International Law Studies - Volume 85
The War in Afghanistan: A Legal Analysis
Michael N. Schmitt (Editor)

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Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, al Qaida and the Limits of the Associated Militia Concept

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In response to a Committee for Human Rights inquiry related to the targeted killing of an alleged al Qaida operative in Yemen, the United States asserted:

> The Government of the United States respectfully submits that inquiries related to allegations stemming from any military operations conducted during the course of an armed conflict with Al Qaida do not fall within the mandate of the Special Rapporteur.
>
> . . .
>
> Al Qaida and related terrorist networks are at war with the United States . . . .
>
> Despite coalition success in Afghanistan and around the world, the war is far from over. The Al Qaida network today is a multinational enterprise with operations in more than 60 countries.[1]

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This assertion of the existence of an armed conflict between al Qaida and the United States was both clear and emphatic, specifically rejecting the proposition that the killing was governed by human rights norms. It also represents what many believe is a radical theory of law: that an armed conflict can exist between a State and a transnational non-State entity.[2]

In no location has this latter proposition been more contested than in Afghanistan. Although al Qaida may very well operate in over sixty countries around the world, the reality is that almost all the US military effort directed against that enemy has occurred in Afghanistan, where much of that effort has been intertwined with the effort to defeat the Taliban armed forces. Because of the contiguous nature of these operations, most scholars and law of armed conflict (LOAC) experts have asserted from the outset of Operation Enduring Freedom that operations directed against al Qaida in Afghanistan are subsumed within the broader armed conflict in Afghanistan. Accordingly, they reject categorically the suggestion that there was, or is, in Afghanistan a distinct armed conflict between the United States and al Qaida.[3] Instead, operations directed against al Qaida were initially just a component of the broader international armed conflict between the US-led coalition and the Taliban regime, and thereafter of the non-international armed conflict between the Kharzai government and its coalition backers and the remnants of the Taliban.

But if the premise asserted in the US response excerpted above is valid—that an armed conflict does exist between the United States and al Qaida—the question of the nature of that conflict in Afghanistan is arguably more complex. By staking out a new category of armed conflict, what I have labeled in previous articles as transnational armed conflict, the United States created the potential to treat the contiguous conflicts in Afghanistan as distinct.

Such a theory of conflict bifurcation has potentially profound consequences. If there was and is only one armed conflict in Afghanistan, then rights and obligations related to al Qaida operatives must be analyzed under the regulatory regime related to that broader conflict. This would impact a wide array of legal issues, ranging from status of detainees, transferability and command responsibility to jurisdiction related to criminal sanction for violation of the LOAC. If, in contrast, the conflict between the United States and al Qaida occurring in Afghanistan is treated as distinct from the conflicts related to the Taliban, a far more uncertain legal framework would dictate a distinct package of rights and obligations vis-à-vis al Qaida. This framework would be, at best, composed of general LOAC principles, perhaps supplemented by policy extension of conventional LOAC provisions.[4]

This article will analyze the two primary impediments to recognizing such a bifurcated conflict theory. The first of these is related to recognition in the context of an

international armed conflict—that in such a context al Qaida is properly and exclusively treated as a militia or volunteer group associated with the Taliban armed forces. The second is related to recognition in the context of a non-international armed conflict—that unless al Qaida is an element of the insurgent forces fighting against the Kharzai government, operations conducted against al Qaida cannot be characterized as armed conflict but must instead be characterized as extraterritorial law enforcement.

A theory of bifurcated armed conflict is concededly unconventional. Even if such a theory is viable in the abstract, it is particularly problematic in relation to the conflict in Afghanistan. This is because of the unavoidable reality that unlike the type of "one off" operations exemplified by the Predator strike that generated the Department of State assertion above, operations in Afghanistan directed against al Qaida are geographically and often operationally contiguous with those directed against the Taliban. Further complicating the theory is that operations conducted *by* al Qaida were, and are often are, intertwined with those conducted by the Taliban. However, these complicating realities only highlight the ultimate question: does all this mean that the legal character of the armed conflicts themselves *must* be contiguous? It is precisely because the United States has asserted the existence of a distinct armed conflict with al Qaida that this question must be critically considered.

Transnational Armed Conflict: Has Reality Outpaced Legality?

Defining the nature of the armed conflict against al Qaida—if there can be such an armed conflict—is obviously critical to this analysis. As I have asserted in previous articles,[5] the traditionally understood law-triggering paradigm that evolved from the development of Common Articles 2 and 3 of the Geneva Conventions proved insufficient to respond to the need for battlefield regulation of counterterror combat operations.[6] These operations, particularly those conducted in response to the attacks of September 11, 2001 reflect the reality that the basic regulatory framework of the law of armed conflict must be triggered by *any* armed conflict. Because this is the critical predicate for the application of a bifurcated conflict theory to Afghanistan, this section (reproduced with light edits from my prior article, "Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict"[7]) will explain the underlying rationale for a transnational, or *any,* armed conflict theory.

The "either/or" law-triggering paradigm of Common Articles 2 and 3[8] proved generally sufficient to address the types of armed conflicts occurring up until 9/11. However, this fact no longer justifies the conclusion that no other triggering

standard should be recognized. Instead, as the events since 9/11 have illustrated so convincingly, such recognition is essential in order to keep pace with the evolving nature of armed conflicts themselves. The prospect of an unregulated battlefield is simply unacceptable in the international community, a fact demonstrated by the response to the conflict in Lebanon.[9] The ultimate question, therefore, is whether it is best to continue to try and fit the proverbial square "armed conflict" peg into the round "Common Article 3" hole, or whether the time has come to acknowledge that the essential trigger for application of basic LOAC principles is just armed conflict, irrespective of the enemy or the location.

The stress on the existing paradigm of law of war application reflected in the diverging conclusions of both the DC Circuit and the Supreme Court in the *Hamdan* case is in no way fatal to the ability of the law to adapt to the necessities of the changing nature of warfare. All law is adaptive, but this is particularly true with regard to the LOAC, a conclusion illustrated by the fact that this law has endured for centuries. This area of international legal regulation has been historically resilient precisely because the law has always responded to the changes in the nature of warfare. Perhaps more importantly, these responses have been implemented in a manner considered credible by States and the armed forces called upon to execute military conflicts.

It is essential that the applicability of the principles of the laws of war—principles that operate to limit the brutality of war and mitigate the suffering of victims of war—not be restricted by an overly technical legal triggering paradigm. Accordingly, the ongoing evolution in the nature of warfare requires acknowledgment that *any* armed conflict triggers the foundational principles of the laws of war. If this outcome is achieved by characterizing such military operations as "Common Article 3" conflicts that trigger the humane treatment obligation *plus* additional customary LOAC principles, the regulatory purpose of the law can be achieved. However, because Common Article 3 conflicts have become generally synonymous with *internal* conflicts, it is more pragmatic to expressly endorse a hybrid category of armed conflict: *transnational* armed conflict.[10]

The recognition of this "hybrid" category would not render Common Articles 2 or 3 irrelevant. Instead, these articles would continue to serve as triggers for application of the treaty provisions to which they relate. But this new category would be responsive to the rapidly changing nature of warfare, a change that creates an increased likelihood that States will resort to the use of combat power to respond to threats posed by non-State armed entities operating outside their territory. Such armed conflicts justify a more precise interpretation of the de facto conditions that trigger the foundational principles of the laws of war, supporting the conclusion that any de facto armed conflict serves as such a trigger. Common Articles 2 and 3

would then serve to trigger layers of more defined regulation in some ways redundant to, and in other ways augmenting, these principles. This "layered" methodology will ensure no conflict falls outside the scope of essential baseline regulation, while preserving the technical triggers for more detailed regulation required by application of specific treaty provisions.

This bifurcated methodology of distinguishing between treaty provisions per se and the principles providing the foundation for these treaty provisions was an essential aspect of the first major international war crimes trial since the advent of Common Articles 2 and 3. In the seminal decision defining the jurisdiction of the first international war crimes tribunal since World War II, *Prosecutor v. Tadic*,[11] the International Criminal Tribunal for the former Yugoslavia (ICTY), an ad hoc war crimes court created by the United Nations Security Council to prosecute alleged war criminals from the conflict that followed the breakup of the former Yugoslavia, relied on a similar methodology. The Tribunal was able to sustain many war crimes allegations only by extending to the realm of non-international armed conflict fundamental principles of the laws of war derived from treaty articles applicable only to international armed conflicts.[12] According to this seminal decision, the requirements for application of individual criminal responsibility under Article 3 of its Statute (vesting the Tribunal with competence to adjudicate violations of the laws or customs of war) were that "(i) the violation must constitute an infringement of a rule of international humanitarian law" and "(ii) the rule must be customary in nature *or, if it belongs to treaty law*, the required conditions must be met . . . ."[13] Accordingly, the Tribunal relied on this methodology to fill a regulatory gap essential to establish individual criminal responsibility in relation to the armed conflict, the exact same logic that supports a further reliance on this methodology to regulate transnational armed conflicts.

The pragmatic logic of adopting an *ipso facto* application of these fundamental principles to *any* armed conflict suggested in the *Tadic* ruling has also been at the core of US military policy for decades. It also provided the *ratio decidendi* for the *Hamdan* majority holding that the principle of humane treatment applied to the armed conflict between the United States and al Qaida. The *Hamdan* majority endorsed a modified version of the Common Article 2/3 "either/or" paradigm. The scope of international armed conflict defined by Common Article 2 was left intact. However, instead of endorsing the intra-State qualifier to the alternate "type" of armed conflict, the Court concluded that the term "non-international" as used in Common Article 3 operates in juxtaposition to international armed conflicts, and therefore covers *all* armed conflicts falling outside the scope of Common Article 2. Accordingly, the Court determined that a non-international armed conflict

includes the traditional category of internal armed conflicts, *but also* extraterritorial armed conflicts between a State and non-State forces. As Justice Stevens noted:

> The Court of Appeals thought, and the Government asserts, that common article 3 does not apply to Hamdan because the conflict with al Qaeda, being "'international in scope,'" does not qualify as a "'conflict not of an international character.'" That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." Common article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-à-vis the nonsignatory if "the latter accepts and applies" those terms. Common article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in common article 2 chiefly because it does not involve a clash between nations (whether signatories or not). *In context, then, the phrase "not of an international character" bears its literal meaning.*[14]

This interpretation of the scope of Common Article 3 was the essential predicate to the Court's holding that the procedures established by the President for the military commission violated the laws of war. It is also thoroughly consistent with the view that all situations of armed conflict require regulation, the view that has motivated US military policy for decades.

Recognition that combat is an endeavor that must trigger an effective regulatory framework is derived from a long-standing history of self-imposed regulatory codes adopted by professional armed forces. As is suggested by A.P.V. Rogers in his book *Law on the Battlefield*,[15] prior to the development of the legal "triggering mechanisms" controlling application of this regulatory framework, armed forces did not appear to consider "conflict typing" as an essential predicate for operating within the limits of such a framework. While it is true that throughout most of history this framework took the form of self-imposed limits on warrior conduct,[16] these limits provided the seeds for what are today regarded as the foundational principles of the laws of war.[17] Thus, the pragmatic military logic reflected in both the *Hamdan* decision and the Department of Defense law of war policy is deeply rooted in the history of warfare.

This history undoubtedly includes examples of combat operations conducted by the regular armed forces of States against non-State armed groups prior to the

development of Common Article 3. These operations ranged from colonial expeditions to what would today be characterized as "coalition" operations, such as the multinational response to the Boxers in China. In his book *Savage Wars of Peace*,[18] Max Boot provides several examples of such combat operations conducted by the armed forces of the United States prior to the Second World War, ranging from the conflict against the Barbary Pirates to the punitive expedition against Pancho Villa. Armed forces executing such operations must have invoked what today would be characterized as the principle of military necessity, asserting the authority to take all measures not forbidden by international law necessary to achieve the prompt submission of their opponents. However, these forces must have also respected what would today be regarded as the principle of humanity, as understood in historical context.[19] While the nature of the constraint on the conduct of these operations may have been understood more in terms of "chivalry" and less in terms of law,[20] the basic premise that runs through this history to the contemporary battlefield is that combat operations trigger a framework of regulation necessary for disciplined operations. Today, this framework is best understood not in terms of a chivalric code, but in terms of compliance with the principles of necessity, humanity, distinction and the prohibition against inflicting unnecessary suffering.[21]

It is, of course, improper to assert that the pre-1949 history of military operations supports a conclusion that armed forces regarded such operations as triggering legal obligations. On the contrary, the international legal character of the laws of war in relation to contemporary warfare was based primarily on treaties that applied to conflicts between States. This point is emphasized by Professor Green in his book *The Contemporary Law of Armed Conflict:*

> Historically, international law was concerned only with the relations between states. As a result, the international law of armed conflict developed in relation to inter-state conflicts was not in any way concerned with conflicts occurring within the territory of any state or with a conflict between an imperial power and a colonial territory.[22]

However, this history does suggest that the seeds that grew into the foundational principles of the contemporary laws of war extended to the realm of internal armed conflict by the *Tadic* ruling and applied to all US military operations by way of policy were derived from these internal military codes. Indeed, the fact that the contemporary laws of war find their origins in the practices of armed forces is also highlighted by Professor Green: "the law of armed conflict is still governed by those principles of international customary law which have developed virtually since feudal times . . . ."[23] It therefore seems significant that armed forces did not historically qualify application of these internal codes of conflict regulation on the

character of the armed conflict. Nor can it be legitimately asserted that armed forces bound by such internal codes were employed exclusively in the realm of State-versus-State conflict. While this may have been the most common type of their combat operations, the history of the nineteenth and twentieth centuries also include military engagements falling outside this category.[24]

Nonetheless, the historical context of the range of combat operations engaged in by regular armed forces during this critical period of legal development is significant when assessing appropriate scope of application of the contemporary principles of the laws of war. This history supports the inference that regular armed forces historically viewed combat operations—or armed conflict—as an *ipso facto* trigger for principles that regulated combatant conduct on the battlefield. This history is also instructive in exposing the fact that this "basic framework" concept was severely strained during the years between the First and Second World Wars. This strain was exacerbated by the fact that the scope of the emerging treaty-based regulatory regime was strictly limited to "war," which was understood in the classic terms of a contention between States.[25]

In this regard, it also seems relevant that even Common Article 2 was a response to a perceived failure of the traditional expectation that armed forces would apply a regulatory framework derived from either the laws and customs of war or internal disciplinary codes when engaged in "war" between States.[26] The rejection of "war" as a trigger for application of the laws of war during inter-State conflicts in favor of the "armed conflict" trigger was an attempt to prevent what one might understand as "bad faith avoidance" of compliance with the customary standards related to the *jus in bello*.[27] The qualifier of "international" was, as indicated in the International Committee of the Red Cross (ICRC) *Commentary*, an effort to emphasize that specific provisions of the Geneva Conventions were triggered by armed conflicts conducted under State authority.[28] However, as that same *Commentary* indicates, it is the "armed conflict" aspect of military operations that distinguish such activities—and the law that regulates them—from the wide range of government activities not involving the application of combat power by armed forces. It is therefore thoroughly consistent with the purpose and history of the Geneva Conventions to place principal emphasis on the existence of armed conflict when assessing the appropriate trigger for the foundational principles reflected in those and other law of war treaties.

This general concept—that the need to provide effective regulation of de facto armed conflicts warrants resort to foundational principles reflected in treaties that are technically inapplicable to a given conflict—was also endorsed by the International Criminal Tribunal for the former Yugoslavia. In *Prosecutor v. Tadic*,[29] the Tribunal held that "an armed conflict exists whenever there is a resort to armed

force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[30] Of course, because the question before this Tribunal dealt with application of the laws of war to international and/or internal armed conflict, or a combination thereof, the significance of this language is primarily related to these traditional categories of armed conflict.[31] What was far more significant about this decision was the recognition that non-international armed conflicts trigger a regime of regulation more comprehensive than only humane treatment. In ruling on the obligations applicable to participants in such non-international armed conflicts that provide a basis for individual criminal responsibility, the Tribunal looked beyond the humane treatment mandate of Common Article 3. In addition to this obligation, the Tribunal concluded that many of the fundamental rules related to the methods and means of warfare applicable in international armed conflicts had evolved to apply as a matter of customary international law to non-international armed conflicts.[32] While the Tribunal noted that this evolution did not result in a "mechanical transfer" of rules from one category of armed conflict to the other, this ruling clearly encompassed what are characterized by many sources as the foundational principles of the law of war.[33] According to the ruling, these principles

> cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[34]

The wisdom of the *Tadic* judgment recognizing the necessity of extending principles originally associated with international armed conflicts into the realm of non-international armed conflict logically extends to both internal and transnational armed conflicts. Indeed, there seemed to be virtually no hesitation among legal scholars and diplomatic officials for demanding application of these principles to the recent conflict in Lebanon.[35] Obviously, the alternate was unthinkable—that intense combat operations could fall beyond the scope of any legal regulation. Nor would application of the *Hamdan* ruling satisfy the perceived necessity to regulate such a conflict, as that ruling in no way addressed application of principles regulating the methods and means of warfare. Instead, the reaction to the conflict indicated an emerging international expectation that participants in such conflicts—and especially State forces—would be legally bound to comply with a range of law

of war principles intended to mitigate the suffering inflicted by combat operations. This evolution is achieving the imperative proposed below by Professor Roberts:

> [I]n anti-terrorist military operations, certain phases and situations may well be different from what was envisaged in the main treaties on the laws of war. They may differ from the provisions for both international and non-international armed conflict. Recognising that there are difficulties in applying international rules in the special circumstances of anti-terrorist war, the attempt can and should nevertheless be made to apply the law to the maximum extent possible.[36]

In short, the logic animating the Department of Defense law of war *policy,* first extended to the realm of internal armed conflicts by the *Tadic* Tribunal, had been further extended to the realm of transnational armed conflicts. This evolution essentially treats the foundational principles of the law of armed conflict as a layer of regulation upon which more comprehensive treaty regimes are built. In so doing, it addresses the pragmatic necessity of regulation of de facto armed conflicts, while preserving the continuing significance of the Common Article 2 applicability criteria.

The Contiguous Conflict Dilemma: Does Any Association Create a Unified Armed Conflict?

Acknowledging that certain military operations conducted by the United States against al Qaida trigger basic LOAC principles does not in and of itself mandate a bifurcated conflict approach to Afghanistan. Instead, the viability of a distinct conflict theory vis-à-vis al Qaida mandates analysis of whether the facts related to operations in Afghanistan render such operations under this category or under the broader category of the armed conflict against the Taliban. This analysis must then turn on the relationship between al Qaida in Afghanistan and the Taliban.

The LOAC, specifically Article 4A(2) of the Third Geneva Convention Relative to the Treatment of Prisoners of War (GPW), specifically addresses the status of militia or volunteer corps personnel associated with a State party to an international armed conflict. That article provides that so long as certain conditions are satisfied, such personnel are to be treated as prisoners of war upon capture, suggesting that their status is no different from that of members of the armed forces. This in turn suggests that such militia and volunteer corps personnel are essentially connected to the international armed conflict triggering application of the convention and Article 4.

This provision provides the strongest basis to assert a unified armed conflict theory for Afghanistan. Indeed, this is the conventional approach to addressing the

conflict classification issue related to al Qaida. The logic of this unified conflict theory is quite simple: Article 4 provides a basis to treat militia or volunteer corps personnel as prisoners of war; this suggests that such personnel are connected to the international armed conflict triggering Article 4; accordingly, their treatment pursuant to Article 4 indicates that their operations must be within the context of the broader international armed conflict.

While this logic is certainly appealing, it has unquestionably been undermined by the emergence of a transnational armed conflict theory. Prior to this development in the law, the presumption that armed groups operating in association with a State party to a conflict were part of that international armed conflict was conclusive, because no alternate theory of armed conflict could apply to such groups. However, if it is conceptually possible that such groups can be involved in a distinct armed conflict with the State party opposing the forces with which they are associated, this presumption can no longer be considered conclusive, but is instead better understood as rebuttable.

It therefore seems more appropriate to treat al Qaida personnel operating in Afghanistan in association with the Taliban as presumptively part of the international armed conflict between the United States and Afghanistan. Pursuant to this presumption, the status and treatment of captured al Qaida personnel would be pursuant to Article 4A(2) of the GPW: if they met the express qualification requirements of that article they were prisoners of war; if they did not they were civilians who had taken part in hostilities (with all the targeting and liability consequences that flow from such participation). Was there, however, a legitimate basis to treat this presumption as rebutted? Answering this question requires consideration of the underlying purpose and meaning of the "associated militia" provision of the GPW.

Article 4A(2) of the GPW was developed for a very clear purpose: to ensure that individuals fighting on behalf of a party to an international armed conflict who met certain qualification conditions could claim the protections of prisoner of war status. The ICRC *Commentary* to this provision indicates that the primary source of disagreement among delegates to the drafting conference was the treatment of partisan and resistance groups in occupied territories. However, one aspect of the development of this provision seems clear: there is no disagreement that any organized group claiming the benefit of Article 4 must be fighting *on behalf* of a State party. According to the *Commentary*

> [i]t is essential that there should be a *de facto* relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit

> agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting.[37]

Thus, while such a relationship need not take the form of a formal agreement or declaration, it is clear that the militia must be operating on behalf of the State. As the *Commentary* notes, organized militia groups that are *not* fighting on behalf of a party to the conflict do not benefit from Article 4, but instead "the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a 'Party to the conflict.'"[38] This comment seems to explicitly recognize that geographically contiguous armed conflicts are indeed subject to legal bifurcation.

The emphasis of connection to a State party is also manifest in the provision of Article 4 granting prisoner of war status to members of armed forces fighting on behalf of a belligerent State authority not recognized by an opponent State. Treatment of such individuals apparently did not generate disagreement among the delegates to the drafting sessions, precisely because it was clear the belligerent conduct of such forces was conducted on behalf of a de facto State authority:

> At the Conference of Government Experts, delegations immediately approved the International Committee's proposal for a special clause to cover "members of armed forces claiming to be under an authority not recognized by the enemy." It was feared, however, that the proposal might be open to abusive interpretation, and the Conference therefore decided to add that such forces must, in order to benefit by the Convention, be fighting "in conjunction" with a State recognized as a belligerent State by the enemy.[39]

This express "in conjunction" language was removed in subsequent drafts, but only because it was clear that the situation that motivated the provision—the treatment of forces fighting on behalf of the Free French authority during World War II—made it clear that the provision would only be applicable when the "in conjunction" component was satisfied. Accordingly, the significance of fighting on behalf of a "State" remained the *sine qua non* for such application.

Few experts would likely dispute the conclusion that fighting on behalf of a State party is a condition precedent to application of Article 4 of the GPW. However, what exactly does this mean? Unfortunately, the ICRC *Commentary* provides virtually no guidance, a likely result of the fact that the primary concern for the drafters at the time Article 4 was revised was not this condition, but the four "combatant qualification" conditions required by Article 4A(2). However, the lack of discussion on this condition does not justify the conclusion that it has no substantive meaning.

What does seem clear from the spirit and purpose of Article 4 is that the association of an organized militia group to a State party must be more than merely incidental. Simple geographic continuity of operations does not in itself seem to rise above the concept of incidental association, a fact implicitly acknowledged by the *Commentary* when it indicates that some militia groups might fall under the non-international armed conflict legal regime. However, does a shared operational objective suffice to move beyond incidental association to the type of association required to trigger Article 4? In the opinion of this author, the answer is no.

The "on behalf" of language used by the ICRC *Commentary* to explain the meaning of article 4A(2) suggests more than a shared operational objective; it suggests that the militia or volunteer group be seeking to achieve that objective for the primary purpose of contributing to the State's strategic objective. Thus, for a militia group to be operating "on behalf" of a State party, its operations must be "nested" within the strategic and operational objectives of the State and its regular armed forces. If the militia group is operating for the purpose of achieving its own independent strategic objectives, the mere fact that some of these objectives might be shared by the State party, or that the operational implementation of these distinct objectives leads the militia group to collaborate with the State party in tactical execution, does not warrant the conclusion that it is operating on behalf of the State.

There is a legitimate argument that it was this latter type of linkage that defined the Taliban–al Qaida association in Afghanistan when the United States initiated operations against both these entities. There is no indication that al Qaida was subordinate to the Taliban in either a *de jure* or de facto sense. On the contrary, all indicators suggest that al Qaida had established what could be characterized as a parasitic relationship with the Taliban—using the territory and resources offered by the Taliban to further its own independent strategic goals. In many ways, this reflects a perverse inversion of the type of association envisioned by the drafters of the GPW. Instead of al Qaida militia operating under the command and control of the Taliban, Taliban forces were ostensibly subordinated to al Qaida command and control to serve al Qaida interests.[40]

It also seems clear that the events that caused the United States to target al Qaida with combat power—the terror attacks of September 11—were not conducted "on behalf" of Afghanistan. While it is undisputed that al Qaida had exploited the safe haven provided to it by the Taliban, this was at the time merely the latest base of operations al Qaida had exploited.[41] There is no evidence to indicate that al Qaida launched the terror attacks of September 11 at the direction of the Taliban or to further some Taliban strategic objective. On the contrary, the independent nature of these attacks resulted in the destruction of the Taliban regime.

All of this supports the conclusion that the association between al Qaida and the State of Afghanistan was insufficient to support the presumption of Article 4 applicability discussed above. If al Qaida initiated an armed attack on the United States as a distinct strategic objective, the mere fact that the military response to that attack led the United States to engage in armed conflict with the State that provided safe haven to al Qaida does not necessarily justify the legal windfall of lodging the conflict with al Qaida within the realm of the international armed conflict against Afghanistan.

The alternate conclusion is, of course, not without merit. It is certainly plausible that at least within the confines of Afghanistan, the conflict between the United States and al Qaida should be treated as derivative of the broader conflict between the United States and Afghanistan. But proponents of this theory should be required to muster more than mere geographic continuity, or even shared tactical objectives. The linkage between these two entities must reflect that al Qaida operated in a derivative capacity to the Taliban armed forces, for only such evidence can confirm the presumption that al Qaida was in fact operating "on behalf of" a party to the conflict.

If al Qaida was not sufficiently connected to the Taliban in Afghanistan to qualify as operating on behalf of a party to the conflict, then what was the nature of military operations conducted by the United States against al Qaida forces in Afghanistan? As I have argued elsewhere and outlined above, the de facto conflict nature of such operations indicates that they should be considered to qualify as an armed conflict triggering the basic regulatory framework of LOAC principles. Others, however, argue that unless military operations against al Qaida fall within the broader context of an armed conflict with Afghanistan, such operations are nothing more than extraterritorial law enforcement. It is to the fallacy of this proposition that this article will now turn.

The Fallacy of Extraterritorial Law Enforcement as a Legal Model for Transnational Counterterrorism Military Operations

One of the most difficult issues related to military operations directed against transnational terrorist operatives (what I will refer to throughout this section as counterterror military operations) has been determining the appropriate legal framework applicable to such operations. Since the United States characterized its response to the terror attacks of September 11, 2001 as an "armed conflict," the well accepted standards for determining when the law of armed conflict is triggered have been thrown into disarray. In the years following that tragic attack, a variety of legal theories have been offered to identify the appropriate locus of such operations

within the international legal regulatory continuum. These have ranged from the US position that such operations are armed conflicts triggering LOAC-derived authorities (although what type of armed conflict remains allusive), to the ICRC assertion that such operations are merely derivative of international armed conflicts triggered whenever a State conducts military operations in the territory of another State, to the assertion of human rights organizations that these operations fall under the human rights regulatory framework because armed conflict between States and transnational non-State entities is a legal impossibility.

The skeptical reaction to the US assertion of a LOAC-based legal framework is unsurprising considering the breadth of that assertion typified by the hyperbolic characterization of a "Global War on Terror." But just as the nature of the military component of the international struggle against highly organized terrorist groups is much more refined than the broad concept of a "global war," so must be the analysis of which legal framework operates to regulate such military operations. Suggesting that the struggle against terrorism justifies invoking the "authorities of war" for every aspect of counterterrorism operations—from detaining a terrorist "foot soldier" on what is in all respects a conventional battlefield to capturing a terrorist operative with law enforcement assets in the midst of a peaceful domestic environ—is unjustifiably overbroad. But it is also unjustifiably under-inclusive to demand that military operations launched for the purpose of employing combat power against terrorist targets cannot be conducted pursuant to the LOAC legal framework because those operations fail to satisfy a law-triggering paradigm that evolved with an almost exclusive focus on inter-State or intra-State armed conflicts.

The stakes related to determining the applicable legal regime to regulate counterterror military operations are enormous. Not only do they have profound impact on the rights and liberties of individuals captured and detained in the course of such operations, but whether operations are conducted under the LOAC legal framework or under the alternate human rights framework fundamentally impacts the authority of State forces to employ combat power. Nor will pigeonholing every operation under the inter-State conflict framework always produce a logical result. While offering the benefit of application of the LOAC, such an approach—for example, treating the 2006 conflict between Israel and Hezbollah as a subset of an armed conflict between Israel and Lebanon—results in what many consider to be an unjustified benefit for non-State forces, namely the opportunity to qualify for the privilege of combatant immunity.

But determining the *nature* of an armed conflict is secondary to determining the very existence of armed conflict. It is this issue—i.e., whether an armed conflict can even exist outside the inter-State/intra-State paradigm—that generates the most

fundamental debate related to the military component of the fight against international terror groups. For the United States, the answer is an unequivocal "yes." However, this in no way indicates a consensus on this issue; far from it. Instead, many experts in international law have insisted that such operations are not armed conflicts, but instead "extraterritorial law enforcement" operations.

This alternate legal framework was recently emphasized by Professor Yoram Dinstein, certainly one of the international community's most respected *jus belli* scholars. During the conference which inspired this article, Professor Dinstein articulated what he asserted was the clear and simple legal framework for the conduct of transnational counterterror military operations. According to Dinstein, such operations qualify as armed conflict under only two circumstances: first, when the operations are essentially derivative to an armed conflict with the State sponsor of the terrorist organization; second, when the actions of the terrorist organization can be attributed to a sponsoring State as the result of terrorist authority over organs of the State. All other uses of force against such a threat must, according to Dinstein, be regarded as what he labels extraterritorial law enforcement. Accordingly, he categorically rejected the proposition that such operations could amount to armed conflict.

I will attempt the unenviable task of challenging the clarity and simplicity of Professor Dinstein's extraterritorial law enforcement theory. I will do so because I believe his conception of the legal characterization of counterterror military operations employing combat power is fundamentally inconsistent with the underlying nature of such operations. A far more important motive, however, is my conviction that under appropriate circumstances treating such operations as events that trigger LOAC obligations is much more consistent with the logic, history and spirit of that law than attempting to characterize them as law enforcement missions.

Context for this argument is critical. I do not suggest that there cannot be certain uses of the armed forces that do appropriately fall under a law enforcement legal paradigm. Instead, the nature of military operations I will focus on involve the application of combat power by the armed forces against a designated target or group. For point of reference and clarity, the focus of this article are those military operations conducted by the armed forces against non-State actors operating outside the State's territory pursuant to what are essentially status-based rules of engagement. If, as suggested above, operations conducted by the United States against al Qaida personnel in the context of Operation Enduring Freedom in Afghanistan can legitimately be segregated from the broader armed conflict against the Taliban, they would fall into this category. Other examples include the 2007 US AC 130 strike against an alleged al Qaida base camp in Somalia and the Israeli campaign against Hezbollah in southern Lebanon during the 1990s and again in 2006.

Determining the nature of such military operations is central to the ongoing struggle against transnational terrorism. Past and future military operations conducted to destroy, disable or disrupt the capabilities of such organizations have and will remain operationally and legally complex. More significantly, they will continue to strain the accepted construct for determining LOAC applicability. The depth of entrenchment of this construct no doubt explains Professor Dinstein's hostility to the suggestion that such operations could, under certain circumstances, qualify as armed conflicts for purposes of triggering LOAC obligations. However, any assessment of the controlling legal framework for these military operations must contemplate not only the "accepted" scope of the current law-triggering paradigm, but also the underlying purpose that motivated that paradigm. Perhaps of equal importance is the necessity to consider the second- and third-order consequences of characterizing these operations as law enforcement.

This section will therefore focus on the following factors that I believe are essential to any analysis of the legal framework for military operations conducted against transnational terrorist operatives. These include the underlying nature and purpose of the existing law-triggering paradigm; the relationship between the basic nature of employment of combat power and the legal regime that should regulate that employment; how the nature of the authority invoked reveals a fundamental distinction between the authority derived from the law of armed conflict framework and that derived from the law enforcement framework; the importance of maintaining a bright-line distinction between the *jus ad bellum* and the *jus in bello*; and the comparative feasibility of applying each framework to such operations. I believe these factors indicate that, contrary to Professor Dinstein's assertion, relying on the LOAC framework to regulate these operations is not only more logical but more feasible than relying on a law enforcement legal framework.

The Nature and Purpose of the Traditional LOAC-Triggering Paradigm

All LOAC scholars and practitioners are versed in what I have previously characterized as the "either/or" law-triggering paradigm created by Common Articles 2 and 3 of the four Geneva Conventions and the interpretation of these articles that evolved since 1949. This paradigm may have proved generally sufficient to address the types of armed conflicts occurring up until 9/11. However, this fact no longer justifies the conclusion that no other triggering standard should be recognized. Instead, as the events since 9/11 have illustrated so convincingly, such recognition is essential in order to keep pace with the evolving nature of armed conflicts themselves. The prospect of an unregulated battlefield is simply unacceptable in the international community, a fact demonstrated by the response to the conflict in

Lebanon.[42] The ultimate question, therefore, is whether it is best to continue to try and fit the proverbial square "armed conflict" peg into the round "Common Article 3" hole, or whether the time has come to endorse a new category of armed conflict. It is the limited impact of Common Article 3 itself that compels the conclusion that recognizing a new law-triggering category is essential.

Both the military components of the US fight against al Qaida and the recent conflict between Israel and Hezbollah have strained this traditionally understood LOAC-triggering paradigm.[43] While this strain has produced international and national uncertainty as to the law that applies to such operations,[44] it has also provided what may actually come to be appreciated as a beneficial reassessment of the trigger for application of fundamental LOAC principles. As a result, the time is ripe to consider whether the pragmatic logic that has animated military policy on this subject for decades should not be regarded as something more, to wit a reflection of a general principle of law requiring that all military operations involving the employment of combat power fall under the regulatory framework of the LOAC.

Before the United States Supreme Court issued its highly publicized ruling in the case of *Hamdan v. Rumsfeld*,[45] the Court of Appeals for the District of Columbia ruled on Hamdan's challenge. In the judgment of *Hamdan v. Rumsfeld*,[46] Judge Williams articulated the logic motivating this reassessment in his concurring opinion. In that opinion, he responded to the majority conclusion that Common Article 3 did not apply to armed conflict with al Qaida because the President has determined that this conflict is one of international scope:

> Non-state actors cannot sign an international treaty. Nor is such an actor even a "Power" that would be eligible under Article 2 (¶ 3) to secure protection by complying with the Convention's requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The gap being filled is the non-eligible party's failure to be a nation. Thus the words "not of an international character" are sensibly understood to refer to a conflict between a signatory nation and a non-state actor. The most obvious form of such a conflict is a civil war. But given the Convention's structure, the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict "not of an international character." In such a conflict, the signatory is bound to Common Article 3's modest requirements of "humane" treatment and "the judicial guarantees which are recognized as indispensable by civilized peoples."[47]

Although the logic expressed by Judge Williams seems pragmatically compelling, his interpretation did not sway his peers. This reflected the influence of

Common Articles 2 and 3—and the legal paradigm they spawned—on conflict regulation analysis. But, as Judge Williams recognized, it is fundamentally inconsistent with the logic of the LOAC to disconnect the applicability of regulation from the necessity for regulation. Judge Williams looked beyond the traditional interpretation of Common Articles 2 and 3 because he recognized that what was needed was a pragmatic reconciliation of these two considerations. Ironically, it is the long-standing policy of the US military that validates this interpretation of the LOAC. That policy, as will be explained below, long ago rejected a formalistic interpretation of applicability of LOAC principles to military operations in favor of a pragmatic application based on the necessity of providing US forces with a consistent regulatory framework.

Recognizing the Regulatory Gap: How Military Policies Reflect the Necessity of a "Principled" Approach to Military Operations

The need to provide a LOAC-based regulatory framework for all combat operations, even those ostensibly falling outside the accepted law-triggering categories derived from Common Articles 2 and 3, is not something that critics of Israeli operations targeting Hezbollah have only recently suggested. For more than three decades prior to this conflict, the armed forces of the United States followed a clear and simple mandate codified in the Department of Defense Law of War Program:[48] comply with the principles of the law of war during all military operations. While this policy mandate has never explicitly articulated what precisely is meant by "principles,"[49] this term is generally understood to refer to the concepts that reflect the fundamental balance between the dictates of military necessity[50] and the obligation to mitigate the suffering associated with armed conflict, concepts that provide the foundation for the more detailed rules that have evolved to implement these principles. This foundational principle/specific rule relationship is explained by Professor Adam Roberts:

> Although some of the law is immensely detailed, its foundational principles are simple: the wounded and sick, POWs and civilians are to be protected; military targets must be attacked in such a manner as to keep civilian casualties and damage to a minimum; humanitarian and peacekeeping personnel must be respected; neutral or non-belligerent states have certain rights and duties; and the use of certain weapons (including chemical weapons) is prohibited, as also are other means and methods of warfare that cause unnecessary suffering.[51]

While the US Department of Defense has never explicitly defined the content of the term "principles," manuals for other armed forces do provide more clarity to

the content of this term. For example, the recently revised United Kingdom Ministry of Defence Manual for the Law of Armed Conflict provides:

> Despite the codification of much customary law into treaty form during the last one hundred years, four fundamental principles still underlie the law of armed conflict. *These are military necessity, humanity, distinction, and proportionality.* The law of armed conflict is consistent with the economic and efficient use of force. It is intended to minimize the suffering caused by armed conflict rather than impede military efficiency.[52]

For US forces and their operations, the significance of the mandate to comply with these principles during all military operations is not diminished by the absence of a precise definition of this term. Instead, definition is left to operational legal advisors based on their training and experience. What is significant for purposes of this article is that the policy requires that US armed forces treat *any* military operation, and especially any operation involving the use of combat power (armed conflict), as the trigger for application of a LOAC-based regulatory framework.[53] This policy has provided the basis for following LOAC principles during every phase of the military component of what the Bush administration has characterized as the "Global War on Terror."[54]

The motive for this policy was twofold. First, it was intended to provide a common standard of training and operational compliance during the range of military operations.[55] Second, it responded to the reality that such operations are often initiated prior to a clear government determination of the legal applicability of the laws of war.[56] Ultimately, the armed forces value this policy because they intuitively understand that a framework for the execution of combat operations is essential to the preservation of a disciplined force. This is a critically important purpose of legal regulation of the battlefield, a consideration often overlooked by contemporary commentators. Although no longer commonly cited as a critical purpose of the LOAC, prior generations clearly understood this purpose. This is clearly evident by the emphasis of this purpose in one of the most important precursors to the twentieth-century evolution of the conventional laws of war, the *Oxford Manual of the Laws of War on Land*:[57]

> By [codifying the rules of war derived from State practice], it believes it is rendering a service to military men themselves . . . . A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts—which battle always awakens, as much as it awakens courage and manly virtues,—it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.[58]

The compelling logic reflected in this extract finds contemporary manifestation in the policy mandates imposed on US and other armed forces that extend application of these principles to all military operations. These mandates indicate that the application of combat power must always be subject to a basic regulatory framework. The gap in the accepted scope of legally required LOAC application, coupled with this logic, led other nations to follow the practice of imposing such regulation by policy.[59] Even the United Nations, habitually called upon to use military forces in situations of uncertain legal classification, implemented an analogous mandate for forces operating under its control.[60] However, no matter how logical such mandates may be in terms of military efficiency and humanitarian protections, their policy characters reveal a perceived gap between situations necessitating LOAC application and the technical legal triggers for such application. Furthermore, their policy characters indicate that these mandates are ultimately subject to modification.[61]

The historical underpinnings of the LOAC and the contemporary application of LOAC principles to a wide spectrum of military operations as a matter of national policy indicate that the dispositive factor in determining when this regulatory framework should apply is the fundamental nature of the military operation in question. When armed forces conduct operations employing combat power against a defined enemy with authority to engage and subdue the enemy based solely on that defined status, such operations should be regarded as armed conflicts. Because of this, the underlying logic that has driven the historical application of LOAC principles to regulate such operations provides compelling evidence in support of extending this framework to counterterror military operations that fall into this category, even when the enemy is a non-State entity with no plausible link of attribution to the State in which it operates. As will be discussed below, an analytical focus on the fundamental nature of the authority invoked by the State indicates that the alternate proposition—to characterize such operations as law enforcement—is unsupported by any analogous logic.

The Fundamental Distinction between the Law of Armed Conflict Legal Framework and the Extraterritorial Law Enforcement Legal Framework

The discussion above reveals why the regulatory framework applicable to military operations must respond to the de facto existence of armed conflict. However, it also reveals why the existing understanding of this law-triggering paradigm has operated as an impediment to such application in any armed conflict not falling neatly within the inter-State/intra-State conflict categories. As a result, military operations conducted by States against non-State operatives who operate transnationally fall into a category of regulatory uncertainty. In response to this

uncertainty, scholars like Professor Dinstein argue that such operations are best understood as extraterritorial law enforcement activities, and not as armed conflicts. This view presumably indicates that it is a law enforcement legal framework, and not LOAC principles, that functions to regulate such operations.

This is a significant assertion, for it dictates a scope of authority that is arguably inconsistent with the fundamental nature and purpose of such military operations. It is undoubtedly true that the ultimate objective of disabling the operational capabilities of terrorist organizations is the common purpose of any counterterror State action. However, the means by which law enforcement activities achieve this objective differs fundamentally from the means by which military operations do so, most significantly with regard to the use of deadly force. Indeed, the most fundamental distinction between law enforcement and armed conflict is manifested in the scope of use of deadly force authority—a distinction between use of deadly force as a last resort and use of deadly force as a first resort. Law enforcement activities, governed by international human-rights standards, reserve the use of deadly force as a measure of last resort. In contrast, use of deadly force against a military objective is a legitimate measure of first resort during armed conflict.

This basic distinction between relative authorities reveals in the starkest manner the fundamental fallacy of characterizing military operations directed against transnational terrorists as law enforcement operations, not based on an analysis of the nature of authority associated with such operations, but merely on the basis of incompatibility with the inter-State/intra-State law-triggering paradigm. In most instances, the choice by the State to resort to military force against such a threat is driven by the assessed need to employ deadly force as a measure of first, and not last, resort. Consider the example of an airstrike conducted against a terrorist training facility operating with impunity in the territory of another State. It is inconceivable that the authority to employ deadly force relied on by the air assets executing the mission will be contingent on a provocation from the terrorist target. Nor is it conceivable that the air assets will be obliged to offer the potential targets the opportunity to submit to apprehension as a condition precedent to the employment of combat power. Instead, the authority to employ that power will almost certainly be based on an inherent invocation of the principle of military objective, allowing the use of deadly combat power based solely on the identification of the target as one falling into the category of a defined terrorist enemy.

Employment of combat power under this type of authority is not law enforcement. It is, quintessentially, a use of deadly force as a measure of first resort. The LOAC provides the only legal justification for such a use of force. Accordingly, based on the nature of the authority related to the military operation, armed conflict best characterizes the de facto nature of such activities, if for no other reason

than the State's implicit invocation of the principle of military objective as a justification for the use of deadly force. Characterizing such operations as law enforcement creates an immediate incongruity that undermines the fundamental nature of that characterization: the suggestion that the use of deadly force is limited to a measure of last resort and that less destructive means must be attempted prior to such use.

No such incongruity would result from acknowledging that operations targeting terrorist operatives with combat power are armed conflicts. Instead, such acknowledgment achieves a critical effect: the authority implicitly invoked by the State is counterbalanced by the limiting humanitarian principles of this law. In short, if such operations are categorized as armed conflicts, the law essentially creates a "package deal" for participants. While the principle of military necessity/military objective may justify the employment of deadly force as a measure of first resort, other principles limiting the methods and means of warfare and establishing baseline standards of treatment for captured and detained personnel also become applicable. Unless combat operations conducted against terrorist operatives are understood to trigger this "package" of principles, States will continue to be free to adopt a selective invocation of the fundamental authority derived from the LOAC to take measures necessary to disable terrorist capabilities, while disavowing legally mandated obligations derived from the same source of law.[62]

The Bright-Line Distinction between the Jus ad Bellum *and the* Jus in Bello: *Remembering That Application of the LOAC Should Not Be Influenced by Use of Force Legality*

Another significant objection to treating military operations directed against transnational terrorists as triggering LOAC rights and obligations is that doing so will somehow legitimize such uses of force. This argument, however, ignores the historic bright-line distinction between the *jus ad bellum* and the *jus in bello*. This distinction has long stood for the proposition that the legality *of* war must not be permitted to influence the applicability of the rules for conduct *during* war. This distinction can genuinely be considered a foundational principle of the Geneva Conventions and the de facto law-triggering provisions incorporated therein.

The *ad bellum/in bello* distinction is intended to achieve a critical effect: to ensure that the legal regime protecting the *participants* in armed conflict is not diluted or denied based on the choices of those who *decide* on armed conflict. It is a reflection of the basic tenet of the Geneva Conventions—all individuals impacted by armed conflict, civilian and warrior alike, are in essence "victims of war," for they are not responsible for the decision to wage war. Accordingly, the legal

regime that operates to limit the harmful effects of war on both warrior and civilian must be triggered by a pure de facto standard: the existence of armed conflict.

Of course, the primary concern at the time of the drafting of the Conventions was preventing States from using the illegality of war as a justification for denial of humanitarian protections. The issue related to the application of the LOAC to military operations between a State and non-State entity is quite the opposite. In this context, the concern is that acknowledging that such operations trigger the LOAC legal framework will bolster the legal justification for the use of force by the State. Nonetheless, the underlying purpose of the *ad bellum/in bello* distinction is equally applicable to this context and indicates that the legal framework that regulates the conduct of military operations should in no way influence the assessment of the legality of those operations.

As I have written extensively elsewhere, this de facto standard is a core concept of the existing law triggers of the Geneva Conventions. The focus of these triggers is on the question of actual hostilities that rise above the level of law enforcement activities. In such circumstances, the LOAC is the appropriate legal framework to achieve the humanitarian objective of limiting unnecessary suffering.

In the context of inter-State or intra-State hostilities, the line between a use of State power for law enforcement purposes and armed conflict has been relatively well defined. However, once States began to employ power outside their territories for the purpose of combating terrorism, this line became much blurrier. I (with my co-author Eric Jensen) have addressed the problem of defining the line between law enforcement and armed conflict in this extraterritorial context in a prior article, asserting that the nature of the use-of-force authority employed by armed forces is the most effective means of definition. It is not my purpose to expand upon that theory here. Instead, the basic concept reveals why the *ad bellum/in bello* distinction is equally relevant in such a context. We argue that when a State authorizes the use of combat power based on an inherent invocation of the principle of military objective (in the form of status-based rules of engagement) a situation of de facto armed conflict exists. Even assuming that the use of force authorized by the State is in violation of the *jus ad bellum*, this in no way alters the basic reality that the State has implicitly invoked the LOAC for purposes of executing the operation. As a result, there is no justification to deprive the participants in associated hostilities of the benefit of the fundamental principles of that law.

What seems more appropriate, and certainly more consistent with the *ad bellum/in bello* distinction that is an integral element in determining LOAC applicability, is to treat the ad bellum/in bello issues as truly independent legal questions. Concluding a State's use of military force to target a terrorist entity is in

violation of the *jus ad bellum* but is nonetheless armed conflict triggering fundamental LOAC rights and obligations seems more satisfactory than asserting the *jus ad bellum* violation requires denying the participants in the hostilities the benefits of the legal framework best suited to regulate such activities.

Of course, characterizing such operations as law enforcement avoids this issue entirely. Or does it? It is unlikely that a State will not be held to account for armed interventions in the territory of other States simply because the State asserts it is exercising "extraterritorial law enforcement." And here lies the potential irony. In assessing the *jus ad bellum* legality of State action, it is almost certain that the *de facto* nature of that action will be the focus, and not the characterizations adopted by the State. As a result, use of combat power under the rubric of extraterritorial law enforcement creates a double failure: it will be insufficient to avoid condemnation for a *jus ad bellum* violation, while at the same time it will deprive the forces engaged in the operation of the clarity provided by the legal framework developed to regulate the essential nature of their activities: armed conflict.

The Law of Armed Conflict: A Defined and Intuitive Regulatory Framework

As suggested above, the regulatory framework applicable to the conduct of military operations against transnational terrorist threats should not influence the assessment of the legality of such operations. Accordingly, the primary analytical consideration for determining which legal framework is most appropriate for the regulation of such operations is how effectively it achieves the regulatory purpose. It is here that applying LOAC principles offers substantial benefit over applying a law enforcement framework. This conclusion is supported by two primary considerations. First, fundamental LOAC principles are well established and well understood by professional armed forces. Indeed, these principles are so pervasive they have formed the foundation for policy regulation of many military operations that are not technically subject to the law. Second, because of this pervasive application, armed forces are well versed in compliance with these principles and as a result conducting operations pursuant thereto is relatively intuitive.

This is not the case with the law enforcement framework. As a general proposition, armed forces are not trained to conduct law enforcement operations. Unlike their law enforcement counterparts, demanding a careful escalation of force to ensure that resort to deadly force is only a measure of last resort is the exception to the mindset normally demanded of military personnel. That mindset requires the ability to engage an enemy with deadly combat power on command. This often involves the application of overwhelming, and not graduated, combat power. Imposing a law enforcement framework on military personnel requires a radical

modification to the combat mentality, with all the training, planning and execution challenges associated therewith.

Ironically, one of the common criticisms of the assertion that military operations against transnational terrorist groups trigger LOAC principles is the uncertainty associated with determining what rules would apply to such operations. As Professor Dinstein noted during one presentation, "Where do the rules come from? Do you just make them up in a library in Texas?" There is, however, no need to "make up" any rules. Instead, as my co-author and I have noted elsewhere, the fundamental LOAC principles—military necessity, military objective, proportionality and humanity—are well enough understood as to provide an effective starting point for the regulation of these military operations. Nor is extending these principles to transnational armed conflicts a radical suggestion, but instead a process analogous to that which has led to the development of the regulation of internal armed conflicts (another point of particular irony, considering that Professor Dinstein has been central to the proposed application of regulatory provisions developed in the context of inter-State conflict to the realm of internal conflict).

What seems particularly invalid about this criticism is that it seems even more legitimately leveled against the extraterritorial law enforcement theory. Unlike fundamental LOAC principles, there is no well established source of regulatory principles that apply to the use of military force for extraterritorial law enforcement principles. If such operations are considered law enforcement, where do the rules that govern those operations come from? While rules applicable to domestic law enforcement activities are certainly well developed, there is no basis to assert that they can simply be transplanted to apply to extraterritorial military operations. Use of law enforcement would presumably be governed by the sending State's domestic policing statutes, an odd choice of laws in an extraterritorial use of force. Accordingly, such a suggestion seems far more fabricated than applying LOAC principles to combat operations against terrorist operatives. In the latter situation, the armed forces would apply a body of rules that form the foundation of military training and operations and were developed to limit the harmful consequence of a State unleashing combat power. In the former, armed forces would be expected to comply with a regulatory framework that was never developed nor intended to apply to armed hostilities.

Policy Application of the Law of Armed Conflict: Its Value and Limitations

Perhaps the most compelling evidence in support of the validity of applying the LOAC framework to the type of military operations addressed in this article is that

reliance on this framework as a "default" standard has been the long-standing solution to the legal uncertainties associated with contemporary military operations. For several decades, the armed forces of major military powers have imposed an obligation to comply with LOAC principles during all military operations, even when those principles were not applicable as a matter of law. This practice was ultimately emulated by the United Nations as a solution to the dilemma of establishing a uniform regulatory standard for all UN forces engaged in peacekeeping operations.

The logic behind this policy application of LOAC principles reinforces the argument that the LOAC is better suited to provide for the regulation of counterterror military operations than the law enforcement framework. Military leaders have long understood that setting a LOAC-based default standard of regulation enhances the probability of disciplined operations by facilitating uniform training and planning criteria. Perhaps more important, because the LOAC is the only source of international law that evolved for the specific purpose of regulating military operations, its extension to all military operations was understood as pragmatically and operationally logical. In short, these policies indicate that military operations are best regulated by the law developed for such a purpose, and not by some artificial application of a body of law developed for an entirely different purpose.

Indeed, the past effectiveness of this policy application of LOAC principles has led some to assert that there is no need to wade into the controversial waters of conflict characterization in relation to counterterror military operations, but that compliance with these policies provides an effective solution to the regulatory dilemma. But this argument is flawed for two reasons. First, it is in effect an acknowledgment that these operations require the regulatory framework provided by the LOAC, with an effort to avoid the difficult question of *why* this framework should be applied. However, if the assumption is valid—that the nature of the operations requires LOAC regulation—then that issue must be addressed head on; and the reason for this is revealed in the second flaw of this argument.

Until the US response to the terror attacks of September 11, the "policy is enough" argument held great merit. This was because issues related to the regulation of military operations and treatment of individuals captured and detained during those operations were left almost exclusively to military decisionmakers. However, it is widespread knowledge that this paradigm shifted dramatically after those attacks. No longer was the military free to "apply the principles of the law of war" with little or no interference from civilian policy- and decisionmakers. Instead, the intervention of these individuals exposed the limits of policy application of these principles.

In what are now regarded as notorious legal opinions, senior US government lawyers and the decisionmakers they advised adopted policies related to the treatment of captured and detained personnel that deviated from the "principles" of the LOAC. The justification for these decisions was clear: unlike law, policy is malleable. Accordingly, Department of Defense policy became ineffective once the leadership of the department or the nation chose to adopt inconsistent courses of action. This process exposed why simply asserting a policy-based application of LOAC principles to counterterror military operations is insufficient to address the regulatory issue. Participants in these endeavors—and the individuals they engage with combat power, subdue, capture and detain—require a legally defined and mandated regulatory framework. While the long-standing policies requiring compliance with LOAC principles certainly indicate that these principles are the most logical and appropriate source of regulation for these operations, policy is ultimately insufficient to provide this certainty. Only by acknowledging the legally mandated applicability of LOAC principles to such operations will this certainty be achieved.

Case-by-Case Application and the Rejection of the Zero-Sum Game

What I have attempted to do in this article is expose why it is invalid and disingenuous to characterize counterterror military operations employing combat power under a "deadly force as a first resort" authority as extraterritorial law enforcement. Instead, these operations should be treated as triggering the foundational principles of the LOAC. However, I am not suggesting a zero-sum game analysis—that all uses of the military in the struggle against transnational terrorism must be characterized as triggering LOAC principles; far from it. What I have proposed here and previously is that the essential nature of the use-of-force authority related to any use of military power must dictate whether that use falls into the category of armed conflict or instead remains under the assistance-to-law-enforcement category. This may often be a difficult line to decipher. But rejecting the applicability of LOAC principles to those operations that cross this line simply because to do so deviates from the entrenched law-triggering paradigm seems to defy the underlying logic of the conventions that paradigm evolved from: a truly de facto law-triggering standard that ensured the assertion of authority derived from the LOAC required compliance with limiting principles of the same body of law.

Acknowledging that under the appropriate circumstances armed forces are bound to comply with LOAC principles when conducting counterterror operations will not dilute the effectiveness of this law. It will instead ensure a balance of authority and obligation. Nor will it result in a parade of horribles because of the

uncertainty as to what rules apply to such operations. Applying the fundamental principles of the LOAC to such operations is a feasible first step for such regulation, and one with which many armed forces are familiar pursuant to the policy application of these same principles that has been required for decades. Furthermore, any uncertainty as to the content of regulatory provisions derived from application of the LOAC is insignificant in comparison to the subjection of such operations to a law enforcement regulatory framework designed for a radically different purpose.

Nor do I believe that such acknowledgment will increase the uses of combat power by States. While characterizing counterterror operations under the LOAC framework will undoubtedly trigger more expansive authorities than law enforcement operations, requiring compliance with LOAC principles of constraint will limit the scope of that authority. Furthermore, there are other significant factors that will offset any tendency to treat such operations as armed conflict simply for the benefit of expanded authority. These include not only *jus in bello* considerations, which, when dealing with a terror target in anything other than a failed State are profound, but also domestic political considerations, international relations considerations and, perhaps most important, assessment of the most feasible means to achieve the neutralization objective. All that is suggested here is that when a State, after considering all these factors, chooses to unleash combat power to achieve the national objective, the benefit of the LOAC regulatory framework should not be denied simply because the enemy is a transnational organization without traditional military structure.

Conclusion

Conflict classification is the essential first step in determining the rights and obligations of parties involved in armed hostilities. For decades, this classification process has been premised on the assumption that international law recognizes only two types of armed conflict: inter-State and intra-State. This led to the evolution of an "either/or" law-triggering paradigm: either the conflict was between two States, satisfying the triggering criteria of Common Article 2, or the conflict was between a State and a non-State armed entity within the territory of the State, satisfying the triggering criteria of Common Article 3.

The increasing prevalence of extraterritorial military operations conducted by States against non-State armed organized groups has resulted in an assertion that such operations can qualify as armed conflicts. This theory of law applicability is exemplified by the US treatment of the struggle against al Qaida as an "armed conflict," a position clearly reflected in the Department of State enunciation excerpted at the beginning of this article. Although controversial, it seems undeniable that

this theory of what can be functionally characterized as "transnational" armed conflict is gaining legal momentum.

The assumption that such a category of armed conflict can exist calls into question the related assumption that military operations conducted by the United States against al Qaida in Afghanistan could only be categorized as falling within the broader armed conflict against the Taliban. While such a unified armed conflict theory is certainly plausible, and concededly the presumptive position, it need not be the only position. Instead, a careful assessment of the relationship between al Qaida and the Taliban is necessary to determine whether such an outcome is justifiable. If, as is suggested in this article, the facts reveal that al Qaida did not operate truly "on behalf" of the Taliban, but instead had established more of a parasitic relationship to serve its own independent strategic objectives, then this presumption becomes invalid. Such invalidity suggests that the conflict between al Qaida and the United States in Afghanistan can and should be characterized as distinct from the conflict between the United States and the Taliban.

This conflict bifurcation leads to another inevitable question: are extraterritorial counterterror operations armed conflicts? Or are they simply exercises of extraterritorial law enforcement? Resolving this question and determining the most appropriate legal framework for the regulation of extraterritorial military operations directed against transnational terror operatives is no easy task, but it is essential because of the increasing prevalence of such operations. Since the United States began asserting it was engaged in an armed conflict with al Qaida, scholars, legal advisors, policymakers and courts have struggled with this question, producing a wide variety of outcomes. Two major theories have evolved in response to this question. The first, epitomized by the US position, is that these operations qualify as "armed conflicts" within the meaning of international law, triggering a heretofore undefined package of legal authorities and obligations. The second is that armed conflict can only occur within the inter-State or intra-State law-triggering paradigm established by Common Article 2 and Common Article 3, and that military operations can be considered "armed conflicts" only if they can be pigeonholed into one of these categories. In all other cases, including the use of combat power to target terrorist operatives in the territory of another State, the military operations must be characterized as extraterritorial law enforcement activities, presumably regulated by law enforcement authorities and human rights obligations.

This article has asserted that this latter approach—rejecting the possibility of an armed conflict between a State and a transnational non-State entity—produces an illogical outcome disconnected from the underlying purpose of the LOAC. By essentially pushing a square peg into a round hole, it unjustifiably denies the armed

forces and the people they encounter on what is indisputably a "battlefield" the benefit of the regulatory framework developed specifically to limit the harmful consequences produced when States unleash their combat power. While the overly broad reach of LOAC authority resulting from the Bush administration's assertion of a "Global War on Terror" certainly justifies a cautious approach to the question of legal characterization, an under-inclusive backlash is equally invalid.

What is necessary is a careful assessment of the fundamental nature of military operations on a case-by-case basis. When those operations are conducted pursuant to a "use of deadly force as a first resort" authority—normally revealed in the form of status-based rules of engagement—it indicates an inherent invocation of the authority of the LOAC. Under such circumstances, armed forces must operate under the obligations established by the fundamental principles of the same body of law. These principles are generally well understood and have formed the foundation for operational regulation of a multitude of military operations conducted by many armed forces for decades. Whatever uncertainty that may be inherent in these principles is relatively insignificant compared to the far more uncertain regulatory content of an extraterritorial law enforcement legal framework. What is much more problematic, however, is that military operations conducted pursuant to status-based rules of engagement are fundamentally inconsistent with a law enforcement legal framework, for the use of deadly force as a measure of first resort is the quintessential nature—and in all likelihood purpose for—such operations. As such, it is the principles of the LOAC, and not those related to law enforcement activities, that are most logically, pragmatically and appropriately suited for such operations.

Notes

1. *See* The Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. E/CN.4/2004/7/Add.1 (Mar. 24, 2004).

2. See International Committee of the Red Cross, International humanitarian law and terrorism: questions and answers (May 5, 2004), available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YNLEV#a3, asserting that unless associated with a "traditionally" defined armed conflict (such as Afghanistan), the "war on terrorism" is not an armed conflict:

> However, much of the ongoing violence taking place in other parts of the world that is usually described as "terrorist" is perpetrated by loosely organized groups (networks), or individuals that, at best, share a common ideology. On the basis of currently available factual evidence it is doubtful whether these groups and networks can be characterised as a "party" to a conflict within the meaning of IHL.

3. This rejection was evident from the reaction of many of the distinguished experts assembled for the conference that generated this article. Included among those who explicitly rejected such a contention were Professor Michael Schmitt, Professor Charles Garraway, Professor

Yoram Dinstein and Professor Marco Sassòli. Other participants, including many military practitioners, seemed to find the proposition more appealing.

4. *See* Geoffrey S. Corn & Eric T. Jensen, *Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations* (forthcoming in ISRAEL LAW REVIEW), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1256380.

5. *See* Geoffrey Corn, *Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 295, 316, 341 (2007); *see also* Geoffrey Corn & Eric Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror* (forthcoming in TEMPLE LAW REVIEW), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=1083849; Corn & Jensen, *Transnational Armed Conflict, supra* note 4.

6. *See* Corn, *Hamdan, Lebanon, and the Regulation of Armed Conflict*, *supra* note 5, at 316, 341.

7. *Id.*

8. Articles 2 and 3 are referred to as "common" because they are found identically in each of the four Geneva Conventions. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287; all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 198; 222, 223; 244, 245; and 301, 302; respectively. Article 2 provides in pertinent part that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . ," i.e., international armed conflict. Article 3 applies to all cases "of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .," i.e., non-international armed conflict.

9. *See* Human Rights Watch, Lebanon/Israel: U.N. Rights Body Squanders Chance to Help Civilians (Aug. 11, 2006), http://hrw.org/english/docs/2006/08/11/lebano13969_txt.htm (statements by Louise Arbour) [hereinafter Lebanon/Israel]; *see also* Human Rights Watch, U.N.: Open Independent Inquiry into Civilian Deaths (Aug. 8, 2006), http://hrw.org/english/docs/2006/08/08/lebano13939.htm (statements by Kofi Annan) [hereinafter Open Independent Inquiry].

10. Recognition of this new classification of armed conflict might be viewed by some as subsuming the continuing role for the "internal" armed conflict classification. Such a conclusion is somewhat justified, because the principles triggered by transnational armed conflict would essentially be synonymous with those triggered by internal armed conflicts. However, pragmatic considerations warrant caution in this regard. The entire rationale for proposing a *transnational* designation is to respond to the policy reality that States will continue to seek to match a characterization with the geographic scope of conflicts in which they engage.

11. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction, para. 94 (Oct. 2, 1995), *reprinted in* 35 INTERNATIONAL LEGAL MATERIALS 32 (1996).

12. *See* Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MILITARY LAW REVIEW 66 (2005) (providing an excellent analysis of the significance of the *Tadic* ruling).

13. Tadic, *supra* note 11, para. 94.

14. Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (citations omitted) (emphasis added).

15. *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD (1st ed. 1996).

16. *See generally* Leslie Green, *What Is—Why Is There—the Law of War, in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 141 (Michael N. Schmitt & Leslie C. Green eds., 1998) (Vol. 71, US Naval War College International Law Studies).

17. *Id.*

18. *See generally* MAX BOOT, SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER (2003).

19. *See* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 54–55 (2d ed. 2000).

20. *Id.*

21. *See* ROGERS, *supra* note 15.

22. GREEN, *supra* note 19, at 54.

23. *Id.* at 52.

24. Without even considering the colonial conflicts of this period (see *id.* at 54–55), examples of such "non inter-State" military operations include several campaigns conducted by the armed forces of the United States, such as the operations during the Boxer Rebellion, Pershing's campaign against Pancho Villa, and numerous "stability" operations in Haiti, the Dominican Republic, the Philippine Islands and Nicaragua. *See generally* BOOT, *supra* note 18.

25. During this period, brutal internal conflicts in Spain, Paraguay, Russia and China challenged this customary expectation that professional armed forces engaged in armed conflict would conduct themselves in accordance with principles of disciplined warfare. The estimated number of people killed in civil wars during the inter-war years are 18,800,000, Russian Civil War (1918–21); 3,000,000, Chaco War (Paraguay and Bolivia) (1932–35); 2,500,000, Chinese Civil War (1945–49) and 365,000, Spanish Civil War (1936–39). Historical Atlas of the Twentieth Century, http://users.erols.com/mwhite28/20centry.htm#FAQ (last visited Sept. 5, 2006).

This created a perceived failure of international law to provide effective regulation for non-international armed conflicts, ultimately providing the motivation for the development of Common Article 3. It is, however, worth questioning whether Common Article 3 is properly understood as "necessary" to ensure compliance with such foundational principles during non-State conflicts. Within the context of the history of armed conflicts—a history that was characterized up until the inter-war years by relative obedience to internally imposed regulatory frameworks during all combat operations—Common Article 3 might instead be legitimately viewed as a fail-safe to provide the international community a basis to demand compliance with the most fundamental component of such a framework: respect for the humanity of persons placed *hors de combat* when armed forces refuse to comply with the customary standards of conduct related to any combat operation, including non-international conflicts.

26. According to the *International Committee of the Red Cross Commentary:*

> Since 1907 experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the Hague Convention. Furthermore, there have been many cases where Parties to a conflict have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation has been put forward as a pretext for not observing one or other of the humanitarian Conventions. It was necessary to find a remedy to this state of affairs and the change which had taken place in the whole conception of such Conventions pointed the same

> way. The Geneva Conventions are coming to be regarded less and less as contracts concluded on a basis of reciprocity in the national interests of the parties, and more and more as a solemn affirmation of principles respected for their own sake, a series of unconditional engagements on the part of each of the Contracting Parties 'vis-à-vis' the others. A State does not proclaim the principle of the protection due to prisoners of war merely in the hope of improving the lot of a certain number of its own nationals. It does so out of respect for the human person.
>
> . . .
>
> By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of de facto hostilities is sufficient.
>
> It remains to ascertain what is meant by "armed conflict." The substitution of this much more general expression for the word "war" was deliberate. It is possible to argue almost endlessly about the legal definition of "war." A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a State of war.

See COMMENTARY ON GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 19–23 (Jean S. Pictet ed., 1960) (emphasis added) [hereinafter ICRC COMMENTARY].

27. *Id.*

28. *Id.* at 32.

29. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction, paras. 96–127 (Oct. 2, 1995), *reprinted in* 35 INTERNATIONAL LEGAL MATERIALS 32 (1996). It is interesting to note that the Tribunal cites US policy in support of this conclusion:

> The Standing Rules of Engagement issued by the US Joint Chiefs of Staff spell this out: U.S. forces will comply with the Laws of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all other operations.

Id.

30. *Id.*, para. 70.

31. Nonetheless, it is interesting to note that the qualifying language of "within a State" was not applied to "protracted armed violence between governmental authorities and organized armed groups." *Id.* This does lend some support for application of the principles of the law of war to armed conflicts involving protracted violence outside either of these traditional categories of conflict.

32. *See id.*, paras. 96–127.

33. *See id.*, para. 126.

34. *See id.*

35. *See* Gaby El Hakim & Joe Karam, *Beirut Bleeding: Law Under Attack in Lebanon,* http://jurist.law.pitt.edu/forumy/2006/07/beirut-bleeding-law-under-attack-in.php; *see also* Anthony

D'Amato, *War Crimes and the Middle East Conflict,* http://jurist.law.pitt.edu/forumy/2006/07/war-crimes-and-mideast-conflict.php; Nick Wadhams, *Annan: Israel Raid May Be Part of Pattern,* http://apnews.myway.com/article/20060808/D8JC0D5O2.html.

36. Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, SURVIVAL, Spring 2002, at 7, *available at* http://www.ssrc.org/sept11/essays/roberts.htm.

37. *See* ICRC COMMENTARY, *supra* note 26, at 57.

38. *Id.*

39. *Id.* at 62.

40. Comments of W. Hays Parks at the Naval War College Workshop, The War in Afghanistan: A Legal Analysis (June 25–27, 2008).

41. *See* Al Qaida and Taliban, BOOKRAGS, http://www.bookrags.com/research/al-qaida-and-taliban-aaw-04/ (last visited Jan. 30, 2009).

42. *See* Lebanon/Israel, *supra* note 9; Open Independent Inquiry, *supra* note 9.

43. *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,* 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2004) (discussing the complex challenge of conflict categorization related military operations conducted against highly organized non-State groups with transnational reach); *see also* Kirby Abott, *Terrorists: Combatants, Criminals, or . . . ?, in* CANADIAN COUNSEL ON INTERNATIONAL LAW, THE MEASURES OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS, AND VALIDITY 366 (2004); JENNIFER ELSEA, CONGRESSIONAL RESEARCH SERVICE, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS (2001), *available at* http://www.au.af.mil/au/awc/awcgate/crs/rl31191.pdf (analyzing whether the attacks of September 11, 2001 triggered the law of war).

44. This uncertainty is clearly reflected in the analysis prepared by the Office of Legal Counsel in response to the terrorist attacks of September 11, 2001. *Compare* Memorandum from John C. Yoo, Deputy Assistant General Counsel & Robert Delahunty, Special Counsel, Office of Legal Counsel, Department of Justice, to William J. Haynes II, General Counsel, Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38 (Karen J. Greenberg & Joshua Dratel eds., 2005), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf (concluding, *inter alia*, that Common Article 3 was inapplicable to the armed conflict with al Qaida because Common Article 3 applied exclusively to intra-State conflicts and conflict with al Qaida was "international" in scope), *with* Memorandum from William H. Taft IV, Legal Adviser, Department of State, to Counsel to the President, Comments on Your Paper on the Geneva Conventions (Feb. 2, 2002), *reprinted in* TORTURE PAPERS, *supra*, at 129, *available at* http://www.fas.org/sgp/othergov/taft.pdf (arguing that the Geneva Conventions should be interpreted to apply to the armed conflict with both the Taliban and al Qaida); *see also* Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006), *available at* http://www.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.-HRC.3.2.pdf ("[t]he hostilities that took place from 12 July to 14 August 2006 constitute an international armed conflict to which conventional and customary international humanitarian law and international human rights law are applicable").

45. 548 U.S. 557 (2006).

46. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

47. *Id.* at 44 (Williams, Sr. Judge, concurring).

48. *See* Department of Defense, DoD Directive 5100.77, DoD Law of War Program (1998).

49. The purported justification for this omission is that each subordinate service is then able to define the content of this term for purposes of its forces. Leaving definition of these principles

to the individual services creates obvious concerns of inconsistent practice. This concern is unacceptable in the contemporary environment of joint operations. However, it is likely that a joint standard will be established by the Department of Defense in a Department of Defense Law of War Manual, which is currently under development.

50. *See* UK MINISTRY OF DEFENCE, THE MANUAL FOR THE LAW OF ARMED CONFLICT para. 2.2 (2004) [hereinafter UK MANUAL] ("Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources"); *see also* William Downey, *The Law of War and Military Necessity*, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW 251 (1953).

51. International Middle East Media Center & Agencies, *United Nations Official: Israeli Bombardment of Lebanon Violates Humanitarian Law*, IMEMC NEWS, July 23, 2006, http://www.imemc.org/index.php?option =com_content&task=view&id=20260&Itemid=173.

52. *See* UK MANUAL, *supra* note 50, para. 2.1 (emphasis added). The manual also provides an extensive definition of these principles.

53. *See* Department of Defense, DoD Directive 2311.01E, DoD Law of War Program (2006) [hereinafter Directive 2311.01E]. The exact language is "It is DoD policy that: Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other operations." *Id.*, para. 4.1; *see also* Timothy E. Bullman, *A Dangerous Guessing Game Disguised as an Enlightened Policy: Untied States Laws of War Obligations During Military Operations Other Than War,* 159 MILITARY LAW REVIEW 152 (1999) (analyzing the potential that the US law of war policy could be asserted as evidence of a customary norm of international law).

Other armed forces have implemented analogous policy statements. For example, the German policy to apply the principles of the law of war to any armed conflict, no matter how characterized, was cited by the ICTY in the *Tadic* jurisdictional appeal as evidence of a general principle of law extending application of the law of war principles derived from treaties governing international armed conflict to the realm of internal armed conflict. *See* Tadic, *supra* note 29, para. 118 *(citing* HUMANITARES VOLKERRECHT IN BEWAFFNETEN KONFLIKTEN—HANDBUCH 211, DSK AV207320065 (1992)[hereinafter German Military Manual of 1992]); *reprinted in* 35 INTERNATIONAL LEGAL MATERIALS 32 J(1996); *see also* Bullman, *A Dangerous Guessing Game, supra.*

This policy has recently been updated, and has been made even more emphatic by omitting the "principles" qualifier to require compliance with the law of war during all military operations. According to the most recent version: "It is DoD policy that: Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations." Directive 2311.01E, *supra*, para. 4.

54. This term will be used throughout this article as a convenient reference for the variety of military operations conducted by the United States subsequent to September 11, 2001. Use of this term is not intended as a reflection on this author's position on the legitimacy of characterizing these operations as a "war." While the author acknowledges the hyperbolic nature of this term, it is intended to refer to combat military operations against armed and organized opposition groups.

55. Interview with W. Hays Parks, a senior attorney for the Defense Department and recognized expert on the law of armed conflict. Parks is the chair of the Department of Defense Law of War Working Group, and one of the original proponents of the Law of War Program.

56. For example, the uncertainty related to the application of the laws of war to Operation Just Cause in Panama is reflected in the following excerpt from a Department of State submission related to judicial determination of General Noriega's status: "[T]he United States has made no formal decision with regard to whether or not General Noriega and former members of the PDF charged with pre-capture offenses are prisoners of war, but has stated that each will be provided all prisoner of war protections afforded by the law of war." *See* Gov't Resp. to Def. Post-Hearing Memo. of Law, Sept. 29, 1992, at 8, *cited in* United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992).

In Somalia, although US forces engaged in intense combat operations against non-State organized armed militia groups (see MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR (1999), there was never a formal determination of the status of the conflict. *See* Memorandum from Lieutenant General Robert B. Johnston, Commander, Unified Task Force Somalia, to All Subordinate Unified Task Force Commanders, Subj: Detainee Policy (Feb. 9, 1993).

57. INSTITUTE OF INTERNATIONAL LAW, THE LAWS OF WAR ON LAND (1880), *available at* http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument.

58. *Id.*, Preface.

59. *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction, para. 118 (Oct. 2, 1995), *reprinted in* 35 INTERNATIONAL LEGAL MATERIALS 32 (1996) (citing the German Military Manual of 1992, the relevant provision of which is translated as follows: "Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." German Military Manual of 1992); *see also* UK Manual, *supra* note 50, para. 14.10 (which indicates that during what it defines as "Peace Support Operations"—military operations that do not legally trigger application of the law of armed conflict—"Nevertheless, such fighting does not take place in a legal vacuum. Quite apart from the fact that it is governed by national law and the relevant provisions of the rules of engagement, the principles and spirit of the law of armed conflict remain relevant").

60. In 1999, the Secretary-General of the United Nations issued a bulletin titled "Observance by United Nations forces of international humanitarian law." This bulletin mandated compliance with foundational principles of the law of war (international humanitarian law) during any operation that qualified as an "armed conflict." No characterization qualification was included, and the application paragraph demonstrates an extremely expansive interpretation of the concept of armed conflict to which such principles apply:

> **Section 1**
> **Field of application**
>
> 1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

UN Secretary-General, Bulletin on the Observance by United Nations forces of international humanitarian law, U.N. Doc. ST/SGB/1999/13, *reprinted in* 38 INTERNATIONAL LEGAL MATERIALS 1656 (1999).

61. *See* Noriega, *supra* note 56 (indicating that a policy-based application of the laws of war is insufficient to protect the rights of General Noriega because it is subject to modification at any time at the will of the executive).

62. A brief comment here about what some scholars have characterized as "militarized" law enforcement. Pursuant to this theory, the overarching legal framework for extraterritorial counterterror operations is best defined as a one derived from law enforcement authorities; but under certain circumstances when the use of combat power to augment law enforcement capabilities is required, the presumptive law enforcement activity would be considered "militarized." This theory seems to be consistent with the thesis of this article, if it suggests that *when* law enforcement activities become "militarized," that ratcheting up of means brings into effect a different legal framework, namely LOAC principles. If, however, the suggestion is that when a State "militarizes" law enforcement activities, the armed forces engaged in operations are bound to comply with a law enforcement legal framework, then it seems that the effectiveness of the "militarization" of the activity would be disabled due to an incongruous operational authority equation.

One middle ground that might also be suggested by this concept is that armed forces would be regulated by LOAC principles during the operational phase of "militarized" law enforcement, but that individuals captured and detained, once removed from the area of immediate conflict, would be subject to a law enforcement legal regime. Such a hybrid approach seems responsive to the primary objection leveled against the US invocation of LOAC authorities vis-à-vis captured terrorists—namely their indefinite detention without trial on the basis of military necessity. It also seems to accommodate the needs of the armed forces engaged in such operations by providing them with the most logical legal framework during those operations. One other potentially significant benefit of such a hybrid approach is that it would eliminate any incentive for an unjustified invocation of LOAC authority as a subterfuge for avoiding normal legal process related to detention.

It does, however, seem difficult to dispute the logic of detaining an individual who has acted in what is for all intents and purposes a belligerent capacity against a State. The legitimacy of this "militarized" law enforcement theory rests on the assumption that existing domestic legal authority for the trial and incapacitation of such an individual will satisfy the necessity of preventing a return to belligerent activities. If this assumption is valid, then the hybrid approach holds great merit. If, however, the assumption is invalid, it seems inconsistent with a LOAC-based authority that led to the capture of such an individual to require release with full knowledge of a likely return to belligerent activities.