was interrogated for approximately two months before being transferred to New York and charged in federal civilian court.<sup>2</sup> The Obama Administration claimed that he initially was captured and detained pursuant to the laws of war, and that the decision to transfer him to civilian court was a policy choice based on the nation's security interests.<sup>3</sup> The decision led to

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<sup>1</sup> See Press Release, U.S. Att'y's Office for the S. Dist. of N.Y., Accused Al Shabaab Leader Charged with Providing Material Support to Al Shabaab and Al Qaeda in the Arabian Peninsula (July 5, 2011), available at <http://www.justice.gov/usao/nys/pressreleases/July11/warsameindictment.pr.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> See Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, et al., to Mike Johanns, U.S. Sen. (July 25, 2011) (on file with author) ("The decision to prosecute Warsame in federal court, made only after conducting a comprehensive intelligence interrogation to the satisfaction of the Intelligence Community and only after careful consideration of all the available options, is in the best interests of national security."); see also Sarah Parnass, *Keeping a Suspected Terrorist On a Boat for Two Months and the ATF Chief Testifies: Today's Qs for O's WH—7/6/2011*, Posted to *Political Punch*, ABC NEWS (July 6, 2011, 11:37 AM), <http://abcnews.go.com/blogs/politics/2011/07/keeping-a-suspected-terrorist-on-a-boat-for-two-months-and-the-atf-chief-testifies-todays-qs-for-os-1/> (citing the law of war as the legal basis for Warsame's detention) (quoting Interview

an immediate outcry from both ends of the political spectrum. Several leaders of Congress and high-profile commentators argued that Warsame should have been moved to Guantanamo Bay or another site for long-term law-of-war detention rather than being transferred to the civilian court system for trial.<sup>4</sup> Others decried the reliance on the laws of war for even the short-term detention and interrogation of someone picked up far from any conventional battlefield.<sup>5</sup>

Six months later, the United States reportedly launched a drone into Yemen, killing Anwar al Aulqi, the alleged operational leader of al Qaeda in the Arabian Peninsula, an ostensible co-belligerent of al Qaeda.<sup>6</sup> Once again, a vocal and polarized debate ensued, with critics of the alleged killing deploring the Obama Administration's use of law-of-war tactics outside the so-called "hot battlefield" of Afghanistan.<sup>7</sup>

by Jake Tapper, Senior White House Correspondent, ABC News, with Jay Carney, White House Press Sec'y (July 6, 2011).

<sup>4</sup> See, e.g., *Ten Years After the 2001 Authorization for Use of Military Force: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror: Hearing Before the H. Comm. Armed Servs.*, 112th Cong. 4-6 (2011) (statement of Michael B. Mukasey, Former Att'y Gen. of the U.S.) ("Based on my own experience as a trial judge and as Attorney General, I have concluded that Article III courts are not ideally suited for trying many or most of [the detainee] cases."); 157 CONG. REC. S4334 (July 6, 2011) (statement of Sen. Mitch McConnell) ("Mr. Warsame is a foreign enemy combatant, and he should be treated as one. He should be sitting in a cell in Guantanamo Bay and eventually tried before a military commission."); Joseph I. Lieberman & Kelly Ayotte, *Why We Still Need Guantanamo*, WASH. POST, July 22, 2011, at A17 ("Given the activities that Warsame is suspected of having engaged in[,] . . . the logical place for the Obama administration to have sent him was Guantanamo Bay . . ."); Letter from Five Comm. Chairs, U.S. H. Rep., to President Barack Obama (July 19, 2011), available at <http://www.lawfareblog.com/wp-content/uploads/2011/07/Letter-to-President-Obama-July-19-2011.pdf> (seeking an "explanation as to why detention [of Warsame and other terrorists] at Guantanamo Bay is considered 'of the table'"); Letter from Twenty-Three U.S. Senators to Leon Panetta, Sec'y of Def. (July 12, 2011), available at [http://www.politico.com/static/PPM170\\_detaineesletter.html](http://www.politico.com/static/PPM170_detaineesletter.html) (expressing concern that the use of civilian trials for enemy combatants "appears to be a circumvention of the clear intent of many in Congress that terrorists captured abroad . . . should not be brought into U.S. for trial").

<sup>5</sup> See, e.g., Editorial, *Terrorism and the Law*, N.Y. TIMES, July 17, 2011, at SR11; see also Noah Feldman, *U.S. Legal Dilemma Exposed by Somali Terror Case*, BLOOMBERG (July 11, 2011), <http://www.bloomberg.com/news/2011-07-11/u-s-legal-dilemma-exposed-by-somali-terror-case-noah-feldman.html> ("We are at war with al-Qaeda, which Congress has said includes all those who perpetrated or supported the September 11 attacks. We are not, however, at war with all terrorists everywhere—including the Somali rebel group Al Shabab. Membership in Al Shabab is therefore not grounds for POW-style detention.")

<sup>6</sup> See, e.g., Mark Mazzetti, Eric Schmitt & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1 (detailing the pursuit and killing of al Aulqi).

<sup>7</sup> While much of the commentary also focused on the fact that al Aulqi was a U.S. citizen, the debate was largely triggered by the fact that he was targeted outside a conventional battlefield. See, e.g., Noah Feldman, *Obama Team's Al-Awlaki Memo Furthered Bush Legacy*, BLOOMBERG (Oct.

The Warsame and al Aulqi cases highlight longstanding—and still unresolved—questions about the international law rules governing the use of force and detention outside areas resembling a traditional armed conflict with boot on the ground. While there is general agreement that the United States has had the authority to target and detain enemy fighters within Afghanistan since late 2001, and in Iraq from 2003 to 2011, the notion that the United States can take custody of, and perhaps kill, any alleged member of al Qaeda or associated forces *wherever* he or she is found—including within the United States—continues to make many uneasy.<sup>8</sup>

The debate has largely devolved into an either–or dichotomy, even while security and practical considerations demand more nuanced practices. Thus, the United States, supported by a vocal group of scholars, including Professors Jack Goldsmith, Curtis Bradley, and Robert Chesney, has long asserted that it is at war with al Qaeda and associated groups. Therefore, it can legitimately detain without charge—and kill—al Qaeda members and their associates wherever they are found, subject of course to additional law-of-war, constitutional, and sovereignty constraints.<sup>9</sup> Conversely, European

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16, 2011), <http://www.bloomberg.com/news/2011-10-17/obama-team-s-al-awlaki-memo-furthered-bush-legacy-noah-feldman.html> (emphasizing that al Aulqi was not “on a battlefield, except according to the view that anywhere in the world can be the battlefield in the war on terrorism”). Had al Aulqi been killed while fighting on the front lines in Afghanistan, the killing likely would have been deemed by most observers as legitimate. In World War II, for example, the United States attacked Axis military units containing U.S. citizen personnel with little public response. *Cf. In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (rejecting a claim by an American-born individual captured by American forces while he was serving in the Italian military that he could not be “legally a prisoner of war” due to his citizenship status).

<sup>8</sup> See, e.g., Complaint at 2, *Al-Aulqi v. Panetta*, No. 12-1192 (D.D.C. July 18, 2012), 2012 WL 3024212 [hereinafter *Al Aulqi Complaint*] (warning of the risks associated with killings that “have taken place outside the context of armed conflict, in countries including Yemen, Somalia, Pakistan, Sudan, and the Philippines”); Letter from Rand Paul, U.S. Sen., to John Brennan, Ass’t to the President for Homeland Sec. & Counterterrorism (Feb. 20, 2013), *available at* [http://www.paul.senate.gov/?p=press\\_release&tid=713](http://www.paul.senate.gov/?p=press_release&tid=713) (expressing concern about the possibility of a drone strike on a U.S. citizen on U.S. soil).

<sup>9</sup> See, e.g., John O. Brennan, Ass’t to the President for Homeland Sec. & Counterterrorism, Remarks at the Harvard Law School Program on Law & Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011) [hereinafter Brennan, Harvard Law School Remarks], *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (“The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan.”); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2117–23 (2005) (arguing that neither the Authorization for Use of Military Force (AUMF) nor international law limit the geographic scope of the use of force against enemies of the state, whether outside or within the United States); Robert Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 857–58 (2011) (describing membership in an AUMF-covered group as a sufficient condition for detention, although also indicating that it might, as a matter of policy, be appropriate to limit membership-

allies, supported by an equally vocal group of scholars and human rights advocates, assert that the United States is engaged in a conflict with al Qaeda only in specified regions, and that the United States' authority to employ law-of-war detention and lethal force extends only to those particular zones.<sup>10</sup> In all other places, al Qaeda and its associates should be subject to

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based detention to those captured outside the United States); see also Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L L.J. 293, 312-13 (2012) ("By limiting [international humanitarian law (IHL)] to territory on which the threshold of violence for an armed conflict is currently occurring, IHL would effectively create sanctuaries for terrorist organizations in any state not currently involved in a domestic insurgency in which law enforcement is known to be ineffective."); Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268 (2013) (rejecting efforts to place strict geography-based limits on the application of international humanitarian law).

<sup>10</sup> See, e.g., Brennan, Harvard Law School Remarks, *supra* note 9 (noting that "[o]thers in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the 'hot' battlefields"); see also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶¶ 53-56, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) (expressing skepticism that the United States is in armed conflict with al Qaeda outside of Afghanistan and Iraq); Int'l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 10, 31IC/11/5.1.2 (Oct. 2011) ("[T]he [International Committee of the Red Cross] does not share the view that a conflict of global dimensions is or has been taking place [between al Qaeda and the United States]."); Declaration of Prof. Mary Ellen O'Connell, para. 14, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-01469) [hereinafter O'Connell Declaration] ("That the United States is engaged in armed conflict against al Qaeda in Afghanistan does not mean that [it] can rely on the law of armed conflict to engage suspected associates of al Qaeda in other countries. . . . Armed conflict exists in the territorially limited zone of intense armed fighting by organized armed groups." (emphasis added)); Al Aulqi Complaint, *supra* note 8; Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SECURITY L. 245, 266 (2010) ("It is hard to see how one can . . . hold that the mere fact that some members of the armed forces of [a] non-state party are present on the territory of a third state could trigger the geographical extension of the armed conflict to the territory of that State as well."); Mary Ellen O'Connell, Essay, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858 (2009) ("In addition to exchange, intensity, and duration [of fighting], armed conflicts have a spatial dimension. It is not the case that if there is an armed conflict in one state—for example, Afghanistan—that all the world is at war, or even that Afghans and Americans are at war with each other all over the planet."); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1342, 1347 (2007) (arguing that "any conflict between the United States and al Qaeda as such cannot amount to war or trigger the application of the laws of war," and that, as a result, application of the laws of war should be geographically limited to the areas where the United States is engaged in separate conflicts with other belligerent groups or operates as an occupying power, such as in Afghanistan and Iraq); Gabor Rona, *Interesting Times for International Law: Challenges from the "War on Terror"*, 27 FLETCHER F. WORLD AFF., Summer/Fall 2003, at 55, 62 (questioning whether the "targeted killings of terrorist suspects by U.S. authorities in Yemen" in the year following September 11, 2001 should be considered part of an armed conflict).

law enforcement measures, as governed by international human rights law and the domestic laws of the relevant states.<sup>11</sup>

Recent statements by United States officials suggest an attempt to mediate between these two extremes, at least for purposes of targeted killing, and as a matter of *policy*, not law. While continuing to assert a global conflict with al Qaeda, official statements have limited the defense of out-of-conflict zone targeting operations to high-level leaders and others who pose a “significant” threat.<sup>12</sup> In the words of President Obama’s then-Assistant for Homeland Security and Counterterrorism, John O. Brennan, the United States does not seek to “eliminate every single member of al-Qaida in the world,” but instead conducts targeted strikes to mitigate “actual[,] ongoing threat[s].”<sup>13</sup> That said, the United States continues to suggest that it can, as a matter of law, “take action” against anyone who is “part of” al Qaeda or associated forces—a very broad category of persons—without any explicit geographic limits.<sup>14</sup>

The stakes are high. If the United States were permitted to launch a drone strike against an alleged al Qaeda operative in Yemen, why not in London—so long as the United States had the United Kingdom’s consent and was confident that collateral damage to nearby civilians would be minimal (thereby addressing sovereignty and proportionality concerns)? There are many reasons why such a scenario is unlikely, but the United

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<sup>11</sup> See, e.g., Al Aulqi Complaint, *supra* note 8, at 3-4; Rona, *supra* note 10, at 64.

<sup>12</sup> See Brennan, Harvard Law School Remarks, *supra* note 9, (emphasizing that the “Administration’s counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa’ida and its associated forces”); Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS (May 19, 2011, 6:00 AM), <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden> (defending the targeting of al Qaeda leader Osama bin Laden due to his “unquestioned leadership position” and “clear continuing operational role”).

<sup>13</sup> John O. Brennan, Ass’t to the President for Homeland Sec. and Counterterrorism, Remarks at Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012) [hereinafter Brennan, Wilson Center Remarks], *available at* <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.

<sup>14</sup> *Id.* (emphasizing that “individuals who are part of al-Qaida or its associated forces are legitimate military targets”); see also Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, Remarks at Northwestern University School of Law (Mar. 5, 2012), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (highlighting that the authority to “take action against enemy belligerents” is “not limited to the battlefields in Afghanistan”); Jeh Charles Johnson, Gen. Counsel, U.S. Dep’t of Def., Speech at the Oxford Union: The Conflict Against Al Qaeda and its Affiliates: How Will it End? (Nov. 30, 2012) [hereinafter Johnson, Oxford Remarks], *available at* <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union> (describing the United States as “taking the fight directly to [al Qaeda in the Arabian Peninsula]” in Yemen).



States has yet to assert any limiting principle that would, as a matter of *law*, prohibit such actions. And in fact, the United States did rely on the laws of war to detain a U.S. citizen picked up in a Chicago airport for almost four years.<sup>15</sup>

Even if one accepts the idea that the United States now exercises its asserted authority with appropriate restraint, what is to prevent Russia, for example, from asserting that it is engaged in an armed conflict with Chechens and that it can target or detain, without charge, an alleged member of a Chechen rebel group wherever he or she is found, including possibly in the United States?

Conversely, it cannot be the case—as the extreme version of the territorially restricted view of the conflict suggests—that an enemy with whom a state is at war can merely cross a territorial boundary in order to plan or plot, free from the threat of being captured or killed. In the London example, law enforcement can and should respond effectively to the threat.<sup>16</sup> But there also will be instances in which the enemy escapes to an effective safe haven because the host state is unable or unwilling to respond to the threat (think Yemen and Somalia in the current conflict), capture operations are infeasible because of conditions on the ground (think parts of Yemen and Somalia again), or criminal prosecution is not possible, at least in the short run.

This Article proposes a way forward—offering a new legal framework for thinking about the geography of the conflict in a way that better mediates the multifaceted liberty, security, and foreign policy interests at stake. It argues that the *jus ad bellum* questions about the geographic borders of the conflict that have dominated much of the literature are the wrong questions to focus on. Rather, it focuses on *jus in bello* questions about the conduct of hostilities. This Article assumes that the conflict extends to wherever the enemy threat is found, but argues for more stringent rules of conduct outside zones of active hostilities. Specifically, it proposes a series of substantive and procedural rules designed to limit the use of lethal targeting

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<sup>15</sup> See *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005) (concluding that the Authorization for Use of Military Force Joint Resolution allowed the President to militarily detain a U.S. citizen taken into custody in the United States). On June 9, 2002, President Bush ordered that Padilla, who had been arrested by civilian law enforcement officials in Chicago, be transferred to military custody and detained as an “enemy combatant.” *Id.* at 389-90. On January 3, 2006, Padilla was transferred back to federal court, where he was charged and convicted of providing material support to terrorists and two conspiracy charges. Although President Bush initially claimed Padilla had been planning to build and explode a dirty bomb in the United States, he was never charged with such a crime. See *Superseding Indictment, United States v. Hassoun*, 477 F. Supp. 2d 1210 (S.D. Fla. 2007) (No. 04-60001), 2005 WL 5680800.

<sup>16</sup> The same is true, of course, in the United States.

and detention outside zones of active hostilities—subjecting their use to an individualized threat finding, a least-harmful-means test, and meaningful procedural safeguards.<sup>17</sup>

The Article does not claim that existing law, which is uncertain and contested, dictates this approach. (Nor does it preclude this approach.) Rather, the Article explicitly recognizes that the set of current rules, developed mostly in response to state-on-state conflicts in a world without drones, fails to address adequately the complicated security and liberty issues presented by conflicts between a state and mobile non-state actors in a world where technological advances allow the state to track and attack the enemy wherever he is found. New rules are needed. Drawing on evolving state practice, underlying principles of the law of war, and prudential policy considerations, the Article proposes a set of such rules for conflicts between states and transnational non-state actors—rules designed both to promote the state's security and legitimacy *and* to protect against the erosion of individual liberty and the rule of law.

The Article proceeds in four parts. Part I describes how the legal framework under which the United States is currently operating has generated legitimate concerns about the creep of war. This Part outlines how the U.S. approach over the past several years has led to a polarized debate between opposing visions of a territorially broad and territorially restricted conflict, and how both sides of the debate have failed to

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<sup>17</sup> This Article assumes that the United States has been engaged in an ongoing armed conflict with al Qaeda and associated forces and is therefore primarily focused on the rules regarding the use of force and detention within an armed conflict. The United States has also hinted at a separate and independent self-defense justification for the use of force—an issue that will become increasingly important as the armed conflict with al Qaeda winds down. *See, e.g.*, DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 1 (2011) [hereinafter DOJ WHITE PAPER], available at [http://msnbcmedia.msn.com/1/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/1/msnbc/sections/news/020413_DOJ_White_Paper.pdf) (describing the authority “to respond to the imminent threat posed by al-Qa’ida and its associated forces” as arising from the existence of an armed conflict, the AUMF, and “the inherent right of the United States to national self-defense under international law”); Brennan, Wilson Center Remarks, *supra* note 13 (“As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense.”); Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (“[T]he United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”). It is unclear whether the United States has yet relied on a self-defense claim—and in what circumstances it would in the future—as a separate authority to use force outside the context of an armed conflict. I take up this issue briefly in Part IV.

acknowledge the legitimate substantive concerns of the other. Part II explains why a territorially broad conflict can and should distinguish between zones of active hostilities and elsewhere, thus laying out the broad framework under which the Article's proposal rests.

Part III details the proposed *zone approach*. It distinguishes zones of active hostilities from both peacetime and lawless zones, and outlines the enhanced substantive and procedural standards that ought to apply in the latter two zones. Specifically, Part III argues that outside zones of active hostilities, law-of-war detention and use of force should be employed only in exceptional situations, subject to an individualized threat finding, least-harmful-means test, and meaningful procedural safeguards.<sup>18</sup> This Part also describes how such an approach maps onto the conflict with al Qaeda, and is, at least in several key ways, consistent with the approach already taken by the United States as a matter of policy.

Finally, Part IV explains how such an approach ought to apply not just to the current conflict with al Qaeda but to other conflicts with transnational non-state actors in the future, as well as self-defense actions that take place outside the scope of armed conflict. It concludes by making several recommendations as to how this approach should be incorporated into U.S. and, ultimately, international law.

The Article is United States-focused, and is so for a reason. To be sure, other states, most notably Israel, have engaged in armed conflicts with non-state actors that are dispersed across several states or territories.<sup>19</sup> But the United States is the first state to self-consciously declare itself at war with a non-state terrorist organization that potentially spans the globe. Its actions and asserted authorities in response to this threat establish a reference point for state practice that will likely be mimicked by others and inform the development of customary international law.

## I. THE NATURE OF THE CONFLICT AND THE TERRITORIAL DIVIDE: THE UNITED STATES VERSUS AL QAEDA

It is commonly accepted that once a state is engaged in an armed conflict, peacetime rules no longer apply. Killings that would be deemed murder or

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<sup>18</sup> I adopt the definition of "targeted killing" offered by Nils Melzer: "[T]he term 'targeted killing' denotes the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them." NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 5 (2008).

<sup>19</sup> For a discussion of post-World War II noninternational armed conflicts that have involved fighting in multiple states, see *id.* at 259-61.

assassination outside armed conflict are not only permitted, but overtly pursued. Moreover, preventive detention schemes that bear little resemblance to Western democracies' criminal justice systems are both allowed and often deemed necessary for the duration of the conflict.

Such a system works well when the enemy force is easily identifiable and distinguishable, and the conflict is both geographically and temporally limited. In the conflict between the United States and al Qaeda, however, none of these prerequisites apply. The enemy hides among the civilian population and is scattered across the globe.<sup>20</sup> There is no obvious endpoint, as it is unlikely that the United States is ever going to declare a truce or establish diplomatic relations with a terrorist enemy such as al Qaeda.<sup>21</sup> (Moreover, even after the "war" is deemed to have come to an end, the United States has increasingly laid the groundwork for an expansive view of self-defense—an issue to which I return in Part IV.) And due to technological advances, namely the use of drones, the United States has the ability to track and target the alleged enemy just about anywhere he is found.

The conflict has exposed the gaps in the legal framework governing the conduct of armed conflict. Neither the laws of international armed conflict—governing conflicts that arise when one state is fighting another state—nor the laws of noninternational armed conflict—governing conflicts that have historically been deemed to take place within a single state's territory—provide an appropriate framework for dealing with a conflict involving a non-state actor with global reach. Critically, they do not answer fundamental questions regarding the scope of the conflict, and the belligerent state's corresponding authority (or lack thereof) to bypass ordinary law

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<sup>20</sup> For an interactive map of al Qaeda's global presence, see Alan McLean & Arche Tse, *Map of Countries Where al Qaeda and Its Affiliates Operate*, N.Y. TIMES (May 12, 2011), available at [http://www.nytimes.com/interactive/2011/05/12/world/12aqmap.html?\\_r=0](http://www.nytimes.com/interactive/2011/05/12/world/12aqmap.html?_r=0).

<sup>21</sup> That said, recent statements by Jeh Johnson, then-General Counsel for the U.S. Department of Defense, describes a future "tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured" that the organization is "effectively destroyed" and the armed conflict will end. Johnson, Oxford Remarks, *supra* note 14. See also Brennan, Wilson Center Remarks, *supra* note 13 (predicting al Qaeda's future "demise" as a result of U.S. actions); Peter Bergen, *And Now, Only One Senior Al Qaeda Leader Left*, CNN.COM (June 6, 2012), <http://www.cnn.com/2012/06/05/opinion/bergen-al-qaeda-whos-left/index.html> (describing al Qaeda as "more or less out of business"). This issue as to when the conflict ends is likely to be the most important legal and policy question with respect to the conflict with al Qaeda in the near future. One should expect, for example, court filings by Guantanamo detainees asserting an end to the conflict—and thus an end to the underlying law-of-war detention authority—once the United States pulls out of Afghanistan and the "practical circumstances of [the] conflict [become] entirely unlike those of the conflicts that informed the development of the law of war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion).

enforcement rules and detain without charge or engage in planned, targeted killings.

The United States has responded to this gap in the law by drawing from standards developed in the context of international armed conflicts—standards that yield a broad, geographically unlimited definition of who qualifies as a member of the enemy force that can be detained or targeted. This has generated a legitimate concern about what Professor Rosa Ehrenreich Brooks has coined “war everywhere,”<sup>22</sup> and sparked a vociferous and polarized debate as to the existence of geographic limits on the scope of the conflict.<sup>23</sup>

This Section addresses the arguments on both sides of the debate, highlighting the flawed reasoning of each and the failure to fully account for the important liberty and security interests at stake. This sets the stage for a new approach—one that acknowledges the state’s need to respond to the enemy threat wherever it is located, yet adjusts the response based on whether or not the state is acting within a zone of active hostilities. High-level official statements suggest that in important respects the United States is already moving toward such a calibrated approach, albeit as a matter of policy rather than law.

*A. The United States’ Approach:  
The Substantively and Territorially Broad View*

Within days after the September 11, 2001 attacks, the Bush Administration proudly announced what became known as a “global war on terror.”<sup>24</sup> Relying on both the President’s Article II Commander-in-Chief authority and the September 18, 2001 Authorization for Use of Military Force (AUMF),<sup>25</sup> the executive branch asserted the power to employ law-of-war tools anywhere and everywhere the terrorist enemy is found.

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<sup>22</sup> Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 745 (2004) (“[T]he decision to make use of legal paradigms relating to armed conflict have brought us into the era of ‘war everywhere,’ and rather than a war to end all wars, we are now in a war without end.”).

<sup>23</sup> See *supra* notes 9-10.

<sup>24</sup> See President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001) (“Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”); Brief for Respondents in Opposition at 1, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 425739 (describing a “global armed conflict in which the United States is currently engaged against the al Qaeda terrorist network and its supporters”).

<sup>25</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)); see also Memorandum from John C. Yoo, Deputy Ass’t Att’y Gen., Office of Legal Counsel, The

The Obama Administration has been more circumspect. It has grounded detention authority solely on the AUMF, eschewing the Bush Administration's reliance on Article II-based authorities;<sup>26</sup> self-consciously dropped the "global war on terror" rhetoric;<sup>27</sup> and affirmatively bound itself to employing detention standards "informed" by the laws of war.<sup>28</sup> That said, the detention authority asserted is, with minor adjustments, just as broad as that claimed by the Bush Administration.<sup>29</sup> It covers anyone who is "part of" or "substantially supported"<sup>30</sup> al Qaeda, the Taliban, or associated forces, wherever they are found.<sup>31</sup>

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President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm> (describing the President's "plenary constitutional power" to "deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11").

<sup>26</sup> See Koh, *supra* note 17 (emphasizing that "the Obama Administration has not based its claim of authority to detain . . . on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF.").

<sup>27</sup> See WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM 2 (2011), available at [http://www.whitehouse.gov/sites/default/files/counterterrorism\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf) ("The United States deliberately uses the word 'war' to describe our relentless campaign against al-Qa'ida. However, this Administration has made it clear that we are not at war with the tactic of terrorism or the religion of Islam. We are at war with a specific organization—al-Qa'ida.").

<sup>28</sup> See Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In re* Guantanamo Bay Detainee Litig., No. 08-442 (D.D.C. Mar. 13, 2009) [hereinafter Respondents' Memorandum] ("The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war."); Koh, *supra* note 17 ("[U]nlike the last administration, as a matter of *international law*, this Administration has expressly acknowledged that international law informs the scope of our detention authority.").

<sup>29</sup> The Obama Administration adopted the detention standard articulated by the Bush Administration nearly verbatim, asserting the authority to detain

persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Respondents' Memorandum, *supra* note 28, at 2. The only definitional change is the added requirement that support must be "substantial"—i.e. not "unwitting or insignificant." *Id.*

For the detention standard adopted by the Bush Administration, see Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal para. a (July 7, 2004) available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf>. Congress endorsed and adopted the Obama Administration's detention standard in the National Defense Authorization Act for Fiscal Year 2012. Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1562 (2011) (codified at 10 U.S.C. § 801).

<sup>30</sup> To date, the Obama Administration has not defended any detention based solely on the substantial support prong, and has explicitly disavowed reliance on this detention theory in at least one case. See Letter from Sharon Swingle, U.S. Dep't of Justice, Civil Div., to Mark Langer, Clerk, U.S. Court of Appeals for the D.C. Circuit (filed in *Boumediene v. Obama*, No. 08-5537

Critically, this detention authority rests on an individual's *status* as a member of ("part of") the enemy forces and is based on an analogy to the rules of international armed conflict. Under these rules, such status makes the individual a legitimate military target as well, assuming the person has not attempted surrender or is *hors de combat* (i.e., a sick, wounded, or detained fighter).<sup>32</sup>

In the context of habeas litigation, the United States has adopted a broad understanding of who qualifies as "part of" the enemy force and is therefore a legitimate subject of law-of-war detention (and possibly targeting). The Executive has proposed, and the D.C. Circuit has endorsed, a "functional membership" test, which is essentially a totality-of-the-circumstances test with no requirement that the individual engage in any specific, hostile act.<sup>33</sup> Courts have deemed training camp participation highly significant as proof of membership, and, at least according to dicta in several D.C. Circuit

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(D.C. Cir. Sept. 22, 2009)) (stating that "the Government is *not* arguing . . . that this Court should affirm on the independent ground that the support [the petitioner detainee] provided to al Qaeda rendered him detainable even if he was functionally part of the organization." (emphasis in original)). It has, however, relied on evidence of support as a basis for establishing membership.

<sup>31</sup> See Respondents' Memorandum, *supra* note 28, at 2.

<sup>32</sup> See Brennan, Wilson Center Remarks, *supra* note 13 ("[I]ndividuals who are part of al-Qaeda or its associated forces are legitimate military targets."); Respondents' Memorandum, *supra* note 28, at 5 (describing the power to detain as a subset of the power to use force "against members of an opposing armed force"); Jeh Charles Johnson, Gen. Counsel, Dep't of Def., Dean's Lecture at Yale Law School: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012) (emphasizing that there is lawful authority to target any "valid military objective[.]" defined to include those who are "part of" the enemy force) (transcript available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school>). The Administration apparently bases this argument on an assumption that al Qaeda lacks any "non-military wing," making all members potential targets. See Brief for Respondents In Opposition at 9, *Al-Bihani v. Obama*, 132 S. Ct. 2739 (2012) (No. 10-1383). For an argument that this approach misconstrues international humanitarian law, see Daphne Eviatar & Gabor Rona, *Kill the Kill List*, FOREIGN POL'Y (May 31, 2012), [http://www.foreignpolicy.com/articles/2012/05/31/kill\\_the\\_kill\\_list](http://www.foreignpolicy.com/articles/2012/05/31/kill_the_kill_list). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 41(2), adopted June 8, 1977, 1125 U.N.T.S. 3 (defining persons who are *hors de combat*).

<sup>33</sup> See, e.g., *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011) (noting the D.C. Circuit's adoption of a functional test, rather than a "command structure" test, for determining al Qaeda membership); *Khan v. Obama*, 741 F. Supp. 2d 1, 5 (D.D.C. 2010) (applying a functional approach, based on the "totality of the evidence," to the determination of an individual's membership in al Qaeda and holding that petitioner is, in fact, a member of the organization and thus ineligible for habeas relief, *aff'd*, 655 F.3d 20 (D.C. Cir. 2011)). For a thorough discussion of the legal standards applied in habeas litigation, see generally Chesney, *supra* note 9. See also BENJAMIN WITTES, ROBERT M. CHESNEY & LARKIN REYNOLDS, BROOKINGS INST., THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING (2011), available at [http://www.brookings.edu/~media/research/files/reports/2011/5/Guantanamo%20wittes/05\\_guantanamo\\_wittes.pdf](http://www.brookings.edu/~media/research/files/reports/2011/5/Guantanamo%20wittes/05_guantanamo_wittes.pdf).

rulings, may even be independently sufficient. The same is true for guest-house attendance.<sup>34</sup>

Neither the substantive nor evidentiary standards applied in these cases vary based on either location of capture or location of activities, at least for noncitizens apprehended outside the United States. Thus, in the three Guantanamo habeas cases that squarely presented the issue to date—*Bensayah v. Obama* (involving a detainee whose capture and relevant activities took place in Bosnia),<sup>35</sup> *Salahi v. Obama* (involving a detainee captured in Mauritania whose most relevant activities occurred both there and in Canada),<sup>36</sup> and *Almerfedi v. Obama* (involving a detainee whose capture and relevant activities took place in Iran)<sup>37</sup>—the location of neither the capture nor the activities changed the basic analysis. Rather, the D.C. Circuit employed a functional-membership test that was developed to establish membership for those who accompanied fighting forces in

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<sup>34</sup> See, e.g., *Al-Adahi v. Obama*, 613 F.3d 1102, 1109 (D.D.C. 2010) (emphasizing that evidence that an individual attended al Qaeda training camps or stayed at an al Qaeda guesthouse can constitute “overwhelming” evidence that the United States had authority to detain that person” (quoting *Al-Bihani v. Obama*, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010))). To date, the Supreme Court has not accepted certiorari of any of the Guantanamo rulings, making the D.C. Circuit the de facto final arbiter of who qualifies as “part of” the enemy force, at least for the purposes of detentions at Guantanamo.

<sup>35</sup> 610 F.3d 718, 720 (D.C. Cir. 2010). *Bensayah* was arrested in Bosnia in late 2001, turned over to the United States, and brought to Guantanamo Bay in January 2002. *Id.* The D.C. Circuit noted al Qaeda’s global reach and endorsed the government’s view that “the AUMF authorizes the Executive to detain, at the least, any individual who is functionally part of al Qaeda,” regardless of the place of capture or relevant activities. *Id.* at 725. The court did not address the location of capture and activities in its analysis. Ultimately, the court remanded for additional fact-finding, which had not yet taken place at the time of this writing. *Id.* at 727.

<sup>36</sup> 625 F.3d 745, 748-49 (D.C. Cir. 2010). *Salahi*, who was captured in Mauritania in 2001 and transferred to Guantanamo in 2002, had not been to Afghanistan since 1992—a time at which al Qaeda and the United States were aligned in their efforts to oust Afghanistan’s Communist government. *Id.* at 748-50. Although the district court granted *Salahi*’s habeas petition, 710 F. Supp. 2d 1, 16 (D.D.C. 2010), the D.C. Circuit vacated and remanded on the ground that the lower court failed to apply a “functional membership” test and instead focused on whether or not *Salahi* fell within al Qaeda’s command structure. *Id.* at 752-53.

<sup>37</sup> 654 F.3d 1, 2-3 (D.C. Cir. 2011). *Almerfedi*, who was arrested in Iran, was not accused of engaging in military action against the United States or coalition forces. The D.C. Circuit reversed the lower court’s grant of the writ of habeas corpus. *Id.* at 8; see also 725 F. Supp. 2d 18 (D.D.C. 2010). In concluding that *Almerfedi* was an “al Qaeda facilitator” who could be detained as a functional member of al Qaeda, the court relied on evidence that he stayed with an Islamist missionary organization in Iran that was “closely aligned” with al Qaeda, traveled a strange and indirect route from his home in Yemen to Iran that was inconsistent with his stated goal of getting to Europe, and had at least \$2000 of cash on his person when captured. *Almerfedi*, 654 F.3d at 6.



Afghanistan.<sup>38</sup> The court also applied the same preponderance of the evidence standard that had been used to adjudicate battlefield captures.

In *Padilla v. Hanft*<sup>39</sup> and *Al-Marri v. Pucciarelli*,<sup>40</sup> the Fourth Circuit similarly concluded that the authority to detain “enemy combatants” applied even to those persons whose apprehension and relevant activities occurred in the United States.<sup>41</sup>

This broad definition of who qualifies as “part of” the enemy force, coupled with the lack of geographic boundaries, has led to a legitimate concern about “war everywhere.” If the conflict extends to wherever the non-state enemy goes, then the non-state enemy can embroil additional states in the conflict merely by crossing state lines and bringing the permissive rules of armed conflict along with him. The more expansive the definition of the non-state enemy, the greater the erosion of peacetime rules and the broader the threat to fundamental liberties.

The United States and its supporters have attempted to address these concerns by pointing to sovereignty and the law of constraints as imposing limits on the locations where and manner in which fighting is waged.<sup>42</sup>

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<sup>38</sup> See, e.g., *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) (“[T]here are ways other than making a ‘command structure’ showing to prove that a detainee is part of al Qaeda. For example, if a group of individuals were captured who were shooting at U.S. forces in Afghanistan, and they identified themselves as being members of al Qaeda, it would be immaterial to the government’s authority to detain these people whether they were part of the ‘command structure’ of al Qaeda.”); *Al-Bihani*, 590 F.3d at 872-73 (focusing on the detainee’s “acknowledged actions—accompanying the brigade on the battlefield, carrying a brigade-issued weapon, cooking for the unit, and retreating and surrendering under brigade orders” as evidence that the detainee was part of the enemy force).

<sup>39</sup> 423 F.3d 386, 392 (4th Cir. 2005) (holding that “the President is authorized by the AUMF to detain [an American citizen captured on U.S. soil] as a fundamental incident to the conduct of war”). But see *Padilla v. Rumsfeld*, 352 F.3d 695, 712 (2d Cir. 2003) (holding that the Executive does not have the power under the Constitution to detain an American citizen as an enemy combatant captured within the United States and far from a conflict zone), *rev’d*, 542 U.S. 426 (2004). For a thorough discussion of the litigation in both *Hanft* and *Al-Marri*, see Chesney, *supra* note 9, at 808-19.

<sup>40</sup> 534 F.3d 213, 223-25 (4th Cir. 2008) (en banc) (Motz, J., concurring in the judgment) (per curiam), *vacated sub nom.*, *Al-Marri v. Spagone*, 555 U.S. 1220 (2009).

<sup>41</sup> The Fourth Circuit, in a 5-4 split, also ruled that location *did* matter in evaluating the applicable procedural standards. *Id.* at 216. Notably, however, the ruling appears to turn on *Al-Marri*’s due process rights as a legal resident detained in the United States. *Id.* at 262-265, 270-71 (Traxler, J., concurring in the judgment). It therefore offers little guidance as to the procedural rights of noncitizens who lack substantial connections to the United States. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271-75 (1990) (concluding that aliens are protected by the Fourth Amendment only if they come within the territory of and establish “substantial connections” to the United States).

<sup>42</sup> President Obama’s then-Counterterrorism Advisor, John Brennan, for example, has emphasized that “[i]nternational legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in

Recent statements from high-level administration officials also suggest that, at least as a matter of policy, out-of-battlefield lethal targeting operations focus on those who pose a “significant” threat when capture is not feasible and when a strike is “necessary” to mitigate the ongoing threat.<sup>43</sup> But there is no publicly available definition of what constitutes a “significant” threat or the factors that go into deciding when lethal targeting is necessary.<sup>44</sup> Reported practices suggest that these self-imposed policy constraints are hardly binding.

### 1. Sovereignty-Based Geographical Constraints

Respect for the state system and its embodiment of Westphalian notions of state sovereignty provides a set of territorially based (*jus ad bellum*) limits on the scope of the conflict, limiting the use of unconsented-to force in another state’s territory to those instances in which the state is unable or unwilling to effectively suppress the threat.<sup>45</sup> This restricts the United

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which we can use force—in foreign territories.” See Brennan, Harvard Law School Remarks, *supra* note 9. In a 2006 speech, then-Legal Advisor to the U.S. Secretary of State, John Bellinger, similarly suggested geographic limits on the use of force:

I am not suggesting that, because we remain in a state of armed conflict with al Qaida, the United States is free to use military force against al Qaida in any state where an al Qaida terrorist may seek shelter. The U.S. military does not plan to shoot terrorists on the streets of London.

Speech at the London School of Economics: Legal Issues in the War on Terror Forum (Oct. 31, 2006), available at <http://www.state.gov/s/1/2006/98861.htm>; see also Bradley & Goldsmith, *supra* note 9, at 2120 & n.325 (describing law-of-war rules that would potentially constrain the use of lethal targeting in the United States).

<sup>43</sup> See Brennan, Wilson Center Remarks, *supra*, note 13.

<sup>44</sup> As of this writing, the only publicly available document that purports to define the relevant factors and criteria is the leaked DOJ White Paper. See DOJ WHITE PAPER, *supra* note 17. But the White Paper’s reasoning is explicitly limited to the rules that apply to the targeting of U.S. citizens and says nothing about the standards that apply to non-U.S. citizens, who constitute the overwhelming majority of targets. In fact, based on publicly available information, Anwar al-Aulaqi is the only U.S. citizen to be intentionally targeted by a drone strike, out of as many as 4700 killed. See Jason Evans, *Sen. Graham: I Support Drone Strikes*, EASLEYPATCH (Feb. 20, 2013) available at <http://easley.patch.com/articles/sen-graham-i-support-drone-strikes> (citing Senator Lindsey Graham as asserting that the United States has killed 4700 persons as a result of targeted strikes). Three other U.S. citizens are also reported to have been killed, although they do not appear to have been specifically targeted. See Ken Dilanian, *Brennan CIA Hearings Expose Fears About Targeted Drone Killings*, L.A. TIMES, Feb. 9, 2013, at A1.

<sup>45</sup> For an excellent discussion of the unwilling-or-unable test and its origins in neutrality law, see generally Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VA. J. INT’L L. 483, 491-506 (2012). See also Kenneth Anderson, *Stop Presses: “Even Eric Posner Says Drone Strikes in Pakistan are Illegal,”* LAWFARE (Oct. 9, 2012, 8:32 PM), <http://www.lawfareblog.com/2012/10/stop-presses-even-eric-posner-says-drone-strikes-in-pakistan-are-illegal> (defending the unwilling-or-unable test). The question of which factors are relevant to

States' use of unconsented-to force against al Qaeda and its associates to failed states (such as Somalia), ungoverned regions within states (such as the northwest province of Pakistan), or state supporters of terrorism (such as Afghanistan under the Taliban leadership). By comparison, the use of unconsented-to force in London or Munich is generally prohibited, given that the United Kingdom and Germany are able and willing to respond to the threat posed by terrorists on their soil, albeit through law enforcement mechanisms.<sup>46</sup>

Such territorially based limitations, however, are generally presumed to recede if a state consents to the use of force. Imagine, for example, that the United States learns that an al Qaeda operative is traveling to Montreal for a meeting with a potential collaborator. Imagine, further, that the Canadian government is unwilling to arrest the individual under its domestic laws, wants to avoid the spectacle of a U.S.-orchestrated capture, and instead gives the United States the green light to launch a drone strike. Imagine, finally, that U.S. intelligence determines in advance the precise location of the meeting and concludes that it could strike with precision in a manner consistent with the principle of proportionality. Under the territorially broad view of the conflict, nothing, as a matter of state sovereignty, would prevent the United States from taking military action to kill that individual (although there would likely be strong policy reasons not to do so).

This hypothetical might not pose a concern were one convinced that: (1) the individual is who we think he is, (2) there will be no collateral damage, and (3) the individual poses a grave threat that cannot be addressed through other means. But there are reasons to be concerned about each of these assumptions—reasons that expose the fundamental problems with the United States' approach and its analogy to the law of international armed conflict.

## 2. Law-of-War Constraints on the Manner of Fighting— The Principles of Distinction and Proportionality

Scholars dating back to Cicero have long stressed the need for restraint in the exercise of wartime actions so as to ensure that the return to peace is

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determining that a state is unable or unwilling to appropriately respond to a threat remains highly unsettled.

<sup>46</sup> This assumes that the United Kingdom and Germany agree with the United States' assessment of who qualifies as a terrorist enemy. If, by contrast, the United States determines that an individual is a legitimate target and the host state refuses to intervene, this constraint on the use of force might disappear.

possible.<sup>47</sup> Over time this has developed into the widely accepted norm that what is permitted by military necessity must be tempered by respect for humanity. This in turn has been integrated into the central, operational principles of distinction and the avoidance of unnecessary suffering, as well as the related rule of proportionality.<sup>48</sup> The principle of distinction requires that states distinguish between civilians and belligerents and mandates that civilians and civilian objects may not be the targets of attack.<sup>49</sup> The rule of proportionality prohibits military attacks that cause loss and damage to civilians and civilian objects that are excessive in relation to the military advantage to be gained.<sup>50</sup> Together, these requirements impose cardinal limits on a belligerent state's military response to an identified threat.

Scholars have pointed to these rules as a means of addressing concerns about erroneous deprivations of life and liberty of both targets and innocent bystanders.<sup>51</sup> Under this view, the principle of distinction, if properly applied, identifies and distinguishes legitimate targets from others. The requirement of proportionality protects the interests of innocent bystanders.

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<sup>47</sup> See 1 MARCUS TULLIUS CICERO, *DE OFFICIIS* ch. XI, para. 35 (Walter Miller trans., Harv. Univ. Press 1913) ("The only excuse . . . for going to war is that we may live in peace unharmed . . .").

<sup>48</sup> YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 5 (2d ed. 2010) (describing the law of international armed conflict as "predicated on a subtle equilibrium between the two diametrically opposed stimulants of military necessity and humanitarian considerations").

<sup>49</sup> *Id.* at 8. See also U.S. DEPT OF THE AIR FORCE, AIR FORCE PAMPHLET 110-31: INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 5-9 (1976) ("The requirement that attacks be limited to military objectives results from several requirements of international law. The mass annihilation of enemy people is neither humane, permissible, nor militarily necessary.")

<sup>50</sup> See DINSTEIN, *supra* note 48, at 130 ("The quintessence of proportionality is that collateral damage to civilians and civilian objects—caused by an attack against lawful targets—must not be expected to be 'excessive.'"); see also Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 (defining "war crimes" to include "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 32, art. 57(2) (requiring the taking of "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").

<sup>51</sup> See Robert Chesney, *Who May Be Killed?, Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force* (emphasizing that the "strict-geographic approach [is not] a sensible way to address concerns about the individual scope of targeting authority; such concerns can and should be addressed by a[n] application of the principle of distinction and related concepts from within [International Humanitarian Law] itself"), in 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 37 (M.N. Schmitt et al. eds., 2010).

But the degree to which the principles of distinction and proportionality effectively serve this purpose depends directly on the definition of “combatant” being employed.<sup>52</sup> On the one hand, an overly narrow definition of combatant unduly ties the belligerent state’s hand, prohibiting it from using force against those that ought to be legitimate targets. On the other hand, an overbroad definition of combatant fails to provide meaningful constraints on the state’s potential use of force. In the United States, it is precisely the breadth of the functional combatant definition, as laid out by the executive branch and endorsed by the courts, that has elevated concerns about over-expansive detention, targeting practices, and “war everywhere.”

Meanwhile, though proportionality requirements minimize the suffering of innocent civilians, they do not and cannot eliminate such risks. To the contrary, the laws of war accept that civilian casualties may be the expected consequence of an attack, so long as such casualties are not excessive in relation to the military advantage gained.<sup>53</sup> As the definition of legitimate target expands, the risk to civilians—who are more likely to be collateral damage in an increasing number of presumptively legitimate attacks—increases. Even if the target is accurately identified, there is always the possibility, and frequent reality, of collateral damage. This can be caused by a civilian wandering by at the last minute, by technological failures, by intelligence failures, or by a combination of all three. Statistics from targeting operations in northwest Pakistan suggest that this is a legitimate concern.<sup>54</sup>

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<sup>52</sup> This of course assumes that the category of “combatant,” or its functional equivalent, carries over to a noninternational armed conflict and provides a sufficient basis for lethal targeting—issues about which there is ongoing debate.

<sup>53</sup> Some have suggested that the requirement that states take “feasible” precautions in the means and methods of attack to minimize civilian death, specified in Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 32, art. 57(2), mandates capture whenever doing so is feasible and would yield a lower likelihood of civilian casualties. But this is hardly a universal interpretation. Moreover, even if this interpretation were the correct one, it does little to respond to the situation in which a commander’s expectation is that a strike will yield little to no collateral damage and therefore satisfies this test, but the expectation turns out to be wrong. It also does not address or weigh the collateral damage concerns in places like Yemen and Somalia where law enforcement is not likely to be a feasible alternative. These concerns suggest the need for a carefully circumscribed definition of who qualifies as a legitimate target, along with an explicit least-harmful-means test and meaningful procedural protections, as detailed in Part III.

<sup>54</sup> See Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SECURITY J. 283, 330-33 (2011) (compiling estimates of civilian deaths resulting from targeted-killing operations in northwest Pakistan). For an account of civilian casualties resulting from targeted killings in Yemen, see Gregory Johnsen, *Signature Strikes in Yemen*, BIG THINK (April 19, 2012, 2:45 PM), <http://bigthink.com/waq-al-waq/signature-strikes-in-yemen> (listing civilian casualties resulting from strikes in Yemen).

Finally, even if the combatant category were appropriately delineated and strikes were carried out with perfect precision, identification problems would continue to pose significant concerns. In international armed conflict, the enemy forces typically wear uniforms, carry arms openly, and, if captured, have an incentive to self-identify (so as to obtain prisoner-of-war status). By contrast, the enemy in this conflict does not self-identify as such, but blends in with the civilian population. In fact, the enemy's entire modus operandi depends on the ability to hide, which in turn increases the possibility of mistake.<sup>55</sup> Even the world's best intelligence agencies have made documented mistakes in the past.<sup>56</sup> In targeting operations, the identification mistake is irreversible. In detention operations, the mistake can be corrected, but with costs to both individual liberty and state legitimacy.

### 3. Additional Policy Constraints

Recent statements by administration officials suggest that while, as a matter of law, the United States continues to press a broad definition of the enemy force, its actions, as a matter of policy, are more restrained. Specifically, it focuses its targeted-killing operations on those who pose a "significant threat"<sup>57</sup> and only as a matter of last resort. In the words of John Brennan, the United States does not seek to kill every al Qaeda member, but instead focuses its efforts on "disrupt[ing] . . . plans and . . . plots before they come to fruition,"<sup>58</sup> and limits lethal strikes to situations in which it is the "only recourse" against the threat.<sup>59</sup> Brennan cites operational leaders,

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<sup>55</sup> See, e.g., RICHARD A. POSNER, NOT A SUICIDE PACT 60 (2006) ("The danger of erroneously identifying an individual as an enemy of the United States is therefore much greater than in a conventional war."); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1383 (2008) (describing "terrorist networks [as] tak[ing] the identification problems long posed by guerrilla warfare to new heights").

<sup>56</sup> In July 1973, for example, the Israeli Mossad reportedly assassinated an innocent Moroccan waiter in Lillehammer, Norway, mistaking him for a member of the Black September faction responsible for the Munich massacre. See Doug Mellgren, *Norway Solves Riddle of Mossad Killing*, GUARDIAN (Mar. 1, 2000), <http://www.guardian.co.uk/world/2000/mar/02/israel>. The United States has also taken custody of persons who are widely believed to have been innocent, including, for example, Khalid al-Masri. See, e.g., Dana Priest, *The Wronged Man*, WASH. POST, Nov. 29, 2006, at C1. Had al-Masri been targeted instead of detained, the consequences would have been irreversible. See also Johnsen, *supra* note 54 (describing a 2009 strike intended for an al Qaeda training camp that instead hit a Bedouin encampment and killed "more than 40 civilians").

<sup>57</sup> See Brennan, Harvard Law School Remarks, *supra* note 9; Brennan, Wilson Center Remarks, *supra* note 13, and accompanying text.

<sup>58</sup> *Id.*

<sup>59</sup> Interview by Margaret Warner, Senior Correspondent, PBS NewsHour, with John O. Brennan, Ass't to the President for Homeland Sec. and Counterterrorism (Aug. 8, 2012) (transcript

operatives in the midst of training for an attack, and persons who possess unique operational skills that are being leveraged for an attack.<sup>60</sup> But no binding limits have yet been articulated, and it is not clear that they exist.<sup>61</sup> Are the examples of possible targets exclusive or merely illustrative? How far along does the attack planning need to be? Is mere agreement to plot or plan enough? In what situations is lethal targeting considered the “only recourse”?

Of note, recent reporting suggests that the United States has launched at least one drone strike near Sana’a, the capital of Yemen, in a region readily accessible to law enforcement officials, thereby casting doubt on official assertions that lethal targeting is used as a measure of last resort, when capture is not feasible.<sup>62</sup> Moreover, “signature strikes” reportedly were approved for use in Yemen in 2012, allowing the targeting of individuals or groups based on their pattern of activities without knowing the specific targets’ identities or roles in the organization—a practice that seems to belie a policy of individualized assessments of “significant threat.”<sup>63</sup>

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available at <http://www.lawfareblog.com/2012/08/transcript-of-john-brennans-speech-at-the-council-on-foreign-relations>) (“[I]f our only recourse is to take legal action in concert with partners and provide our partners some assistance in that regard or to do things with them that [will] mitigate threat, we do it, but because it presents a terrorist threat to U.S. persons, properties, entities.”); see also Brennan, Wilson Center Remarks, *supra* note 13 (asserting that “our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible”).

<sup>60</sup> Brennan, Interview with Margaret Warner, *supra* note 59.

<sup>61</sup> As discussed above, the most detailed explanation to date of standards employed is the recently released DOJ White Paper, but its application is limited to U.S. citizens. See DOJ WHITE PAPER, *supra* note 17. Moreover, the White Paper does not even define the outer limits of permissible attacks on U.S. citizens, explicitly stating that it is merely describing one instance in which such killings are permissible and “does not attempt to determine the minimum requirements necessary.” *Id.* at 1.

<sup>62</sup> See, e.g., Adam Baron, *Family, Neighbors of Yemeni Killed by U.S. Drone Wonder Why He Wasn't Taken Alive*, MCCLATCHY NEWSPAPERS (Nov. 28, 2012), <http://www.mcclatchydc.com/2012/11/28/175794/family-neighbors-of-yemeni-killed.html>; Gregory Johnsen, *Adnan al-Qadhi and the Day After*, BIG THINK (Nov. 7, 2012, 3:54 PM), <http://bigthink.com/waq-al-waq/adnan-al-qadhi-and-the-day-after>. The aforementioned DOJ White Paper suggests that lack of consent by the host government may justify a finding that capture is not feasible—which possibly explains how this strike was justified. See DOJ WHITE PAPER, *supra* note 17, at 8 (“[R]egarding the feasibility of capture, capture would not be feasible if . . . the relevant country were to decline to consent to a capture operation.”). It remains unclear whether there is any obligation on the United States to take steps to secure such consent or cooperation.

<sup>63</sup> See Greg Miller, *U.S. Drone Campaign in Yemen Expanded*, WASH. POST, Apr. 26, 2012, at A8 (“The expanded authority will allow [strikes] . . . on targets based solely on their intelligence ‘signatures’—patterns of behavior that are detected through signals intercepts, human sources and aerial surveillance and that indicate the presence of an important operative or a plot against U.S. citizens.”); Cora Currier & Justin Elliot, *The Drone War Doctrine We Still Know Nothing About*, PROPUBLICA (Feb. 26, 2013), <http://www.propublica.org/article/drone-war-doctrine-we-know-nothing-about> (“[L]ast spring the U.S. reportedly expanded signature strikes to Yemen, though

### B. *The Territorially Restricted View*

Responding to the United States' approach, a number of scholars, human rights groups, and other commentators have sought to impose what Professor Kenneth Anderson has called a "legal geography of war."<sup>64</sup> This argument seeks to narrow the scope of who can be detained and targeted by limiting the geographic reach of the laws of war, rather than by (or in addition to) focusing on the standards for detention and targeting themselves.<sup>65</sup> The arguments have sounded in *jus ad bellum* and *jus in bello*, but the impulse is the same: to impose territorial-based limits on the use of law-of-war tools.

The *jus ad bellum* argument focuses on the legality of the conflict: in a post-United Nations Charter world, one must establish a legitimate basis to use unconsented-to force in another state's territory based either on self-defense or a Security Council resolution justifying the use of such force.<sup>66</sup> Proponents of the territorially limited view of the conflict argue that, whereas there was both a self-defense justification and Security Council resolution justifying use of force in Afghanistan against al Qaeda and the Taliban (as the entity harboring al Qaeda), there is no such justification for the use of force in other nations based solely on the fact that certain al Qaeda members or associated forces are found there.<sup>67</sup>

administration officials said there were stricter standards than in Pakistan and evidence of a threat to the U.S. or U.S. interests was required.").

<sup>64</sup> KENNETH ANDERSON, HOOVER INST., TARGETED KILLING AND DRONE WARFARE 2-3 (2011), available at [http://media.hoover.org/sites/default/files/documents/FutureChallenges\\_Anderson.pdf](http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf) (noting that historically there was an "implied geography of war" based on "where hostilities took place" but that drones disturb this long-accepted boundedness of war).

<sup>65</sup> There is also a separate, important, and ongoing debate about who can be targeted and detained in a transnational conflict with a non-state actor, separate and apart from the debate about the geography of the conflict. Views range from those who agree that rules should be derived from those applicable in an international armed conflict, see, e.g., Bradley & Goldsmith, *supra* note 9, at 2091, to those who argue for the application of human rights law norms, see, e.g., Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT'L L.J. 135, 148 (2008), to those who argue for a hybrid approach, see, e.g., Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 159-65 (2010).

A related and important debate addresses who properly qualifies as taking a "direct part in hostilities" and is therefore a legitimate military target. See generally NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010). The underlying assumption in all of these debates is that the applicable criteria should apply consistently throughout the applicable scope of conflict. This zone approach challenges that underlying assumption.

<sup>66</sup> U.N. Charter art. 2, para. 4; *id.* arts. 39-42 & 51.

<sup>67</sup> See, e.g., Letter from Anthony D. Romero, Exec. Dir., Am. Civil Liberties Union, to President Barack Obama (Apr. 28, 2010), available at <http://www.aclu.org/files/assets/2010-4-28->



The *jus in bello* argument focuses on the existence of an armed conflict, as opposed to the legality of the conflict, but also does so on a state-by-state basis. Proponents of this approach generally treat the International Criminal Tribunal for the Former Yugoslavia (ICTY) ruling in *Prosecutor v. Tadic* as laying out the governing standard for determining the existence of a noninternational armed conflict. Under this standard, such a conflict exists when there is “protracted armed violence” involving “organized armed groups.”<sup>68</sup> Applying these factors, scholars and other commentators argue that, while a conflict may exist with al Qaeda in Afghanistan and the border regions of Pakistan, it does not exist outside those areas.<sup>69</sup> Thus, even if another state consents to the use of force on its territory (thereby addressing the *jus ad bellum* concerns), it is illegitimate to use law-of-war tools to detain or target members of the enemy armed forces because the armed conflict does not extend to that state.<sup>70</sup>

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ACLULettertoPresidentObama.pdf (advocating that “[t]he entire world is not a war zone, and wartime tactics that may be permitted on the battlefields in Afghanistan and Iraq cannot be deployed anywhere in the world where a terrorism suspect happens to be located”); Mary Ellen O’Connell, *Killing Awlaki was Illegal, Immoral and Dangerous*, CNN WORLD (Oct. 1, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/10/01/killing-awlaki-was-illegal-immoral-and-dangerous> (“[E]very American knows that the U.S. is not engaged in an armed conflict in Yemen—not a real armed conflict. Nevertheless, President Obama placed an American citizen in Yemen on a kill list.”).

<sup>68</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>, *accord* *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 152 (1997), <http://www.cidh.org/annualrep/97eng/Argentina11137.htm>; *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, Judgment, ¶ 619 (Sept. 2, 1998), <http://www.unhcr.org/refworld/pdfid/40278fbb4.pdf>; INT’L COMM. OF THE RED CROSS, I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD: COMMENTARY 49 (Jean S. Pictet ed., 1952).

<sup>69</sup> Some have also suggested that there is a separate noninternational armed conflict between Yemen and al Qaeda in the Arabian Peninsula (AQAP), that the United States has intervened in this conflict on behalf of Yemen, and that it is therefore engaged in a separate noninternational armed conflict with AQAP. *See, e.g.*, Benjamin R. Farley, *Targeting Anwar Al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killing*, 2 AMER. U. NAT’L SECURITY L. BRIEF 57, 71-73 (2012) (“United States operations in Yemen, including airstrikes targeting AQAP on behalf of the Yemeni government, constitute an armed intervention into Yemen’s non-international armed conflict.”). *But see* O’Connell Declaration, *supra* note 10, at para. 15 (“[T]he United States is not engaged in armed conflict in Yemen.”). For opposing views on the geographic reach of armed conflict, see *Predator Drones and Targeted Killing*, FEDERALIST SOC’Y (Jan. 27, 2011), <http://www.fed-soc.org/publications/detail/predator-drones-and-targeted-killings-podcast>, in which Ben Wizner, Litigation Director of the American Civil Liberties Union National Security Project, and Professor Michael Lewis consider the legality of drone strikes against U.S. citizens in Yemen.

<sup>70</sup> *See* Mary Ellen O’Connell, *Unlawful Killings with Combat Drones: A Case Study of Pakistan, 2004–2009* (arguing that a state may not consent to the use of military force on its territory in the absence of armed conflict hostilities), in *SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON*

This approach, however, suffers from both positivist and normative flaws. Treaty law does not provide the clear answers that proponents of this approach suggest. Noninternational armed conflicts were initially assumed to take place solely within the territory of a state, and, as a result, the Geneva framers simply did not address the situation in which a state is engaged in a conflict with a non-state actor whose presence spans multiple states. The Conventions are thus silent as to the scope of a conflict with such attributes.<sup>71</sup> Moreover, in connection with international armed conflicts (or conflicts between states), Geneva's drafters actually sought for the law of international armed conflict to have the broadest possible reach so as to prevent nations from resorting to unregulated warfare.<sup>72</sup>

Similarly, neither case law nor state practice provides clear answers to the question of the geographic reach of the conflict, and are probably best read to support a territorially broad view. The leading and oft-cited ICTY case on point, *Prosecutor v. Tadic*, describes the conflict as extending to the state's borders as a way to expand, not restrict, the scope of the conflict.<sup>73</sup> Whether or not the conflict extends beyond state borders was irrelevant to that case. State practice is also rife with examples of states crossing borders to attack belligerent non-state actors that have set up operations in neighboring states.<sup>74</sup>

As a policy matter, the territorially restricted approach also creates safe havens for the non-state enemy, allowing it to cross state lines to regroup, plan, and coordinate externally directed plots free from the threat of attack.<sup>75</sup> To the extent that the threat can be appropriately addressed

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THE USE OF LETHAL FORCE 263, 280 (Simon Bronitt, Miriam Gani & Saskia Hufnagel eds., 2012).

<sup>71</sup> See INT'L COMM. OF THE RED CROSS, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY 27-44 (Jean S. Pictet ed., A.P. deHeney trans., 1960) (describing "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" (emphasis added)).

<sup>72</sup> See *id.* at 19-20 (explaining that the broadly applicable term "armed conflict" was chosen to avoid the situation in which belligerent parties deny the existence of a state of war so as to circumvent the obligations imposed by the laws of war).

<sup>73</sup> See *Tadic*, No. IT-94-1-1, Interlocutory Appeal at ¶ 70 (rejecting petitioner's argument that the Tribunal lacked subject matter jurisdiction because the alleged crimes took place at a prison camp that petitioner asserted was outside the scope of the armed conflict); Ohlin, *supra* note 9, manuscript at 18-19 (arguing that the effort to impose geographic limits on the scope of the conflict is based on a "profound misreading of the logic of *Tadic*").

<sup>74</sup> See Chesney, *supra* note 51, at 36 (describing the "endless examples of a party to an existing armed conflict using force in the territory of another state which until then was not experiencing hostilities within its own borders, in order to prevent establishment of a safe haven").

<sup>75</sup> Some proponents of a territorially restricted view acknowledge that those who are planning or coordinating attacks within the conflict zone may be subject to law-of-war authorities even if they have crossed state lines. According to this view, the Taliban and al Qaeda leaders directing

through foreign cooperation and law enforcement means, that might not be particularly troubling. But what if the foreign government is unable or unwilling to respond to the threat, and capture by the belligerent state is infeasible? Alternatively, what if the foreign government is supportive of the belligerent state's efforts to arrest and prosecute the enemy, but information about the target, at least initially, comes primarily from intelligence reporting that cannot be introduced in open court without revealing a critical source or jeopardizing a key relationship with a foreign power?<sup>76</sup> Under the territorially restricted view, even short-term law-of-war detention is prohibited, and even if carried out for the express purpose of gathering information for a criminal prosecution (as was done in Warsame's case).<sup>77</sup>

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attacks in Kabul from northwest Pakistan (or elsewhere) would be legitimate military targets subject to law-of-war detention or lethal targeting. *See, e.g.*, Kevin Jon Heller, *Bobby Chesney Responds to My Post*, OPINIO JURIS (Sep. 25, 2010, 9:24 PM), <http://opiniojuris.org/2010/09/25/bobby-chesney-responds-to-my-post> (arguing that international humanitarian law "applies to individuals located outside the battlefield only if they are members of an organization involved in that [noninternational armed conflict] or are directly participating in hostilities there"). But an affiliated but distinct group of al Qaeda operatives in Yemen who are planning an attack in Germany or the United States would not be a legitimate target, absent a separate finding of imminent threat justifying an attack in self-defense.

<sup>76</sup> Some commentators have responded to the concern about safe havens by noting that grave threats can still be dealt with as a matter of self-defense, even if there is no law-of-war basis for the use of force or detention without charge. *See, e.g.*, Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 238-41 (2010) ("[A]n armed attack by a non-state actor . . . can trigger the right of self-defense . . . even if selective responsive force directed against a non-state actor occurs within a foreign country."). And in fact, the United States has itself increasingly invoked self-defense, along with law-of-war authorities, as justifying targeted killings in places such as Pakistan, Yemen, and Somalia. *See* Brennan, Harvard Law School Remarks, *supra* note 9. But the rules governing the use of force in self-defense outside the context of armed conflict are arguably even more unsettled than those with respect to the use of force based on the law of war. The United States, for example, has argued for a "flexible interpretation of imminence." *See id.* ("We are finding increasing recognition in the international community that a more flexible understanding of 'imminence' may be appropriate when dealing with terrorist groups . . . ."); *see also* DOJ WHITE PAPER, *supra* note 17, at 7 (adopting a broad definition of "imminent"). Such a framework presumably would allow it to target high-level leaders even if there were no evidence that they were participating in or coordinating a specific, imminent attack. A self-defense rationale could easily result in the aforementioned concern of "war everywhere," albeit pursuant to a different legal framework. Brooks, *supra* note 22.

<sup>77</sup> Following the announcement that Ahmed Abdulkadir Warsame would receive a trial in federal court, the American Civil Liberties Union summarized its position and reasoning as follows:

[T]he Obama administration will prosecute Warsame in the criminal justice system. . . . But the Obama administration has put a criminal conviction at risk by holding Warsame in unlawful military detention for over two months. The government could have obtained intelligence through law enforcement rather than military

Finally, the underlying assumption behind the territorially restricted view of armed conflict—that geographic limitations will result in the replacement of the permissive rules of law of armed conflict with restrictive rules of international human rights norms—is itself subject to debate. The United States has long taken the position that the treaty-based obligations embodied in the International Covenant on Civil and Political Rights do not apply extraterritorially.<sup>78</sup> This position has been sharply criticized by numerous scholars, as well as the United Nations Human Rights Committee, yet the United States is unlikely to alter its views, at least in the near future.<sup>79</sup> Moreover, accepting that the human rights obligation to respect life applies independent of any treaty-based obligations,<sup>80</sup> it is not clear how this norm would apply in the context of most targeted killings. While the extrajudicial killing of a person who is in the state's custody or *hors de combat* is clearly prohibited, human rights law does not neatly address the

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interrogation, as it successfully has in hundreds of terrorism cases, without jeopardizing its criminal case.

Press Release, Am. Civil Liberties Union, ACLU Supports Moving Terror Suspect to U.S. Court but Questions Unlawful Military Detention (July 6, 2011), *available at* <http://www.aclu.org/national-security/aclu-supports-moving-terror-suspect-us-court-questions-unlawful-military-detention>.

<sup>78</sup> See generally International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). For the United States' reading of the International Convention on Civil and Political Rights to apply "only to individuals who are both within the territory of a State Party and subject to that State Party's sovereign authority", see U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Reports of States Parties Due in 2003: United States of America, Annex I, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005), *available at* <http://www.state.gov/documents/organization/124143.pdf>; see also Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 251-52 (2010) (explaining the George W. Bush Administration's position that "a person would have to be both 'within' a state's territory and subject to its jurisdiction for any covenant protections to apply"); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 123-24 (2005) (arguing that the drafting history of the International Covenant on Civil and Political Rights supports the view of the United States).

<sup>79</sup> See U.N. Human Rights Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 26, 2004) ("[T]here is a United Nations Charter obligation to promote universal respect for, and observance of, human rights . . .").

<sup>80</sup> The obligation to respect life is generally considered a norm of customary international human rights law. See, e.g., David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 184-85 (2005) (noting that "the duty to respect the right of life" has become a peremptory norm of customary international law regardless of a particular state's treaty obligations). This norm, however, does not answer the question as to the degree to, and manner in, which this obligation restricts a state's use of lethal force in response to an alleged terrorist threat.

situation in which the United States takes action with respect to a purported terrorist threat driving down a desert road in Yemen.<sup>81</sup>

Similarly, with respect to detention, human rights law does not provide much in the way of substantive limits. In fact, human rights norms explicitly permit the use of administrative detention without any clear standards as to who may be detained under such an administrative detention regime.<sup>82</sup>

## II. A NEW APPROACH: ZONES OF ACTIVE HOSTILITIES AND BEYOND

The current debate has resulted in a stalemate, with neither side adequately addressing the legitimate concerns of the other. The notion of an on-off switch, in which the state's ability to go after the enemy is restricted to limited territorial regions, ignores the geographically unbounded nature of a conflict with a transnational non-state actor. Conversely, the notion of an unbounded conflict raises legitimate concerns about the use of force as a first resort and the erosion of peacetime norms in areas far from any recognized "hot" battlefield. What is needed is a new framework of domestic and international law that better balances the multiple security and liberty interests at stake.

This Article offers such a framework—one that recognizes the broad scope of the conflict, but distinguishes between zones of active hostilities and elsewhere in setting the procedural and substantive standards for detention and targeting. This framework, which I call the *zone approach*, accommodates the state's key security interests while also protecting against the erosion of peacetime norms outside zones of active hostilities. It recognizes that rules applicable in wartime—rules that permit killing and

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<sup>81</sup> See Kretzmer, *supra* note 80, at 177 (describing unresolved issues regarding the right to life under a law enforcement and international human rights law model); Chesney, *supra* note 51, at 49-50 (contemplating the various arguments regarding the application of international human rights law as applied to the case of Anwar al Aulaki); Paust, *supra* note 76, at 264-65 (arguing that human rights law does not protect targeted persons who are not within the jurisdiction or effective control of a country engaged in self-defense or law-of-war targeting). *But see* Al-Skeini v. United Kingdom, App. No. 55721/07, ¶ 136 Eur. Ct. H.R. (July 7, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606> (suggesting that, at least under the European Convention on Human Rights, "the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's Article I [of the Convention] jurisdiction").

<sup>82</sup> For an excellent discussion of detention schemes governed by international human rights law, see generally Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 382-89 (2008). See also John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 209-13 (2011) (discussing the difficulty of identifying and applying the relevant human rights rules).

detention without charge based on status alone—should be the exception rather than the norm, limited to circumstances in which security so demands.

This Part outlines the several normative and practical reasons why the zone approach should be adopted and incorporated into U.S. and, ultimately, international law. Although the analysis focuses primarily on the United States, the arguments as to the benefits of this framework apply equally to any other belligerent state seeking to defeat a transnational non-state enemy.

### A. *Basis for the Distinction*

There is an intuitive sense that, separate and apart from any sovereignty concerns, the killing or detention of an alleged enemy of the state in a war zone is different from the killing or detention of an alleged enemy in a peaceful zone (think Munich or London), even if the known facts about the enemy's role in the opposing force are the same. Similarly, there is a less intuitive, but equally important, difference between both of those situations and the killing or detention of an alleged enemy in a lawless zone (think Yemen or Somalia). This Section highlights several reasons why these distinctions should be reflected in the law—reasons largely based on the relevant exigency, the importance of notice, and the intrinsic value of cabining war and its permissive use of force and detention without charge.

#### 1. The War Zone Versus the Peaceful Zone

The exigencies that justify application of wartime rules simply do not apply outside zones of active hostilities. The Supreme Court recognized this important distinction in *Reid v. Covert*,<sup>83</sup> in which it ruled that civilians accompanying the armed forces outside a war zone could not be subject to military trial. “The exigencies which have required military rule on the battlefield are not present where no conflict exists. Military trial of civilians ‘in the field’ is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights.”<sup>84</sup> The *Reid* opinion echoed the reasoning of a case from almost ninety years prior, when the Court ruled that Indiana—which was not the site of any active fighting—could not be subject to martial law during the Civil War: “Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion

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<sup>83</sup> 354 U.S. 1, 35 (1957).

<sup>84</sup> *Id.*

real, such as effectually closes the courts and deposes the civil administration.”<sup>85</sup> Similar reasoning has led courts to conclude that the requisition of property by the United States government is permitted at the “scene of conflict” but not thousands of miles away<sup>86</sup> and that the protections of the Suspension Clause depend to a large extent on whether or not the detainees are held in an “active theater of war.”<sup>87</sup>

As these cases recognize, the existence of warlike conditions in one part of the world should not lead to a relaxation of the substantive and procedural standards embodied in peacetime rules elsewhere. In some areas, intense fighting can create conditions that often make it impracticable, if not impossible, to apply ordinary peacetime rules. Such situations justify resort to more expedient wartime rules. By contrast, in areas where ordinary institutions are functioning, domestic police are effectively maintaining law and order, and communication and transportation networks are undisturbed, the exigent circumstances justifying the reliance on law-of-war tools are typically absent.<sup>88</sup> In those areas, the peacetime standards—which themselves reflect a careful balancing of liberty and security interests—serve the important functions of minimizing error and abuse and enhancing the legitimacy of the state’s actions. These standards should be respected absent exigent circumstances that justify an exception.

Second, the notion of a global conflict clashes with the legitimate and reasonable expectations of persons residing in a peacetime zone. These expectations matter. The corollary—the requirement of fair notice—is perhaps the primary factor that distinguishes a law-abiding government from a lawless dictatorship. Its importance is emphasized time and time again in both U.S. constitutional law and international law doctrines. It sets bounda-

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<sup>85</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

<sup>86</sup> *Filbin Corp. v. United States*, 266 F. 911, 917 (E.D.S.C. 1920); *see also id.* (“A state of war does not sanction summary requisitions for all purposes everywhere, but only in those places in which, by the necessities of the conflict, martial law is in force and civil law is suspended.”).

<sup>87</sup> *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010). *But see Ex parte Kanai*, 46 F. Supp. 286, 288 (E.D. Wis. 1942) (upholding an order requiring persons of Japanese descent to evacuate San Francisco based on the conclusion that the “field of military operation is not confined to the scene of actual physical combat”); *United States ex rel. Wessels v. McDonald*, 265 F. 754, 764 (E.D.N.Y. 1920) (describing “the territory of the United States” as “certainly within the field of active operations” during World War I and upholding the court-martial of an alleged spy captured in New York).

<sup>88</sup> The boundaries between these two areas will not always be clear-cut. But the inevitable messiness of the situation on the ground does not negate the basic insight that the exigencies created by intense, sustained fighting do not exist, at least not in any sustained way, in places far removed from any battlefield setting.

ries on substantive rights,<sup>89</sup> is key to choice of law questions,<sup>90</sup> and is the core of procedural-rights protections in both domestic and international law.<sup>91</sup>

In places of intense, obvious, and publicly acknowledged fighting, civilians are on notice that they are residing within a zone of conflict. Those who remain within the conflict zone have implicitly accepted some risk, albeit not voluntarily in most cases. They can, at least in theory, take steps to protect themselves and minimize the likelihood of being caught in the crossfire by, when possible, leaving or avoiding areas with the heaviest concentration of fighters or taking extra precautions in conducting their daily activities.<sup>92</sup> Host states are similarly on notice of the likelihood of ongoing hostilities and can take appropriate steps to move their citizens away from areas of intense fighting.

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<sup>89</sup> For example, Fourth Amendment protections apply to “reasonable” or “justifiable” expectations of privacy. *See, e.g., Rakas v. United States*, 439 U.S. 128, 142-44 (1978) (linking the Fourth Amendment’s protections to the “legitimate expectation of privacy”); *United States v. White*, 401 U.S. 745, 751 (1971) (plurality opinion) (stating that the Fourth Amendment inquiry turns on whether an expectation of privacy is “justifiable”); *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that reasonable searches necessarily require compliance with a “judicial process” and that “searches conducted outside the judicial process . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few . . . exceptions”).

<sup>90</sup> *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317-18 & n.24 (plurality opinion) (emphasizing the lack of “unfair surprise or frustration of legitimate expectations” in holding an insurance company subject to the laws of Minnesota).

<sup>91</sup> *See, e.g., International Covenant on Civil and Political Rights*, *supra* note 78, art. 15 (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”); *United States v. Williams*, 553 U.S. 285, 304 (2008) (“A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited . . . .”); *E. Enters. v. Apfel*, 524 U.S. 498, 501 (1998) (plurality opinion) (“Retroactive legislation . . . presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions.” (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992))); *Steel v. United Kingdom* (No. 91), 1998-VII Eur. H.R. Rep. 2720, 2766-67 (1998) (“Two requirements flow from the expression ‘prescribed by law’ . . . . These requirements are first that the law be adequately accessible to citizens, and secondly that the law be formulated with sufficient precision to enable the citizen to regulate his conduct and foresee with reasonable certitude the consequences . . . .”).

<sup>92</sup> The ability of civilians to take such precautionary measures is often extremely limited in situations in which the non-state enemy has purposefully diffused itself among the civilian population. In some cases, it also may be near impossible to leave a conflict zone due to risks of travel, health constraints, or political barriers, such as the closing of border crossings. That said, the heavy refugee flows out of places like Afghanistan and Iraq indicate that there is at least *some* possibility of departing a zone of active hostilities, albeit often at extraordinarily high financial, physical, and emotional costs. *See, e.g., UNITED NATIONS HIGH COMM’N FOR REFUGEES, GLOBAL TRENDS 2011*, at 14 fig.5 (2012) (identifying Afghanistan and Iraq as the two main source countries of refugees in 2011), *available at* <http://www.unhcr.org/4fd6f87f9.html>.



By comparison, civilians sitting at an outdoor café in Paris are not on notice that they are within the zone of conflict. As a result, there is something intuitively unsettling about the idea that they could be deemed the legitimate collateral damage of a state-sponsored attack. It is precisely this fear of the unpredictable on which terrorists capitalize when they attack unsuspecting civilians. A legal doctrine that allows the state to engage in attacks that may have a similar consequence—even if civilians are not the intended or expected targets of the attacks—raises legitimate concerns.

It is, of course, possible to conceive of a new set of rules for this new type of conflict, under which the procedural and substantive requirements of domestic criminal justice systems and human rights norms give way when the non-state enemy crosses into one's jurisdiction. But the idea that a non-state actor could, through its clandestine behavior, trigger the permissive use of killing and detention without charge runs counter to longstanding conceptions of fairness and justice.<sup>93</sup> It essentially allows the terrorist to erode protections of basic rights simply by crossing state lines.

Third, the conditions on the ground affect the assumptions as to who qualifies as the enemy. While it may be valid to presume that individuals who attend a training camp and are found in a zone of active hostilities intend to join the fight, the same presumption does not necessarily hold for individuals who are subsequently located thousands of miles away in a zone of relative peace.<sup>94</sup> Absent additional, specific information suggesting that the individual is actively engaged in attack planning or playing a sufficiently important role in the organization so as to pose a significant ongoing threat, the justifications for law-of-war detention or lethal killing (to prevent the return to the battlefield or otherwise eliminate the threat) are questionable.<sup>95</sup> At a minimum, heightened quantum-of-information standards ought to

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<sup>93</sup> See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (explaining that a set of rules that change so frequently that citizens lack notice and the ability to comply is not just a bad system of law, but not a system of law at all).

<sup>94</sup> I also question whether a key factor used to establish functional membership—guesthouse attendance—suffices even within a zone of active hostilities. For an insightful analysis, see Benjamin Wittes, *The Significance of Guesthouses and Training*, *LAWFARE* (June 11, 2011, 12:39 PM), <http://www.lawfareblog.com/2011/06/the-significance-of-guesthouses-and-training> (“Memo to the D.C. Circuit: Staying at a guesthouse is not the same as taking military training.”).

<sup>95</sup> There are, of course, exceptions to this general rule. For example, a high concentration of such individuals in a particular area, even outside a zone of active hostilities, could be grounds for significant concern. Under the framework proposed in this Article, the state would still be able to respond with force to such threats; it simply would have to meet the higher substantive and procedural standards for doing so.

apply to detention and targeting that take place outside a zone of active hostilities.<sup>96</sup>

## 2. The Lawless Zone

In practice, the truly contested areas fall somewhere between the obvious warzone and the peacetime zone. The United States is unlikely to begin launching drone strikes in Paris. It is, however, reportedly doing so with increasing frequency in places like Yemen and possibly Somalia<sup>97</sup>—areas that can be loosely characterized as “lawless zones.”

In some ways, a lawless zone shares attributes with a zone of active hostilities. Domestic law enforcement tends to be largely ineffective or non-existent, suggesting the need for alternative mechanisms to deal with threats. In many instances (and certainly in much of Yemen as well as Somalia), civilians are on notice that they are living in a conflict zone, even if the main conflict is distinct from the transnational conflict between the state and a non-state entity (e.g., the internal armed conflict between the government and insurgent forces in southern Yemen, and the internal armed conflict between al Shabaab and the Transitional Federal Government in Somalia).

Despite these similarities, the lawless zone where a discrete number of non-state actors find sanctuary is analytically distinct from the hot conflict zone where there is overt, active, ongoing fighting between troops on the ground. This is so for two main reasons.

First, the existence of a separate, distinct conflict of the type often found in a lawless zone does *not* provide notice of a conflict between a belligerent state and transnational non-state enemy. In concrete terms, the existence of a conflict between al Shabaab and the Transitional Federal Government does not provide notice of a conflict between the United States and al Qaeda affiliates reportedly operating in Somalia. This matters for reasons of attribution and accountability. It also affects the degree, if not the fact, of conflict experienced by the civilian population. Imagine if the existence of a lawless zone gave states free rein to unilaterally attack any alleged non-state enemy found therein. Absent any meaningful limits, such a region might be

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<sup>96</sup> See Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOK. L. REV. 437, 493-94 (2012) (arguing for a “clear and convincing” standard to be applied to the identification of non-state enemy belligerents outside the zone of active hostilities).

<sup>97</sup> See, e.g., Bill Roggio, *British Shabab Operative Killed in Airstrike in Somalia*, LONG WAR J. (Jan 21, 2012), [http://www.longwarjournal.org/archives/2012/01/british\\_shabaab\\_oper.php](http://www.longwarjournal.org/archives/2012/01/british_shabaab_oper.php) (asserting that the last confirmed U.S. airstrike in Somalia was in June 2011).

decimated by external attacks. The situation would likely exacerbate the separate conflict, prolong the situation of lawlessness, and make it exceedingly difficult for the population properly to identify or take steps to address the source of conflict.<sup>98</sup>

Second, operations in a lawless zone are likely to be limited to targeted and surgical strikes, often with advance planning and little risk to the state's own troops. This is a very different setting than an active battlefield where troops on the ground are exposed to high levels of risk. As is often noted, those engaged in on-the-ground combat should not be required to hold their fire until they conduct a careful evaluation of the threat posed; such a rule would be potentially suicidal. In Yemen and Somalia, by contrast, the United States carefully pinpoints and identifies targets, with little to no danger to its own troops. When engaging in that type of deliberate killing, with negligible risk to one's own forces, there should be a corresponding obligation to take extra precautions to prevent error, overzealousness, and abuse.<sup>99</sup>

### B. *Current State Practice*

Since 2006, the United States has, at least implicitly and as a matter of policy, distinguished between zones of active hostilities and elsewhere.<sup>100</sup> The Bush Administration initially placed a significant number of off-the-battlefield captures into long-term law-of-war detention. Detainees reportedly included persons captured in places as far-flung from the Afghanistan battlefield as Bosnia, Mauritania, and Thailand—as well as the United States.<sup>101</sup> These off-the-battlefield detentions turned out to be highly controversial. They have been the subject of numerous court challenges,

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<sup>98</sup> This problem of notice arguably dissipates with each additional strike. But when strikes are unacknowledged, unattributed, and launched from afar, as is often the case in the current conflict, there is hardly widespread, overt notice of the type that exists when troops are deployed on the ground.

<sup>99</sup> Relatedly, identification problems are likely to be acute in a lawless zone, where there is usually little in the way of law enforcement and human intelligence capacity. Given that the objective of most operations is likely to kill rather than capture, the costs of misidentification are irreversible.

<sup>100</sup> See *infra* note 105 and accompanying text.

<sup>101</sup> See, e.g., *Salahi v. Obama*, 625 F.3d 745, 750 (D.C. Cir. 2010) (describing the habeas claim of a detainee seized in Mauritania); *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010) (describing the habeas claim of an Algerian captured in Bosnia); *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010) (describing the claims of, among others, a Yemeni citizen captured in Thailand).

international criticism, and endless commentary.<sup>102</sup> Moreover, they raise difficult questions about repatriation—issues with which the United States continues to struggle.<sup>103</sup>

Beginning in September 2006, the Bush Administration initiated a shift in policy. Largely in response to the Supreme Court's ruling in *Hamdan v. Rumsfeld*,<sup>104</sup> President Bush announced that he was closing CIA-run black sites, at least temporarily, and ordered the transfer of fourteen long-term CIA detainees to Guantanamo.<sup>105</sup> Subsequently, the number of out-of-battlefield captures transferred to Guantanamo fell to a mere three captures in 2007<sup>106</sup> and only one capture in 2008.<sup>107</sup> All were described as high-value targets based on alleged links to al Qaeda leadership or involvement in specific terrorist attacks.<sup>108</sup>

<sup>102</sup> For examples of judicial challenges, see generally *Boumediene v. Bush*, 553 U.S. 723 (2008) and *Rasul v. Bush*, 542 U.S. 466 (2004). For an example of international opprobrium, see ECON. & SOC. COUNCIL, UNITED NATIONS COMM'N ON HUMAN RIGHTS, SITUATION OF DETAINEES AT GUANTANAMO BAY, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006).

<sup>103</sup> See, e.g., Bellinger & Padmanabhan, *supra* note 82, at 209, 233-41 (describing some of the hard repatriation questions, such as concerns that a detainee may face mistreatment in his country of origin). Difficult transfer and repatriation questions can also arise when foreign nationals are captured and held within a zone of active hostilities.

<sup>104</sup> 548 U.S. 557 (2006).

<sup>105</sup> See George W. Bush, Remarks on the War on Terror, 2 PUB. PAPERS, 1612, 1617-19 (Sept. 6, 2006) (stating that the Supreme Court's decision that Common Article 3 of the Geneva Conventions applied to the conflict with al Qaeda "has put in question the future of the CIA program" and that "[t]he current transfers mean that there are now no terrorists in the CIA program").

<sup>106</sup> The three detainees transferred to Guantanamo in 2007 were (1) Abd al-Hadi al-Iraqi, described as being captured as he was "trying to return to his native country," Press Release, U.S. Dep't of Def., Defense Department Takes Custody of a High-Value Detainee, No. 494-07 (Apr. 27, 2007), available at <http://www.defense.gov/releases/release.aspx?releaseid=10792>; (2) Adbul Malik, reportedly captured in Kenya, Press Release, U.S. Dep't of Def., Terror Suspect Transferred to Guantanamo, No. 343-07 (Mar. 26, 2007), available at <http://www.defense.gov/releases/release.aspx?releaseid=10662>; and (3) Abdullahi Sudi Arale, reportedly captured in the Horn of Africa, Press Release, U.S. Dep't of Def., Terror Suspect Transferred to Guantanamo, No. 703-07 (June 6, 2007), available at <http://www.defense.gov/releases/release.aspx?releaseid=10976>.

<sup>107</sup> Muhammad Rahim al-Afghani, reported to have been captured in Lahore, Pakistan, was transferred to Guantanamo in 2008. Press Release, U.S. Dep't of Def., Defense Department Takes Custody of a High-Value Detainee, No. 206-08 (Mar. 14, 2008), available at <http://www.defense.gov/releases/release.aspx?releaseid=11758> (announcing Rahim al-Afghani's capture and removal to Guantanamo Bay); Bill Roggio, *U.S. Captures Senior al Qaeda Leader Mohammad Rahim*, LONG WAR J. (Mar. 14, 2008), [http://www.longwarjournal.org/archives/2008/03/us\\_captures\\_senior\\_a.php](http://www.longwarjournal.org/archives/2008/03/us_captures_senior_a.php) (noting same).

<sup>108</sup> See, e.g., Press Release, Defense Department Takes Custody of a High-Value Detainee, No. 494-07, *supra* note 106 (describing al-Iraqi as "one of al-Qaida's highest-ranking and experienced senior operatives"); Press Release, Terror Suspect Transferred to Guantanamo, No. 343-07, *supra* note 106 ("Malik has admitted to participation in the 2002 Paradise Hotel attack in Mombasa, Kenya" and in an attempted attack on an Israeli commercial airline). It is, of course,

On January 22, 2009, two days after taking office, President Obama declared the permanent shuttering of CIA black sites as well as his plan to close the detention center at Guantanamo Bay.<sup>109</sup> While Guantanamo remains open today, the Obama Administration has committed not to transfer any additional detainees there.<sup>110</sup> Since 2009, Warsame is the only known case of an out-of-battlefield detainee being placed in anything other than very short-term military custody.<sup>111</sup>

Some have argued that the low number of out-of-battlefield detentions is due in part to the lack of viable locations for holding detainees. But while that may be a factor, it seems that the difficulty of apprehension, the high diplomatic, reputational, and transactional costs of such detentions, and the relative effectiveness of the criminal justice system in responding to threats, are equal—if not more—important factors in limiting the reliance on law-of-war detention.<sup>112</sup>

As out-of-battlefield detentions have declined, targeted killings reportedly have increased dramatically.<sup>113</sup> The vast majority of these killings appear

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plausible that the CIA detention sites subsequently reopened after their temporary closure in September 2006, or that out-of-battlefield captures were simply moved to long-term detention elsewhere, such as Afghanistan. Yet, with the one possible exception of Muhammad Rahim al-Afghani, who reportedly was held in CIA custody before being transferred to Guantanamo in March 2008, the available evidence does not support these scenarios. See Roggio, *supra* note 107 (quoting a Pentagon spokesperson as reporting that Rahim al-Afghani was held in CIA custody for an eight-month period). As for Afghanistan, estimates indicate that “close to 50” detainees captured elsewhere had been brought to the Bagram Theater Internment Facility for long-term detention as of 2009. Peter Finn & Julie Tate, *Some Held at U.S.-Run Prison in Afghanistan Could Return Home*, WASH. POST, Jan. 24, 2012, at A11. The four detainees whose cases are publicly known and officially confirmed were brought to Afghanistan well before 2006. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209-10 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

<sup>109</sup> Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009).

<sup>110</sup> See Dafna Linzer, *Obama Counterterrorism Adviser Slams Congressional Efforts to Block Guantanamo's Closure*, PROPUBLICA (Mar. 18, 2011), <http://www.propublica.org/article/obama-counterterrorism-adviser-slams-efforts-to-block-guantanamos-closure> (citing a statement by John O. Brennan that even if bin Laden were captured, he would not be taken to Guantanamo).

<sup>111</sup> See *supra* note 2 and accompanying text.

<sup>112</sup> Indeed, since 2003, hundreds of terrorist suspects in the United States and elsewhere have been apprehended by and processed through the civilian criminal justice system with no need to invoke the law of war. See, e.g., David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 14-18, nn.47-52 (2011) (listing recent cases involving terrorism charges in federal courts). For a general overview of the prosecution of individuals alleged to be terrorists by the Department of Justice, see N.Y. UNIV. SCH. OF LAW CTR. ON LAW & SECURITY, *TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011* (2011), available at <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf>.

<sup>113</sup> Some have suggested that persons who would otherwise be detained are killed instead. See, e.g., Jo Becker & Scott Shane, *Secret "Kill List" Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1 (describing the suspicion that “Mr. Obama has avoided the complications of detention by deciding, in effect, to take no prisoners alive”). This argument is not

to have been concentrated in northwest Pakistan—an area that most concede is a spillover of the zone of active hostilities in Afghanistan.<sup>114</sup> A growing number of strikes reportedly have been launched in Yemen as well.<sup>115</sup>

The Obama Administration also appears to have adopted a distinction between Afghanistan and elsewhere in setting the rules for these strikes. While top administration officials have argued that their military authorities are not restricted to the “hot” battlefield of Afghanistan, they also have argued that “outside of Afghanistan and Iraq” targets are focused on those “who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa’ida and its associated forces.”<sup>116</sup> Whether or not one agrees with the standard employed, it is clear that the administration itself recognizes a distinction between Afghanistan (and, earlier, Iraq) and other areas embroiled in the conflict with al Qaeda. Procedural rules in terms of who must authorize the strike also reportedly vary depending on whether one is operating within Afghanistan and the border regions of Pakistan or elsewhere.<sup>117</sup> While there are good reasons to demand additional safeguards, the

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particularly convincing, given that almost all targeted killings have reportedly occurred in places such as northwest Pakistan, Somalia, and Yemen, where capture operations are extremely difficult, if not impossible. It also contradicts the official statement of U.S. policy:

[W]henver it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people. This is how our soldiers and counterterrorism professionals have been trained. It is reflected in our rules of engagement. And it is the clear and unambiguous policy of this Administration.

Brennan, Harvard Law School Remarks, *supra* note 9. *But see supra* text accompanying notes 62–63.

<sup>114</sup> See, e.g., Greg Miller, *Under Obama, a Drone Network*, WASH. POST, Dec. 28, 2011, at A1 (describing several hundred strikes in northwest Pakistan between January 2009 and the end of 2011); Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004–2013*, LONG WAR J. (last updated Jan. 8, 2013), <http://www.longwarjournal.org/pakistan-strikes.php> (“The US ramped up the number of strikes in July 2008, and has continued to regularly hit at Taliban and Al Qaeda targets inside Pakistan.”).

<sup>115</sup> See, e.g., Bill Roggio & Bob Barry, *Charting the Data for U.S. Air Strikes in Yemen, 2002–2013*, LONG WAR J., <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php> (last updated Jan. 3, 2012) (documenting a significant increase in strikes within Yemen in 2012).

<sup>116</sup> Brennan, Harvard Law School Remarks, *supra* note 9; see also Holder, *supra* note 14 (arguing that the legal authority to take action against al Qaeda and associated forces is “not limited to the battlefields in Afghanistan” but suggesting that targeting operations elsewhere are focused on “specific senior operational leaders”).

<sup>117</sup> See Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT’L SECURITY L. & POL’Y 539, 575 (2012) (describing a tiered approval process for actions against al Qaeda abroad that depends on the location of the action); Becker & Shane, *supra* note 113 (describing President Obama as personally “sign[ing] off on every strike in Yemen

United States' own actions already reflect the importance and value of distinguishing between zones of active hostilities and other areas.

### III. THE SPECIFICS: DEFINING THE ZONES AND SETTING THE STANDARDS

Given the basis for distinguishing between zones of active hostilities and elsewhere, this Part provides the specifics of the proposed approach. It first lays out criteria for distinguishing between a zone of active hostilities and elsewhere by drawing on both existing law and the normative justifications for the distinctions. It then describes the proposed substantive and procedural standards that ought to apply, consistent with the goals of protecting individual liberty, peacetime institutions, and the fundamental security interests of the state.

This task is both necessary and inherently difficult. It is an attempt to develop a set of clear standards, or on-off triggers, for a situation in which the gravity, imminence, and likelihood of a threat are dynamic, uncertain, and difficult to categorize. My aim is to propose an initial set of standards that will regulate the use of force and detention without charge outside a zone of active hostilities, consistent with the state's legitimate security needs. The expectation is that debate and discussion will help develop and refine the details over time.

#### A. *The Zone of Active Hostilities*

Commentary, political discourse, court rulings, and academic literature are rife with references to the distinction between the so-called "hot battlefield" and elsewhere. Yet despite the salience of this distinction, there is no commonly understood definition of a "hot battlefield," let alone a common term applied by all.<sup>118</sup> In what follows, I briefly survey the relevant treaty

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and Somalia and also on the more complex and risky strikes in Pakistan"); Karen deYoung, *Brennan Reshaped Anti-Terror Strategy*, WASH. POST, Oct. 25, 2012, at A1 (describing efforts by then-Obama advisor John Brennan to standardize targeted killings and collect "legal authorities the administration thinks sanction its actions in Pakistan, Yemen, Somalia and beyond"); Greg Miller, *U.S. Set to Keep Kill Lists for Years*, WASH. POST, Oct. 24, 2012, at A1 (describing the creation of a "disposition matrix" to eliminate terrorists and the processes surrounding that approach). Statements by top Administration officials confirm that the United States applies more rigorous procedural reviews to strikes that take place outside Afghanistan and northwest Pakistan. See, e.g., Brennan, Wilson Center Remarks, *supra* note 13 (emphasizing "the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of al-Qaida outside the 'hot' battlefield of Afghanistan" (emphasis added)).

<sup>118</sup> See Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 36-38 (2010)

and case law and offer a working definition of what I call the “zone of active hostilities.” This definition takes into account such sources of law as well as the normative and practical reasons for this distinction.

### 1. Treaty and Case Law

While not explicitly articulated, the notion of a distinct zone of active hostilities where fighting is underway is implicit in treaty law. The Geneva Conventions, for example, specify that prisoners of war and internees must be moved away from the “combat zone” in order to keep them out of danger,<sup>119</sup> and that belligerent parties must conduct searches for the dead and wounded left on the “battlefield.”<sup>120</sup> While there are no explicit definitions provided, the context suggests that these terms refer to those areas where fighting is currently taking place or very likely to occur. The related term “zones of military operations,” which is spelled out in a bit more detail in the Commentaries to the Geneva Conventions, is described as covering those areas where there is actual or planned troop movement, even if no active fighting.<sup>121</sup>

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(highlighting the difficulty of identifying the “zone of combat” and suggesting several factors that should be considered).

<sup>119</sup> See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 5(2)(c), June 8, 1977, 1125 U.N.T.S. 609 (“Places of internment and detention shall not be located close to the combat zone.”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 127, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (referring to the process for the “transfer of internees” housed near a “combat zone”); Geneva Convention Relative to the Treatment of Prisoners of War art. 19, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Prisoners of war shall be evacuated . . . to camps situated in an area far enough from the combat zone for them to be out of danger.”).

<sup>120</sup> See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 15, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (“Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.”); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 3, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303 (mandating that a victorious army search the “field of battle . . . for the wounded and dead”).

<sup>121</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 119, 6 U.S.T. at 3532, 75 U.N.T.S. at 302; see OSCAR M. UHLER ET AL., INT’L COMM. OF THE RED CROSS, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 163 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) (“The expression ‘zones of military operations’ . . . may also apply to . . . areas, for example, where there are troop movements but not fighting, and even in those where there is no actual movement of troops but in which the High Command wishes to be able to move them at short notice.”); see also INT’L COMM. OF THE RED CROSS, PROTOCOL ADDITIONAL TO THE GENEVA CONVENTION OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I):



In a variety of contexts, U.S. courts also have opined on whether certain activities fall within or outside of a zone of active hostilities, indicating that the existence and quantity of fighting forces are key. In *Hamdi v. Rumsfeld*, for example, the Supreme Court observed that the large number of troops on the ground in Afghanistan supported the finding that the United States was involved in “[a]ctive combat” there.<sup>122</sup> A panel of the D.C. Circuit subsequently noted that the ongoing military campaign by U.S. forces, the attacks against U.S. forces by the Taliban and al Qaeda, the casualties U.S. personnel incurred, and the presence of other non-U.S. troops under NATO command supported its finding that Afghanistan was “a theater of active military combat.”<sup>123</sup> Previous cases have similarly used the presence of fighting forces, the actual engagement of opposing forces, and casualty counts to identify a theater of active conflict.<sup>124</sup>

Conversely, U.S. courts have often assumed that areas in which there is no active fighting between armed entities fall outside of the zone of active hostilities. Thus, the *Al-Marri* and *Padilla* litigations were premised on the notion that the two men were outside of the zone of active hostilities when

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COMMENTARY 617 (1977) (noting that “[a] mixed group of the Diplomatic Conference” defined “zone of military operations” as “the territory where the armed forces of the adverse Parties taking a direct or an indirect part in current military operations, are located”).

<sup>122</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion). In *Boumediene v. Bush*, the Supreme Court again described Afghanistan as part of the “battlefield,” but it failed to explain whether all or only part of Afghanistan was included therein, whether the battlefield extended beyond Afghanistan, or even what criteria defined the battlefield. 553 U.S. 723, 734 (2008).

<sup>123</sup> *Al Maqaleh v. Gates*, 605 F.3d 84, 88 (D.C. Cir. 2010); see also *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007) (including both Afghanistan and Iraq as part of the “battlefield”).

<sup>124</sup> In *Reid v. Covert*, 354 U.S. 1, 35 (1957) (plurality opinion), for example, the Supreme Court described the condition of actual hostilities as justifying the finding that one was “in the field” for purposes of military commission jurisdiction. Similarly, in *Ex parte Milligan*, the Court emphasized the fact that there had been no “invasion” by enemy armed forces in declaring Indiana outside the “theatre of active military operations.” 71 U.S. (4 Wall.) 2, 127 (1866). See also *Madsen v. Kinsella*, 343 U.S. 341, 357, 362 (1952) (asserting that the “military occupancy” of a territory justified the exercise of military commission jurisdiction). The Ninth Circuit identified attacks by U.S. naval ships on Iranian gunboats and oil platforms as creating a “combat zone” during the Iran–Iraq tanker war. *Koohi v. United States*, 976 F.2d 1328, 1335–37 (9th Cir. 1992). Other courts have looked to the presence and engagement of fighting forces, as well as to the number of casualties, when defining the existence of “war” in the first place—a condition precedent to identifying a zone of active hostilities. See, e.g., *Hamilton v. McLaughry*, 136 F. 445, 450–51 (C.C.D. Kan. 1905) (noting that the “occupation of Chinese territory” by U.S. military forces and conflicts between U.S. and Chinese troops were key factors in defining engagement in China during the Boxer Uprising as “war”); *United States v. Bancroft*, 3 C.M.A. 3, 5 (C.M.R. 1953) (declaring the existence of a state of war in Korea due to the presence of troops, casualties, and the “sacrifices required,” among other factors).

taken into custody in the United States.<sup>125</sup> The central issue in those cases was how much this distinction mattered.<sup>126</sup> The D.C. Circuit in *Al Maqaleh* similarly distinguished Afghanistan—defined as part of “the theater of active military combat”—from Guantanamo—described as outside of this “theater of war”—presumably because of the absence of active fighting there.<sup>127</sup> In the context of the Guantanamo habeas litigation, D.C. District Court judges have at various times also described Saudi Arabia, Gambia, Zambia, Bosnia, Pakistan, and Thailand as outside an active battle zone.<sup>128</sup>

In defining what constitutes a conflict in the first place, international courts have similarly looked at the existence, duration, and intensity of the actual fighting. Specifically, in *Tadic*, the ICTY defined a noninternational armed conflict as involving “protracted armed violence between governmental authorities and organized armed groups.”<sup>129</sup> In subsequent cases, the ICTY

<sup>125</sup> See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 219 (4th Cir. 2008) (en banc) (Motz, J., concurring) (per curiam) (describing Al-Marri’s December 2001 arrest in Peoria, Illinois), *vacated*, *Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (mem.); *Padilla v. Hanft*, 423 F.3d 386, 388 (4th Cir. 2005) (detailing Padilla’s arrest in Chicago after traveling from Pakistan).

<sup>126</sup> In previous conflicts, courts have similarly described the United States as “outside of the area of active hostilities” when fighting was concentrated in specific locations overseas. See, e.g., *United States v. Anderson*, 38 C.M.R. 582, 586 (C.M.A. 1967) (defining the United States as “outside of the area of active hostilities” during the Vietnam War, yet applying criminal liability to an act of desertion that originated in the United States); *United States v. Ayers*, 15 C.M.R. 220, 221 (C.M.A. 1954) (suggesting implicitly that the United States fell outside of the area of active hostilities during the Korean War). *But see* Blank, *supra* note 118, at 23–24 (citing cases in which courts held that the continental United States was part of the “field of military operation[s]” during World Wars I and II (internal quotation marks omitted)).

<sup>127</sup> *Al Maqaleh*, 605 F.3d at 97.

<sup>128</sup> See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446–47 (D.D.C. 2005) (describing detainees taken into custody in Gambia, Zambia, Bosnia, and Thailand, even though some of them “may never have been close to an actual battlefield”), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d*, 553 U.S. 723 (2008); *Khalid v. Bush*, 355 F. Supp. 2d 311, 316, 320 (D.D.C. 2005) (noting that petitioners captured in Bosnia and Pakistan “were not captured on or near the battlefields of Afghanistan” and thus were acting “outside of the theatre or zone of active military operations” (internal quotation marks omitted)), *vacated*, *Boumediene v. Bush*, 476 F.3d 981, *rev’d*, 553 U.S. 723; *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 31 (D.D.C. 2004) (“Abu Ali was not captured on a battlefield or in a zone of hostilities—rather, he was arrested in a [Saudi] university classroom while taking an exam.”). For an opposing view on the relevance of a detainee’s location to whether he was “in the field,” see *Al Odah v. United States*, 321 F.3d 1134, 1149 (D.C. Cir. 2003) (Randolph, J., concurring), *rev’d*, *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>129</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdce/en/51002.htm>. Both the International Criminal Court (ICC) and the International Criminal Tribunal for Rwanda (ICTR) have adopted this test for determining the existence of a noninternational armed conflict as well. For the standard used by the ICC, see Rome Statute of the International Criminal Court, *supra* note 50, at art. 8(2)(f). For the standard used by the ICTR, see *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgement, ¶¶ 619–20 (Sept. 2, 1998).

described the term “protracted armed violence” as turning on the intensity of the violence and encompassing considerations such as “the number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of weapons fired; the number of persons and type of forces partaking in the fighting; the number of casualties; [and] the extent of material destruction.”<sup>130</sup> Security Council attention is also deemed relevant.<sup>131</sup>

The International Committee of the Red Cross (ICRC) has similarly defined noninternational armed conflicts as “protracted armed confrontations” that involve a “minimum level of intensity.”<sup>132</sup>

## 2. Identifying the Zone

Consistent with treaty and case law, overt and sustained fighting are key factors in identifying a zone of active hostilities. Specifically, the fighting must be of sufficient duration and intensity to create the exigent circumstances that justify application of extraordinary war authorities, to put civilians on notice, and to justify permissive evidentiary presumptions regarding the identification of the enemy.<sup>133</sup> The presence of troops on the

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<sup>130</sup> Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgement, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008). For a sample of additional cases that have applied the *Tadic* standard to determine the existence of an armed conflict, see Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶¶ 41-43, 343-47 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2007), <http://www.icty.org/x/cases/martic/tjug/en/070612.pdf>; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 233-37 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF>; Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶¶ 14-40 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004), [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.pdf](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.pdf); and Prosecutor v. Delali, Case No. IT-96-21-T, Judgement, ¶¶ 182-187 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), [http://www.icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.pdf](http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf).

<sup>131</sup> See, e.g., Prosecutor v. Limaj, Bala & Musliu, Case No. IT-03-66-T, Judgement, ¶ 90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005), <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf> (describing “whether the conflict has attracted the attention of the United Nations Security Council” as a relevant factor in identifying the existence of an armed conflict); *Delali*, No. IT-96-21-T at ¶ 190 (citing the attention of the Security Council to the conflict in Bosnia as evidence that fighting there “was clearly intense”); see also Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT’L L. (forthcoming 2013) (providing an excellent discussion of the ways in which this test has ossified in a manner inconsistent with international humanitarian law).

<sup>132</sup> INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 5 (March 2008) (emphasis omitted), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>. As in the *Tadic* opinion, the ICRC also includes as a second factor the requirement that the parties involved “show a minimum [level] of organisation.” *Id.* (emphasis omitted).

<sup>133</sup> Treaty and case law also provide relevant guidance for determining the factors to which one should look in analyzing duration and intensity. See Blank, *supra* note 118, at 33-34 (compiling

ground is a significant factor, although neither necessary nor sufficient to constitute a zone of active hostilities. Action by the Security Council or regional security bodies such as NATO, as well as the belligerent parties' express recognition of the existence of a hot conflict zone, are also relevant.

Linking the zone of active hostilities primarily to the duration and intensity of the fighting and to states' own proclamations suffers, however, from an inherent circularity. A state can itself create a zone of active hostilities by ratcheting up violence or issuing a declaration of intent, thereby making previously unlawful actions lawful.<sup>134</sup>

It is impossible to fully address this concern. The problem can, however, be significantly reduced by insisting on strict compliance with the law-of-war principles of distinction and proportionality and by vigorously punishing states for acts of aggression.<sup>135</sup> There will, of course, be disagreement as to whether a state's escalation of a certain conflict constitutes aggression, particularly given underlying disagreements about who qualifies as a lawful target. The zone approach is helpful in this regard as well: it narrows the range of disagreement by demanding heightened substantive standards as to who qualifies as a legitimate target outside the zones of active hostilities. Under the zone approach, the escalation of force must be aimed at a narrower set of possible military targets until the increased use of force is sufficiently intense and pervasive enough to create a new zone of active hostilities.

### 3. Geographic Scope of the Zone

A secondary question relates to the geographic scope of the zone of active hostilities. In answering the related question of the scope of the overarching armed conflict, the *Tadic* court defined the conflict as extending throughout the state in which hostilities were conducted (in the case of international armed conflict)<sup>136</sup> and the area over which a party had territorial control (in the case of a noninternational armed conflict that did not extend

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criteria drawn from international criminal cases for evaluating the intensity of hostilities in the context of a transnational conflict with a non-state terrorist actor).

<sup>134</sup> This problem also is inherent in the *Tadic* definition of armed conflict, which makes intensity of the violence a determinative factor in identifying the existence of armed conflict.

<sup>135</sup> See the discussion of the principles of distinction and proportionality, *supra* notes 48-50, and accompanying text.

<sup>136</sup> See *Prosecutor v. Tadic*, No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 68 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (concluding that in international armed conflict "the very nature of the Conventions—particularly Conventions III and IV—dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose").

throughout an entire state).<sup>137</sup> Neither approach, however, maps well onto the practical realities of a transnational conflict between a state and a non-state actor. In many cases, the non-state actor and related hostilities will be concentrated in a small pocket of the state. It would be contrary to the justifications of exigency and proper notice to define the zone of active hostilities as extending to the entire state. A territorial control test also does not make sense when dealing with a non-state actor, such as al Qaeda, which does not exercise formal control over any territory and is driven more by ideology than territorial ambition.

This Article suggests a more nuanced, albeit still imperfect, approach: If the fighting is sufficiently widespread throughout the state, then the zone of active hostilities extends to the state's borders. If, however, hostilities are concentrated only in certain *regions* within a state, then the zone will be geographically limited to those administrative areas or provinces in which there is actual fighting, a significant possibility of fighting, or preparation for fighting. This test is fact-intensive and will depend on both the conditions on the ground and preexisting state and administrative boundaries.

It remains somewhat arbitrary, of course, to link the zone of hostilities to nation-state boundaries or administrative regions within a state when neither the state itself nor the region is a party to the conflict and when the non-state party lacks explicit ties to the state or region at issue. This proposed framework inevitably will incorporate some areas into the zone of active hostilities in which the key triggering factors—sustained, overt hostilities—are not present. But such boundaries, even if overinclusive or artificial, provide the most accurate means available of identifying the zone of active hostilities, at least over the short term.

Over the long term, it would be preferable for the belligerent state to declare particular areas to be within the zone of active hostilities, either through an official pronouncement by the state party to the conflict or via a resolution by the Security Council or a regional security body. A public declaration would provide explicit notice as to the existence and parameters of the zone of active hostilities, thereby reducing uncertainty as to which legal rules apply. Such declarations would allow for public debate and diplomatic pressure in the event of disagreement. Furthermore, the belligerent states could then define the zone with greater nuance, which would better

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<sup>137</sup> See *id.* ¶ 70 (“[I]nternational humanitarian law continues to apply[,] . . . in the case of internal conflicts, [to] the whole territory under the control of a party . . .”).

reflect the actual fighting than would preexisting state or administrative boundaries.<sup>138</sup>

Some likely will object that such an official designation would recreate the same safe havens that this proposal seeks to avoid. But a critical difference exists between a territorially restricted framework that effectively prohibits reliance on law-of-war tools outside of specific zones of active hostilities and a zone approach that merely imposes heightened procedural and substantive standards on the use of such tools. Under the zone approach, the non-state enemy is not free from attack or capture; rather, the belligerent state simply must take greater care to ensure that the target meets the enhanced criteria described in Section III.B.

### B. *Setting the Standards*

Law-of-war detention and lethal targeting outside a zone of active hostilities should be limited, not categorically prohibited. It should be focused on those threats that are clearly tied to the zone of active hostilities and other significant and ongoing threats that cannot be adequately addressed through other means. Moreover, a heightened quantum of information and other procedural requirements should apply, given the possibility and current practice of *ex ante* deliberation and review. Pursuant to these guiding principles, this Section proposes the adoption of an individualized threat requirement, a least-harmful-means test, and meaningful procedural safeguards for lethal targeting and law-of-war detention that take place outside zones of active hostilities.

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<sup>138</sup> Militaries, moreover, regularly make such designations. In the United States, for example, the “theater of war” is “[d]efined by the President, Secretary of Defense, or the geographic combatant commander” as “the area of air, land, and water that is, or may become, directly involved in the conduct of major operations and campaigns involving combat.” JOINT CHIEFS OF STAFF, JOINT PUBL’N 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 370 (2011), available at [http://ra.defense.gov/documents/rtnm/jp1\\_02.pdf](http://ra.defense.gov/documents/rtnm/jp1_02.pdf). The “theater of operations” is the “operational area defined by the geographic combatant commander for the conduct or support of specific military operations.” *Id.* (emphasis added). Similarly, the “area of operations” is “defined by the joint force commander for land and maritime forces.” *Id.* at 25. Another interesting approach would be to tie the geographic boundaries of the zone to the rules of engagement that apply therein. See, e.g., Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 818-27 (2008) (arguing that the use of status-based rules of engagement should trigger the application of the laws of war, including the attendant “regulatory obligations” derived therefrom).

### 1. An Individualized Threat Finding

The law of international armed conflict permits the detention and killing of members of the enemy force based on a legitimate expectation that individuals who are part of a formal, hierarchical enemy state army will be called upon to fight and thereby pose an ongoing threat. By comparison, the broad definition of “functional membership” put forth by the Executive and endorsed by the courts serves as a poor proxy for assessing threat in a conflict with a non-state actor.<sup>139</sup> Even assuming, *arguendo*, that the functional membership test provides an appropriate standard for detention and targeting within a zone of active hostilities, it is too permissive a standard outside such zones, for the reasons described in Part II. Outside of a zone of active hostilities, an individualized threat finding is needed to ensure that law-of-war detention and lethal targeting are employed in those situations in which the target actually poses an ongoing threat, consistent with the underlying rationale for the permissive use of force and detention without charge.<sup>140</sup>

Of course, there are a number of possible ways to define the threat. For *lethal targeting*, I suggest two such categories: (1) those involved in the active planning or operationalization of specific, imminent, and externally focused attacks, regardless of their relative hierarchical position in the organization; and (2) operational leaders who present a significant, ongoing, and externally focused threat, even if they are not implicated in the planning of a specific, imminent attack.<sup>141</sup> The first definition is a conduct-based test that prohibits

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<sup>139</sup> See *supra* notes 33-34 and accompanying text.

<sup>140</sup> An individualized threat finding also consistent with the ICRC's position that only those who assume a continuous combat function in the armed forces of a non-state party to the conflict or take a direct part in hostilities can be targeted in a conflict with a non-state actor. See *e.g.*, Al Aulqi Complaint, *supra* note 8, at 3. Adoption of such a standard promotes convergence between competing views of the rules that ought to apply. See Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1385-91 (2012) (arguing for a functional approach to the targeting and detention of non-state actors that allows for convergence of international human rights law and international humanitarian law based on a common set of principles that “focuses decisionmakers on the right questions and suggests comparative answers”). An individualized threat finding is also consistent with the ICRC's views and those of others who reject the notion of a membership test for non-state actors and instead argue that only those who “take a direct part in hostilities” can be targeted in a conflict with a non-state actor, subject to meaningful periodic reviews. Int'l Comm. of the Red Cross, *International Humanitarian Law*, *supra* note 10, at 43.

<sup>141</sup> In its recently released White Paper, the Department of Justice offers a definition of “imminent” threat that includes an operational leader who is “personally and continually involved in planning terrorist attacks against the United States,” even if the United States “does not have clear evidence that an attack on U.S. persons and interests will take place in the immediate future.” DOJ WHITE PAPER, *supra* note 17, at 7-8. Here, by contrast, I use “imminent” to refer to

the use of lethal force absent a specific, imminent, and significant threat. The second definition encompasses those who pose a continuous and significant threat given their leadership roles within an organization.<sup>142</sup> Whether an individual meets this threat requirement depends on the individual's role within the organization, his capacity to operationalize an attack, and the degree to which the threat is externally focused. For example, an al Shabaab operational leader, whose attacks are focused on the internal conflict between al Shabaab and Somalia's Transnational Federal Government, would not qualify as a legitimate target in the separate conflict between the United States and al Qaeda, even if he had demonstrated associations with al Qaeda. He might, however, be a legitimate target if he were involved in the planning of externally focused attacks and had demonstrated the capacity and will to operationalize the attacks.<sup>143</sup>

Such restrictions serve the important purpose of limiting state authority to target and kill to instances in which the individual poses an active, ongoing, and significant threat. The low-level foot soldier who is found thousands of miles from the hot conflict zone could not be targeted unless involved in the planning or preparation of a specific, imminent attack. Even mid-level operatives, such as the prototypical terrorist recruiter, would be off-limits, unless they were plotting, or recruiting for, a specific, imminent attack.<sup>144</sup> Such recruiters could, however, be prosecuted for providing material support to a terrorist organization.<sup>145</sup>

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temporal imminence. However, I also adopt a standard (option 2 above) that, in the context of an armed conflict, would permit the targeting of an individual who falls within DOJ's broader targeting criteria, *if* the individual poses a significant, ongoing, and externally focused threat and capture is not feasible.

<sup>142</sup> This categorization is similar to the definition of "imminent threat" offered in the DOJ White Paper. See DOJ WHITE PAPER, *supra* note 17, at 7-8. It is also analogous to the ICRC's distinction between persons who maintain a "continuous combat function" (CCF) in an organization and those who only sporadically engage with the organization. See MELZER, *supra* note 65, at 995. That concept, and the specific contours of who fits into the CCF framework, however, have been the subject of significant controversy—a debate that is beyond the scope of this Article.

<sup>143</sup> A secondary and critical question relates to the standard of proof on which decisionmakers rely to make an individualized threat finding. As Geoffrey Corn argues, the amount of information required for target identification should be greater for potential threats outside of a zone of active hostilities than for those within the zone. Corn, *supra* note 96, at 457-58. He specifically suggests a "clear and convincing" standard for lethal targeting in places like Yemen, Somalia, and Pakistan—a standard I support. *Id.* at 491-93.

<sup>144</sup> Cf. NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 1022 (2008) (discussing recruiting as an example of "indirect" participation, unless recruitment is for a specific, planned attack).

<sup>145</sup> See 18 U.S.C. § 2339B (2006 & Supp. III 2009) (making it a crime to "knowingly provide[] material support or resources to a foreign terrorist organization"); see also Kris, *supra* note 112, at 14



An individualized threat requirement also prohibits so-called “signature strikes,” in which anonymous groups of alleged al Qaeda members are targeted based on their pattern of activities without an individualized assessment of the threat posed by each of the targets.<sup>146</sup>

For *detention*, I suggest the same standards that apply to lethal targeting, as well as a third category of fighters whose actions are clearly linked to the zone of active hostilities. Under this standard, a low-level al Qaeda or Taliban foot soldier who is fleeing from or believed to be traveling in and out of the active conflict zone in Afghanistan could be subject to law-of-war detention.<sup>147</sup> However, once circumstances change, and the active conflict zone becomes a latent conflict zone, then this justification for law-of-war detention disappears.<sup>148</sup> Unless the detainee presents either a specific, imminent, and significant threat or the kind of ongoing, significant threat high-level leaders pose that would justify his continued detention, he would need to be either transferred to a third party government, released, or prosecuted—just as occurred with the detainees in U.S. custody in Iraq and is expected to eventually occur with respect to detainees in United States’ custody in Afghanistan.<sup>149</sup>

Those favoring such an additional category of detention may wonder why it should not also apply to targeting operations. Some are likely to argue that the low-level foot soldier should not be given a “free pass” if he travels to a region where capture is exceedingly risky and the other viable means of preventing his return to the fight is a targeted, lethal strike. It is worth noting, however, that the United States does not publicly defend the lethal targeting of the lone low-level fighter outside the hot conflict zone.

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n.47 (listing cases of defendants convicted of terrorism-related offenses, several of whom were convicted of providing material support).

<sup>146</sup> If, however, the Taliban and al Qaeda established a cross-border base camp to train and organize fighters and to coordinate further actions in the hot conflict zone, the region likely would qualify as an extension of the zone of active hostilities. This description arguably fits activity in parts of northwest Pakistan.

<sup>147</sup> He would not, however, be a legitimate subject of targeted killing unless he were deemed to pose a specific, imminent, externally-focused, and significant threat.

<sup>148</sup> Such a change in circumstances would include, for example, the United States’ withdrawal from Afghanistan.

<sup>149</sup> See, e.g., Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT’L L. 549, 595 (2011) (highlighting that by 2007, the United States regularly transferred detainees to Iraqi custody); Carol E. Lee & Adam Entous, *Obama to Speed Troop Exit*, WALL ST. J., Jan. 12, 2013, at A1 (discussing ongoing negotiations regarding the transfer of U.S.-held detainees to Afghan custody); Robert M. Chesney, *Daqduq Transferred to Iraq*, LAWFARE (Dec. 16, 2011), <http://www.lawfareblog.com/2011/12/daqduq-transferred-to-iraq> (marking the transfer of “the very last detainee held by the U.S. military in Iraq”).

Its defense of lethal targeting is instead focused on high-level leaders and others who pose a “significant threat.”<sup>150</sup> Moreover, the United States’ public defense of current practices does not include any historical examples—and I know of none—in which a state has tracked down and killed a low-level soldier far from the battlefield, even in a state-to-state conflict where combatants are relatively easy to identify and are clearly legitimate military targets. Rather, the main precedent upon which the United States relies to justify its lethal-targeting operations is the killing of Admiral Isoroku Yamamoto, the commander of the Imperial Japanese Navy’s combined fleet in World War II, who was shot down over the Pacific while en route to several forward-operating bases.<sup>151</sup>

Good reasons exist for this distinction between low-level foot soldiers and high-level operational leaders: the deliberate, lethal targeting of an individual or group of people is an extraordinary power that should be employed only when the security of the state so demands. The state should not be permitted to kill absent a strong basis for believing that the individual poses an active, ongoing, and significant threat. In a zone of active hostilities, particularly when troops are on the ground and exposed to risk, the low-level foot soldier arguably poses such a threat. Outside that zone, lethal force is not justified simply on the basis that an individual once attended a training camp and may have fought alongside al Qaeda members in Afghanistan, unless there is an additional basis for believing that he poses a specific and imminent, or ongoing and significant, threat.

Determining the proper approach for dealing with nonparadigmatic cases, however, will require additional work. There may be, for example, circumstances in which it will be appropriate for troops or other operatives to take custody of persons found with an identified target, even if it is not known whether they meet the requisite threat criteria. In these cases, a short-term period of detention should be permitted to determine whether the individuals meet the criteria for continued detention or if they can be charged with a crime and prosecuted.<sup>152</sup> As in all cases, the government should immediately notify the ICRC about any detainee in its custody and provide the ICRC prompt access to the detainee. An additional exception might be warranted if the non-state actor established some sort of headquarters or operational

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<sup>150</sup> See Brennan, Wilson Center Remarks, *supra* note 13 (“For example, when considering lethal force we ask ourselves whether the individual poses a significant threat to U.S. interests.”).

<sup>151</sup> See, e.g., Koh, *supra* note 17 (asserting that the killing of the architect of the attack on Pearl Harbor was a lawful operation because he was a “leader of an enemy force in an armed conflict” and a “belligerent[]”).

<sup>152</sup> Such short-term detention would also allow the state to gather potentially valuable intelligence regarding operational plans.

center far removed from the zone of active hostilities. In that case, the headquarters might be a legitimate military target, even if it would be infeasible to conduct an individualized assessment of each individual residing there. Finally, a grave-threat exception may be warranted to address a situation in which it is known that a specific, catastrophic attack will be launched from an identifiable location, even if the specific persons involved could not be individually described and identified.

## 2. Least-Harmful-Means Test: Targeted Killings

Some experts have suggested that a “least-harmful-means” or “least-restrictive-means” test should and does apply to all targeting killings associated with an armed conflict, whether or not they occur in a zone of active hostilities. Professor Ryan Goodman, in particular, has amassed strong support for this claim, although he also significantly limits the application of the rule to situations in which it does not pose any risk to the attacking force.<sup>153</sup> Other experts have criticized this claim, on, among others, the grounds that it would “inject potentially deadly hesitation into the targeting process.”<sup>154</sup> Assuming, *arguendo*, that the military need not weigh the possibility of capture when deciding whether to execute a strike in the zone of active hostilities, it appears to be an appropriate limiting criterion outside of such zones for two primary reasons.

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<sup>153</sup> See Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT’L L. (forthcoming 2013) (on file with author); see also MELZER *supra* note 18, at 289 (“[W]here the targeting of an individual is concerned, the restrictive aspect of military necessity as *informed* (and not: *balanced*) by humanitarian considerations requires that, whenever possible, even combatants be captured rather than killed.”); Ryan Goodman, *The Lesser Evil*, SLATE (Feb. 19, 2013) available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/02/the\\_obama\\_administration\\_and\\_drones\\_the\\_rule\\_of\\_law\\_is\\_capture\\_not\\_kill.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/the_obama_administration_and_drones_the_rule_of_law_is_capture_not_kill.html) (asserting that the least-restrictive-means test “does not require U.S. troops to endanger themselves to try to capture al-Qaida terrorists”).

<sup>154</sup> Robert Chesney, *Corn, Blank, Jenks, and Jensen Respond to Goodman on Capture-Instead-of-Kill*, LAWFARE (Feb. 25, 2013, 4:52 PM), <http://www.lawfareblog.com/2013/02/corn-blank-jenks-and-jensen-respond-to-goodman-on-capture-instead-of-kill> (posting a critique of Goodman’s argument in favor of a limited duty to capture); see also Jens David Ohlin, *The Kill–Capture Debate: Lost Legislative History or Revisionist History?* (Cornell Legal Studies Research Paper Mar. 8, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2230486](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230486) (critiquing Goodman’s argument that the law of war provides a duty of capture). But see Robert Chesney, *The Capture-vs-Kill Debate #6: Rejoinder to Goodman from Corn, Blank, Jenks, and Jensen*, LAWFARE (Mar. 1, 2013, 3:36 PM), <http://www.lawfareblog.com/2013/03/the-capture-vs-kill-debate-6-rejoinder-to-goodman-from-corn-blank-jenks-and-jensen> (critiquing Goodman’s position as “overstat[ing] the impact of his research by asserting the existence of a clear and obvious binding legal norm”). For additional commentary on this issue, see Robert Chesney, *The Capture-or-Kill Debate #10: Goodman Responds to Heller*, LAWFARE (Mar. 12, 2013, 1:13 PM), available at <http://www.lawfareblog.com/2013/03/the-capture-or-kill-debate-10-goodman-responds-to-heller> (compiling articles and postings on the duty to capture).

In such circumstances, there is often the time, and the need for advance planning and careful evaluation of possible plans of action for dealing with a specific target.<sup>155</sup> An evaluation of potential capture operations and the likely collateral damage and risk to the U.S. or partner forces if they were to engage in such operations should and could be incorporated into this advance planning.

Moreover, there are strong normative and practical reasons to minimize lethal targeting outside of zones of active hostilities, including the intrinsic value of life; the risk of both targeting error and collateral damage; and the costs to the rule of law of allowing the state to kill based on status determinations; and the ways in which such killings can cause resentment among the local population and ultimately undercut security gains. Several experts, including the former Director of National Intelligence, Dennis Blair, and the former Commander of U.S. troops in Afghanistan, General Stanley McChrystal, have warned of the blowback that excessive reliance on targeted killings can cause.<sup>156</sup> When it is feasible both to avoid loss of life and to eliminate the threat (and thereby obtain the desired military advantage), the state should do so. This is also consistent with the prevailing human rights-based norm that the state should not shoot to kill except in extreme circumstances, such as where actions are taken in self-defense or

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<sup>155</sup> See, e.g., Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 21, 2011, at 34 (featuring John Rizzo, the CIA's former acting general counsel, describing the creation of a "hit list"); Gregory McNeal, *Kill-Lists and Accountability* (Mar. 5, 2013) (manuscript at 17-29), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1819583](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819583) (detailing the planning process conducted by the United States prior to engaging in a targeted killing).

<sup>156</sup> See Dennis Blair, Op-Ed, *Drones Alone Are Not the Answer*, N.Y. TIMES, August 15, 2011, at A21. (describing the United States' "reliance on high-tech strikes that pose no risk to our soldiers [as being] bitterly resented in a country that cannot duplicate such feats of warfare without cost to its own troops"); David Alexander, *Retired General Cautions Against Overuse of Hated Drones*, REUTERS, Jan. 7, 2013, available at <http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mchrystal-idUSBRE90608O20130107> (quoting Retired General Stanley McChrystal as warning of the "resentment created by American use of unmanned strikes"); see also MICAH ZENKO, REFORMING U.S. DRONE POLICIES, COUNCIL OF FOREIGN RELATIONS: SPECIAL REPORT NO. 65, at 10-11 (2013), available at <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736?co=Co09601> (describing the strong correlation in Yemen between increased targeted killings since December 2009, heightened anger toward the United States, and sympathy with or allegiance to AQAP). General James E. Cartwright, the former vice chairman of the Joint Chiefs of Staff, has similarly warned of the "blowback" resulting from targeted killings that threatens to undermine long-term counterterrorism policies. See Mark Mazzetti & Scott Shane, *As New Drone Policy is Weighed, Few Practical Effects Are Seen*, N.Y. TIMES, Mar. 22, 2013, at A11 (describing and quoting General Cartwright's remarks).

defense of others, based on an imminent threat, and in the absence of other means of addressing the threat.<sup>157</sup>

This approach also appears to be consistent with U.S. practice, at least as it has been officially described. In the words of John Brennan, it is the “unqualified preference of the Administration to take custody” of suspected terrorists “whenever it is possible.”<sup>158</sup> This approach similarly maps onto what the Supreme Court of Israel—a court long accustomed to operating amidst state–nonstate actor hostility—has required. In *Public Committee Against Torture in Israel v. Israel*, that court ruled:

[A] civilian should not be attacked at a time that he is taking a direct part in hostilities if it is possible to act against him by means of a less harmful measure. . . . Therefore, if it is possible to arrest, interrogate and prosecute a terrorist who is taking a direct part in hostilities, these steps should be followed.<sup>159</sup>

The strength of such a test will, of course, ultimately depend on how much risk the state is expected to incur in order to pursue a capture operation, and how the state evaluates and weighs the relative risks and likelihood of success.<sup>160</sup> In some situations, a capture operation may actually yield more collateral damage than a targeted-killing operation. Additional questions relate to the temporal frame in which one makes the assessment and the role of the host government. What if the individual could be captured, but with a time delay that could be avoided by employing lethal targeting? What if a capture operation is deemed infeasible at a given point in time, but might become feasible if the target moved to another location? What if the host state will consent to a targeted-killing operation but does not cooperate in a capture operation or consent to boots on the ground?

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<sup>157</sup> See Kretzmer, *supra* note 80, at 202–04 (relying on a hybrid of international human rights standards and principles underlying the right of self-defense to argue similarly for a least-harmful-means test).

<sup>158</sup> Brennan, Harvard Law School Remarks, *supra* note 9; see also Brennan, Wilson Center Remarks, *supra* note 13 (reiterating the “unqualified preference . . . to only undertake lethal force when we believe that capturing the individual is not feasible”).

<sup>159</sup> HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel 62(1) PD 507, 572 [2006] (Isr.), translated in 2 Isr. L. Rep. 459, 503 [2006]. The Israeli Supreme Court requires an individualized assessment of each target. See *id.* at 571 (emphasizing the importance of “[p]roperly verified” information regarding the “identity and activity” of the target). But see Ohlin, *supra* note 9, at 23–25 (critiquing the Israeli Supreme Court’s conflation of human rights and humanitarian law principles).

<sup>160</sup> In this regard, it seems as if Goodman’s formulation of the least-restrictive-means test as requiring *no* risk to the attacking party will have minimal effect, particularly when the choice is between an unmanned drone and troops on the ground. See *supra* note 153 and accompanying text.

The answers to these questions necessarily involve case-by-case analyses. Relevant factors to consider include the seriousness of the threat posed; the likelihood that the individual who poses the potential threat could operationalize his plans; the threat's imminence; the previous success rate of capture operations in a particular region; known information about the target's likely behavior, including the likelihood of other opportunities to target or capture if this attempt fails; and risks to those involved in the capture operation.

A few clear-cut rules should apply. First, while the state need not assume extreme risk, there must be some acceptance of risk. Second, there should be a rebuttable presumption in favor of capture any time it is more likely than not that such an operation will be feasible. Third, a relatively short time delay should not render a capture operation infeasible unless a credible belief exists that the individual will attack during that period of delay. Fourth, a host government's lack of consent to a capture operation should not be deemed conclusive absent meaningful efforts to secure consent or cooperation.

### 3. Least-Harmful-Means Test: Detention

A least-harmful-means test should also inform long-term detention operations. Thus, even in cases where law-of-war detention is permitted (in that the individual meets the substantive standard for detention), long-term law-of-war detention should be limited to instances in which prosecution is infeasible. Efforts should be made to gather admissible evidence in order to develop a prosecutable case against the individual. In fact, the United States took this approach in the *Warsame* case, albeit as a matter of policy. Initially held in law-of-war detention, Warsame was, after approximately sixty days, moved to federal court for civilian trial.<sup>161</sup> Such a requirement protects against states selectively bypassing functioning domestic criminal justice institutions that can effectively address the threat. Such an approach also helps to legitimize the state's detention practices and delegitimize the enemy.<sup>162</sup>

Simply put, the farther from the hot battlefield, the more likely alternative law enforcement means of addressing the threat are available and effective. Where such means are available—as they are in Montreal, London, and, of course, the United States—there should be an explicit requirement that

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<sup>161</sup> See *supra* notes 1-2 and accompanying text.

<sup>162</sup> See, e.g., Philip Mudd, *The Right Way to Punish Al Qaeda*, WASH. POST, Dec. 30, 2011, at A17 (arguing that it is in the United States' security interests to treat al Qaeda fighters as murderers and charge them in civilian court).

they be employed. Where they are not available (as in Yemen or Somalia), additional tools may be justified, but only based on an actual showing of need.

#### 4. Procedural Requirements

Currently, officials in the executive branch carry out all such *ex ante* review of out-of-battlefield targeting and detention decisions, reportedly with the involvement of the President, but without any binding and publicly articulated standards governing the exercise of these authorities.<sup>163</sup> All *ex post* review of targeting is also done internally within the executive branch. There is no public accounting, or even acknowledgment, of most strikes, their success and error rates, or the extent of any collateral damage. Whereas the Department of Defense provides solatia or condolence payments to Afghan civilians who are killed or injured as a result of military actions in Afghanistan (and formerly did so in Iraq), there is no equivalent effort in areas outside the active conflict zone.<sup>164</sup>

Meanwhile, the degree of *ex post* review of detention decisions depends on the location of detention as opposed to the location of capture. Thus,

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<sup>163</sup> In a recent set of speeches, Obama Administration officials described some of the policy-based constraints on the exercise of their targeting authorities, but these are nonbinding limits. The recently leaked DOJ White Paper also purportedly describes circumstances in which a U.S. citizen could be targeted overseas. But the White Paper describes only one circumstance in which such killings are permissible, without setting any outer limits on that authority. DOJ WHITE PAPER, *supra* note 17. And at the same time that officials have articulated discretionary policy limits, they have also argued for an underlying and broad-based authority to target anyone deemed to be “part of” the enemy force. *See, e.g.*, Brennan, Wilson Center Speech, *supra* note 12 (arguing that the Administration has the legal authority to target the “literally thousands of individuals who are part of al-Qaida, the Taliban, or associated forces,” but noting that, in many cases, to do so would be unwise); *see also* DANIEL KLAIDMAN, KILL OR CAPTURE 117-43 (2012) (describing the difficulties the Obama Administration faced in developing a coherent legal justification for detention and targeting policies); Becker & Shane, *supra* note 113 (discussing the internal deliberations and the President’s highly personal involvement in determining targets outside zones of active hostilities). The lack of any clearly articulated standards was a source of obvious concern at the February 2013 Senate Intelligence Committee confirmation hearing on John Brennan’s nomination to be Director of the CIA. *See, e.g.*, Nomination of John O. Brennan to be the Director of the Central Intelligence Agency 55 (Feb. 7, 2013) (question of Sen. Ron Wyden to Mr. Brennan during hearing before S. Select Comm. on Intelligence, 113th Cong.), *available at* <http://intelligence.senate.gov/130207/transcript.pdf> (emphasizing the need for increased transparency and a “public conversation” about drones).

<sup>164</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE’S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 1-2 (2007) (asserting that the Department of Defense gave out about \$1.9 million in solatia payments and more than \$29 million in condolence payments to Iraqi and Afghan civilians between 2003 and 2006 and noting that these were not admissions of liability or fault, but rather were intended as expressions of sympathy or remorse).

Guantanamo detainees are entitled to habeas review, but detainees held in Afghanistan are not, even if they were captured far away and brought to Afghanistan to be detained.<sup>165</sup>

Enhanced ex ante and ex post procedural protections for both detention and targeting, coupled with transparency as to the standards and processes employed, serve several important functions: they can minimize error and abuse by creating time for advance reflection, correct erroneous deprivations of liberty, create endogenous incentives to avoid mistake or abuse, and increase the legitimacy of state action.

a. *Ex Ante Procedures*

Three key considerations should guide the development of ex ante procedures. First, any procedural requirements must *reasonably* respond to the need for secrecy in certain operations. Secrecy concerns cannot, for example, justify the lack of transparency as to the substantive targeting standards being employed. There is, however, a legitimate need for the state to protect its sources and methods and to maintain an element of surprise in an attack or capture operation. Second, contrary to oft-repeated rhetoric about the ticking time bomb, few, if any, capture or kill operations outside a zone of active conflict occur in situations of true exigency.<sup>166</sup> Rather, there is often the time and need for advance planning. In fact, advance planning is often necessary to minimize damage to one's own troops and nearby civilians.<sup>167</sup> Third, the procedures and standards employed must be transparent and sufficiently credible to achieve the desired legitimacy gains.

These considerations suggest the value of an independent, formalized, ex ante review system. Possible models include the Foreign Intelligence

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<sup>165</sup> *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010). This distinction has been justified based on the alleged security concerns associated with bringing civilian lawyers to a base in Afghanistan. *Cf. id.* at 97-98 (stating that Afghanistan is still subject to “the vagaries of war” while the United States is “answerable to no other sovereign” in Guantanamo). Such a rationale is not convincing, particularly after the military has since invited members of nongovernmental organizations to observe the administrative review proceedings that take place there.

<sup>166</sup> For excellent critiques of the excessive and unfounded claims of exigency justifying deprivation of certain liberties, see Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 307-12 (2009) and David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440-45 (2005).

<sup>167</sup> See Robert Chesney, Professor, Univ. of Tex. Law Sch., *Drones and the War on Terror: When Can the United States Target Alleged American Terrorists Overseas?* 6-7 (Feb. 27, 2013) (written statement to the H. Comm. on the Judiciary, 113th Cong.), available at [http://judiciary.house.gov/hearings/113th/02272013\\_2/Chesney%2002272013.pdf](http://judiciary.house.gov/hearings/113th/02272013_2/Chesney%2002272013.pdf) (highlighting the distinction between Stage One decisionmaking—during which officials engage in an extensive and often prolonged review of whether an individual is a legitimate target—and Stage Two decisionmaking—which involves target identification and operational decisionmaking).



Surveillance Court (FISC),<sup>168</sup> or a FISC-like entity composed of military and intelligence officials and military lawyers, in the mode of an executive branch review board.<sup>169</sup>

Created by the Foreign Intelligence Surveillance Act (FISA) in 1978,<sup>170</sup> the FISC grants *ex parte* orders for electronic surveillance and physical searches, among other actions, based on a finding that a “significant purpose” of the surveillance is to collect “foreign intelligence information.”<sup>171</sup> The Attorney General can grant emergency authorizations without court approval, subject to a requirement that he notify the court of the emergency authorization and seek subsequent judicial authorization within seven days.<sup>172</sup> The FISC also approves procedures related to the use and dissemination of collected information. By statute, heightened restrictions apply to the use and dissemination of information concerning U.S. persons.<sup>173</sup> Notably, the process has been extraordinarily successful in protecting extremely sensitive sources and methods. To date, there has never been an unauthorized disclosure of an application to or order from the FISC court.

An *ex parte* review system for targeting and detention outside zones of active hostility could operate in a similar way. Judges or the review board would approve selected targets and general procedures and standards, while still giving operators wide rein to implement the orders according to the approved standards. Specifically, the court or review board would determine whether the targets meet the substantive requirements and would

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<sup>168</sup> Senators Diane Feinstein (D-CA), Patrick Leahy (D-VT), and Angus King (I-ME) have recently advocated the adoption of a system to review the targeting of U.S. citizens. See Press Release of Angus King, U.S. Senator, King Offers Proposal to Review Targeted-Strikes (Feb. 13, 2012), available at <http://www.king.senate.gov/record.cfm?id=339592>; Carlos Muñoz, *Sens. Feinstein, Leahy Push for Court Oversight of Armed Drone Strikes*, THE HILL (Feb. 10, 2013), <http://thehill.com/blogs/defcon-hill/policy-and-strategy/282033-feinstein-leahy-push-for-court-oversight-of-armed-drone-strikes>. Robert Chesney has made a similar suggestion. See Chesney, *supra* note 167, at 2, 7-10 (outlining a proposal for *ex ante* judicial review of decisions to target U.S. citizens).

<sup>169</sup> Individuals would need to be appointed and supervised in a way that protects against political, bureaucratic, or command influence. The rules governing the appointment and supervision of Inspectors General provide a possible model. See 5 U.S.C. app. § 3 (2006). See also Neal K. Katyal, Op-Ed, *Who Will Mind the Drones?*, N.Y. TIMES, Feb. 21, 2013, at A27 (arguing for a national security court housed in the executive branch to review targeted killing decisions). *But see* Eugene Fidell, Letter to the Editor, *A Drone Panel Within the Executive Branch?*, N.Y. TIMES, Feb. 28, 2013, at A28 (criticizing Professor Katyal’s national security court proposal on policy and normative grounds).

<sup>170</sup> Pub. L. No. 95-115, 92 Stat. 1783 (1978) (codified as amended in 50 U.S.C. §§ 1801-1812 and scattered sections of 18 U.S.C.).

<sup>171</sup> 50 U.S.C. § 1804(a) (2006 & Supp. V 2011).

<sup>172</sup> *Id.* § 1805(e)(1).

<sup>173</sup> *Id.* § 1806.

evaluate the overarching procedures for making least harmful means-determinations, but would leave target identification and time-sensitive decisionmaking to the operators.<sup>174</sup>

Moreover, there should be a mechanism for emergency authorizations at the behest of the Secretary of Defense or the Director of National Intelligence. Such a mechanism already exists for electronic surveillance conducted pursuant to FISA.<sup>175</sup> These authorizations would respond to situations in which there is reason to believe that the targeted individual poses an imminent, specific threat, and in which there is insufficient time to seek and obtain approval by a court or review panel—as will likely be the case in instances of true imminence justifying the targeting of persons who do not meet the standards applicable to operational leaders. As required under FISA, the reviewing court or executive branch review board should be notified that such an emergency authorization has been issued; it should be time-limited; and the operational decisionmakers should have to seek court or review board approval (or review, if the strike has already taken place) as soon as practicable—but at most within seven days.<sup>176</sup>

Finally, and critically, given the stakes in any application—namely, the deprivation of life—someone should be appointed to represent the potential target's interests and put together the most compelling case that the individual is not who he is assumed to be or does not meet the targeting criteria.

The objections to such a proposal are many. In the context of proposed courts to review the targeting of U.S. citizens, for example, some have argued that such review would serve merely to institutionalize, legitimize, and expand the use of targeted drone strikes.<sup>177</sup> But this ignores the reality of their continued use and expansion and imagines a world in which targeted

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<sup>174</sup> This proposal tracks Chesney's analogous efforts to distinguish Stage One and Stage Two decisionmaking, and to protect Stage Two decisionmaking from ex ante judicial interference. See *supra* note 167. It also addresses one of the key concerns identified by former Department of Defense Counsel, Jeh Johnson. See Jeh Charles Johnson, A Drone Court: Some Pros and Cons, Keynote Address at the Center on National Security at Fordham Law School (Mar. 18, 2013) [hereinafter Johnson, Fordham Law School Remarks], available at <http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons> (warning against judges reviewing operational matters).

<sup>175</sup> See *supra* text accompanying note 172.

<sup>176</sup> Cf. 50 U.S.C. § 1805(e)(1)(D) (describing similar requirements for the Attorney General to authorize emergency use of electronic surveillance).

<sup>177</sup> See, e.g., Judson Berger, *US Senators Propose Assassination Court to Screen Drone Targets*, FOX NEWS (Feb. 11, 2011), <http://www.foxnews.com/politics/2013/02/11/us-senators-propose-assassination-court-to-screen-drone-targets> (quoting Professor Jonathan Turley as warning that applying a FISC-like review model to decisions to target U.S. citizens would "legitimize" the asserted authority "to kill citizens without charge or judicial review")

killings of operational leaders of an enemy organization outside a zone of active conflict is categorically prohibited (an approach I reject<sup>178</sup>). If states are going to use this extraordinary power (and they will), there ought to be a clear and transparent set of applicable standards and mechanisms in place to ensure thorough and careful review of targeted-killing decisions. The formalization of review procedures—along with clear, binding standards—will help to avoid ad hoc decisionmaking and will ensure consistency across administrations and time.

Some also condemn the ex parte nature of such reviews.<sup>179</sup> But again, this critique fails to consider the likely alternative: an equally secret process in which targeting decisions are made without any formalized or institutionalized review process and no clarity as to the standards being employed. Institutionalizing a court or review board will not solve the secrecy issue, but it will lead to enhanced scrutiny of decisionmaking, particularly if a quasi-adversarial model is adopted, in which an official is obligated to act as advocate for the potential target.

That said, there is a reasonable fear that any such court or review board will simply defer. In this vein, FISC's high approval rate is cited as evidence that reviewing courts or review boards will do little more than rubber-stamp the Executive's targeting decisions.<sup>180</sup> But the high approval rates only tell part of the story. In many cases, the mere requirement of justifying an application before a court or other independent review board can serve as an internal check, creating endogenous incentives to comply with the statutory requirements and limit the breadth of executive action.<sup>181</sup> Even if this system does little more than increase the attention paid to the stated requirements and expand the circle of persons reviewing the factual basis for the application, those features in and of themselves can lead to increased reflection and restraint.

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<sup>178</sup> See *supra* subsection III.B.1.

<sup>179</sup> See, e.g., Gabor Rona, *The Pro Rule of Law Argument Against a 'Drone Court'*, THE HILL, (Feb. 27, 2013), <http://thehill.com/blogs/congress-blog/judicial/285041-the-pro-rule-of-law-argument-against-a-drone-court> (warning that a "secret judicial process in which the right to life is at stake but the owner of that life has no say is an affront both to American values and international legal principles").

<sup>180</sup> See *id.* (warning of a court serving as "rubber stamp"); see also Katyal, *supra* note 169 (citing a 1 in 3000 odds of being rejected by the FISC, based on a record of rejecting just 11 out of more than 32,000 requests between 1979 and 2011).

<sup>181</sup> As then-Circuit Judge Anthony Kennedy noted, infrequent denials of applications do not necessarily reflect official acquiescence to the whims of the Executive, but instead evince a "practice of careful compliance with the statutory requirements on the part of the government"—or, at the very least, careful preparation of the court filings. *United States v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987).

Additional accountability mechanisms, such as civil or criminal sanctions in the event of material misrepresentations or omissions, the granting of far-reaching authority to the relevant Inspectors General, and meaningful ex post review by Article III courts,<sup>182</sup> are also needed to help further minimize abuse.

Conversely, some object to the use of courts or court-like review as stymying executive power in wartime, and interfering with the President's Article II powers.<sup>183</sup> According to this view, it is dangerous—and potentially unconstitutional—to require the President's wartime targeting decisions to be subject to additional reviews. These concerns, however, can be dealt with through emergency authorization mechanisms, the possibility of a presidential override, and design details that protect against ex ante review of operational decisionmaking. The adoption of an Article II review board, rather than an Article III–FISC model, further addresses some of the constitutional concerns.

Some also have warned that there may be no “case or controversy” for an Article III, FISC-like court to review, further suggesting a preference for an Article II review board.<sup>184</sup> That said, similar concerns have been raised with respect to FISA and rejected.<sup>185</sup> Drawing heavily on an analogy to courts' roles in issuing ordinary warrants, the Justice Department's Office of Legal Counsel concluded at the time of enactment that a case and controversy existed, even though the FISA applications are made ex parte.<sup>186</sup>

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<sup>182</sup> See, e.g., Stephen I. Vladeck, Professor, Am. Univ. Wash. Coll. of Law, Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas? 8-11 (Feb. 27, 2013) (written testimony submitted to the H. Comm. of the Judiciary, 113th Cong.), available at [http://judiciary.house.gov/hearings/113th/02272013\\_2/Vladeck%2002272013.pdf](http://judiciary.house.gov/hearings/113th/02272013_2/Vladeck%2002272013.pdf) (offering a very thoughtful proposal for an Article III ex post damages regime to review targeted killings).

<sup>183</sup> See, e.g., Johnson, Fordham Law School Remarks, *supra* note 174 (suggesting that a FISC-like court would interfere with the President's Commander-in-Chief authorities). This, however, appears to be a United States-specific objection. It is, for example, widely accepted in Israel that the courts have a role in reviewing targeted-killing operations. See, e.g., HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel 62(1) PD 507, 514 [2006] (Isr.), translated in 2 Isr. L. Rep. 459, 514-17 [2006] (asserting the court's authority to review targeted killings and discussing the scope of review).

<sup>184</sup> See Johnson, Fordham Law School Remarks, *supra* note 174; Vladeck, *supra* note 182, at 5-6 (describing Article III concerns).

<sup>185</sup> See, e.g., *In re Sealed Case*, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002) (per curiam) (concluding that there is no merit to an earlier objection to the “statutory responsibilities of the FISA court” that the court was “inconsistent with Article III case and controversies responsibilities of federal judges because of the secret, non-adversary process”).

<sup>186</sup> See *Foreign Intelligence Elec. Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 26-31 (1978) (memorandum of John M. Harmon, Ass't Att'y Gen., Office of Legal Counsel) (arguing that a “case or controversy” existed on the grounds that the judges would be ruling on a

Here, the judges would be issuing a warrant to kill rather than surveil. While this is significant, it should not fundamentally alter the legal analysis.<sup>187</sup> As the Supreme Court has ruled, killing is a type of seizure.<sup>188</sup> The judges would be issuing a warrant for the most extreme type of seizure.<sup>189</sup>

It is also important to emphasize that a reviewing court or review board would not be “selecting” targets, but determining whether the targets chosen by executive branch officials met substantive requirements—much as courts do all the time when applying the law to the facts. Press accounts indicate that the United States maintains lists of persons subject to capture or kill operations—lists created in advance of specific targeting operations and reportedly subject to significant internal deliberation, including by the President himself.<sup>190</sup> A court or review board could be incorporated into the existing *ex ante* decisionmaking process in a manner that would avoid interference with the conduct of specific operations—reviewing the target lists but leaving the operational details to the operators. As suggested above, emergency approval mechanisms could and should be available to deal with exceptional cases where *ex ante* approval is not possible.<sup>191</sup>

Additional details will need to be addressed, including the temporal limits of the court’s or review board’s authorizations. For some high-level operatives, inclusion on a target list would presumably be valid for some set period of

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“specific and concrete issue”; the ruling touches the legal relationship of the United States and the target of surveillance; it is conclusive; the judge is being asked to apply standards of law to the facts; and there is adversity in fact, even if both parties are not present at court). Others have emphasized the legal fiction that the subject of the warrant will have the opportunity to attack the warrant in a later criminal proceeding.

<sup>187</sup> See, e.g., Chesney, *supra* note 167, at 9 (noting the “razor-thin legal fiction” that a FISC warrant will ultimately be contested in an adversarial hearing). To the extent that this fiction is deemed key, it could be dealt with by creating an after-the-fact damages remedy and allowing litigants to contest the initial authorization during that process.

<sup>188</sup> See *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (“[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”).

<sup>189</sup> That said, this might be a task that judges do not wish to take on—a factor that may point to a preference for an Article II review board. See Michael B. Mukasey, Opinion, *How to Untangle an Incoherent Drone Policy*, WALL ST. J., Feb. 19, 2013, at A15 (“Judges have no basis or background that suits them to review targeting decisions and no way to gather facts independently.”); James Robertson, *Judges Should Not Decide About Drones Strikes*, WASH. POST, (Feb. 15, 2013), available at [http://articles.washingtonpost.com/2013-02-15/opinions/37117878\\_1\\_drone-strikes-justice-department-white-paper-federal-courts](http://articles.washingtonpost.com/2013-02-15/opinions/37117878_1_drone-strikes-justice-department-white-paper-federal-courts) (arguing against the preapproval of “kill lists” by federal judges).

<sup>190</sup> See Becker & Shane, *supra* note 113.

<sup>191</sup> The most persuasive argument, it seems to me, against any of these options is a political, not a policy, one—namely lack of faith in the political process to design a court or review board that is rational and appropriately limited along the lines suggested in this Article. That is a significant concern—but does not defeat the value of describing what such a scheme should look like, at least in theory.

time, subject to specific renewal requirements. Authorizations based on a specific, imminent threat, by comparison, would need to be strictly time-limited, and tailored to the specifics of the threat, consistent with what courts regularly do when they issue warrants.

In the absence of such a system, the President ought to, at a minimum, issue an executive order establishing a transparent set of standards and procedures for identifying targets of lethal killing and detention operations outside a zone of active hostilities.<sup>192</sup> To enhance legitimacy, the procedures should include target list reviews and disposition plans by the top official in each of the agencies with a stake in the outcome—the Secretary of Defense, the Director of the CIA, the Secretary of State, the Director of Homeland Security, and the Director of National Intelligence, with either the Secretary of Defense, Director of National Intelligence, or President himself, responsible for final sign-off.<sup>193</sup> In all cases, decisions should be unanimous, or, in the absence of consensus, elevated to the President of the United States.<sup>194</sup> Additional details will need to be worked out, including critical questions about the standard of proof that applies. Given the stakes, a clear and convincing evidentiary standard is warranted.<sup>195</sup>

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<sup>192</sup> See also Johnson, Fordham Law School Remarks, *supra* note 174 (arguing that “the President can and should institutionalize his own process, internal to the Executive Branch, to ensure the quality of the decisionmaking”). This option suffers from the obvious problem that it lacks any permanency and that the next administration can revoke or amend it with the stroke of a pen. That said, in the absence of legislation, it would provide a clear, and at least temporarily binding, statement of the standards and procedures that are being applied. While the Obama Administration has made a nod to increased transparency in a series of speeches by top national security officials, these speeches lack any prescriptive force and fail to set any binding limits on future actions. See Alston, *supra* note 54, at 308-18 (providing an excellent discussion of the importance of transparency in the standards and procedures used to identify targets).

<sup>193</sup> See Miller, *supra* note 117 (suggesting that such a process currently exists for targeted killings, including vetting by all the key agencies and sign-off by the President himself on targeted killings outside Pakistan); see also KLADMAN, *supra* note 163, at 200-23 (describing the vetting process). By formalizing and codifying this process in an Executive order, the President can help ensure that it will be followed in all cases, protect against deviations, promote transparency as to the standards and processes employed, and ensure that a particular individual or set of individuals bear final responsibility as the relevant decisionmakers.

<sup>194</sup> Recent reporting suggests that, as of May 2012, President Obama was reviewing all targeting decisions for Yemen and Somalia, as well as roughly a third of the targeting decisions for Pakistan. Becker & Shane, *supra* note 113. For an argument that presidential review is a good thing, see David Luban, *What Would Augustine Do? The President, Drones, and Just War Theory*, BOSTON REV. (June 6, 2012), [http://www.bostonreview.net/BR37.3/david\\_luban\\_obama\\_drones\\_just\\_war\\_theory.php](http://www.bostonreview.net/BR37.3/david_luban_obama_drones_just_war_theory.php).

<sup>195</sup> See Corn, *supra* note 96, at 493-94 (arguing that a clear and convincing standard creates a demanding burden while preserving the ability to take action when necessary).

While this proposal is obviously geared toward the United States, the same principles should apply for all states engaged in targeting operations.<sup>196</sup> States would ideally subject such determinations to independent review or, alternatively, clearly articulate the standards and procedures for their decisionmaking, thus enhancing accountability.

b. *Ex Post Review*

For *targeted-killing operations*, ex post reviews serve only limited purposes. They obviously cannot restore the target's life. But retrospective review either by a FISC-like court or review board can serve to identify errors or overreaching and thereby help avoid future mistakes. This can, and ideally would, be supplemented by the adoption of an additional Article III damages mechanism.<sup>197</sup> At a minimum, the relevant Inspectors General should engage in regular—and extensive—reviews of targeted-killing operations. Such post hoc analysis helps to set standards and controls that then get incorporated into ex ante decisionmaking. In fact, post hoc review can often serve as a more meaningful—and often more searching—inquiry into the legitimacy of targeting decisions. Even the mere knowledge that an ex post review will occur can help to protect against rash ex ante decisionmaking, thereby providing a self-correcting mechanism.

Ex post review should also be accompanied by the establishment of a solatia and condolence payment system for activities that occur outside the active zone of hostilities. Extension of such a system beyond Afghanistan and Iraq would help mitigate resentment caused by civilian deaths or injuries and would promote better accounting of the civilian costs of targeting operations.<sup>198</sup>

As for *detention* operations, detainees captured outside a zone of active hostilities should, at a minimum, be entitled to judicial habeas review, regardless of where they are detained. There should be a searching inquiry into the basis for detention, conducted, of course, in a way that protects

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<sup>196</sup> For a recent example of another powerful state considering the use of targeting killing, see Jane Perlez, *Chinese Plan to Kill Drug Lord with Drone Highlights Military Advances*, N.Y. TIMES, Feb. 20, 2013, at A5.

<sup>197</sup> See Vladeck, *supra* note 182; see also Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO. L. REV. 405, 440-45 (2009) (arguing for the availability of a post hoc *Bivens*-style action in which “a survivor of an attempted targeted killing or an appropriate next friend . . . claims that the attack was unconstitutional because it violated the Fifth Amendment on a ‘shock the conscience’ theory or because it constituted excessive force under the Fourth Amendment”).

<sup>198</sup> This proposal would obviously require that such killings be made public, even if initially conducted as a clandestine or covert operation.

sources and methods.<sup>199</sup> Use of hearsay should be permitted, consistent with the basic requirement that the detainee be provided sufficient information about the source of relevant information to be able to respond effectively.<sup>200</sup>

The detaining state should also provide additional periodic reviews to protect against the continued detention of individuals who no longer pose a threat—a procedure that the Obama Administration has announced, but not yet instituted, with respect to the Guantanamo detainees.<sup>201</sup> As suggested by Professors Matthew Waxman and Monica Hakimi, these review procedures should be amended to apply “increasingly stringent evidentiary standards” over time.<sup>202</sup> Such a requirement recognizes that the security benefits of detention often diminish over time (particularly if based on an individual’s involvement with a specific, lapsed—or foiled—plot), while the costs to

<sup>199</sup> See, e.g., *A. & Others v. United Kingdom*, App. No. 3455/05, Eur. Ct. H.R. § 96 (2009), <http://www.unhcr.org/refworld/docid/499d4a1b2.html> (ruling that an individual subjected to a “control order” must be provided with sufficiently detailed allegations to allow him to instruct his attorney on a meaningful response (citing *Sec’y of State for the Home Dep’t v. MB(FC)*, [2007] UKHL 46, [65]-[67], [85], [90] (appeal taken from Eng.))). A similar standard should govern here.

<sup>200</sup> Cf. *Latif v. Obama*, 666 F.3d 746, 779 (D.C. Cir. 2011) (Tatel, J., dissenting) (warning that the “presumption of regularity” given to the government’s intelligence reports “comes perilously close to suggesting that whatever the government says must be treated as true” and “it is hard to see what is left of the Supreme Court’s command in *Boumediene* that habeas review be ‘meaningful’” (citations omitted)); Stephen I. Vladeck, *The D.C. Circuit after Boumediene*, 41 SETON HALL L. REV. 1451, 1466-67, 1489 (2011) (noting the ways in which the D.C. Circuit’s rulings have substituted “some” review for what ought to be a “meaningful” review of the legal and factual basis for detention).

<sup>201</sup> Pursuant to a 2011 Executive order, continued “detention is warranted for a detainee . . . if it is necessary to protect against a significant threat to the security of the United States.” Exec. Order No. 13,567, 3 C.F.R. 227, 227 (2011). Detainees are entitled to full executive branch reviews every three years, at which point they are represented by a government-appointed “personal representative” and permitted to submit “relevant information” and call “reasonably available” witnesses. *Id.* at 13, 228-29. File reviews are conducted every six months in the intervening years. *Id.* at 229. Pursuant to the National Defense Authorization Act of 2012, the final decision to release or transfer a Guantanamo Bay detainee is vested with the Secretary of Defense. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1023, 125 Stat. 1298, 1564-65 (2011) (to be codified at 10 U.S.C. § 801). As of January 2013, however, such reviews had not yet commenced.

<sup>202</sup> Hakimi, *supra* note 82, at 413; see also Waxman, *supra* note 55, at 1412 (proposing an “escalating standard of certainty” for subsequent reviews, where a higher burden of proof is required to keep someone in detention). *But see* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 736 n.204 (2009) (suggesting that such an approach will affect only the “marginal cases” because initially strong evidence is “unlikely to be weakened by the passage of time” and will likely “suffice to justify an extended detention”). The current procedures employed by the Obama Administration would need to be amended to incorporate this recommendation.



personal liberty increase.<sup>203</sup> Thus, while the initial review might employ a reasonable belief or probable cause standard, subsequent reviews might employ a preponderance-of-evidence or clear-and-convincing standard. Moreover, at some point, continued detention arguably crosses from preventive to punitive; when that point is reached, there should be a requirement of either prosecution or release.

#### IV. ADDITIONAL APPLICATIONS AND IMPLEMENTATION: TWENTY-FIRST CENTURY CONFLICTS, SELF-DEFENSE, AND INCORPORATION INTO U.S. LAW

This Part looks ahead, explaining how the framework laid out in this Article can and should be implemented not only in the current conflict, but also in future conflicts.

##### A. *Diffuse Conflicts*

This Article has assumed the existence of one or more zones of active hostilities, involving either a large-scale military presence or consistent aerial attacks. But what happens when no such center of gravity exists? Professor Anne-Marie Slaughter predicts that future conflicts are unlikely to resemble those in Afghanistan and Iraq, which involved the large-scale ground invasion of one state by others.<sup>204</sup> Rather, they are more likely to involve targeted operations conducted by special forces and intelligence operatives without any active zone of hostilities.<sup>205</sup> In fact, this description may fit the situation in Afghanistan once the United States and NATO remove their troops.<sup>206</sup>

Such a situation raises two distinct questions: First, can there be an armed conflict without a zone of active hostilities? Second, if so, what rules apply? Answering the first question depends on a fact-intensive analysis of

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<sup>203</sup> Cf. CrimA 6659/06 Anonymous v. Israel 62(4) PD 329, 396 [2008] (Isr.), translation available at [http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf) (“The longer the period of the administrative detention, the greater the weight of the prisoner’s right to his personal liberty when balanced against considerations of public interest, and therefore the greater the onus placed upon the competent authority to show that it is necessary to continue holding the person concerned in detention.” (citation and internal quotation marks omitted)).

<sup>204</sup> Anne-Marie Slaughter, *War and Law in the 21st Century: Adapting to the Changing Face of Conflict*, EUROPE’S WORLD, Autumn 2011, at 32.

<sup>205</sup> See *id.*

<sup>206</sup> See Johnson, Oxford Remarks, *supra* note 14 (describing a future “tipping point” at which the United States will no longer be in an “armed conflict against al Qaeda and its associated forces” but rather will focus its counterterrorism efforts against “individuals who are the scattered remnants of al Qaeda”).

the nature of the conflict, applying the factors laid out in *Tadic*.<sup>207</sup> Is the fighting of sufficient intensity and duration to qualify as an armed conflict? Is there an organized group that the belligerent state is fighting? This Article is based on the premise that once these threshold requirements are met, the conflict extends to where the belligerent parties operate, but that the rules for targeting and detention vary depending on whether one is acting within a zone of active hostilities. Similarly, if a single organization engages in sustained and intense attacks against an opposing state, an armed conflict may exist, even if the attacks emanate from multiple locations and lack a central zone of activity. That said, there would need to be strong and convincing evidence to establish that ongoing attacks and threat of attack emanated from a single organization and were of sufficient intensity and duration to justify the assertion of an armed conflict.<sup>208</sup> In such a situation, the more restrictive substantive and procedural standards would apply throughout the entire conflict.

### B. *Self-Defense Killings*

Absent the existence of an armed conflict, the United States—supported by a number of scholars—will turn increasingly to a self-defense theory to justify actions that would otherwise be conducted under a law-of-war framework. The United States has already suggested that certain targeted killings that have taken place outside of Afghanistan and northwest Pakistan are legitimate under both an armed-conflict and a self-defense justification.<sup>209</sup> Statements by CIA General Counsel Stephen Preston suggest that self-defense is in fact the primary basis for the CIA's targeted-killing operations, with law-of-war authorities acting as a backstop.<sup>210</sup> Meanwhile,

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<sup>207</sup> See *supra* notes 129-31 and accompanying text.

<sup>208</sup> There is a strong argument that al Qaeda will no longer meet this standard once the United States leaves Afghanistan and there ceases to be a zone of active conflict there. See, e.g., Chesney, *supra* note 167, at 10-11 (“The United States is drawing down in Afghanistan, and though it may maintain forces there, it is more likely than not that the use of force in Afghanistan beyond 2014 will resemble current uses of force in Yemen, Somalia, or Pakistan—i.e., episodic, low-intensity uses of force that will generate dispute as to whether an armed conflict exists and whether the laws of war are relevant.”); cf. Johnson, Oxford Remarks, *supra* note 14 (describing the possible end of the conflict, but declining to say if or when that point is near).

<sup>209</sup> See, e.g., Koh, *supra* note 17 (“[A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense . . . .” (emphasis added)). See generally *supra* note 17

<sup>210</sup> See Stephen W. Preston, Gen. Counsel, CIA, Remarks at Harvard Law School (Apr. 10, 2012), available at <https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/>

scholars and European allies who reject the idea that the United States is engaged in a transnational armed conflict with al Qaeda nonetheless agree that the United States may act in self-defense against those al Qaeda operatives who pose an imminent threat, regardless of where they are located.<sup>211</sup>

However, the standards as to which actions are permitted under a claim of self-defense are equally—if not more—contested and underdeveloped as the standards governing targeting and detention in a transnational armed conflict.<sup>212</sup> Is anticipatory self-defense permitted? Under what circumstances? How do the standards of “necessity” and “proportionality” apply? Even if human rights standards are deemed applicable, under what circumstances do self-defense killings violate the prohibition on the arbitrary deprivation of life?<sup>213</sup>

Assuming, *arguendo*, that, consistent with the U.S. view, some uses of anticipatory self-defense are permitted, the framework described in Part III offers a general approach for beginning to limit and legitimize the scope of acceptable self-defense killings as well. Critically, the standards for who could be targeted would need to be stringently limited to those who pose an actual, significant, and imminent threat that cannot be addressed by other means. Such an approach provides the benefits of increased transparency and procedural protections—including meaningful *ex post* reviews—and explicitly limits self-defense killing only in situations where capture is infeasible.

Additional work is needed to flesh out the precise standards for concluding that a threat justifies action in self-defense. But by applying the general approach described in Part III both to lethal targeting that takes place outside a zone of active hostilities in the course of an armed conflict

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cia-general-counsel-harvard.html (commenting that for the authority to act, “we need look no further than the inherent right of national self-defense, which is recognized by customary international law”).

<sup>211</sup> See, e.g., Brennan, Harvard Law School Remarks, *supra* note 9 (describing the views of key U.S. allies that use of force outside of “hot” battlefields” would be permissible as a matter of self-defense only in response to an “imminent” threat); Paust, *supra* note 77, at 280 (“During a lawful self-defense response, targeted killings and the capture of non-state actor fighters and others who are directly and actively engaged in non-state actor armed attacks can be permissible no matter where such forms of direct participation occur.”). *But see* O’Connell, *supra* note 70, at 14 (examining what constitutes a lawful exercise of self-defense under international law, and concluding that “[a]n armed response to a terrorist attack will almost never meet these parameters”).

<sup>212</sup> See, e.g., Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (describing “self-defense” as “one of the most contested issues in all of public international law”), in *LEGISLATING THE WAR ON TERROR* 346, 366 (Benjamin Wittes ed., 2009).

<sup>213</sup> See generally Kretzmer, *supra* note 80, at 177-83 (examining the contours of the “right to life” under the international human rights regime).

and to killings undertaken in self-defense outside an armed conflict, states can begin to develop a clear and consistent set of practices to regulate targeted killings outside the conflict zone.<sup>214</sup> Such an approach furthers the important goal of creating and protecting a stable set of expectations as to the rules that apply to these killings. The approach serves to limit the state's use of premeditated lethal force to instances in which the targets pose a profound and ongoing threat that cannot be dealt with through other means. Finally, the framework protects against the perverse situation in which self-defense justifications are used as end-runs around the more restrictive set of law-of-war rules proposed here.

### C. *Implementation and Security Benefit*

One might be skeptical that a nation like the United States would ever accept such constraints on the exercise of its authority. There are, however, several reasons why doing so would be in the United States' best interest.

First, as described in Section II.B, the general framework is largely consistent with current U.S. practice since 2006. The United States has, as a matter of policy, adopted important limits on its use of out-of-battlefield targeting and law-of-war detention—suggesting an implicit recognition of the value and benefits of restraint.

Second, while the proposed substantive and procedural safeguards are more stringent than those that are currently being employed, their implementation will lead to increased restraint and enhanced legitimacy, which in turn inure to the state. As the U.S. Counterinsurgency Manual explains, it is impossible and self-defeating to attempt to capture or kill every potential insurgent: “Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power” by increasing their own legitimacy at the expense of the insurgent's legitimacy.<sup>215</sup> The Counterinsurgency Manual further notes, “[E]xcessive use of force, unlawful detention . . . and punishment without trial” comprise “illegitimate actions” that are ultimately “self-defeating.”<sup>216</sup> In this vein, the Manual advocates moving “from combat operations to law enforcement as

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<sup>214</sup> Cf. Hakimi, *supra* note 140, at 1372, 1387-91 (arguing for a “functional” approach to detaining and targeting non-state enemy actors).

<sup>215</sup> U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 3-24: COUNTERINSURGENCY para. 1-129 (2006).

<sup>216</sup> *Id.* para. 1-132; *see also id.* para. 1-128 (“[K]illing every insurgent is normally impossible. Attempting to do so can also be counterproductive in some cases; it risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge.”).

quickly as feasible.”<sup>217</sup> In other words, the high profile and controversial nature of killings outside conflict zones and detention without charge can work to the advantage of terrorist groups and to the detriment of the state. Self-imposed limits on the use of detention without charge and targeted killing can yield legitimacy and security benefits.<sup>218</sup>

Third, limiting the exercise of these authorities outside zones of active hostilities better accommodates the demands of European allies, upon whose support the United States relies. As Brennan has emphasized: “The convergence of our legal views with those of our international partners matters. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies—who, in ways public and private, take great risks to aid us in this fight.”<sup>219</sup> By placing self-imposed limits on its actions outside the “hot” battlefield, the United States will be in a better position to participate in the development of an international consensus as to the rules that ought to apply.

Fourth, such self-imposed restrictions are more consistent with the United States’ long-standing role as a champion of human rights and the rule of law—a role that becomes difficult for the United States to play when viewed as supporting broad-based law-of-war authority that gives it wide latitude to employ force as a first resort and bypass otherwise applicable human rights and domestic law enforcement norms.

Fifth, and critically, while the United States might be confident that it will exercise its authorities responsibly, it cannot assure that other states will follow suit. What is to prevent Russia, for example, from asserting that

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<sup>217</sup> *Id.* para. 1-131; see also Alexander, *supra* note 156 (quoting Stanley McChrystal as fearing that drone strikes “exacerbate[] a ‘perception of American arrogance’”); Blair, *supra* note 156 (noting that the continued use of drone strikes impedes the goal of destroying al Qaeda and advocating that the United States should partner with Pakistan to improve “local government on the ground”); Mudd, *supra* note 162 (warning that the treatment of al Qaeda as “a powerful movement meriting a military response” provides as “boon to al-Qaeda, allowing its fighters to argue that they remain a strategic threat”). Mudd is the former deputy director of the CIA’s Counterterrorism Center and served as senior intelligence adviser to the FBI from 2009 to 2010. *Id.*

<sup>218</sup> See Brennan, Wilson Center Remarks, *supra* note 13 (emphasizing that “going after every single [member of al Qaeda, the Taliban, or associated forces] . . . would neither be wise nor . . . effective”).

<sup>219</sup> Brennan, Harvard Law School Remarks, *supra* note 9; see also John B. Bellinger III, Partner, Arnold & Porter LLP, Drones and the War on Terror: When Can the U.S. Target Alleged Americans Overseas? 9 (Feb. 27, 2013) (testimony before the H. Comm. on the Judiciary, 113th Cong.), available at [http://judiciary.house.gov/hearings/113th/02272013\\_2/Bellinger%2002272013.pdf](http://judiciary.house.gov/hearings/113th/02272013_2/Bellinger%2002272013.pdf) (warning of concerns posed by key allies with respect to U.S. targeted-killing operations); Ravi Somaiya, *Drone Strike Prompts Suit, Raising Fears for U.S. Allies*, N.Y. TIMES, Jan. 31, 2013, at A4 (describing concerns among British intelligence officers that they could face prosecution for sharing intelligence with the United States that is used in drone strikes).

it is engaged in an armed conflict with Chechen rebels, and can, consistent with the law of war, kill or detain any person anywhere in the world which it deems to be a “functional member” of that rebel group? Or Turkey from doing so with respect to alleged “functional members” of Kurdish rebel groups? If such a theory ultimately resulted in the targeted killing or detaining without charge of an American citizen, the United States would have few principled grounds for objecting.

Capitalizing on the strategic benefits of restraint, the United States should codify into law what is already, in many key respects, national policy. As a first step, the President should sign an Executive order requiring that out-of-battlefield target and capture operations be based on individualized threat assessments and subject to a least-harmful-means test, clearly articulating the standards and procedures that would apply. As a next step, Congress should mandate the creation of a review system, as described in detail in this Article. In doing so, the United States will set an important example, one that can become a building block upon which to develop an international consensus as to the rules that apply to detention and targeted killings outside the conflict zone.

#### CONCLUSION

Legal scholars, policymakers, and state actors are embroiled in a heated debate about whether the conflict with al Qaeda is concentrated within specific geographic boundaries or extends to wherever al Qaeda members and associated forces may go. The United States’ expansive view of the conflict, coupled with its broad definition of the enemy, has led to a legitimate concern about the creep of war. Conversely, the European and human rights view, which confines the conflict to a limited geographic region, ignores the potentially global nature of the threat and unduly constrains the state’s ability to respond. Neither the law of international armed conflict (governing conflicts between states) nor the law of noninternational armed conflict (traditionally understood to govern intrastate conflicts) provides the answers that are so desperately needed.

The zone approach proposed by this Article fills the international law gap, effectively mediating the multifaceted liberty and security interests at stake. It recognizes the broad sweep of the conflict, but distinguishes between zones of active hostilities and other areas in determining which rules apply. Specifically, it offers a set of standards that would both limit and legitimize the use of out-of-battlefield targeted killings and law of war-based detentions, subjecting their use to an individualized threat assessment, a least-harmful-means test, and significant procedural safeguards. This

approach confines the use of out-of-battlefield targeted killings and detention without charge to extraordinary situations in which the security of the state so demands. It thus limits the use of force as a first resort, protects against the unnecessary erosion of peacetime norms and institutions, and safeguards individual liberty. At the same time, the zone approach ensures that the state can effectively respond to grave threats to its security, wherever those threats are based.

The United States has already adopted a number of policies that distinguish between zones of active hostilities and elsewhere, implicitly recognizing the importance of this distinction. By adopting the proposed framework as a matter of law, the United States can begin to set the standards and build an international consensus as to the rules that ought to apply, not only to this conflict, but to future conflicts. The likely reputational, security, and foreign policy gains make acceptance of this framework a worthy endeavor.