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THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE

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Abstract. *The U.S. conflict with al Qaeda raises a number of complicated and highly contested questions regarding the geographic scope of the battlefield and the related limits on the state's authority to use lethal force and detain without charge. To date, the legal and policy discussion on this issue has been locked in a heated and intractable debate. On the one hand, the United States and its supporters argue that the conflict and broad detention and targeting authorities extend to wherever the alleged enemy is found, subject to a series of malleable policy constraints. On the other hand, European allies, human rights groups, and other scholars, fearing the creep of war, counter that the conflict and related authorities are geographically limited to Afghanistan and possibly northwest Pakistan. Based on this view, state action outside these areas is governed exclusively by law enforcement, tempered by international human rights norms.*

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

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INTRODUCTION

On April 19, 2011, U.S. military forces captured Ahmed Abdulkadir Warsame in the Gulf region and placed him aboard a Naval ship, where he was interrogated for approximately two months before being transferred to New York and charged in federal civilian court.[1] The Obama administration claimed that he was initially captured and detained pursuant to the law of war, and that the decision to transfer him to civilian court was a policy choice based on the nation's security interests.[2] The decision led to an immediate outcry from both ends of the political spectrum. Several leaders of Congress and commentators argued that he should have been moved to Guantanamo Bay or another site for long-term law of war detention rather than being transferred to the civilian court system for trial.[3] Others decried the out-of-battlefield reliance on the law of war

[1] Press Release, United States Attorney for the Southern District of New York, Accused Al Shabaab Leader Accused of Providing Material Support to Al Shabaab and Al Qaeda in the Arabian Peninsula, (July 5, 2011), www.justice.gov/usao/nys/pressreleases/July11/-warsameindictmentpr.pdf.

[2] Jay Carney, ABC NEWS, July 6, 2011, *available at* http://blogs.abcnews.com/politicalpunch/2011/07/keeping-a-suspected-terrorist-on-a-boat-for-two-months-and-the-atf-chief-testifies-todays-qs-for--s-html;
Letter from the Attorney General, Secretary of Defense, Director of National Intelligence, and Secretary of Homeland Security to the Honorable Mike Johanns (July 25, 2011) (stating that "[t]he decision to prosecute Warsame in federal court, made only after conducting a comprehensive intelligence interrogation to the satisfaction of the Intelligence Community and only after careful consideration of all the available options, is in the best interest of national security") (on file with author).

[3] *See, e.g.,* Senators Joseph I. Lieberman & Kelly Ayotte, *Send Terrorists to Guantanamo – Not New York*, WASH. POST, July 21, 2011; Letter from House Committee Chairs to President Obama (July 19, 2011), *available at* http://www.lawfareblog.com/2011/07/letter-to-obama-regarding-warsame-from-house-committee-chairs/; Letter from 23 Senators to Sec. of Defense Leon Panetta (July 12, 2011), *available at* http://www.politico.com/static/PPM170_detaineesletter.html; 157 CONG. REC. __ (daily ed. June 6, 2011) (statement of Sen. McConnell); *Ten Years after the*

for even short-term detention and intelligence interrogations of someone picked up far from any conventional battlefield.[4]

Six months later, the U.S. reportedly launched a drone into Yemen, killing Anwar al Aulaqi, the alleged operational leader of al Qaeda in the Arabian Peninsula, an ostensible co-belligerent of al Qaeda.[5] Once again, a vocal and polarized debate ensued, with critics of the alleged killing deploring the Obama administration's use of law of war tactics outside of the so-called "hot battlefield" of Afghanistan.[6]

The Warsame and al Aulaqi cases highlight long-standing – and still unresolved – questions about the scope of the President's detention and targeting authority outside zones of active hostilities. While there is general agreement that the United States has broad authority to detain and target within areas that look like a traditional battlefield with boots on the ground (*e.g.,* Afghanistan since late 2001 and Iraq from 2003 to 2011), the notion that the United States can take custody of, and perhaps kill, any alleged member or substantial supporter of al Qaeda or associated forces wherever he or she is found – including in the United States – continues to make many uneasy.

The debate has largely devolved into an either-or frame, even while security and practical considerations demand a more nuanced practice. Thus, the United States, supported by a vocal group of scholars including Professors Jack Goldsmith, Curtis Bradley, and Robert Chesney, has long asserted that the United States is at war with al Qaeda and affiliated groups, and therefore its detention – and kill – authorities extend to wherever al Qaeda and its associates are found, subject of course to additional law of war, constitutional, and sovereignty constraints.[7] Conversely, key European allies, supported by an

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AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror: Hearing Before the H. Armed Serv. Comm., 112th Cong. (2011) (statement of Michael Mukasey) (criticizing decision to transfer Warsame to federal civilian court).

[4] *See, e.g.,* Editorial, *Terrorism and the Law*, N.Y. TIMES, July 16, 2011; Noah Feldman, *U.S. Legal Dilemma Exposed by Somali Terror Case*, BLOOMBERG NEWS, July 11, 2011.

[5] *See, e.g.*, Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Leads to Killing of Awlaki in Yemen,* N.Y. TIMES, Sept. 30, 2011.

[6] Much of the commentary also focused on the fact that al Aulaqi was a U.S. citizen. But the debate was largely triggered by the fact that he was targeted outside a conventional battlefield. *See, e.g.*, Noah Feldman, *Obama Team's Al-Awlaki Memo Furthered Bush Legacy*, BLOOMBERG NEWS, Oct. 16, 2011, *available at* http://www.bloomberg.com/news/2011-10-17/obama-team-s-al-awlaki-memo-furthered-bush-legacy-noah-feldman.html (emphasizing that al Aulaqi was not "on a battlefield, except according to the view that anywhere in the world can be the battlefield in the war on terrorism."). Had al Aulaqi been killed while fighting in the front lines in Afghanistan, the killing would likely have been garnered little controversy, notwithstanding his U.S. citizenship. In World War II, for example, the U.S. attacked German military units containing U.S. citizen personnel with little public response. See also In re Territo, 156 F.2d 142 (9th Cir. 1946) (concluding that an American citizen who is captured as part of enemy force can be lawfully held as a prisoner of war).

[7] *See, e.g.,* Jeh Charles Johnson, Speech, National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012), *available at:* http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/ (emphasizing that there is "nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority [to use force against al Qaeda] to the "hot" battlefields of Afghanistan."); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism Remarks at the Harvard Law School Program on Law & Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011)

equally vocal group of scholars and human rights advocates, assert that the United States is engaged in a conflict with al Qaeda in specified regions, and that the United States' authority to employ law of war detention and lethal force only extends to those engaged in fighting in those particular zones.[8] In all other places, al Qaeda and its associates should be subject to law enforcement measures, as governed by international human rights law and the domestic laws of the relevant states.[9]

Recent United States statements suggest an attempt to mediate between these two extremes, at least for purposes of targeted killing, and as a matter of *policy*, not law. Thus, while continuing to assert a global conflict with al Qaeda, official statements have limited the defense of out-of-conflict zone targeting

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("The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to the 'hot' battlefields of Afghanistan."); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2117-2119 (2005) (arguing that neither the AUMF nor international law place limits on the geographic restrictions on the use of law of war authorities); Robert Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 857-58 (2011) (suggesting that membership in an AUMF-covered group should be a sufficient condition for detention without any geographic limitations based on location of capture or activities, but also indicating that it may be appropriate to impose geographic limitations for detention premised on independent support for the group). *See also* Nicholas Rostow, *Combating Terrorists: Legal Challenges in the Post-9/11 World*, *in* 87 INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 4 (Raul A. Pedrozo & Daria P. Wollschlaeger eds., 2011) (emphasizing that states have an "an inherent right to use force if necessary and proportionate in self-defense" in response to terrorist non-state enemies, wherever they are found).

[8] *See, e.g.,* Mary Ellen O'Connell, *Combatants and the Combat Zone,* 43 U. RICH. L. REV. 845, 858 (2009) ("In addition to exchange, intensity, and duration [of fighting], armed conflicts have a spatial dimension. It is not the case that if there is an armed conflict in one state-for example, Afghanistan-that all the world is at war, or even that Afghanis and Americans are at war with each other all over the planet."); Declaration of Mary Ellen O'Connell at ¶ 14, Al Aulaqi v. Obama, 10-CV-01469 (JDB) (D.D.C. Oct. 8, 2010) ("[T]hat the United States is engaged in armed conflict against al Qaeda in Afghanistan does not mean that the United States can rely on the law of armed conflict to engage suspected associates of al Qaeda in other countries. . . Armed conflict exists in the *territorially limited zone* of intense armed fighting by organized armed groups.") (emphasis added); International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 28 Nov. – 1 Dec. 2011, 31IC/11/5.1.2, at 10 (rejecting the notion of a transnational armed conflict between the United States and al Qaeda); Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflict*, J. CONFL. & SEC'Y L. 266 (2010) (arguing that armed conflicts are geographically bounded by the territory in which a non-state actor has a military presence, and the fact that members of a non-state party to the conflict are found in another state does not extend the armed conflict to that third party state); Gabor Rona, *Interesting Times for International Law: Challenges from the War on Terror*, 27 FLETCHER FORUM WORLD AFF. 55, 62 (2003) (accepting that the United States was engaged in an armed conflict in Afghanistan after September 11, 2001, but questioning whether the 2002 attacks on terrorist suspects in Yemen can be justified by the law of armed conflict); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶¶ 53-56, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf (expressing skepticism that the United States is in armed conflict with al Qaeda outside Afghanistan and Iraq); Jordan J. Paust, *Post 9/11 Overreactions and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1342 (2007).

[9] *Id.*

operations to high-level leaders and others who pose a "significant" threat[10] In the words of President Obama's Assistant for Homeland Security and Counterterrorism, John O. Brennan, the United States does not seek to "eliminate ever single member of al Qa'ida in the world," but instead conducts targeted strikes to mitigate "actual, ongoing threats."[11] That said, the United States continues to insist that it can, as a matter of law, "take action" against anyone who is "part of" al Qaeda or associated forces – a very broad category of persons – wherever they are located.[12]

The stakes are high. If the United States were permitted to launch a drone strike against an alleged al Qaeda operative in Yemen, why not in London as long as the United States had the United Kingdom's consent and was confident that collateral damage to nearby civilians would be minimal (thereby addressing proportionality concerns)? There are many reasons why such a scenario is unlikely, but to date the United States has failed to assert any limiting principle that would, as a matter of *law*, prohibit such actions. And in fact, the United States did rely on the laws of war to detain for almost four years a U.S. citizen picked up in a Chicago airport. [13]

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

It also simply cannot be the case – as the extreme version of the territorially-restricted view of the conflict suggests – that an enemy with whom a state is at war can merely cross a territorial boundary in order to plan or plot free from the threat of being captured or killed. In the London example, law enforcement can and should respond effectively to the threat. But there also will be instances in which the enemy escapes to an effective safe haven because the host state is unable or unwilling to respond to the threat (think Yemen and Somalia in the current conflict), capture operations are infeasible because of

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[10] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism Remarks at Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (April 30, 2012). *See also* Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIOJURIS.ORG, May 19, 2011, http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/.

[11] Brennan, Woodrow Wilson Center Remarks, *supra* note __.

[12] Eric Holder, Remarks by Attorney General Eric Holder at Northwestern School of Law, March 5, 2012 (highlighting the authority to "take action against enemy belligerents" is "not limited to the battlefields in Afghanistan"); *see also* Brennan, Woodrow Wilson Center Remarks, *supra* note __ (emphasizing that "individuals who are part of al Qa'ida or its associated forces are legitimate military targets").

[13] *See* Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005). On June 9, 2002, President Bush ordered that Padilla, who had been arrested by civilian law enforcement officials in Chicago be transferred to military custody and detained as an "enemy combatant." On January 3, 2006, Padilla was transferred back to federal court, where he was charged and convicted of providing material support to terrorists and two conspiracy charges. Although President Bush initially claimed Padilla had been planning to build and explode a dirty bomb in the United States, he was never charged with such a crime.

conditions on the ground (think Yemen and Somalia again), or criminal prosecution is infeasible, at least in the short-run.

This Article proposes a way forward, offering a new legal framework for thinking about the geography of the conflict in a way that better mediates the multi-faceted liberty, security, and foreign policy interests at stake. It recognizes the state's need to respond to the enemy threat wherever it is found, thus accepting the United States' view that the conflict follows the enemy, yet argues that the rules for doing so should distinguish between zones of active hostilities and elsewhere. Specifically, it proposes a series of substantive and procedural rules designed to limit and legitimize the use of lethal targeting and detention outside zones of active hostilities – subjecting their use to an individualized threat finding, least harmful means test, and meaningful procedural safeguards.[14]

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

The paper proceeds in four parts. Part I describes how the legal framework under which the United States is currently operating has generated legitimate concerns about the creep of war. This section outlines how the U.S. approach over the past several years has led to a polarized debate between opposing visions of a territorially-broad and territorially-restricted conflict, and how both sides of the debate have failed to acknowledge the legitimate, substantive concerns of the other. Part II describes a way forward – explaining the reasons why a territorially-broad conflict can and should distinguish between zones of active hostilities and elsewhere, thus laying out the broad framework under which the paper's proposal rests.

Part III lays out the zoned approach that this paper argues. It distinguishes zones of active hostilities from both peacetime and lawless zones, and outlines the enhanced substantive and procedural standards that ought to apply. Specifically, it argues that outside zones of active hostilities, law of war detention and targeting killings should be employed only in exceptional situations, subject to an individualized threat finding, least harmful means test, and meaningful procedural safeguards.[15] This section also describes how such an

[14] This paper is primarily focused on law of war justifications for the use of force. The United States, however, has also offered a separate self-defense justification for the use of force, irrespective of the existence of an armed conflict – an issue I take up briefly in Part IV. *See, e.g.,* Harold Honju Koh, Speech, The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

[15] For the purposes of the paper, I adopt the definition of "targeted killing" offered by Nils Melzer: "[T]he term 'targeted killing' denotes the use of lethal force attributable to a subject of

approach maps onto the conflict with al Qaeda, and is, at least in several key ways, consistent with the approach already taken by the United States as a matter of policy.

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

The paper is U.S.-focused, and is so for a reason. To be sure, other states, most notably Israel, have engaged in armed conflicts with non-state actors that are dispersed across several states or territories.[16] The United States is however the first state to self-consciously declare itself at war with a non-state terrorist organization that spans the globe. Its actions and asserted authorities in response to this threat establish a reference point for state practice that will likely be mimicked by others and inform the development of future standards as well as customary international law.

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

It is commonly accepted that once a state is engaged in an armed conflict, ordinary rules no longer apply – at least within the conflict zone. Killings that would be deemed murder or assassination outside armed conflict are not only permitted but overtly pursued. Moreover, preventive detention schemes that bear little resemblance to western democratic states' peacetime criminal justice system are both allowed and deemed necessary for the duration of hostilities.

Such a system works well when the enemy force is easily identifiable and distinguishable, and the conflict zone is both readily discernible and temporally limited. In the conflict between the United States and al Qaeda, however, none of these prerequisites apply. The enemy hides among the civilian population and is scattered across the globe. There is no obvious end point, as it is unlikely that the United States is ever going to declare a truce, establish diplomatic relations with a terrorist enemy such as al Qaeda, or declare al Qaeda conclusively defeated. (Moreover, even if the "war" is deemed to end, the United States has increasingly laid the groundwork for an expansive view of self-defense that would allow it to attack alleged al Qaeda leaders wherever they are located – an issue I return to in Part IV.) And due to technological advances, namely the use of drones, the United States has the ability to track and target the alleged enemy just about anywhere he is found.

The conflict has exposed the gaps in the legal framework governing the conduct of armed conflict. Neither the laws of international armed conflict – conflicts that arise when one state is fighting another state – or the laws of non-

international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them." NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 5 (2008).

[16] *See id.* at 259-261for a discussion of post-WW II non-international armed conflicts that have involved fighting in multiple states.

international armed conflict – conflicts that have historically been deemed to take place within a single state's territory – provide an appropriate framework for dealing with a conflict with a non-state actor that transverses the globe. Critically, they do not answer fundamental questions regarding the scope of the conflict, and the belligerent state's corresponding authority (or lack thereof) to bypass ordinary law enforcement rules and instead detain without charge or engage in premeditated, targeted killings without judicial review.

The United States has responded to this gap in the law by drawing from standards developed in the context of international armed conflicts – standards that yield a broad definition of who qualifies as a member of the enemy force that can be detained or targeted, with no geographic limits. This has generated a legitimate concern about what Professor Rosa Ehrenreich Brooks has coined "war everywhere" and, in turn, spawned a vociferous and polarized debate as to the existence of geographic limits on the scope of the conflict.[17]

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

A. THE UNITED STATES' APPROACH – THE SUBSTANTIVELY AND TERRITORIALLY BROAD VIEW

Within days after the September 11, 2001 attacks, the Bush administration proudly asserted what became known as a "global war on terror."[18] Relying on both the President's Article II Commander-in-Chief authority and the September 18, 2001 Authorization to Use Military Force (AUMF),[19] the executive branch asserted the power to employ law of war tools anywhere and everywhere the terrorist enemy is found.

The Obama administration has been more circumspect. It has grounded its detention authority solely on the AUMF – thereby abandoning the Bush

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[17] Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror,* 153 U. PA. L. REV. 675-761 (2004). *See supra* p. 2 & notes 7 & 8 (describing academic debate).

[18] *See, e.g.,* President George W. Bush, Speech to a Joint Session of Congress and the Nation (Sept. 20, 2001) ("Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."), *available at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html; Respondent's Brief at *1, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739 (describing a "global armed conflict in which the United States is currently engaged against the al Qaeda terrorist network and its supporters.").

[19] Pub. L. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1542 (note)). *See* The President's Constitutional Authority to Use Military Force Against Terrorists and Nations Supporting Them, Op. O.L.C. (Sept. 25, 2001).

administration's reliance on Article II-based authorities;[20] self-consciously dropped the "global war on terror" rhetoric;[21] and affirmatively bound itself to employing detention standards "informed" by the laws of war.[22] That said, the detention authority asserted is – with minor adjustments – just as broad as that asserted by the Bush administration.[23] It covers anyone who is "part of" or "substantially supported"[24] al Qaeda, the Taliban, or associated forces, wherever they are found.[25]

Critically, this detention authority is based on an individual's *status* as a member of ("part of") the enemy forces. Under the rules of international armed conflict to which the United States analogizes, this status makes the individual a legitimate military target as well, assuming the person has not attempted surrender or is *hors de combat*.[26]

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[20] *See* Harold Koh, Keynote Speech, American Society of International Law (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm (emphasizing that "the Obama Administration has not based its claim of authority to detain . . . on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF.").

[21] *See* White House, *National Strategy for Counterterrorism* 2 (June 2011), http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf ("The United States deliberately uses the word "war" to describe our relentless campaign against al-Qa'ida. However, this Administration has made it clear that we are not at war with the tactic of terrorism or the religion of Islam. We are at war with a specific organization—al-Qa'ida.").

[22] *See* Resp'ts' Mem. Regarding the Detention Authority Relative to Individuals Held at Guantanamo Bay at 1, *In re:* Guantanamo Bay Litigation, Misc. No. 08-442 (TFH) (Mar. 13, 2009) [hereinafter Resp'ts' Mem.]; Koh, ASIL Speech, *supra* note __ ("[U]nlike the last administration, as a matter of *international law*, this Administration has expressly acknowledged that international law informs the scope of our detention authority.").

[23] The Obama administration adopted the detention standard articulated by the Bush administration nearly verbatim, asserting the authority to detain "persons who were part of, or substantially supported, Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." Resp'ts' Mem., *supra* note __, at 2. The only definitional change is the added requirement that support must be "substantial" – *i.e.* not "unwitting or insignificant." *Id.* *Compare with* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., Order Establishing Combatant Status Review Tribunal (July 7, 2004). Congress endorsed and adopted this detention standard in the National Defense Authorization Act of 2012. Pub. L. No. 112-81, § 1021.

[24] To date, the Obama administration has not defended any detention based solely on the substantial support prong, and has explicitly disavowed reliance on this detention theory in at least one case. *See* Boumediene v. Obama, No. 08-5537 (D.C. Cir. Sept. 22, 2009) (letter from Sharon Swingle of the Justice Department's Civil Division to the Clerk of the United States Court of Appeal for the District of Columbia Circuit). It has, however, relied on evidence of support as a basis for establishing membership.

[25] *See* Resp'ts' Mem., *supra* note __, at 2.

[26] The Obama administration has never explicitly articulated the legal standard governing its targeting authority. Recent official statements have focused on the targeting of "high-level al Qaeda leaders" and those who pose an "imminent threat," suggesting that, at least as a matter of policy, it has restricted its targeting operations to a subset of those who can be detained. Koh, ASIL Speech, *supra* note __; Stephen Preston, CIA General Counsel, Remarks at Harvard Law School, The CIA and the Rule of Law (Apr. 10, 2012), *available at* http://www.lawfareblog.com/2012/04/remarks-of-cia-general-counsel-stephen-preston-at-harvard-law-school/; Eric Holder, Attorney General, Remarks at Northwestern School of Law (March 5, 2012) (focusing his defense of targeted killings to actions taken against "specific senior operational leaders of al Qaeda and associated forces."). That said, the United States bases

In the context of habeas litigation, the United States has adopted a broad understanding of who qualifies as "part of" the enemy force and is therefore a legitimate subject of law-of-war detention (and possibly targeting). The executive has proposed, and the D.C. Circuit has endorsed, a "functional membership" test, which is essentially a totality of the circumstances test with no requirement that the individual engage in a specific, hostile act.[27] Training camp participation has been deemed highly significant as proof of membership, and, at least according to dicta in several D.C. Circuit rulings, may even be independently sufficient. The same is true for guest house attendance.[28]

Neither the substantive nor evidentiary standards applied in these cases vary based on either location of capture or location of activities, at least for non-citizens apprehended outside the United States. Thus, in the three Guantanamo habeas cases that squarely presented the issue to date – *Bensayah v. Obama* (involving a detainee whose capture and relevant activities took place in Bosnia),[29] *Salahi v. Obama* (involving a detainee captured in Mauritania, whose most relevant activities occurred there and in Canada)[30] and *Almerfedi v. Obama*

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detention authority on detainees' alleged status as a member of an enemy "armed force" – a status that under the laws of armed conflict make an individual a lawful military target as well. See Resp'ts' Mem., *supra* note __, at 5, 9 (emphasizing that "those who belong to armed forces or armed groups can be attacked at any time" and describing the power to detain ad a subset of the power to use force). See also Johnson, Speech, *supra* note __, (emphasizing that there is lawful authority to target any "valid military objective," which appears to include anyone who is "part of" the enemy force.)

[27] *See, e.g.,* Uthman v. Obama, 37 F.3d 400 (8th Cir. 2011) (emphasizing that "determination of whether an individual is 'part of' al-Qaida must be made on a case-by-case basis . . . ") (citations omitted); Khan v. Obama, 741 F. Supp. 2d 1, 5 (D.D.C. 2010) (highlighting that "[t]here are no settled criteria for determining who is part of the Taliban, al-Qaida, or an associated force. . . . The Court must consider the totality of the evidence . . . .") (citations omitted). For an excellent and thorough discussion of the legal standards being applied in *habeas* litigation, *see* Chesney, *Who May Be Held?*, *supra* note __; Benjamin Wittes, Robert M. Chesney & Larkin Reynolds, *The Emerging Law of Detention 2.0*; *The Guantanamo Habeas Cases as Lawmaking*, BROOKINGS INST., May 2011.

[28] *See, e.g.,* Al-Adahi, 613 F.3d 1102, 1109 (concluding that evidence that an individual attended al-Qaida training camps and stayed at al-Qaida safehouses can constitute " 'overwhelming' evidence that the United States had authority to detain that person") (quoting Al-Bihani v. Obama, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010)). To date, the Supreme Court has not accepted certiorari of any of these rulings, making the D.C. Circuit the final arbiter or who qualifies as "part of" the enemy force at least for the purposes of Guantanamo habeas cases.

[29] 610 F.3d 718 (D.C. Cir. 2010). Bensayah was arrested in Bosnia in late 2001, subsequently turned over to the United States, and brought to Guantanamo Bay in January 2002. The district court, in denying Bensayah's writ of *habeas*, found that Bensayah *planned* to travel to Afghanistan to take up arms against the United States and *planned* to facilitate the travel of others to do the same. Boumediene v. Bush, 579 F. Supp. 2d 191, 198 (D.D.C. 2008). On appeal, the D.C. Circuit noted al Qaeda's "global reach" and endorsed the government's view that "the AUMF authorizes the Executive to detain, at the least, any individual who is . . . part of al Qaeda," regardless of the place of capture or relevant activities. *Id.* at 724-25. The court did not address the location of capture and activities in its analysis. Ultimately, the court remanded for additional fact-finding, which had not yet taken place at the time of this writing.

[30] 625 F.3d 745 (D.C. Cir. 2010). Salahi, who was captured in Mauritania in 2001 and transferred to Guantanamo in 2002, had not been to Afghanistan since 1992 – a time at which al Qaeda and the U.S. were aligned in their efforts to oust the Communist government of Afghanistan. The district court granted Salahi's habeas petition. The D.C. Circuit vacated and remanded on the ground that the lower court improperly focused on whether or not Salahi fell within al Qaeda's

(involving a detainee whose capture and relevant activities took place in Iran)[31] – neither the location of capture or activities changed the basic analysis. Rather, the court employed a functional membership test that had been developed as a means of establishing membership for those linked to fighting forces in Afghanistan to persons whose location of capture and relevant activities took place far from any conventional battlefield. The same preponderance of the evidence standard that had been used to adjudicate battlefield captures was also applied.

In the cases of *Padilla v. Rumsfeld*[32] and *Al-Marri v. Pucciarelli*[33] the Fourth Circuit similarly concluded that the authority to detain "enemy combatants" applied even to those persons whose apprehension and relevant activities occurred in the United States.[34]

The broad definition of who qualifies as a "part of" the enemy force (or "enemy combatants" under the Bush administration's lexicon), coupled with the lack of geographic boundaries has led to a legitimate concern about "war everywhere." If the conflict extends to wherever the non-state enemy goes, then the non-state enemy brings the permissive rules of armed conflict anywhere merely be crossing state lines – thereby allowing governments to evade more stringent human rights and domestic, criminal law restrictions on the use of both detention without charge and lethal force.[35] The broader the definition of the non-state enemy, the greater the erosion of peacetime rules, and the greater the threat to fundamental liberties.

The United States and its supporters have attempted to address this concern by pointing to other law of war and sovereignty constraints as imposing limits on the manner and locations where fighting is waged.[36] Recent

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command structure. The D.C. Circuit did not address the argument that Salahi was ineligible for law-of-war detention due to the location of his activities and capture.

[31] 654 F.3d 1 (D.C. Cir. 2011). Almerfedi, who was arrested in Iran, was not accused of having engaged in military action against U.S. or coalition forces. The D.C. Circuit reversed the lower court's grant of the writ of habeas corpus. It relied on evidence that Almerfedi stayed with an Islamist missionary organization in Iran that is "closely aligned" with al Qaeda, traveled a strange and indirect route from his home in Yemen to Iran that was inconsistent with his stated goal of getting to Europe, and had at least $2000 of cash on his person when captured, to conclude he was an "al Qaeda facilitator" who could be detained as a functional member of al Qaeda.

[32] 423 F.3d 386 (4th Cir. 2005). For a thorough discussion of litigation in both this case and Padilla's case, *see* Chesney, *Who May be Held?*, *supra* note __, at 808-19.

[33] 534 F.3d 214 (4th Cir. 2008) (en banc), *vacated*, al-Marri v. Spagone, 555 U.S. 1220 (2009).

[34] The Fourth Circuit, in a 5-4 split, ruled that location *did* matter in evaluating the procedural standards that applied. Al-Marri, 534 F.3d at 216 (per curiam). Notably, however, the ruling appears to turn on al-Marri's due process rights as a legal resident detained in the United States. *Id.* at 262-265, 270 (Traxler, J., concurring). It therefore offers little guidance as to the procedural rights of non-citizens who lack substantial connections to the United States. *See, e.g.,* Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

[35] There is an antecedent question as to whether international human rights law applies, and if so, whether it provides significantly different rules and safeguards, an issue I address *infra*, p. x. *See also Chesney*, *Who May Be Killed?*, *supra* note __, at 49-50; John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 209-213 (2011) (discussing difficulty of identifying and applying the relevant human rights rule).

[36] *See, e.g.,* Brennan, Harvard Speech, *supra* note __ (noting that "[i]nternational legal principles, including respect for a state's sovereignty and the laws of war, impose important constraints on

administration statements also have suggested that, at least as a matter of policy, it focuses its out-of-battlefield lethal targeting operations on operational leaders or those who pose a "significant" threat.[37] But these additional constraints fail to adequately protect against the erosion of basic liberties and human rights standards in places where peacetime rules are presumed to apply.

Law of War Constraints – the Principle of Distinction: Scholars dating back to Cicero have long stressed the need for restraint in the exercise of wartime actions so as to ensure that the return to peace is not impossible.[38] Over time this has developed into the widely accepted norm that what is permitted by military necessity must be tempered by respect for humanity and integrated into the central, operational principles of distinction and avoidance of unnecessary suffering.[39] The principle of distinction requires that states distinguish between civilians and belligerents, and mandates that civilians and civilian objects may not be the object of attack.[40] The related rule of proportionality prohibits military attacks that cause loss and damage to civilians excessive in relation to the military advantage to be gained.[41] Together, these rules impose cardinal limits on a belligerent state's military response to an identified threat.

Scholars such as Professor Robert Chesney have pointed to these rules as a means of addressing concerns about the conflict's reach.[42] But the degree to which the principles of distinction and proportionality have a restraining effect on the state's use of force depends directly on the definition of combatant being employed. An overly narrow definition of combatant unduly ties the belligerent state's hand, prohibiting it from using force against those that ought to be legitimate targets. By contrast, an overbroad definition of combatant fails to provide meaningful constraints on the state's potential use of force. Here, it is

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our ability to act unilaterally—and on the way in which we can use force—in foreign territories."); John Bellinger, Speech, London School of Economics (Oct. 31, 2006) ("I am not suggesting that, because we remain in a state of armed conflict with al Qaida, the United States is free to use military force against al Qaida in any state where an al Qaida terrorist may seek shelter. The U.S. military does not plan to shoot terrorists on the streets of London."); Chesney, *Who May be Killed*, *supra* note __, at 37; Goldsmith & Bradley, *supra* note __, at 2120 & n.325 (describing law of war rules that would potentially constrain the use of lethal targeting in the United States).

[37] *See, supra, n.* __.

[38] *See* MARCUS TULLIUS CICERO, DE OFFICIIS I 33-41 (Walter Miller trans., Harv. Univ. Press 1913).

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

[40] *Id.* at 8.

[41] *Id.* at 130 ("The quintessence of proportionality is that collateral damage to civilians and civilian objects – caused by an attack against lawful targets – must not be expected to be 'excessive.'"). *See also* Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3; Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, A/CONF.183/9.

[42] Chesney, *Who May Be Targeted*, *supra* note __, at 37 (emphasizing that the "strict-geographic approach [is not] a sensible way to address concerns about the individual scope of targeting authority; such concerns can and should be addressed by an application of the principle of distinction and related concepts from within IHL itself").

precisely the breadth of the combatant definition as laid out by the executive branch and endorsed by the courts that has elevated the concerns about "war everywhere."

To the extent that one accepts this paper's premise as to the fundamental distinction between zones of active hostilities and areas outside such zones, refinements of the combatant definition will not satisfactorily respond to the concern. Any effort to adopt a uniform definition of "combatant" that provides sufficient protections to persons living in places such as London and Munich likely will be viewed as unduly hindering state actions within zones of combat. Conversely, any definition that properly identifies the scope of legitimate targets within such zones likely will be overbroad as applied to areas far removed from the conventional battlefield. It might, for example, be appropriate to assume that someone who attended al Qaeda training camp and is subsequently captured near the scene of a firefight in Afghanistan is properly classified as a "functional member" whose detention is a legitimate means of preventing him from returning to the fight, absent any information that he is engaged in or planning any specific attack.[43] By contrast, the idea that someone found thousands of miles from a battlefield could be detained – or even worse, targeted – simply because of past associations with al Qaeda without evidence that he is engaged in or planning any specific, hostile acts, casts the net too wide.

Sovereignty-Based Constraints: Respect for the state system and its embodiment of Westphalian notions of state sovereignty, provide a set of territorial-based limits on the scope of the conflict – limiting the use of unconsented-to force in another state's territory to those instances in which the state is unable or unwilling to effectively suppress the threat.[44] This has the effect of restricting the United States' use of unconsented-to force against al Qaeda and its associates to failed states (such as Somalia), ungoverned regions within states (such as the northwest province of Pakistan), or state supporters of terrorism (such as Afghanistan under the Taliban leadership). By comparison, the use of unconsented-to force in London or Munich is generally prohibited, given that the United Kingdom and Germany are able and willing to respond to the threat posed by terrorists on their soil, albeit through law enforcement mechanisms.[45]

Such geography-based limits, however, are generally presumed to fade away if a state consents to the use of force. Imagine, for example, that the

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[43] This was precisely the fact pattern to which the test was initially applied. *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 872-73 (D.C. Cir. 2010) (focusing on the detainee's "acknowledged actions-accompanying the brigade on the battlefield, carrying a brigade-issued weapon, cooking for the unit, and retreating and surrendering under brigade" as evidence that the detainee was part of the enemy force); Awad v. Obama, 608 F.3d 1, 7 (D.C. Cir. 2010) (concluding that there was no need to establish that detainee was part of al Qaeda's command structure when he had joined a group of al Qaeda fighters shooting at American forces).

[44] *See* Ashley Deeks, *Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT'L L. (forthcoming 2012), for an excellent discussion of the unable and unwilling test and its origins in neutrality law.

[45] This assumes that the United Kingdom and Germany agree with the United States' assessment of who qualifies as a terrorist enemy. If, by contrast, the United States determines that an individual is a legitimate target and the host state refuses to intervene, this constraint on the use of force arguably would disappear.

United States learns that an al Qaeda operative is traveling to Montreal for a meeting with a potential collaborator. Imagine, further, that the Canadian government determines that it lacks sufficient evidence to arrest the individual under its domestic laws, and instead gives the United States the green light to take whatever action it saw fit to deal with the target. Imagine, finally, that U.S. intelligence is able to determine in advance the precise location of the meeting, and concluded that it could strike with precision in a manner that would be consistent with the principle of proportionality. Under the territorially-broad view of the conflict, there would be nothing that would, as a matter of international law, prevent the United States from taking military action to kill that individual (although there would likely be strong policy reasons not to do so). Even if Canada would not consent to U.S. military action on its soil, the United States would still, under the territorially-broad view of the conflict, be legally justified in detaining the target and transferring him to the United States for law of war detention.

Such hypotheticals might not pose a concern when one is convinced that: (one.) the individual is who we think he is; (two.) there will be no collateral damage; and (three.) the individual poses a grave threat that cannot be addressed effectively through other means. But there are reasons to be concerned about each of these assumptions – reasons that expose the fundamental problems with the United States' approach and its analogy to the law of international armed conflict.

First, in international armed conflicts, the enemy forces typically wear uniforms, carry arms openly, and, if captured, have an incentive to self-identify (so as to obtain prisoner of war status). By contrast, the enemy in this conflict does not self-identify as such, but blends in with the civilian population. In fact, the enemy's entire *modus operandi* depends on the ability to hide, which in turn increases the possibility of mistake.[46] Even the world's best intelligence agencies have made documented mistakes in the past.[47] In targeting operations, the mistake is irreversible. In detention operations, it can be corrected, but with costs to both individual liberty and the state legitimacy.

Second, with respect to targeted killings, even with the most precise weapons and well-trained forces, there is always the possibility, and frequent reality, of collateral damage. This can be caused by a civilian wandering by at the last minute, by technological failures, or by intelligence failure, or by a

[46] *See, e.g.,* RICHARD A. POSNER, NOT A SUICIDE PACT 80 (2006) ("The danger of erroneously identifying an individual as an enemy of the United States is therefore much greater than in a conventional war."); Matthew Waxman, *Detention as Targeting*, 108 COLUM. L. REV. 1365, 1382 (2008) (describing "terrorist networks [as] tak[ing] the identification problems long posed by guerrilla warfare to new heights").

[47] In July 1973, for example, the Israeli Mossad assassinated an innocent Moroccan waiter in Lillehammer, Norway, mistaking him for a member of the Black September faction responsible for the Munich massacre. The U.S. has also taken custody of persons that are widely believed to have been innocent, including, for example, Khalid El-Masri. *See, e.g.,* Dana Priest, *The Wronged Man*, WASH. POST., Nov. 29, 2006. Had he been targeted instead of detained, the consequences would be irreversible. also Gregory Johnsen, *Signature Strikes in Yemen,* bigthink.com, April 19, 2012, available at: http://bigthink.com/waq-al-waq/signature-strikes-in-yemen (describing 2009 strike intended for a training camp that instead hit a Bedouin encampment killing more than 40 soldiers).

combination of all three.[48] Statistics from targeting operations in Northwest Pakistan suggest that this is a legitimate concern.[49]

Third, even if a threat is properly identified, there is no reason to believe that as a general matter it could not be effectively handled through the law enforcement system outside a hot conflict zone. Indeed, there are hundreds of examples of terrorist suspects in the United States and elsewhere being apprehended by and processed through the standard criminal justice system, with no need to invoke the law of war.[50] Simply put, the farther from the hot battlefield, the more likely alternative law enforcement means of addressing the threat are available and effective. When such means are available, as they are in Montreal and London, they should be employed. When they are not (as in Yemen or Somalia), additional tools may be justified, but only based on an actual showing of need.

Additional Policy Constraints: Recent administration statements have sought to defend the targeted killing of those who pose a "significant threat."[51] In the words of John Brennan, the United States does not seek to kill every al Qaeda member, but instead focuses its efforts on "disrupt[ing] plots and plans before they come to fruition." Brennan cited operational leaders, operatives in the midst of training for an attack, and persons who possess unique operational skills that are being leveraged for an attack. But no binding limits have yet been articulated, and it is not clear that they exist. Are these examples exclusive or merely illustrative? How far along does the attack planning need to be? Is mere agreement to plot or plan enough? Of note, "signature strikes" reportedly have been recently approved for use in Yemen, which allow the targeting of individuals or groups based on their pattern of activities without knowing the specific targets' identities or role in the organization.[52]

B. THE TERRITORIALLY-RESTRICTED VIEW

Responding to the United States approach, a number of scholars, human rights groups, and other commentators have sought to impose what Professor Kenneth Anderson has called a "legal geography of war."[53] This argument seeks

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[48] Gregory McNeal, The U.S. Practice of Collateral Damage Estimation and Mitigation (Nov. 2011), http://ssrn.com/abstract=1819583 (finding that 70% of collateral damage in targeted operations in Afghanistan and Iraq was due to target misidentification and 22% was due to weapons malfunction).

[49] Philip Alston, *The CIA and Targeted Killings Beyond Borders,* HARV. J. NAT'L SEC. L. (forthcoming) (manuscript at 35-37), *available at* http://ssrn.com/abstract=1928963 (compiling estimates of civilian deaths resulting from targeted killing operations in northwest Pakistan). *See also* Johnsen, *supra*, n. __ (listing civilian casualties resulting from strikes in Yemen).

[50] *See, e.g.,* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SEC. L. & POL'Y 1, 14-18 (2011).

[51] *See, supra*, note 10 and accompanying text.

[52] *See* Greg Miller, *White House Approves Broader Yemen Drone Campaign*, WASH. POST, Dec. 25, 2012.

[53] Ken Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a 'Legal Geography of War,' in* FUTURE CHALLENGES IN NATIONAL SECURITY AND THE LAW (Peter Berkowitz ed. forthcoming) (noting that historically there was an "implied geography of war" based on where actual fighting took place, but that drones challenge this notion by allowing attacks to occur outside these boundaries).

to narrow the scope of who can be detained and targeted by limiting the geographic reach of the laws of war, rather than by (or in addition to) focusing on the standards for detention and targeting themselves.[54] The arguments have sounded in *jus ad bellum* and *jus in bello*, but the impulse is the same: to impose territorial-based limits on the use of law of war tools.

The *jus ad bellum* argument focuses on the legality of the conflict: In a post-United Nations Charter world, one must establish a legitimate basis to use unconsented-to force in another state's territory based either on self-defense or a Security Council resolution justifying the use of such force.[55] Proponents of the territorially-limited view of the conflict argue that whereas there was both a self-defense justification and Security Council resolution justifying use of force in Afghanistan against al Qaeda and the Taliban (as the entity harboring al Qaeda), there is no such justification for use of force in other nations based solely on the fact that certain al Qaeda members or associated forces are found there.[56]

The *jus in bello* argument focuses on the existence of an armed conflict, as opposed to the legality of the conflict, but also does so on a state-by-state basis. Proponents of this approach generally rely on the ICTY's ruling in *Prosecutor v. Tadic* laying out the governing standard for determining the existence of a non-international armed conflict. Under this standard, such a conflict exists when there is "protracted armed violence" involving an "organized group."[57] Applying these factors, scholars and other commentators argue that while a conflict exists with al Qaeda in Afghanistan and border regions of Pakistan, it does not exist

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[54] There is also a separate, important, and ongoing debate about who can be targeted and detained in a transnational conflict with a non-state actor, separate and apart from the debate about the geography of the conflict. Views range from those who agree that rules should be derived from those applicable in an international armed conflict, *see, e.g.,* Goldsmith & Bradley, *supra* note __, to those who argue for the application of human rights law norms, *see, e.g.,* Gabor Rona, *A Bull in the China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT'L. L.J. 135, 148 (2008), to those who argue for a hybrid approach. *See, e.g.,* Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. J. NAT'L SEC. L. 145 (2010). Even those who agree that the rules of international armed conflict provide the appropriate framework disagree as to what those rules require with respect to detention. *See, e.g.,* Ryan Goodman, *The Detention of Civilians in Armed Conflict,* 103 AM. J. INT'L L. 48 (2009). A related and important debate addresses who properly qualifies as a "direct participant in hostilities" and is therefore a legitimate military target. *See, e.g.,* Nils Melzer, Int'l Comm. of the Red Cross, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009); Hays Park, *Part IV of the ICRC Direct Participation in Hostilities: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. POL. 769 (2010). Regardless of one's view, the underlying assumption is that the criteria for targeting and detention should apply consistently wherever employed within the applicable scope of conflict. This paper challenges that underlying assumption.

[55] *See* U.N. Charter arts. 2(4), 39-42, 51.

[56] *See, e.g.*, Mary Ellen O'Connell, , Killing Alwalki was Illegal, Immoral, and Dangerous, CNN BLOG, Oct. 1, 2011; Letter from Anthony D. Romero, Executive Director of the American Civil Liberties Union, to Barack Obama, President of the United States (Apr. 28, 2010), *available at* http://www.aclu.org/files/assets/2010-4-28-ACLULettertoPresidentObama.pdf.

[57] Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for Former Yugoslavia Oct. 2, 1995). *See also* The Prosecutor v. Jean Paul Akayesu, ICTR-96-4-T, Judgment, ¶¶ 619-620 (Sept. 2, 1998); Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc.6 rev. ¶¶ 152-156 (1997); Int'l Comm. of the Red Cross, Commentary: I Geneva Convention Relative to the Treatment of Prisoners of War 49 (Jean Pictet ed. 1960).

outside those areas.[58] Thus, even if another state consents to the use of force on its territory, it is illegitimate to use law of war tools to detain or target because the armed conflict does not extend to that state.[59]

This approach, however, suffers from both positivist and normative flaws. Treaty law does not provide the clear answers that proponents of this approach suggest. Non-international armed conflicts were initially assumed to take place solely within the territory of a state, and, as a result, the Geneva framers simply didn't address the situation in which a state was engaged in a conflict with a non-state actor whose presence spanned multiple states. The Conventions are silent as to the scope of a conflict with such attributes.[60] In connection with international armed conflicts (or conflicts between states), Geneva's drafters, reacting to the ravages of WWII, actually sought for the law of international armed conflict to have the broadest possible reach so as to prevent nations from resorting to unregulated warfare.[61]

Moreover, neither state practice nor case law provide clear answers to the question of the geographic reach of the conflict, and are probably best read to support a territorially broad view. The leading ICTY case on point describes the conflict as extending to the state's borders as a way to expand, not restrict the scope of the conflict.[62] Whether or not the conflict extended beyond those borders was simply irrelevant to that case.

The territorially-restricted approach also creates safe havens for the non-state enemy, allowing it to cross state lines to re-group, plan and coordinate

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[58] Some have recently suggested that even if one rejects the notion of a transnational armed conflict between the United State and al Qaeda, application of the *Tadic* factors suggest that there is an ongoing non-international armed conflict between Yemen and al Qaeda in the Arabian Peninsula (AQAP), that the U.S. has intervened in this conflict on behalf of Yemen, and that it is therefore engaged in a separate non-international armed conflict with Yemen. See, e.g., Benjamin R. Farley, *Targeting Anwar al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killing*, 2 Amer. U. Nat'l Sec. L. Brief 1, 57, 71-73 (2011). *But see* Ben Wizner, Podcast, Predator Drones and Targeted Killing, Federalist Society, Jan. 27, 2011 (arguing that the armed conflict does not extend to Yemen), available at: www.fed-soc.org/publications/detail/predator-drones-and-targeted-killings-podcast; Declaration of Mary Ellen O'Connell at ¶ 15, Al Aulaqi v. Obama, 10-CV-01469 (JDB) (D.D.C. Oct. 8, 2010) ("[T]he United States is not in an armed conflict in Yemen").

[59] *See, e.g.,* Mary Ellen O'Connell, *Unlawful Killings with Combat Drones: A Case Study of Pakistan, 2004- 2009, in* SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT 16-17 (Simon Bronitt ed., forthcoming), *available at* http://ssrn.com/abstract=1501144 (arguing that a state may not consent to the use of military force on its territory in the absence of armed conflict hostilities).

[60] *See, e.g.*, Common Article 3, Geneva Conventions (describing "armed conflict not of an international character *occurring in the territory of one of the High Contracting Parties*") (emphasis added).

[61] *See, e.g.*, Int'l Comm. of the Red Cross, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War 19-20 (Jean Pictet ed. 1960) (explaining that the broadly applicable term "armed conflict" was chosen to avoid the situation in which belligerent parties deny the existence of a state of war so as to avoid the obligations imposed by the laws of war).

[62] *Tadic,* Interlocutory Appeal, ¶ 70 (responding to petitioner's argument that it lacked subject matter jurisdiction because the alleged crimes took place at a prison camp that petitioner asserted was outside the scope of the armed conflict). *See also* Robert Chesney, *Who May Be Killed*, *supra* note __, at 36-37 (highlighting, among other things, the "endless examples of a party to an existing armed conflict using force in the territory of another state which until then was not experiencing hostilities within its own borders, in order to prevent establishment of a safe haven.").

externally directed plots free from the threat of attack.[63] To the extent that the threat can be appropriately addressed through foreign cooperation and law enforcement means that might not be particularly troubling. But what if the foreign government is unable or unwilling to respond to the threat, and capture by the belligerent state is infeasible? Alternatively, what if the foreign government is supportive of the belligerent state's efforts to arrest and prosecute the enemy, but the information about the target, at least initially, comes primarily from intelligence reporting that cannot be introduced in open court without revealing a critical source or jeopardizing a key relationship with a foreign power? Under the territorially-restricted view, even short-term law of war detention is prohibited, even if done for the express purpose of gathering information for a criminal case (as was done in Warsame's case).

One possible answer is that the use of force based on self-defense may still be justified in response, even if there is no law of war basis for using force or detention.[64] The United States itself has increasingly invoked self-defense, along with law of war authorities, as justifying targeted killings in places such as Pakistan, Yemen, and Somalia. But the rules governing the use of force in self-defense outside armed conflict are arguably even more unsettled than those with respect to law-of-war based use of force. The United States, for example, has argued for a "flexible interpretation of imminence" – one that presumably would allow it to target high-level leaders even if there is no evidence that they are participating in or coordinating a specific, imminent attack. Current law does not impose any specific procedural requirements designed to safeguard against abuse or excess in the exercise of self-defense killings. An overly broad view of what constitutes a legitimate target under a self-defense framework could result in same concern of "war everywhere," albeit pursuant to a different legal framework.

Finally, the underlying assumption behind the territorially-restricted view of the conflict – that geographic limitations will result in the replacement of the permissive rules of law of armed conflict with restrictive rules of international human rights norms – is itself subject to debate. The United States has long taken the position that the treaty-based obligations embodied in the International Covenant on Civil and Political Rights do not apply extraterritorially. This position has been sharply criticized by numerous scholars, as well as the United Nations Human Rights Committee, yet the United States is unlikely to alter its views at least in the near future.[65] Even if one accepts that the obligation to

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[63] Proponents of the territorially-restricted view generally acknowledge that those who are planning or coordinating attacks within the territorially-identified conflict zone are potentially subject to law of war authorities even if they have crossed state lines. Under this view, Taliban and al Qaeda leaders directing attacks in Kabul from northwest Pakistan remain legitimate military target (who can be subject to law of war detention or targeting with lethal force), whereas a group of al Qaeda operatives in Yemen who are planning an attack in Germany or Chicago are not, absent an explicit finding of imminent threat justifying action taken in self-defense.

[64] *See, e.g.*, Jordan Paust, *Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan,* 19 J. TRANSNAT'L L. & POL'Y 237 (2010).

[65] *See* U.N. Human Rights Comm., General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, P10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004). For the United States' position, see Sarah Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 251-52

respect life has reached the level of a customary norm that applies regardless,[66] the jurisdictional requirement of effective custody or control may make such a norm irrelevant in the context of most targeted killings.[67] Whereas there is a clear prohibition on the extra-judicial killing of a person who is *hors de combat* and in the state's custody, it is not clear that this obligation binds the United States with respect to a person driving down a desert road in Yemen.

It also is not clear that application of human rights norms would provide significantly enhanced safeguards with respect to detention, particularly given the possible use of administrative detention under a human rights framework.[68] This uncertainty highlights the need for a new set of rules that provide a clear set of standards and procedures to govern detention and targeting outside the zone of active hostilities – irrespective of the state's position as to whether and what human rights constraints apply.

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

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

This article offers such a framework: one that recognizes the broad scope of the conflict, but distinguishes between zones of active hostilities and elsewhere in setting the procedural and substantive standards for detention and targeting. This framework – what I call the *zoned approach* – accommodates the state's key security interests, while also protecting against the erosion of key

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(2010); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation,* 99 AM. J. INT'L L. 119, 123-24 (2005) (arguing that the drafting history supports the U.S. view).

[66] There is a compelling argument that the obligation to respect life is norm of customary international human rights law. *See, e.g.,* David Kretzmer, *Targeted Killing of Suspected Terrorists*, 16 EUR. J. INT'L L. 184, 184-85 (2005); Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, *in* THE INTERNATIONAL BILL OF RIGHTS – THE COVENANT ON CIVIL AND POLITICAL RIGHTS 114-15 (Louis Henkin ed., 1981). This still, however, does not answer the question as to the degree to which this obligation restricts a state's use of lethal force in response to an alleged terrorist threat.

[67] *See, e.g.,* Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 264-65 (2010) (arguing that human rights law does not protect targeted persons who are not within the jurisdiction or effective control of a country engaged in self-defense or law-of-war targeting.). *But see* al-Skeini v. United Kingdom, Judgment, App. No. 55721/07, ¶ 136 (Eur. Ct. H.R. July 7, 2011) (suggesting that at least under the European Convention of Human Rights such persons might be deemed under the state's control).

[68] *See, e.g.,* Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L. L. 369 (2008), for an excellent discussion of detention schemes pursuant to international human rights law.

human rights principles and peacetime norms outside zones of active hostilities. It recognizes that rules applicable in wartime – rules that permit extrajudicial killings and detention without charge based on status alone – should be the exception rather than the norm, limited to circumstances when security demands it.

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

A. BASIS FOR THE DISTINCTION

There is an intuitive sense that the killing or detention of alleged enemy of the state in a war zone is different than the killing or detention of an alleged enemy in a peaceful zone (think Munich or London) even if the known facts about the enemy's role in the opposing force are the same. Similarly, there is a less intuitive, but equally important, difference between both those situations and the killing or detention of an alleged enemy in a lawless zone (think Yemen and Somalia). This section highlights why these distinctions are apt and should be reflected in law: reasons largely based on exigency, notice, and the intrinsic value of cabining war consistent with military necessity.

i. The War Zone vs. the Peaceful Zone

The exigencies that justify application of wartime rules simply do not apply outside zones of active hostilities. The Supreme Court recognized this important distinction in *Reid v. Covert*, in ruling that civilians accompanying the armed forces outside a war zone could not be subject to military trial: "The exigencies which have required military rule on the battlefield are not present where no conflict exists."[69] Similar reasoning has led courts to conclude that the requisitions of property by the U.S. government are permitted at the "seat of the conflict" but not thousands of miles away;[70] and the protections of the Suspension Clause depend to a large extent on whether or not the detainees are held in an "active combat zone."[71]

As these cases implicitly recognize, the existence of war-like conditions in one part of the world should not lead to relaxation of the substantive and

[69] 354 U.S. 1, 35 (1957) (holding that civilians accompanying the armed forces outside a war zone may not be subjected to military trial).

[70] Filbin Corp. v. U.S., 266 F. 911, 917 (D.C.S.C. 1920) ("A state of war does not sanction summary requisitions for all purposes everywhere, but only in those places in which, by the necessities of the conflict, martial law is in force and civil law is suspended.").

[71] 354 U.S. at 35. But see *Ex Parte* Lincoln Seiichi Kanai, 46 F. Supp. 286, 288 (E.D. Wis. 1942) (upholding order requiring persons of Japanese descent to evacuate San Francisco; concluding that the "filed [sic] of military operation is not confined to the scene of actual physical combat"); United States ex re. Weseels v. McDonald, 265 F. 754, 763 (E.D.N.Y. 1920) (describing "the territory of the United States [as] within the field of active operations" during WWI and upholding courts-martial of alleged spy captured in New York).

procedural standards embodied in peacetime rules elsewhere.[72] In some areas, intense fighting can create conditions that often make it impracticable, if not impossible, to apply ordinary peacetime rules. In such situations, resort to more expedient wartime rules is justified. By contrast, in areas where ordinary institutions are functioning, domestic police are effectively maintaining law and order, and communication and transportation networks are undisturbed, the exigent circumstances justifying the reliance on law-of-war tools is generally absent. This is particularly so in instances where specific detentions or killings are pre-planned.[73] In those areas, the peacetime standards – which themselves reflect a careful balancing of liberty and security interests – serve important functions in terms of minimizing error and abuse and enhancing the legitimacy of the state's actions. These standards should be respected absent the actual existence of exigent circumstances justifying an exception.

Second, the notion of a global conflict clashes with the legitimate and reasonable expectations of persons residing in a peacetime zone. These expectations matter. The corollary – the requirement of fair notice – is perhaps the central factor that distinguishes a law-abiding government from a lawless dictatorship. Its importance is emphasized time and time again in both U.S. constitutional law doctrine and international law. It sets boundaries on substantive rights,[74] is key to choice of law questions,[75] and is the core of procedural rights-protections in both domestic and international law.[76]

In places of intense, obvious, and publically acknowledged fighting, civilians are on notice that they are residing within a zone of conflict. Those that remain within the conflict zone have implicitly accepted some risk. They can, at

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[72] This is also the central thesis of the Supreme Court's ruling in *Ex Parte Milligan*, 7 U.S. 2 (1866).

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

[74] Fourth Amendment doctrine, for example, links its protections to that which is deemed to be "reasonable" or "justifiable" expectation of privacy. *See, e.g.,* United States v. Katz, 389 U.S. 347 (1967); Rakas v. United States, 439 U.S. 128, 143 (1978) (linking the Fourth Amendment's protections to the "legitimate expectation of privacy"); United States v. White, 401 U.S. 745, 751 (1971) (central question is whether expectation of privacy is "justifiable").

[75] *See, e.g.,* Allstate Ins. Co. v. Hague, 449 U.S. 302, 317-318, 318 n.24 (emphasizing lack of "unfair surprise or frustration of legitimate expectations" in holding insurance company subject to Minnesota's laws).

[76] *See, e.g.,* United States v. Williams, 553 U.S. 285, 304 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited."); Eastern Enterprises v. Apfel, 524 U.S. 498, 501 (1998) ("Retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions."); International Covenant on Civil and Political Rights, art. 15, Dec. 16, 1966, 999 U.N.T.S. 177 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed"); Steel v. United Kingdom, App. No. 24838/94, 28 Eur. H.R. Rep. 603, 637 (1999) ("[T]he standard of 'lawfulness' set by the Convention . . . requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in all circumstances, the consequences which a given action may entail.").

least in theory, take some steps to protect themselves and minimize the likelihood of being caught in the crossfire, by, for example, leaving or avoiding areas with the heaviest concentration of fighters, or at least taking extra precautions in how they live their daily lives.[77] Host states are similarly on notice of the likelihood of ongoing hostilities and can take appropriate steps to move their own citizens away from areas of intense fighting.

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

It is, of course, possible to respond by announcing a new set of rules for this new type of conflict, under which the procedural and substantive requirements of domestic criminal justice systems and human rights norms give way when the non-state enemy crosses into one's jurisdiction. But the idea that a non-state actor could, through his clandestine behavior, flip a switch that triggers the application of a new set of rules – ones that allow for the permissive use of extrajudicial killing and detention without charge – runs counter to longstanding conceptions of what is fair and just.[78] It essentially gives the terrorist enemy the upper hand, allowing it to single-handedly change the rules of the game and erode basic rights-protections simply by crossing state lines.

Third, the conditions on the ground affect the assessment as to who qualifies as the enemy. While there might be a valid presumption that individuals who attend a training camp and are found in a zone of active hostilities are there in order to join the fight,[79] the same does not necessarily hold for individuals

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[77] This is harder to do in situations in which the non-state enemy has purposefully diffused itself among the civilian population. In some cases, it also may be near impossible to leave due to risks of travel, health constraints, or political reasons, such as the shutting of borders. That said, the heavy refugee flows out of places like Afghanistan and Iraq indicate that there is at least some possibility of departing a zone of active hostilities, albeit often at extraordinarily high financial, physical, and emotional costs.

[78] *See, e.g.,* LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969) (describing a set of rules that change so frequently that citizens lack notice and the ability to comply as not just a bad system of law, but not a system of law at all).

[79] As Philip Heymann and Gabriel Blum explain: "Joining a terrorist organization does not necessarily have a similar on/off switch [as joining a state army]; individuals might join the organization or support it in some ways or for some time, but then go back to their ordinary business without making any ritual marking their joining or departing." Blum & Heymann, *supra*, note __. *See also* BRUCE HOFFMAN, INSIDE TERRORISM 271(2d ed. 2006) (describing "[t]he new generation of terrorists [as] less cohesive organization entities, with a deliberately more diffuse structure and membership with distinctly more opaque command and control memberships" than the hierarchical terrorist organization dominant during the 1970s and 1980s). I also question whether another key factor used to establish functional membership – guest house attendance – suffices even within a zone of active hostilities. For an insightful analysis, see Benjamin Wittes, *The Significance of Guesthouses and Training*, LAWFARE.COM, June 11, 2011, http://www.lawfareblog.com/2011/06/the-significance-of-guesthouses-and-training/.

who are located in thousands of miles away in a zone of relative peace.[80] Absent additional, specific information suggesting that the individual is actively engaged in attack-planning or plays a sufficiently important role in the organizations so as to pose an significant ongoing threat, the justifications for law of war detention or lethal killing (to prevent the return to the battlefield or otherwise eliminate the threat) are largely absent. At a minimum, this suggests the value of applying heightened evidentiary standards to detentions and targeting that take place outside a zone of active hostilities.

ii. The Lawless Zone

In practice, the truly contested areas fall somewhere between the obvious warzone and the peacetime zone. The U.S. has not and is unlikely to launch drone strikes in Paris. It is, however, doing so with increasing frequency in places like Yemen and Somalia – areas that can be loosely characterized as lawless zones.

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

Yet, despite these similarities, the lawless zone in which a discrete number of non-state actors find sanctuary is intuitively distinct – and righty so – from the hot conflict zone where there is overt, active, ongoing fighting. This is so for three main reasons.

First, the existence of a separate, distinct conflict, however, does *not* provide notice of a conflict between a belligerent state and transnational non-state enemy. In concrete terms, the existence of a conflict between Al Shabaab and the Transitional Federal Government does not provide notice of a conflict between the U.S. and al Qaeda affiliates allegedly in Somalia. This matters for reasons of attribution and accountability. It also matters to the degree, if not the fact, of conflict experienced by the civilian population. Imagine if the existence of a lawless zone gave states free rein to unilaterally attack any alleged non-state enemy found there. Absent any meaningful checks, such a region might be decimated by external attacks. Such a situation would likely exacerbate the separate conflict, prolong the situation of lawlessness, and make it exceedingly

[80] There are, of course, exceptions to this general rule. For example, a high concentration of such individuals in a particular area, even outside a zone of active hostilities, would be grounds for significant concern. Similarly, the presence of an individual who trained with al Qaeda near a probable target, like a military installation or an embassy, might also support an inference that he is there in connection with the ongoing conflict. Under the framework proposed in this Article, the state would be able to effectively respond to such threats; it simply would have to meet the higher substantive and procedural standards for doing so.

difficult for the population to properly identify or take steps to address the source of conflict.

Second, the presumption problems that distinguish the peacetime zone from the wartime zone also apply in the lawless zone. Moreover, the costs of misidentification are likely to be exacerbated in a lawless zone. Given the situation on the ground, most operations are likely to be kill, rather than capture, operations. Any mistakes are therefore irreversible.

Third, and relatedly, operations are likely to be limited to targeted and surgical strikes, often with advance planning and little risk to the state's own troops. This is a very different setting than an active battlefield with troops on the ground that are exposed to high levels of risk. In such a situation, troops on the ground need not hold their fire until they do a careful evaluation of the threat posed; such a rule would be potentially suicidal. In Yemen and Somalia, by contrast, the United States carefully pinpoints and identifies targets, with little to no danger to its own troops. When engaging in that type of calibrated killing or detention, there is a corresponding obligation to take extra precautions to prevent error or overzealousness.[81]

B. CURRENT STATE PRACTICE

Dating back to 2006, the United States has, at least implicitly and as a matter of policy, recognized the distinction between zones of active hostilities and elsewhere. As is well known, the Bush administration initially placed a significant number of off-the-battlefield captures into long-term law-of-war detention. Detainees reportedly included persons captured in places as far-flung from the battlefield in Afghanistan as Bosnia, Dubai, Mauritania, and Thailand – as well as the United States.[82] These out-of-battlefield detentions turned out to be highly controversial. They have been the subject of numerous court challenges, international criticism, and endless commentary. Moreover, they raise difficult questions about repatriation – issues with which the United States continues to struggle.[83]

Beginning in September 2006, the Bush administration announced a shift in policy. Largely in response to the Supreme Court's ruling in *Hamdan*,

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[81] This is not meant to suggest that ground troops is a necessary feature of a zone of active hostilities. To the contrary, and as discussed *infra*, most agree that northwest Pakistan is part of the zone of active hostilities given the spillover effect of the conflict and the intensity of the air campaign, even though the United States and ISAF do not have troops on the ground there. Similarly, other intense bombing campaigns, such as the 1999 NATO bombings of former Yugoslavia, have created zones of active hostilities even without troops on the ground. That said, the absence of fighting forces on the ground is a relevant factor not just to the identification of the zone of active hostilities, but the basis for the distinction.

[82] *See, e.g., Bensayah*, 610 F.3d at 720 (habeas claim brought by detainee captured in Bosnia); *Salahi*, 625 F.3d at 750 (habeas claim brought by detainee captured in Mauritania); Al Maqaleh v. Gates, 605 F.3d 84, 87 (D.C. Cir. 2010) (claims brought by detainee allegedly captured in Thailand in 2003 and subsequently transferred to the Bagram Theater Internment Center); Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009) (claim brought by a detainee alleged to have been captured in Dubai in 2002 and transferred to Bagram); *Al-Marri,* 534 F.3d 213; *Padilla*, 423 F.3d 386.

[83] *See, e.g.,* John Bellinger & Vijay Padmanabhan, *Detention Operations in Contemporary Conflicts*, 105 AM. J. INT.'L L. 201, 209, 233-41 (2011) (describing some of the difficult repatriation question).

President Bush announced that he was closing the CIA-run detention black cites, at least temporarily, and ordered the transfer of 14 long-term CIA detainees to Guantanamo. [84] Subsequently, the number of out-of-battlefield captures transferred to Guantanamo trickled to a mere few: three in 2007[85] and one in 2008.[86] All were described as high-value, based on alleged links to high-level al Qaeda operatives or involvement in specific terrorist attacks.[87]

Two days after taking office, on January 22, 2009, President Obama announced the permanent shuttering of the CIA sites.[88] His administration has committed not to transfer any detainees to Guantanamo.[89] Since 2009, Warsame is the only known case of an out-of-battlefield detainee being placed in anything other than short-term military custody. After approximately two months, he was transferred to federal court for trial.

Some have argued that the low number of out-of-battlefield detentions is due in part to the lack of viable locations for holding detainees. But while that may be a factor, it seems that the high diplomatic, reputational, and transactional costs of such detentions, and the relative effectiveness of the criminal justice system in responding to the threat are equally – if not more – important factors in limiting the reliance on law-of-war detention.[90]

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[84] President George W. Bush, Speech to the Nation (Sept. 6, 2006), *available at* http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all (stating that the Supreme Court's ruling that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda "has put in question the future of the CIA program" and that "[t]he current transfers mean that there are now no terrorists in the CIA program").

[85] The three transferred to Guantanamo in 2007 were Abd al-Hadi al-Iraqi, described as being captured as he was "attempting to travel back to his native country in Iraq;" Adbul Malik, reportedly captured in Kenya; and Abdullahi Sudi Arale, reportedly captured in the Horn of Africa. *See* Press Release, U.S. Dep't of Defense, Defense Department Takes Custody of a High-Value Detainee (No. 494-07, Apr. 27, 2007); Press Release, U.S. Dep't of Defense, Defense Department Takes Custody of a High-Value Detainee (No. 347-07, Mar. 26, 2007); Release, U.S. Dep't of Defense, Terror Suspect Transferred to Guantanamo (No. 703-07, June 6, 2007).

[86] Muhammad Rahim al-Afghani, reported to have been captured in Lahore, Pakistan, was transferred to Guantanamo in 2008. *See* Press Release, U.S. Dep't of Defense, Defense Department Takes Custody of a High-Value Detainee (No. 205-07, Mar. 14, 2008).

[87] It is, of course, plausible that after the temporary closure of CIA detention cites in September 2006, they subsequently reopened, or that detainees were moved elsewhere, such as Afghanistan. Yet, with the one possible exception of Muhammad Rahim al-Afghani who according to a Department of Defense spokesperson was held in CIA custody before being transferred to Guantanamo in March 2008, this does not appear to be the case. *See* Roggio, *US Captures Senior al Qaeda leader Mohammad Rahim*, LONG WAR J., Mar. 14, 2008, *available at* http://www.longwarjournal.org/archives/2008/03/us_captures_senior_a.php (quoting Pentagon spokesman Bryan Whitman as stating that "[p]rior to [al-Afghani's] arrival in Guantanamo, he has been held in CIA custody"). As for Afghanistan, outside groups estimate that just 20 detainees captured elsewhere had been brought to Bagram for long-term detention as of 2009. And the three whose cases are publicly known were all brought to Afghanistan well before 2006. *See* Al Maqaleh, 604 F. Supp. 2d at 209-10; Christopher Weaver, *Out With the Old Gitmo, In With the New?*, PROPUBLICA, Jan. 20, 2009.

[88] Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

[89] *See* Dafna Lizner, *Obama Counterterrorism Adviser Slams Congressional Efforts to Block Guantanamo's Closure*, PROPUBLICA, Mar. 18, 2010 (describing Brennan as stating that even Osama bin Laden would not be taken to Guantanamo).

[90] Others have also suggested that persons who would otherwise be detained are instead being killed, given the scrutiny given detention operations and burden of administrative and court reviews. This argument is not particularly convincing, given that almost all targeted killings have

As out-of-battlefield detentions have declined, targeted killings reportedly have increased dramatically. The vast majority of these appear to have been concentrated in northwest Pakistan – an area that most concede is part of the zone of active hostilities.[91]

Critically, the Obama administration appears to have adopted a distinction between Afghanistan and northwest Pakistan and elsewhere in setting the rules for these strikes. Thus, at the same time that top administration officials have argued that its military authorities are not limited to the "hot battlefield" of Afghanistan, they have argued that "outside of Afghanistan and Iraq" its targeting efforts are limited to those "who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qa'ida and its associated forces."[92] Whether or not one agrees with the standard employed, it is clear that the administration itself recognizes a distinction between Afghanistan (and formerly Iraq) and other areas embroiled in the conflict with al-Qaeda. Procedural rules in terms of who must authorize the strike also reportedly vary depending on whether one is operating within Afghanistan or elsewhere.[93] While there are good reasons to demand additional safeguards, the U.S.'s own actions already reflect the importance and value of distinguishing between zones of active hostilities and elsewhere.

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reportedly been carried out in places such as northwest Pakistan, Somalia, and Yemen, where capture operations are extremely difficult, if not infeasible. Moreover, it contradicts at least the official statement of U.S. policy: "[W]henever it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people." Brennan, Harvard Speech, *supra* note __.

[91] *See, e.g.*, Bill Roggio & Alexander Mayer, *Charting the Data for U.S. Airstrikes in Pakistan*, LONG WAR J., http://www.longwarjournal.org/pakistan-strikes.php; Bill Roggio and Bill Barry, Charting the Drone Strikes in Yemen, 2002-2012, LONG WAR J., http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php
Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, WASH. POST, Dec. 27, 2011 (contrasting several hundred strikes in northwest Pakistan between January 2009 and the end of 2011 with handful of strikes in Yemen and Somalia).

[92] Brennan, Harvard Speech, *supra* note __ . *See also* Eric Holder, Speech, supra note __, (arguing that the authority to take action against al Qaeda and associated forces is "not limited to the battlefields in Afghanistan," but suggesting targeting operations elsewhere are focused on "specific senior operational leaders."); Harold Koh, ASIL Speech, *supra* note __, (suggesting nexus between the "location" of the operation and the "imminence of the threat");

[93] *See* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, J. NAT'L SEC. L. & POL'Y (forthcoming 2011) (manuscript at 31) (describing different levels of approval depending on where the military is operating in carrying out lethal strikes against al Qaeda leaders). Statements by top administration officials confirm that the United States applies more rigorous procedural reviews to strikes that take place outside Afghanistan and northwest Pakistan. *See, e.g.,* Brennan, Woodrow Wilson Center Remarks, *supra* note __ (emphasizing "the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of al-*Qa'ida outside the 'hot' battlefield of Afghanistan.")* (emphasis added).

C. THE SECURITY CALCULUS

Some are likely to raise security objection to any effort to distinguish between zones of active hostilities and elsewhere, even if the distinction operates solely to limit, rather than prohibit, the use of law of war authorities outside such zones. But such objections tend to be overstated. In fact, the United States' own practices appear to recognize the security and foreign policy benefits of drawing a distinction between zones of active hostilities and elsewhere. There are several reasons why it is in the long-term security interest of the United States to seek international consensus for such an approach – not just as a matter of policy but also as a matter of law.

First, the high-profile and controversial nature of out-of-conflict zone killings and detentions without charge often work to the advantage of terrorist groups and to the detriment of the state. As the U.S. Counterinsurgency Manual explains, it is impossible and self-defeating to attempt to capture or kill every potential insurgent: "Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power" by increasing their own legitimacy while decreasing the insurgent's legitimacy.[94] Excessive use of force, unlawful detentions, and punishment without trial are described as "illegitimate actions" that are ultimately "self-defeating."[95] In this vein, the Manual advocates moving "from combat operations to law enforcement as quickly as feasible."[96] Self-imposed limits on the use of detention without charge and targeted killing without judicial process may actually inure to the benefit of the belligerent state.[97]

Second, limiting the exercise of these authorities outside zones of active hostilities better accommodates the demands of European allies, whose support the United States relies upon. As John Brennan has emphasized, "[t]he convergence of our legal views with those of our international partners matters. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies – who, in ways public and private, take great risks to aid us in this fight. But their participation must be consistent with their laws, including their interpretation of international law." Key European partners have long viewed the conflict with al Qaeda as limited to the hot battlefield of Afghanistan and northwest Pakistan (and formerly Iraq). According to this view, use of force outside such areas is only permitted under a

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[94] Dep't of the Army, Field Manual 3-24: Counterinsurgency I-129 (2006) [hereinafter Counterinsurgency Manual] .

[95] *Id.* at I-132. *See also id.* at I-128 ("[K]illing every insurgent is normally impossible. Attempting to do so can also be counterproductive in some cases; it risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge.").

[96] *Id.* at I-131. *See also* Phil Mudd, *No More Military Custody for al Qaeda Fighters*, WASH. POST, Dec. 30, 2011 (warning that the treatment of al Qaeda as combatants has been a "boon to al Qaeda, allowing its fighters to argue that they remain a strategic threat, that they are a powerful movement meriting a military response and that the growing perception that they've become common criminals is wrongheaded."). Mudd was the former deputy director of the CIA's Counterterrorist Center and senior intelligence adviser to the FBI from 2009 to 2010.

[97] *See also* Brennan, Woodrow Wilson Center Remarks, *supra*, note __ (emphasizing that "going after every single [member of al Qaeda or associated forces] would neither be wise nor effective").

self-defense framework in response to those who pose an "imminent" threat, and law of war detentions are arguably prohibited altogether.[98] By accepting self-imposed limits on its out-of-hot battlefield actions, the United States better positions itself to develop international consensus as to the rules that ought to apply.

Third, such self-imposed restrictions are also more consistent with the United States' long-standing role as champion of human rights and the rule of law – a role that becomes hard for the United States to play when it is viewed as supporting a theory of broad-based law of war authority that gives it wide latitude to bypass otherwise applicable human rights and domestic law enforcement norms.

Fourth, the United States, as a standard-bearer, sets norms that are mimicked by others. Even if the United States thinks that it will exercise its asserted authorities responsibly, there are good reasons to be concerned about countries such as China, Russia, or Iran relying on United States' precedent to argue that it can detain without charge, or even worse, kill any suspected non-state enemy wherever they might be found. Imagine, for example, that Russia declared itself in an armed conflict with Chechen rebels and sought the United States' assistance in capturing alleged Chechen enemies in Nebraska, and the United States refused. Under the broad legal theory currently espoused by the United States, the Russians arguably would be justified in capturing and detaining them without trial – or even worse, killing them – on its own.

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

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

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

[98] There is an interesting, and unresolved question, as to whether or not the greater power to use force would, in this context, also include the lesser power to detain.

A. ZONES OF ACTIVE HOSTILITIES

Commentary, political discourse, court rulings, and academic literature are rife with references to the distinction between the so-called "hot battlefield" and elsewhere. Yet, despite the salience of the distinction, there is no commonly understood definition of the term – let alone a common term applied by all.[99] In what follows, I briefly survey the relevant treaty and case law and offer a working definition of what I call the "zone of active hostilities" (or more colloquially the "hot" conflict zone) that takes into account the existing treaty and case law as well as the normative and practical reasons for distinguishing between the two zones.

i. Treaty and Case Law

While not spelled out in any specificity, the notion of separate zones of hostilities where fighting is underway is implicit in treaty law. The Geneva Conventions, for example, specify that prisoners of war and internees must be moved away from the "combat zone" in order to keep them out of danger;[100] and that belligerent parties must conduct searches for the dead and wounded left on the "battlefield."[101] There are no explicit definitions provided, but the context suggests a narrow definition covering those areas where fighting is taking place or is likely to erupt at any moment. The related term "zone of military hostilities" is spelled out in a bit more detail in the Commentaries and is described as applying to not just those areas where fighting is taking place, but also to those areas where there are actual or planned troop movements, even if no fighting.[102]

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[99] *See* Laurie Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1 (2010) (highlighting the difficulty of identifying the "zone of combat" and suggesting several factors that should be considered).

[100] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, art. 19, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (referring to need to move POWs "far enough from the combat zone for them to be out of danger."); *id.* at arts. 7, 9 (referencing need to remove POWs from the "fighting zone"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 127, Aug. 12, 1949, 6 U.S.T. 3516 (referring to the transfer of internees from "combat zone"); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 5(2)(c), June 8, 1977, 1125 U.N.T.S. 609 ("[P]laces of internment and detention shall not be located close to the combat zone").

[101] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 15, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, art. 3, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303 (referring to "field of battle").

[102] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 20, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Int'l Committee of the Red Cross, Commentary: IV Geneva Convention Relative to the Treatment of Prisoners of War 163 (Jean Pictet ed. 1960). (The expression "zones of military operations" refers primarily to the area where fighting is taking place. But it may also apply to areas in which military authorities are given certain powers and restrictions are placed on the movement of civilians, in areas, for example, where there are troop movements but not fighting, and even in those where there is no actual movement of troops but in which the High Command wishes to be able to move them at short notice.) *See also* ICRC API Commentary at 617 (describing that "[a] mixed group of the Diplomatic

U.S. courts have in a variety of contexts opined on whether certain activities fall within or without a zone of active hostilities, indicating that the existence of fighting forces is key. In *Hamdi*, for example, the Supreme Court noted the large number of troops on the ground in Afghanistan in support of the finding that the United States was involved in "active combat" there.[103] A panel of the D.C. Circuit judges subsequently noted the ongoing military campaign by U.S. forces, the attacks against U.S. forces by Taliban and al Qaeda, the casualties incurred by U.S. personnel, and the presence of other non-U.S. troops under NATO command in support of its finding that Afghanistan was "a theater of active military combat."[104] Previous court cases have similarly identified the presence of fighting forces, as well as actual engagement of opposing forces and casualty counts, in identifying a theater of active conflict.[105]

Conversely, U.S. courts have generally assumed that areas in which there is no active fighting between armed entities are outside the zone of active hostilities. Thus, the *al-Marri* and *Padilla* litigation were premised on the notion that the two men were arrested outside the zone of active hostilities when taken into custody in the United States. The central issue was how much that distinction mattered.[106] The D.C. Circuit in *al-Maqaleh* similarly distinguished Afghanistan – defined as part of "the theater of war" – from Guantanamo – described as outside this theater, presumably because of the absence of active fighting there.[107] In the context of the Guantanamo habeas litigation, D.C.

Conference defined "zone of military operations" as "the territory where the armed forces of the adverse Parties taking a direct or an indirect part in current military operations, are located" [citing to O.R. XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A].

[103] 542 U.S. at 521. In *Boumediene*, the Supreme Court again described Afghanistan as part of the "battlefield," but failed to explain whether all or only part of Afghanistan was part of the battlefield, whether the battlefield extended beyond Afghanistan, or what the criteria were for qualifying as part of the battlefield. 553 U.S. at 734 (2006).

[104] Al Maqaleh v. Gates, 605 F.3d at 88. *See also In re* Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d 85, 105 (D.D.C. 2007) (describing both Afghanistan and Iraq as part of the "battlefield").

[105] In Reid v. Covert, 354 U.S. 1, 33 (1957), for example, the Supreme Court described the condition of actual fighting as justifying the finding that one was "in the field" for purposes of military commission jurisdiction). *See also* Madsen v. Kinesll*a,* 72 S.Ct. 699 (1952) ("military occupancy" of a territory justified military commission jurisdiction). The Ninth Circuit identified attacks by U.S. naval ships on Iranian gunboats and oil platforms as creating a "combat zone" during the Iran-Iraq tanker war. Koohi v. United States, 976 F.2d 1328, 1335, 1337 (9th Cir. 1992). Other courts have looked to the presence and engagement of fighting forces, as well as number of casualties in defining the existence of "war" in the first place – a condition precedent to identifying a zone of active hostilities. *See, e.g.,* United States v. Bancroft, 11 C.M.R. 3, 5 (1953) (presence of troops, casualties, other sacrifices key factors, among others, in identifying state of war); Hamilton v. M'Claughry, 136 F. 445, 451 (C.C.D. Kan.) (occupation of Chinese territory by U.S. military forces and conflicts between U.S. and Chinese troops key factors in defining engagement in China during the Boxer Uprising as "war").

[106] In previous conflicts, courts have similarly described the U.S. as "outside of the area of active hostilities" when fighting was concentrated in specific locations overseas. *See, e.g.,* United States v. Anderson, 38 C.M.R. 582, 586 (1967) (defining U.S. as outside of the area of active hostilities during Vietnam War); United States v. Ayres, 15 C.M.R. 220 (1954) (implicitly suggesting that U.S. outside area of active hostilities during Korean War). *But see* Blank, *Defining the Battlefield in Contemporary Conflict*, *supra* note __, at 24 (noting cases in which courts held that the continental U.S. was part of the "field of military operations" during WWI and WWII).

[107] Al-Maqaleh*,* 605 F.3d at 99.

District Court judges have at various times also described Saudi Arabia, Gambia, Zambia, Bosnia, Pakistan, and Thailand as outside a battle zone.[108]

In defining what constitutes a conflict in the first place, international courts have similarly looked to existence, duration, and intensity of actual fighting. Specifically, in *Tadic,* the International Criminal Tribunal for the former Yugoslavia (ICTY) defined "protracted armed violence between government authorities and organized groups" as one of two key factors in identifying the existence of an armed conflict.[109] In subsequent cases, the ICTY defined protracted to turn on the intensity of the violence, and encompass factors such as the number, duration, and intensity of individual confrontations; the number of persons taking part in the conflict, the types of weapons used, the extent of destruction, and the number of casualties.[110] Security Council attention is also deemed relevant.[111] The ICRC has similarly defined non-international armed conflicts as "protracted armed confrontations" that involve a "minimum level of intensity."[112]

ii. Identifying the Zone

The treaty and case law point to the presence of overt, sustained fighting as a key factor in identifying and distinguishing a zone of active hostilities. The fighting must be of sufficient duration and intensity to create the exigent circumstances that justify application of extraordinary war authorities, put civilians on notice, and justify permissive evidentiary presumptions regarding the

[108] Khalid v. Bush*,* 355 F. Supp. 2d 311, 319-320 (D.D.C. 2005) (overturned on other grounds) (noting that petitioners captured in Bosnia and Pakistan "were not captured on the battlefield in Afghanistan; describing petitioners as acting "outside of the theater or zone of active military operations"); Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004) ("Abu Ali was not captured on a battlefield or in a zone of hostilities – rather he was arrested in a university classroom while taking an exam"); *In re* Guantanamo Cases, 355 F. Supp. 2d 443 (D.D.C. 2005), *vacated and reversed*, 616 F. Supp. 2d 63 (D.D.C. 2009). For an opposing view, *see* al-Odah v. U.S., 321 F.3d 1134, 1149-1150 (D.C. Cir. 2003) (Randolph, J., concurring).

[109] Prosecutor v. Tadic, ¶ 70. Both the ICC and ICTR have adopted this test for determining the existence of a non-international armed conflict as well. Rome Statute, *supra* note __, at ¶ 8(2)(f); Prosecutor v. Akayesu, ¶¶619–620.

[110] *See, e.g.,* Prosecutor v. Hardinaj, Case No. IT-04-84-T, Trial Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008). For a sample of additional cases that have applied the *Tadic* criteria to determine the existence of an armed conflict, Prosecutor v. Zejnil Delalic et al., Case No. IT-96-21-T, Trial Judgement, ¶¶ 182-187 (Int'l Crim. Trib. for Former Yugoslavia Nov. 16, 1998); Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶¶ 14-40 (Int'l Crim. Trib. for the Former Yugoslalvia June 16, 2004); Prosecutor v. Milan Martic*,* Case No. IT-95-11-T , Judgement, ¶¶ 41, 343-47 (June 12, 2007); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 233 (Jan. 19, 2007).

[111] *See, e.g.,* Prosecutor v. Limaj, Case No. IT-03-66-T, Trial Judgment, ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2008); Tadic Trial Judgement, supra n. __, ¶ 567; Delalic, Trial Judgement ¶ 190.

[112] ICRC, How is the Term "Armed Conflict" Defined in International Humanitarian Law? 5 (March 2008). As in the *Tadic* opinion, the ICRC also includes as a second factor the requirement that the parties involved "show a minimum level of organisation." *Id.* (italics omitted).

identification of the enemy.[113] Troops on the ground are a significant, although neither necessary of sufficient, factor. Action by the Security Council or regional security bodies such as NATO, as well as the belligerent parties' express recognition of the existence of a hot conflict zone, also is relevant in identifying a zone of active hostilities.

Linking the zone of active hostilities primarily to the duration and intensity of fighting and states' own proclamations, however, suffers from some inherent circularity. The state can itself create a zone of active hostilities by ratcheting up the violence and issuing a declaration of intent, thereby making previously unlawful actions lawful. This is a problem inherent in the *Tadic* definition of armed conflict itself, which makes intensity of the violence a determinative factor in identifying the existence of an armed conflict. Such concerns are best dealt with by vigorously punishing acts of aggression and insisting on strict compliance with the rule of military necessity, as well as the related law-of-war principles of distinction and proportionality.[114]

Even under this framework, there will be disagreement as to whether a state's escalation of a particular conflict complies with these basic law-of-war requirements, particularly given underlying disagreements about who qualifies as a lawful target. The zoned approach seeks to narrow the range of disagreement by demanding heightened standards as to who qualifies as a legitimate target outside zones of active hostilities. The escalation of force must be aimed at a narrower set of possible military targets until the increased use of force is sufficiently intense and pervasive to create a new zone of active hostilities.

iii. Geographic Scope of the Zone

A secondary question relates to the geographic scope of the zone of active hostilities. In answering the related question as to the scope of the entire armed conflict, the *Tadic* court defined the conflict as extending throughout the state in which hostilities were being conducted (in the case of international armed conflict) and the area over which a party had territorial control (in the case of a non-international armed conflict that did not extend throughout an entire state).

This approach, however, does not map well onto the practical realities of a transnational conflict between a state and a non-state actor. In many cases, the non-state actor and related hostilities will be concentrated in a small pocket of the state; it would both be contrary to the justification of exigency and notice to define the zone of conflict as extending to the entire state. Moreover, such a territorial-control test does not make sense when dealing with a non-state actor

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[113] Treaty and case law, can, in turn, provide relevant guidance in determining what factors to look to in analyzing duration and intensity. *See also* Blank, *Defining the Battlefield in Contemporary Conflict, supra* note __, at 33-34 (suggesting criteria for evaluating the intensity of hostilities in the context of a transnational conflict with a non-state terrorist actor).

[114] *See, e.g.*, Dep't of the Air Force, Air Force Pamphlet 110-31: International Law--The Conduct of Armed Conflict and Air Operations § 5-3 (b)(2) (1976) ("The requirement that attacks be limited to military objectives results from several requirements of international law. The mass annihilation of enemy people is neither humane, permissible, nor militarily necessary."); *see also* U.S. Dep't of Army, Field Manual 27-10: The Law of Land Warfare (July 18, 1956), as modified by Change no. 1, 15 July 1976, Sec. 56.

such as al Qaeda that does not exercise explicit control over any territory and is driven more by ideology than territorial ambitions.

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

There is, of course, arbitrariness in linking the zone to state boundaries or administrative regions within a state when neither the state nor region is a party to the conflict, and when the non-state party lacks explicit ties to the state or region at issue. This framework thus recreates some of the same problems generated by the *Tadic* court's approach in that it will likely incorporate some areas in which the key triggering factors – sustained, overt hostilities – are not present. But such boundaries, however artificial, provide the best, clear-cut markers for identifying the zone of active hostilities at least in the short-term.

In the long-term, it would be preferable for the belligerent state to declare particular areas to be part of a zone of active hostilities, either through an official pronouncement by the state party to the conflict, or preferably through a Security Council or regional security body resolution. A public declaration would provide explicit notice as to the state's view of the conflict zone, thereby making clear the set of legal authorities that apply. This would eliminate any uncertainty as to which area qualify as zones of active hostilities, thereby avoiding uncertainty as to the legal authorities that apply. It would allow for public debate and diplomatic push back in the event of disagreement. And it would allow the belligerent states to define the zone in a more nuanced way that better tracks the actual fighting than pre-existing administrative and state-based boundaries.[115]

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

[115] Militaries, however, regularly make such designations. In the U.S., for example, the "theater of war" is *"[d]efined by* the President, Secretary of Defense, or geographic combatant commander" as "the area of air, land, and water that is, or may become, directly involved in the conduct of major operations and campaigns involving combat." Joint Chiefs of Staff, Joint Pub. 1-02: Department of Defense Dictionary of Military and Associated Terms 344 (2011). Similarly, the "theater of operations" is the "operational area *defined by the geographic combatant commander* for the conduct or support of specific military operations." *Id.* at 344. *See also id.* at 24 ("area of operations" is "defined by the joint force commander for land and maritime forces"). Another interesting approach would be to tie the geographic boundaries of the zone to the rules of engagement that apply. *See, e.g.,* Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War on Terror*, 8 TEMPLE L. REV. 787 (2008).

criteria – *e.g.,* he is who it thinks it is and that he poses an actual threat, among other requirements.

B. SETTING THE STANDARDS

Law of war detention and lethal targeting outside a zone of active hostilities should be limited, not categorically prohibited. Specifically, they should be limited to threats that are clearly tied to the zone of active hostilities (*e.g.,* those planning or coordinating attacks from afar) and other significant and ongoing threats that cannot be adequately dealt with through other means. Pursuant to this guiding principle, the section proposes the adoption of an individualized threat requirement, least harmful means test, and meaningful procedural safeguards for lethal targeting and law-of-war detention that takes place outside zones of active hostilities. Such an approach serves the multiple goals of protecting against the erosion of peacetime norms and promoting individual liberty, state security, and state legitimacy.

The goal of this section is to describe the general framework, not resolve all the complex details inherent in the development of specific substantive and procedural standards; these are details I intend to turn to in subsequent work.

i. An Individualized Threat Finding

The law of international armed conflict permits the detention and killing of members of the enemy force based on a legitimate expectation that individuals who are part of a formal, hierarchical enemy state army will be called on to fight and thereby pose an ongoing threat. This same presumption simply does not apply to every person who meets the broad "functional membership" put forth by the executive branch and adopted by the D.C. Circuit.

An individualized threat finding is needed to ensure that out-of-conflict zone detention and targeting is limited to those situations in which the target actually poses an ongoing threat, consistent with the rationale for law of war targeting and detention. An individualized threat finding also is more consistent with the international human rights norms, which prohibit extrajudicial killing absent the identification of an actual, imminent, and specific threat, and require an individualized assessment of the basis for detention. Adoption of such a standard promotes convergence between competing views of the rules that ought to apply.[116]

There are, of course, a number of possible ways to define the threat. For purposes of *lethal targeting*, I suggest two: (i) those involved in the planning or operationalization of actual, imminent attacks, regardless of their level in the organization; and (ii) operational leaders who present a significant, ongoing, and externally-focused threat, even if they are not implicated in the planning of a specific, imminent attack. The first directly corresponds to international human rights law restrictions on using lethal force absent an imminent threat. The

[116] *See* Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 Mich. L. Rev. __ (forthcoming 2012) (arguing for a functional approach to the targeting and detention of non-state actors that allows for convergence of views based on a common set of values).

second broadens the international human rights law definition of "imminence" to encompass those who pose a continuous threat given their leadership role.[117] Whether an individual meets the second threat requirement will depend on an evaluation of the individual's role within the organization, his capacity to operationalize an attack, and the degree to which the threat is externally-focused. An al Shabaab operational leader, whose attacks are focused on the internal conflict between al Shabaab and the Transnational Federal Government, would not qualify as a legitimate target in the separate conflict between the United States and al-Qaeda, even if he had demonstrated associations with Al Qaeda. He might, however, be a legitimate target if he were involved in the planning of externally focused attacks and had the demonstrated capacity and will to operationalize the attacks.

Such a restriction serves the important purpose of limiting the state authority to kill any alleged enemy belligerent anywhere around the world to situations in which the individual poses an active, ongoing and significant threat. The low-level foot soldier found thousands of miles from the hot conflict zone could not be targeted unless involved in the planning for or preparation of a specific, imminent attack. Even mid-level operatives, such as terrorist recruiters, would be off-limits, unless they were engaged in the plotting of, or recruiting for, a specific, imminent attack.[118] (They could, however, be prosecuted for providing material support to a terrorist organization.[119])

An individualized threat requirement also prohibits so-called "signature strikes," in which anonymous groups of alleged al Qaeda members are targeted based on their pattern of activities without a particularized assessment of each of the targets. If, however, the Taliban and al Qaeda established a cross-border base camp which it used train and organize fighters and coordinate further actions in the hot conflict zone , the region likely would qualify as an extension of the zone of active hostilities and the training camps would be a legitimate military targets even if the identity of each camp participant was unknown (as is arguably the case in northwest Pakistan).

For *detention*, I suggest the same standards that apply to lethal targeting, as well as a third category of lower-level fighters whose actions are clearly linked to the zone of active hostilities. Under this standard, a low-level al Qaeda or Taliban foot soldier that is believed to be traveling in and out of the active conflict zone in Afghanistan could be subject to law of war detention. He would not, however, be a legitimate subject of targeted killing unless he were deemed to pose an active, imminent threat. Moreover, once circumstances change, and the active conflict zone becomes a latent conflict zone (*e.g.,* once the United States withdraws its troops from Afghanistan), then this justification for law of war detention disappears. Unless the detainee presented the kind of ongoing,

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[117] This categorization is analogous to the ICRC's distinction between persons who maintain "a "continuous combat function" in an organization from those who only sporadically engage with the organization. *See* Melzer, *Interpretive Guidance*, *supra* note __. That concept, and the specific contours of who fits in into the CCF framework, however, has been the subject of significant controversy – a debate that is beyond the scope of the paper.

[118] *Cf. id.* at 53 (discussing recruiting as an example of "indirect" participation, unless recruitment is for a specific, planned attack).

[119] *See* 18 U.S.C. § 2339B (2004).

significant threat posed by high-level leaders that would justify his continued detention, he would need to be either transferred to a third party government, released, or prosecuted – just as was done with the detainees in United States' custody in Iraq and is expected to occur with respect to the detainees in Afghanistan.

Those sympathetic to this additional category of detention may wonder why it should not also apply to targeting operations. Some are likely to argue that the low-level foot soldier should not be given a free pass simply because he travels to a region where capture is exceedingly risky and therefore the only means of preventing his return to the zone of active hostilities is through a targeted strike. It is worth noting, however, that the United States has never publicly defended the lethal targeting of the lone low-level fighter outside the hot conflict zone. Rather, its defense of lethal targeting has focused on high-level leaders and others who pose a "significant threat."[120] Moreover, the United States does not cite – and I know of no – historical examples in which a state has tracked down and killed a low-level soldier far from the battlefield, even in a state-to-state conflict where combatants are relatively easy to identify and are legitimate military targets. Indeed, the primary case relied on to justify the United States targeted killings operations is the killing of General Yamamota, a commander in the Japanese navy who was shot down over the Pacific while en route to several forward operating bases there.[121]

There are good reasons for this distinction: The premeditated, lethal targeting of an individual or group of individuals is an extraordinary power that should be employed only when the security of the state demands it. The state should not be permitted to kill, absent a strong basis for believing that the individual poses an active, ongoing, and significant threat. In a zone of active hostilities, particularly when troops are on the ground and exposed to risk, the low-level foot solder poses such a risk. Outside such a zone, the fact that an individual once attended a training camp and may have even fought alongside al Qaeda members in Afghanistan, does not justify the use of lethal force, absent an additional basis for believing he poses an ongoing and significant threat.

Additional work will need to be done to deal with non-paradigmatic cases. There may, for example, be circumstances in which it will be appropriate for troops or other operatives to take custody of persons found with an identified target, even if it is not known whether the additional individuals meet the requisite threat criteria. In these cases, a short-term period of detention should be permitted to determine whether or not the individual meets the criteria for continued detention or can be charged with a crime and prosecuted.[122] As in all cases, the International Committee for the Red Cross (ICRC) should be immediately notified about and provided prompt access to any detainee. An additional exception might be warranted if the non-state actor set up some sort of headquarters far removed from the zone of the active hostilities. In that case, the headquarters might be a legitimate military target, even if it were infeasible to

120 *See* Brennan, Woodrow Wilson Center Remarks, *supra*, note __ .

121 *See, e.g.,* Koh ASIL speech, *supra*, note__.

122 Such short-term detention would also serve the important purpose of allowing the state to gather potentially valuable intelligence about operational plans.

do an individualized assessment of each individual residing there. Finally, a grave threat exception also might be warranted, so as to address a situation in which it is known that a specific, catastrophic attack is about to be launched from an identifiable location, even if the specific persons involved could not be individually described and identified.

ii. Least Harmful Means Test

Targeted Killings

Some scholars, most notably Nils Melzer, have suggested that a least harmful means test applies to all targeting killings associated with an armed conflict, whether or not they take place in a zone of active hostilities.[123] This claim, however, has been subject to intense criticism on, among other things, the grounds that it fails to appropriately account for the "many vagaries" of the "battlefield."[124] Rather, the prevailing view is that the military need not weigh the possibility of capture when deciding to carry out a strike.[125] Assuming, *arguendo*, that such a test unduly inhibits military actions within a zone of active hostilities, it appears to be an appropriate limiting criterion outside of such zones for two primary reasons.

First, in such circumstances, there is often time for – and the necessity of – advance planning and careful evaluation of possible plans of actions for dealing with a specific target.[126] This advance planning could be augmented by an evaluation of and comparison with the likely collateral damage and risk to U.S. or partner forces engaged in a capture operations.

Second, there are strong reasons to seek to minimize lethal targeting outside of zones of active hostilities. The prevailing human rights-based norm is that the state will not shoot to kill unless in extreme circumstances, such as self-defense or defense of others, based on an imminent threat and when other means of addressing the threat are not available.[127] When it is feasible to avoid

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123 MELZER, TARGETED KILLING, *supra* note __, at 289 ("[W]here the targeting of an individual is concerned, the restrictive aspect of military necessity as *informed* (and not: *balanced*) by humanitarian considerations requires that, whenever possible, even combatants be captured rather than killed."). *See also* Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, 1040-44 (2008)

124 *See* Park, *Part IX of the ICRC 'Direct Participation in Hostilities' Study*, *supra* note __, at 810.

125 *But see* Goldsmith & Bradley, *supra* note __, at 2120 n.325 ("The laws of war may require a belligerent, even when targeting a legitimate military target, to avoid unnecessary violence and suffering . . . This principle might preclude killing a nonthreatening enemy combatant who can easily be arrested without the use of force.").

126 *See, e.g.*, Gregory McNeal, The U.S. Practice of Collateral Damage Estimation and Mitigation, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819583 (detailing planning process before the United States engages in a targeted killing, with a particular emphasis on the significant planning that goes into the use of UAVs); Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 13, 2011, *available at* http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html (John Rizzo, CIA's former Acting General Counsel, describing creation of a "target list").

127 See Kretzmer, *supra*, note __ , at 203-204 (relying on a hybrid of international human rights standards and principles underlying the right of self-defense to similarly argue for a least harmful means test).

loss of life while also continuing to eliminate the threat (and thereby obtain the desired military advantage), one should. This is so for a number of normative and practical reasons, including the intrinsic value of life, the risk of both targeting error and collateral damage, and the costs to the rule of law of allowing the state to kill at will.[128]

This approach also appears to be consistent with U.S. state practice, at least as it has been officially described. In the words of John Brennan: "[W]henever it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people." [129] It similarly maps onto what has been required by the Supreme Court of Israel. Under that court's ruling, "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. . . . Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed."[130]

The strength of such a test will, of course, ultimately depend on how much risk the state is required to incur in order to pursue a capture operation, and how the state evaluates and weighs the relative risks and likeliness of success. In some situations, a capture operation may actually risk more collateral damage than a targeted kill operation. Related questions relate to the temporal frame in which one makes the assessment. What if the individual could be captured, but with a time delay that would be avoided by employing lethal targeting? What if a capture operation is deemed infeasible at a given point in time, but might become feasible if the target would move to another location? Should the belligerent state be required to hold fire until such a future, yet uncertain, event occurs?

The answers to these questions will almost inevitably involve a case-by-case analysis. Relevant factors to consider include the seriousness of the threat posed; its imminence; the likelihood that it could be operationalized; previous success rate of capture operations in a particular region; known information about the target's likely behavior, including the likelihood that there will be other opportunities to target or capture if this one fails and the likelihood that he will effectively resist capture; and risks to those involved in the capture operation.

A few clear-cut rules should apply: First, while the state need not take on extreme risk, some non-trivial acceptance of risk is required. Second, there should be a rebuttable presumption in favor of capture any time it is more likely than not such an operation will be feasible. Third, a relatively short time delay should not render a capture operation infeasible unless there is a credible belief that the individual will attack during that period of delay.

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[128] *See* Hakimi, *Targeting and Detention*, *supra* note __ (arguing for a similar standard based on what she calls the "mitigation principle").

[129] Brennan, Harvard Speech, *supra* note __. *See also* Brennan, Woodrow Wilson Center Remarks, *supra* note __ (reiterating the "unqualified preference . . . to only undertake lethal force when we believe that capturing the individual is not feasible").

[130] *Id.* at ¶ 40. Consistent with the recommendations of this article, the Israeli Supreme Court also requires an individualized assessment of each target. *See id.* (emphasizing the importance of "thoroughly verified" information regarding the "identity and activity" of the target).

Detention

A least harmful means test should also inform detention operations. Thus, even in those cases where law of war detention is permitted (in that the individual meets the substantive standard for detention), law-of-war detention should be limited to those instances in which prosecution is infeasible. Efforts should be made to gather admissible evidence in order to develop a prosecutable case against the individual. This is fact was the approach taken by the United States in the Warsame case, albeit as a matter of policy. Initially held in law-of-war detention, he was, after approximately 90 days, moved to federal court for trial. Such a requirement protects against states doing an end-run around functioning domestic, criminal justice institutions when they can effectively address the threat. It serves the multiple goals of protecting against the erosion of functioning, peacetime institutions, legitimizing the state's detention practices and delegitimizing the enemy.[131]

iii. Procedural Requirements

Currently, there is no independent *ex ante* review of out-of-battlefield capture or targeting decisions. Rather, all of the decisions are carried out in the executive branch. To the extent that exigencies justify such an approach within a zone of active hostilities, they do not outside such zones, particularly given that killings and captures outside such areas raise significant legal and practical issues that actually necessitate advance planning.

All *ex post* review of targeting is done internally within the executive branch. As to *ex post* review of detention, current U.S. procedures depend on location of detention as opposed to location of capture. Thus, Guantanamo detainees are entitled to habeas review, but detainees held in Afghanistan are not, even if they have been captured far away and brought there to be detained.[132]

Enhanced *ex ante* and *ex post* procedural protections for both detention and targeting that take place outside a zone of active hostilities are needed to increase the legitimacy of state action; minimize error and abuse by building in time for advance reflection; and correct for erroneous deprivations of liberty and create endogenous incentives to avoid mistake or abuse.

Ex ante procedures

The development of *ex ante* procedures should be guided by three key principles. First, any procedural requirements must reasonably respond to the need for secrecy in certain operations. While there is a legitimate concern about excessive secrecy, there is also a legitimate need for the state to protect sources and methods and maintain an element of surprise in an attack or capture

131 *See* Mudd, *No More Military Custody for al Qaeda Fighters*, *supra* note ___.

132 *See* Al Maqaleh, 605 F.3d 84. This distinction has been justified based on the alleged security concerns associated with bringing civilian lawyers to a base in Afghanistan. *Id.* at 97-98. Such a rationale is not convincing, particularly since the military has since invited members of non-governmental organizations to observe the administrative review proceedings that take place there.

operation. Second, contrary to oft-repeated rhetoric about the ticking time-bomb, few, if any, capture or kill operations that take place outside a zone of active conflict occur in a situation of true exigency.[133] Rather, there is often time for advance planning. In fact, security often demands advance planning in order to minimize damage to one's own troops and nearby civilians. Third, the procedures must be sufficiently transparent and credible to effectively legitimize the state action.

These considerations suggest the benefit of an *ex parte*, but independent review system, possibly along the lines of the Foreign Intelligence Surveillance Court (FISC),[134] or a FISC-like entity composed of a combination of military and intelligence officials and possibly Article III judges.[135]

Created by the Foreign Intelligence Surveillance Act of in 1978, the FISC grants *ex parte* orders for electronic surveillance and physical searches, among other things, based on a finding, among other things, that a "significant purpose" of the surveillance is to collect "foreign intelligence information."[136] Heightened standards likewise apply to the use of information concerning U.S. persons.[137] Emergency authorizations can be granted with court approval, subject to a requirement that the Attorney General notify the court of the emergency authorization and seek subsequent authorization.[138] Notably, the process has been extraordinarily successful in protecting extremely sensitive sources and methods. To date, there has never been an unauthorized disclosure of an application to or order from the FISC court.

Some are likely to cite to FISC's high approval rate to suggest that the court, or any equivalent body comprised of military or intelligence officers, would serve merely as a rubber stamp. But as now-Justice Anthony Kennedy has noted, infrequent denials in fact do not reflect official acquiescence to the whims of the executive but instead a "practice of careful compliance with the statutory requirements by the government."[139] (Or, as the cynics might say, it at least reflects careful preparation of the court filings.) While not foolproof, the requirement of going before a court or other independent review board to justify an application serves as an internal check, creating endogenous incentives to

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[133] *See* David Luban, *Liberalism, Torture, and the Ticking Time Bomb*, 91 VA. L. REV. 1425 (2005); Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 319 (2009), for excellent critiques of the excessive and unfounded claims of exigency justifying deprivations of certain liberties.

[134] Former Legal Adviser to the Secretary of State under George W. Bush, John Bellinger, has suggested such a system be put in place for the targeting decisions involving U.S. persons. *See* John Bellinger, *Will Drone Strikes Become Obama's Guantanamo*, LAWFARE.COM, Oct. 2011 ("Congress could amend the AUMF to require additional protections for the use of force against Americans, including possible prior judicial review by the FISA court or a national security court."), http://www.lawfareblog.com/2011/10/will-drone-strikes-become-obamas-guantanamo/.

[135] Any military and intelligence officials would need to be appointed, and subject to supervisory requirements, that protect against political, bureaucratic, or command influence. One possible model is the rules governing the appointment and supervision of Inspector Generals. *See* 5 U.S.C. App. § 3.

[136] 50 U.S.C. § 1804.

[137] *See, e.g.*, 50 U.S.C. § 1806.

[138] *See, e.g.,* 50 U.S.C. § 1805(e)(1).

[139] U.S. v. Cavanagh, 807 F.2d 787, 790 (9th Cir. 1987).

comply with the statutory requirements. Even if this does little more than increase attention to the stated requirements and expand the circle of persons reviewing the factual basis for the application, those features in and of themselves serve as additional internal checks. Additional accountability mechanisms, such as civil or criminal sanctions in the event of material misrepresentations or omissions, and the granting of far-reaching authorities to the relevant Inspector Generals can help to further minimize abuse.

Others are likely to argue that by institutionalizing an approval mechanism, this approach would serve merely to legitimize and expand the use of targeted drone strikes. That critique, however, ignores the reality of their expanding use. If states are going to use this extraordinary power, there ought to be a clear and transparent set of applicable standards and mechanisms in place to ensure thorough and careful review of its application.

Conversely, some undoubtedly will object to the use of a courts or court-like review in wartime decision-making on both policy and constitutional grounds.[140] Article III objections are likely to be raised on the grounds that there is no "case or controversy" for Article III judges to review (assuming a FISC-like model is pursued or judges are included on the review board). Similar concerns were raised during the debates on FISA and rejected. Drawing heavily on an analogy to court's roles in issuing ordinary warrants, the Justice Department's Office of Legal Counsel concluded that a case and controversy existed, even though the proceedings were *ex parte* and were not likely to be followed by any adversarial proceeding.[141] That the judges would be issuing a warrant to kill rather than surveil is significant, but does not fundamentally alter the analysis. As the Supreme Court has ruled, killing is a type of seizure.[142] The judges would be issuing a warrant for the most extreme type of seizure.[143]

It also is important to remember that such reviews would not apply to decision making within zones of active hostilities. Rather, it would only to targeted captures and killings that take place outside such zones. It can and should be structured to avoid interference with the conduct of specific operations. Press accounts indicate the U.S. maintains lists of persons subject to

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140 This, however, is not a universal objection. It is, for example, widely accepted in Israel that the courts have a role in reviewing targeted killing operations. *See, e.g.,* HCJ 769/02 The Pub. Comm. Against Torture in Israel v. The Gov't of Israel 57(6) IsrSC 285 [2006] (Isr.).

141 See Memorandum from John M. Harmon, Assistant Att'y Gen., Office of Legal Counsel, to Hon. Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence (Apr. 18, 1978), in Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence, 95th Cong. 26, 31 (1978) (finding that a "case or controversy" existed on the grounds that the judges would be ruling on a specific and concrete issue; the ruling touches the legal relationship or the United States and the target of surveillance; the judge is being asked to apply standards of law to the facts; and there is adversity in fact, even if both parties are not present at court.).

142 *Tennessee v. Garner,* 471 U.S. 1, 7 (1985) (concluding that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.") This is also akin to what Texas judges do when they issue "death warrants" in capital cases.

143 Separate Article II concerns – based on the argument that such a Court or review board would impinge on powers exclusively reviewed to the Executive – also tend to be overstated. In any event, these concerns fade away if the President proceeds by Executive Order and creates an internal review board to ensure compliance with self-imposed standards.

capture or kill operations – lists that are created in advance of specific targeting operations and presumably subject to significant internal deliberation. Such a court or review board would, for example, be well equipped to determine whether the facts support the relevant substantive requirements to be included on the list. This is consistent with what the FISC does when it determines whether or not there is probable cause to believe that the target meets the statutory requirements under FISA. It is also consistent with what the civilian courts regularly do in evaluating whether individuals fall within the jurisdiction of a particular criminal statute.

Such a court or review board should also be given jurisdiction to review and approve procedures for determining whether the least harmful means test is met, while leaving the actual determination as to whether a particular plan of action meets the test to the operators. Again, such an approach is consistent with the FISC does when it approves overarching targeting and minimization procedures without reviewing the selection of each target or each decision regarding minimization.

Finally, as in FISA, there should be a mechanism for emergency authorizations to be made at the behest of the Secretary of Defense, Director of National Intelligence, or other equally high-ranking U.S. government official. This will be particularly important in addressing situations in which there is reason to believe that the targeted individual poses an imminent, grave threat, and there is insufficient time to seek and obtain court or review panel approval. As under FISA, the court or review board should be notified that such an authorization has been issued; it should be time-limited; and the executive branch should be required to seek court or review-board approval as soon as practicable, and in all circumstances within seven days.[144]

Additional details will need to be addressed, including questions about the temporal limits of the court or review board's authorizations. For some high level operatives, placement on a target list would presumably be valid for some set period of time, subject to specific renewal requirements. For those included for imminent threat reasons, based on information about specific attack planning, the authorization would need to be time-limited and tailored to the specifics of the threat, consistent with what courts regularly do when they issue warrants.

In the absence of such a system, the executive branch ought, at a minimum, issue an executive order establishing a transparent set of standards and procedures for identifying targets of lethal killing and detention operations outside a zone of active hostilities.[145] To enhance legitimacy, the procedures should include review by the top officials in each of the agencies with a stake in the outcome – the Secretary of Defense, the Director of the CIA, the Secretary of State, the Director of Homeland Security, and the Director of National

[144] *See* 50 U.S.C. § 1805(e)(1)(D).

[145] Through a series of speeches by top national security officials, the Obama administration has sought to provide greater transparency as to the standards and procedures it employs in targeting decisions. These speeches, while noteworthy, lack any prescriptive force and fail to set any binding limits on future actions. *See* Alston, *The CIA and Targeted Killings Beyond Borders, supra* note __, for an excellent discussion of the importance of transparency in the standards and procedures used to identify targets.

Intelligence. A single official – either the Secretary of Defense or the Director of National Intelligence – should be granted formal approval authority. In the absence of consensus, decisions should be elevated to the President of the United States.

While this proposal is obviously U.S.-centric, the same principles should apply no matter what state is engaged in such operations. States would ideally subject such determinations to external, independent review, or, alternatively, clearly lay out the standards and procedures for such decision-making, thus enhancing accountability.

Ex Post Review

For *targeted killing* operations, ex post reviews serve only limited purposes. They cannot, obviously, restore the target's liberty. But even in those cases, retrospective review either by a FISC-like court or review board can serve to both identify error or overreaching and thereby help avoid future mistakes. Such *post hoc* analysis helps to set standards and controls that then get incorporated into ex ante decision-making.[146] Even the mere knowledge that an ex post review will occur can help to protect against rash *ex ante* decision making, thereby providing a self-correcting mechanism.

Ex post review should also be accompanied by the establishment of a solatia and condolence payment system for activities that occur outside the active zone of hostilities, at least for all non-covert actions. Currently, the U.S. military makes such payments to injured civilians or families of civilians who have been killed during military operations in Afghanistan; it also did so in Iraq.[147] Extension of such a system elsewhere, would help address resentment caused by civilian deaths or injuries and promote a better accounting of the civilian costs of targeting operations.

As for *detention* operations, detainees captured outside a zone of active hostilities should, at a minimum, be entitled to judicial habeas review, regardless of where they are detained. There should be a searching inquiry into basis for detention, done, of course, in a way that continues to protect sources and methods.[148] Use of hearsay should also be permitted, but in such a way that the detainee is be provided with sufficient information about the source of relevant information to effectively respond.[149]

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146 HCJ 769/02 at ¶ 59.

147 *See* U.S. GOV'T ACCOUNTING OFFICE, GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN (2007).

148 *See., e.g.,* A & Others v. United Kingdom, App. No. 3455/05, (February 19 2009), *available at* http://www.unhcr.org/refworld/docid/499d4a1b2.html. (ruling that an individual subjected to a "control order" must be provided with sufficiently detailed allegations to allow him to instruct his attorney on a meaningful response") A similar standard should govern here.

149 *See* Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 42 SETON HALL L. REV. (forthcoming 2011) (manuscript at 12-21, 28) (noting the ways in which the D.C. Circuit's rulings have substituted "some" review for what ought to be a "meaningful" review of the legal and factual basis for detention); Latif v. Obama, No. 10–5319, 2011 WL 5431524 (D.C. Cir. Oct. 14, 2011) (granting government's intelligence reports a "presumption of legitimacy"); *id.* at *30 (Tatel, J., dissenting) (warning that this approach "comes perilously close to suggesting that

The detaining state should also provide additional periodic reviews to protect against the continued detention of individuals who no longer pose a threat – something that the Obama administration has already instituted with respect to the Guantanamo detainees.[150] As suggested by Professors Matthew Waxman and Monica Hakimi, these review procedures should be amended to apply increasingly stringent evidentiary standards over time.[151] Such a requirement recognizes that the security benefits of detention often diminish over time (particularly if based on an individual's involvement with a specific, out-of-date plot), while the costs to personal liberty increase. Thus, while the initial review might employ a reasonable belief standard, subsequent reviews might employ a preponderance of evidence or clear and convincing standard.[152] Moreover, at some point continued detention arguably crosses from preventive to punitive; when that point is reached, there should be a requirement for either prosecution or release.

C. APPLICATION TO THE CURRENT CONFLICT

i. Identifying the Zones of Active Hostilities

Under the approach outlined in this paper, both Afghanistan and northwest Pakistan qualify as zones of active hostilities in the current conflict. In Afghanistan, there are a large number of troops on the ground engaged in regular, overt hostilities. NATO and U.S. forces are sufficiently spread out

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whatever the government says must be treated as true. . . [I]t is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'") (citations omitted).

[150] Continued detention is warranted if the individual poses "a significant threat to the security of the United States." Exec. Order 13,567, § 2, 76 Fed. Reg. 13277 (Mar. 7, 2011). Detainees are entitled to full executive-branch reviews every three years, at which point they are represented by a government-appointed personal representative and permitted to submit information and call reasonably available witnesses. File reviews are conducted every six months in the intervening years,. Pursuant to the National Defense Authorization Act of 2012, the final decision to release or transfer a Guantanamo Bay detainee is vested with the Secretary of Defense. NDAA § 1023(b)(2).

[151] *See, e.g.*, Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L. L 369, 413 (2008); Waxman, *Detention as Targeting*, *supra* note __, at 1411-12. *See also* David Cole, *Out of the Shadows*, 97 CAL. L. REV. 693, 736 n. 204 (2009) (suggesting that such an approach will only have an effect on the "marginal cases" because initially strong evidence is unlikely to be weakened by passage of time and will likely suffice to justify extended detention). The current procedures employed by the Obama administration would need to be amended to incorporate this recommendation.

[152] See also CrimA 6659/06 A v. State of Israel, [2008] IsrSC 1, *translation available at* http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf ("The longer the period of the administrative detention, the greater the weight of the prisoner's right to his personal liberty when balanced against considerations of public interest, and therefore the greater the onus placed upon the competent authority to show that it is necessary to continue holding the person concerned in detention.") (citation omitted).

throughout the entire country, with regional commands responsible for every area of the country, for the zone to encompass the entire state.[153]

The northwest provinces of Pakistan, from where Taliban and al Qaeda leaders, plan and plot, also are part of the zone of active hostilities even though there are no U.S. or NATO troops on the ground. This area aptly qualifies as part of the spillover zone. Taliban and al Qaeda-affiliated operatives seek sanctuary there in order to launch attacks against U.S. and NATO forces in Afghanistan.[154] In response, the U.S. has conducted an intense and protracted air campaign, reportedly launching an estimated 50-plus strikes in 2009, 100-plus in 2010, 60-plus in 2011, and a dozen in the first four months of 2012, resulting in an estimated total of more than 2,000 casualties.[155] Both the enemy's sanctuary and responsive strikes are concentrated in the Federal Administrative Tribal Areas. The hot conflict zone thus tracks these administrative boundaries. It does not extend to other parts of Pakistan, where, despite the high-profile attack on bin Laden's compound, there is no obvious concentration of enemy fighters in one location and fighting is neither protracted nor intense. [156]

The question of whether or not Yemen is considered part of the zone of active hostilities presents a more difficult question. Here, there is a need to separate out two analytically distinct questions: (i) whether southern Yemen is a hot conflict zone in the ongoing battle between the Yemeni government and insurgent groups, including Al Qaeda in the Arabian Peninsula (AQAP);[157] (ii) whether it is a hot conflict zone in the conflict between the United States and al-Qaeda or al-Qaeda associated forces.[158]

There is a strong argument that the first exists – that there is an active and ongoing armed conflict between Yemen and insurgent groups including AQAP.[159] But the existence of a separate armed conflict between Yemen and a

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153 *See, e.g.*, *Troop Numbers and Contributions, Map of NATO's Afghanistan International Security Assistance Force Operations*, INTERNATIONAL SECURITY ASSISTANCE FORCE, http://www.isaf.nato.int/troop-numbers-and-contributions/index.php.

154 *See, e.g., Pakistan's Tribal Areas: A Wild Frontier,* THE ECONOMIST, Sept. 18, 2008 (describing concentration of Taliban insurgents and al Qaeda leaders in northwest Pakistan, many of whom "are probably drawn to the region to kill NATO troops and their local allies in Afghanistan").

155 For a compilation of alleged drone attacks, see *The Year of the Drone*, NEW AMERICA FOUNDATION, http://counterterrorism.newamerica.net/drones/; Bill Roggio & Alexander Mayer, *Charting the Data for U.S. Airstrikes in Pakistan*, LONG WAR J., http://www.longwarjournal.org/pakistan-strikes.php.

156 Bin Laden would however meet the individualized threat requirement, wherever located, given his leadership role in al Qaeda.

157 Some have argued that the United States should be understood as assisting Yemen in its internal conflict between Yemen and AQAP, and that it is therefore operating in the zone of active hostilities in the conflict between Yemen and AQAP. But while the United States has described itself as offering "support" to Yemen, it has made clear that it views Yemen as outside the "hot" battlefield in the conflict between the United States and al Qaeda. See, e.g., Brennan Woodrow Wilson Center Remarks, *supra* note__ .

158 There is also a third possibility of a separate armed conflict between the United States and AQAP. Again, while this is an interesting possibility, the United States does not currently claim this to be the case.

159 See, e.g., Bill Roggio, *AQAP kills 17 Yemeni troops in southern Yemen*, Long War Journal, March 31, 2012 (describing battles for territorial control between AQAP and the Yemeni government); Benjamin Farley, Targeting al-Qaeda, 2 American University College of Law National Security Law Brief 1, 57, 63-69 (2011) (arguing that there is a non-international conflict between Yemen

domestic insurgency does not make the region part of the hot conflict zone between the United States and al Qaeda. Rather, two additional need to be established: a sufficient linkage between AQAP or AQAP leaders and al Qaeda to make them either part and parcel of al Qaeda or an associated force; and intense, sustained fighting between those Al Qaeda members or associates and the United States.

Even assuming, *arguendo*, that there is a sufficient linkage between al Qaeda and AQAP or specific AQAP-leaders to integrate them in the separate conflict between the United States and al Qaeda,[160] the intensity and duration of U.S.-AQAP fighting does not appear sufficient to make Yemen part of the hot conflict zone. Since 2009, AQAP has attempted two major attacks on the United States – the Christmas 2009 attack and a 2010 attempt to place explosives in packages shipped via overnight delivery services. The United States has responded with an estimated 29 targeted drone strikes between January 2009 and April 2012, including, most notably, the attack on Anwar al Aulaqi.[161] The U.S. does not have any openly acknowledged troops on the ground, and for the most part will not even acknowledge that it has engaged in a particular attack. While significant, the pace of fighting is not so intense or continuous to make Yemen part of the zone of hostilities.[162] (This however may change, particularly if the United States significantly steps up its use of so-called "signature strikes" in Yemen.)[163] Notably, the U.S.'s own statements also indicate that it views Yemen as outside the hot battlefield.[164]

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and AQAP in southern Yemen); Robert Chesney, The United States as a Party to an AQAP-Specific Armed Conflict in Yemen, LAWFARE.COM, http://www.lawfareblog.com/2012/01/yemen-armed-conflic/ (same).

160 The question of the relationship between AQAP and AQ is highly contested and difficult to resolve. *See, e.g.,* Gregory Johnsen, AUMF and Yemen, bigthink.com, April. 22, 2012, available at: http://bigthink.com/ideas/aumf-and-yemen?page=1; Chesney, *Who May Be Killed*, *supra* note __; Robert Chesney, The United States as a Party to an AQAP-Specific Armed Conflict in Yemen, Lawfare.com, http://www.lawfareblog.com/2012/01/yemen-armed-conflic/. For an argument that AQAP lacks any organizational coherence, let alone any meaningful connection to Al Qaeda, see Declaration of Benjamin Haykel, Al Aulaqi v. Obama, 10-CV-01469 (JDB) (D.D.C. Oct. 8, 2010).

161 Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, WASH. POST, Dec. 27, 2011. *See also* Mark Mazzetti, Eric Schmitt & Robert E. Worth, *Two Year Manhunt Led to Killing of Aulaqi in Yemen*, N.Y. TIMES, Sept. 30, 2011.

162 *But see* Chesney, *Who May Be Killed, supra* note __, at 31-34 for an opposing view. It is, of course, possible that the number of strikes is significantly higher than that which can be gleaned from public reporting, which could change the analysis. The United States is also reportedly supporting ground raids and airstrikes by the Yemenis, actions. *See, e.g.*, Dana Priest, *US Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST., Jan. 27, 2010. If of sufficient intensity and duration theses U.S-supported attacks could arguably turn the zone into an area of active hostilities.

163 *See* Miller, *White House Approves Broader Yemen Drone Campaign*, *supra* note __.

164 *See, e.g.*, Brennan, Woodrow Wilson Center Remarks, *supra* note __ (highlighting the distinction between actions taken on the "hot" battlefield of Afghanistan and elsewhere); Brennan, Harvard Speech, *supra* note __ (describing ways in which the United States exercised restraint outside Afghanistan and Iraq).

In Somalia, the reports of U.S.-sponsored attacks are even more infrequent.[165] While there is an armed conflict on the ground, it is a separate non-international armed conflict between insurgents and the Transitional Federal Government. The fighting is not connected to the United States' conflict with al Qaeda. It thus falls outside the zone of active hostilities in the conflict between al Qaeda and the United States. This could of course change if al Shabaab started to devote more of its resources to full-time al Qaeda-related work, and the U.S. intervened militarily, consistent with military necessity.

ii. Targeting and Detention in the Current Conflict

The fact that most of Pakistan, Yemen and Somalia fall outside the zone of active hostilities does not prohibit the exercise of law of war tools in those areas. Rather, it limits their exercise to situations in which there is an individualized assessment of threat and less harmful means of dealing with the individual are not a feasible option. Thus, at least based on the United States' public assertions of the threat posed, Osama bin Laden and Anwar al Aulaqi arguably were both legitimate targets.[166]

Under the approach advocated in this paper, each of these targets would have been subjected to *ex ante* independent review, thus forcing the executive to establish that each met the requisite threat standard. The killings also would be the subject of independent *ex post* review to assess whether the substantive standards, including the least harmful means test, are met; the existence and extent of any collateral damage; and the appropriateness of solatia or condolence payments in response. Such reviews would help legitimize the United States' actions, minimize abuse, and set important standards that become incorporated into future decision-making.

Finally, signature strikes, under targeting is based on a pattern of activity without knowledge of the specific target's identity would be categorically prohibited outside a zone of active hostilities.

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[165] Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, *supra* note __, (describing "only a handful of strikes" in Somalia since 2009). This article does not purport to establish a magic ratio of strikes-to-time that transform a region into a zone of active hostilities. The key is whether the strikes are of sufficient intensity and duration to generate exigent conditions and put persons on notice that a zone of active hostilities exists – a determination that will depend on a number of factors including the nature of the strikes, the geographic area over which they are taking place, and the reaction of those residing in the region. The fact that this may be difficult to assess does not negate the value of doing so. The entire law of war consists of on an effort to draw lines (*i.e.*, distinguish between legitimate and illegitimate attacks) on what are inevitably messy and complicated facts.

[166] Al Aulaqi was described the President Obama as playing "the lead role in planning and directing the efforts to murder innocent Americans" for AQAP. *See* Mark Mazzetti, Eric Schmitt & Robert E. Worth, *Two Year Manhunt Led to Killing of Aulaqi in Yemen*, N.Y. TIMES, Sept. 30, 2011. Some, however, have questioned whether al Aulaqi posed as grave a threat as has been described.

IV. ADDITIONAL APPLICATIONS AND IMPLEMENTATION: 21ST CENTURY CONFLICTS, SELF-DEFENSE, AND INCORPORATION INTO U.S. LAW

This section looks ahead, and explains how the framework laid out in this paper can and should apply and be implemented not just with respect to the current conflict, but the conflicts of the future.

A. DIFFUSE CONFLICTS

This paper has assumed the existence of one or more zones of active hostilities, involving a large-scale military presence or consistent aerial attacks. What happens when there is no such center of gravity? As Professor Anne Marie-Slaughter predicts, future conflicts are unlikely to look like those in Afghanistan and Iraq, involving the large-scale ground invasion of one state by others.[167] Rather, future conflicts are likely to involve increased reliance on targeted operations conducted by Special Forces and intelligence operatives without any active zone of hostilities. This in fact may be the situation once the United States and NATO pulls out of Afghanistan.

Such a situation raises two separate questions: First, can there be an armed conflict without a zone of active hostilities? Second, what rules apply? Answering the first question depends on a fact-intensive analysis of the nature of the conflict applying the factors laid out in *Tadic*. Is the fighting of sufficient intensity to qualify as an armed conflict? Is there an organized group with which the belligerent state is fighting? The paper is based on the premise that once these threshold requirements are met, the conflict extends to where the belligerent parties operate, but that the rules for targeting and detention vary depending on whether or not one is acting within a zone of active hostilities. Similarly, if a single organization is engaged in sustained and intense attacks against an opposing state, an armed conflict may exist, even if the attacks emanate from multiple locations and lack a central zone of activity.[168] The more restrictive substantive and procedural standards would apply throughout the entire conflict.

B. SELF-DEFENSE KILLINGS

Absent the existence of an armed conflict, the United States – supported by a number of scholars – will increasingly turn to a self-defense justification to support some of the same actions otherwise conducted under a law of war

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[167] Anne Marie-Slaughter, *War and Law in the 21st Century: Adapting to the Changing Face of Conflict*, SMALL WARS J., Autumn 2011, at 32.

[168] One would need to establish, however, that the group is sufficiently organized and connected to constitute a single non-state enemy spread out across geographic boundaries. There is a strong argument that Al Qaeda will no longer meet this standard once the United States leaves Afghanistan and there is no longer an active zone of conflict there, although it is not one that the U.S. government is likely to accept. *See, e.g.,* Brennan, Woodrow Wilson Center Remarks, *supra* note __ (describing the decimation of al Qaeda core but emphasizing the threat posed by al Qaeda "affiliates and adherents").

framework. The United States already has suggested targeted killings that have taken place outside of Afghanistan and northwest Pakistan are legitimate under both an armed conflict and self-defense justification.[169] Recent statements by CIA General Counsel Preston suggest that self-defense is in fact the primary basis for the its targeted killing operations, with law of war authorities acting as a backstop.[170] Meanwhile, scholars and European allies that reject the idea that the United States is engaged in a transnational armed conflict with al Qaeda nonetheless agree that it can act in self-defense against those al Qaeda operatives who pose an imminent threat, regardless of where they are located.[171]

However the standards as to what is permitted under a self-defense action are equally, if not more, contested and underdeveloped as the standards governing targeting and detention in a transnational armed conflict.[172] Is anticipatory self-defense permitted? Under what circumstances? How do the standards of "necessity" and "proportionality" apply? Even if human rights standards are deemed applicable, in what circumstances do self-defense killings violate the prohibition on the arbitrary deprivation of life?[173]

Assuming *arguendo* that, consistent with the United States view, anticipatory self-defense is permitted, the framework described in Part III provides a way to start limiting and legitimizing the scope of acceptable self-defense killings as well. Such an approach would preclude self-defense killings, except for those narrow circumstances in which the individual is undertaking an actual, identified, and imminent attack or is the operational leader of an organization (such as Osama bin Laden) which poses an ongoing and particularly grave threat to the state, and only in circumstances where capture is infeasible.

Additional work is needed to resolve all of the complicated issues and flesh out the precise standards for self-defense – which ought to be a subset of what is permitted under a law of war framework and which need to be transparent in order to be credible. But by applying the general approach

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169 *See, e.g.,* Harold Koh, ASIL Speech, *supra* note __ ("[A]s a matter of international law, the United States is in an armed conflict with al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, *and may use force consistent with its inherent right to self-defense under international law.*) (emphasis added). *See also* Memorandum from W. Hays Parks, Special Assistant to The Judge Advocate Gen. of the Army for Law of War Matters, to The Judge Advocate Gen. of the Army, Executive Order 12333 and Assassination (Dec. 4, 1989) *reprinted in* ARMY LAW., Dec. 1989, at 7, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/12-1989.pdf (describing self-defense justification for use of force against terrorist actors or organizations).

170 Preston Remarks *supra*, note __.

171 *See, e.g.*, Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010); Brennan, Harvard Speech, *supra* note __ (describing view of key allies that use of force outside of the "hot battlefield" is permitted as a matter of self-defense in response to an imminent threat). *But see* Mary Ellen O'Connell, *Unlawful Killing With Combat Drones: A Case Study of Pakistan, 2004-2009*, *in* SHOOTING TO KILL, *supra* note __, at __ (suggesting significant limits on what constitutes a lawful exercise of self-defense, and concluding that "[a]n armed response to a terrorist attack will almost never meet these parameters").

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

173 *See generally* Kretzmer, *supra* note __, at 177-83.

described in Part III both to lethal targeting that take place outside a zone of active hostilities in the course of an armed conflict and to killings undertaken in self-defense outside an armed conflict, states can begin to develop a clear and consistent set of practices to regulate targeted killings outside the conflict zone.[174] Such an approach serves the important value of creating and protecting a stable set of expectations as to the rules that apply. It serves to limit the state's use of premeditated lethal force to instances in which the targets pose a profound and ongoing threat. And it protects against self-defense justification being used as an end-run around a more restrictive set of law of war rules as are being proposed here.

C. IMPLEMENTATION

One might be skeptical that a nation like the United States would ever accept such constraints on the exercise of its authorities. There are, however, several reasons why doing so is in the United States' own self-interest. First, as described in Part II, the general framework is already largely consistent with current U.S. practice since 2006. The United States has, as a matter of policy, adopted important limits on its use of out-of-battlefield targeting and law-of-war detention – suggesting an implicit recognition of the security and legitimacy benefits of restraint. Second, while the proposed procedural safeguards are more stringent than what is currently being employed, their implementation will increase the legitimacy of the United States' actions. Third, such an approach more closely tracks that advocated by European partners, which reduces friction with key allies and fosters important cooperation. Fourth, it is consistent with the United States efforts to promote human rights and the rule of law – a role that also ultimately inures to the United States interests. Fifth, and critically, while the United States might be confident that it will exercise its authorities responsibly, it cannot assure that others will follow suit. What is to prevent Russia, for example, from asserting that it is engaged in an armed conflict with Chechen rebels, and can, consistent with the laws of war, kill or detain any person anywhere around the world who it deems to be a "functional member" of a rebel group? Or Turkey doing so with respect to alleged "functional members" of alleged Kurdish rebels? Imagine that such a theory resulted in the killing or detention without charge of one of the United States' own citizens. The United States would have little ground to object.

Capitalizing on the strategic benefits of restraint, the United States should codify into law what is already in key respects a matter of state practice and adopt additional procedural protections to better structure, limit, and legitimize the use of lethal targeting and law-of-war detentions outside zones of active hostilities. As a first step, the President should sign an executive order requiring that out-of-battlefield target and capture operations be based on an individualized threat assessment and subject to a least harmful means test, stating clearly the standards and procedures that apply. As a next step, Congress should legislate an independent review system modeled after the FISC, and as described in detail in

[174] See, Hakimi, supra note __ (elaborating in greater detail the argument for a "functional" rather than "domain" approach to detention and targeting non-state enemy actors).

the paper. In doing so, the United States will set an important example – one that will be pointed to by others and can become a building block on which to develop an international consensus as to the rules that apply.

CONCLUSION

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

The framework proposed by this paper fills the international law gap, effectively mediating the multifaceted liberty and security interests at stake. It recognizes the broad sweep of the conflict, but distinguishes between zones of active hostilities and elsewhere in determining the rules that apply. Specifically, it offers a set of standards that would both limit and legitimize the use of out-of-battlefield targeted killings and law-of-war-based detention – subjecting their use to an individualized threat assessment, a least harmful means test, and significant procedural safeguards. This approach confines the use of out-of-battlefield targeting killings and detention without charge to the extraordinary situation when the security of the state demands it. It thus protects against the unnecessary erosion of peacetime norms and institutions and safeguards individual liberty, while at the same time ensuring that the state can effectively respond to grave threats to its security, wherever the threat is based.

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