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Article

***1 DEFINING THE BATTLEFIELD IN CONTEMPORARY CONFLICT AND COUNTERTERRORISM: UNDERSTANDING THE PARAMETERS OF THE ZONE OF COMBAT**Laurie R. Blank [\[FN1\]](#)

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*3 I. Introduction

The English language and traditional military discourse contain numerous terms to describe wartime areas. A battlefield is “a place where a battle is fought”; a combat area is a military area where combat forces operate. [FN1] A theater of operations is a region in which active combat operations are in progress, and a theater of war refers to “the entire land, sea, and air area that is or may become involved directly in war operations.” [FN2] These common terms provide generally clear descriptions of physical areas during traditional armed conflicts. United States Civil War enthusiasts thus visit battlefields at Antietam, Gettysburg, Chancellorsville, and elsewhere. World War II historians have the beaches at Normandy. We can identify the major battles of the Vietnam War, Operation Desert Storm, and even Operation Iraqi Freedom. Moreover, with the exception of the second Gulf War, we can also identify--often to the day--when each of these conflicts began and ended.

We cannot say the same for the current struggle against terrorism, often called the “global war on terror.” Many contemporary conflicts, in which states fight against non-state actors and terrorist groups unbounded by sovereign territorial boundaries and preferring tactics aimed at civilians often far from any traditionally understood battlefield, [FN3] can easily confound attempts to use these existing terms effectively. In particular, the present conflict between the United States and al Qaeda and affiliated terrorist groups poses significant yet seemingly fundamental questions about not only the law applicable to operations against terrorists but also about where the conflict is taking place and where that law applies. Beyond the obvious areas of Afghanistan, Iraq, and the border areas of Pakistan, there is, at present, little agreement on where the battlefield is--i.e., where this conflict *4 is taking place--and an equal measure of uncertainty regarding when it started and how it might end. “A war against groups of transnational terrorists, by its very nature, lacks a well-delineated timeline or a traditional battlefield context” [FN4] In addition to the clear political challenges these uncertainties produce, they also lead to complex legal conundrums regarding the application of the law to military and counterterrorism operations.

The nature of today's conflicts has thus led many practitioners and scholars to suggest that the traditional battlefield-

--once populated by tank battles and infantry--has been replaced by a more complex environment-- sometimes called the zone of combat. [FN5] A manifestation of the blending of armed conflict and operational counterterrorism, the zone of combat has been characterized as broadly as anywhere terrorist attacks are taking place, or perhaps even being planned and financed. [FN6] Even when not defined as broadly, the zone of combat encompasses areas beyond the traditional battlefield and could likely include any area where military responses to terrorists and terrorist attacks take place. As a result, it is a non-static environment, making its identification and definition significantly more challenging.

In an age of conflict where new terminologies abound, the “zone of combat” may seem to be simply another descriptive term that offers a clearer representation of real life than its antecedent. Today's conflicts are not fought out in the open with artillery batteries and scores of infantrymen lined up in trenches. Rather, when soldiers fight in densely populated urban environments, drones track suspected terrorists across borders, and terrorists attempt to detonate bombs in subways, major tourist destinations, and other civilian locales, the battlefield does indeed seem to be a term from days gone by. In a purely descriptive sense, therefore, “zone of combat” may well have great value.

Like many other now-common terms, however, such as enemy combatant, the concept of the “zone of combat” also raises important and interesting legal questions. The Bush administration argued that “the battlefield in the global war on terror extends to every corner of the US itself” [FN7]--including locations where suspected al Qaeda sleeper agents were *5 awaiting instructions but not yet carrying out attacks. Interestingly, although the courts in response have generally accepted the concept of an enemy combatant and detention related to that status, they have taken a limited view of the zone of combat in the present struggle. [FN8]

In cases regarding detainees at Guantanamo Bay or the Bagram Theater Internment Facility at Bagram Airfield and others arrested in the U.S., the courts have consistently referred to the U.S. as “outside a zone of combat,” [FN9] “distant from a zone of combat,” [FN10] or not within any “active [or formal] theater of war,” [FN11] even while recognizing the novel geographic nature of the conflict. As one court noted, comparing the arrest of Yaser Hamdi--captured after a fire-fight in Afghanistan--to Jose Padilla-- captured upon disembarking a plane at Chicago's O'Hare airport--would be akin to comparing apples and oranges, showing that the court saw a distinct difference between the characterization of the U.S. and that of Afghanistan. [FN12] Even more recently, in *Al Maqaleh v. Gates*, both the D.C. District Court and the Court of Appeals for the D.C. Circuit distinguished between Afghanistan, “a theater of active military combat,” [FN13] and other areas outside Afghanistan (including the U.S.), which are described as “far removed from any battlefield.” [FN14]

Much has been and will continue to be written about the acceptable responses to terrorist attacks, the appropriate law to be applied to persons within the combat zone and/or suspected of involvement in such attacks, and related issues. One threshold set of questions involves the very nature of the struggle against terrorism, whether in the form of al Qaeda or other groups--it could be a law enforcement action, an armed conflict, a hybrid of the two, or perhaps even something else entirely. [FN15] Scholars and practitioners will *6 continue to debate these questions for quite some time, given the complexity of both the facts on the ground and the interaction of the relevant legal regimes.

This Article will focus on a related question, but one that has not yet been asked: where can we conduct an armed conflict against terrorist groups? Questions of whether the law of armed conflict applies to conflicts with al Qaeda or other terrorist groups are beyond the scope of this Article. Rather, accepting that the United States views itself as engaged “in an armed conflict with al-Qaeda, as well as the Taliban and associated forces,” [FN16] this Article *7 will focus on two hitherto unexamined issues--when and for how long is an area part of the zone of combat, and how far does this designation extend geographically. Although questions of applicable law have been central to legal and policy discussions for the past several years, these issues have remained below the surface and in the shadows. These questions of where and when with regard to the zone of combat are critical foundational questions that bear directly on the applicable law

within (and without) the zone of combat.

Part I sets forth the traditional conception of the battlefield or zone of combat operations, in both the law of neutrality and the law of armed conflict. The law of neutrality defines the relationship between states engaged in armed conflict and those not participating. [FN17] The Law of Armed Conflict (LOAC) governs the conduct of both states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in **hostilities** and by restricting the means and methods of warfare. [FN18] These frameworks can demonstrate both how these legal regimes *8 can contribute to useful assessments of the temporal and geographic scope of the **zone** of combat and where the traditional parameters fall short.

Part II then examines the nature of the **zone** of combat in contemporary conflict and counterterrorism operations to illustrate why the geographic and temporal scope of the battlefield is a critical issue in such conflicts. Because the traditional frameworks fall short in delineating the parameters of the **zone** of combat, we need to analyze how to better define the temporal and geographic scope of the conflict. For example, if an al Qaeda member is walking down the street in Vancouver, Oslo, or Santiago, is that area necessarily--or not--part of the **zone** of combat? In Part III, general principles of LOAC and concepts drawn from LOAC's analysis of non-international armed conflict suggest three primary factors to consider in delineating the **zone** of combat: the nature of the **hostilities**, the government response, and the territorial connections or attachments of the relevant terrorist group or actors.

Using these factors, this Article proposes parameters for conceptualizing the **zone** of combat, drawing on traditional conceptions of the battlefield and contemporary understandings of armed conflict and operational counterterrorism. By understanding where and when the relevant legal constructs are applicable, we will have a better understanding of the framework within which operational decisions must be made. The policy implications of different legal approaches play an important role, given the ramifications that varying parameters of the zone of combat can have for both national security and individual liberty interests.

II. Traditional Battlefield Parameters

Naturally limited--and triggered--by the existence of an armed conflict, LOAC provides guidance for understanding the temporal and geographic scope of armed conflict. Indeed, “[t]he laws of war operate within temporal and geographic realms; considerable attention is given to when it can be said that an ‘armed conflict’ has arisen and ended, and also to where it is that protected persons are located” [FN19] The temporal and geographic scope, in turn, provides parameters for where and when to apply LOAC's rights and obligations to persons within that area. LOAC thus offers a paradigm for understanding the parameters of the zone of combat that other legal *9 frameworks--such as human rights law or domestic criminal law--cannot necessarily offer because they do not have any comparable framework for determining applicability.

A. Belligerent Territory and Neutral Territory

Although in any international conflict there will be many states that remain neutral, the nature of an interconnected, globalized world is such that neutrals cannot simply turn a blind eye to a conflict between two or more other countries. Neutrality thus signals the dividing line between the application of the laws of neutrality and the laws of war. [FN20] It thus provides an uncontestable framework for where and when hostilities can be conducted--the very questions that remain so difficult to answer in today's counterterrorism operations and conflicts with non-state actors and terrorist groups.

Traditionally, states are either belligerents or neutrals during an armed conflict. As Oppenheim explained, “Such States as do not take part in a war between other States are neutrals.” [FN21] The law of neutrality “defines the relationship under international law between states engaged in an armed conflict and those that are not participating in that armed conflict.” [FN22] Based on the fundamental principle that neutral territory is inviolable, [FN23] neutrality law seeks to (1) contain the spread of hostilities, particularly by keeping down the number of participants; (2) define the legal rights of parties and nonparties to the conflict; and (3) limit the impact of war on nonparticipants, *10 especially with regard to commerce. [FN24] Neutrality law thus leads to a geographic-based framework in which belligerents can fight on belligerent territory or the commons but must refrain from any operations on neutral territory. In essence, the battlespace in a traditional armed conflict between two or more states is anywhere outside the sovereign territory of any of the neutral states. [FN25] In a conflict involving many states, such as World War II, for example, the battlefield--or the areas where states could conduct hostilities-- certainly extended across the globe, but did not include neutral territory.

The Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 1907 (Hague V) sets forth neutrality law's basic principles. [FN26] Beyond upholding the inviolability of neutral territory, Hague V prohibits the movement of belligerent troops or materiel across neutral territory [FN27] and the use of military installations or communications facilities on neutral territory. [FN28] In addition, belligerent states may not attack targets in neutral territory, unless, as stated below, the neutral state fails to ensure its territory is not used for belligerent purposes. [FN29] For its part, a neutral power must not provide, or enable the provision of, military supplies to any belligerent, [FN30] nor allow its territory to be used for military operations. [FN31] Indeed, it may use force--as necessary and within its capability--to prevent belligerent powers from using its territory for war-making purposes. [FN32] To the extent a neutral state is unable or unwilling to prevent the use of its territory for such purposes, “a belligerent state may become entitled to use force in self-defence against enemy forces operating from the territory of that neutral state,” [FN33] based on the ordinary rules governing the resort to force.

*11 B. LOAC's Geographic and Temporal Parameters

Beyond the belligerent-neutral paradigm, LOAC provides an alternative way to identify temporal and spatial boundaries or, at a minimum, to highlight useful criteria for doing so. Although the Geneva Conventions do not specifically delineate the geographic boundaries of conflict, both Common Article 2 and Common Article 3 take a geographic approach in some way. Common Article 2, which speaks of “all cases of declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties,” [FN34] brings the law of neutrality and the division between belligerents and neutrals directly into play. In the event of such a conflict, the theater of war--to use one descriptive term--would be anywhere the forces of two belligerents come into contact or are otherwise using force, such as to attack civilians, outside neutral territory. For non-international armed conflicts, Common Article 3 refers to conflict “occurring in the territory of one of the High Contracting Parties,” [FN35] suggesting that, at a minimum, the territory of the state in which the conflict is taking place forms part of the geographic area of conflict.

The Geneva Conventions do provide some guidance regarding the temporal scope of armed conflict, referring to the “cessation of active hostilities” [FN36] and the “general close of military operations.” [FN37] When the Conventions were drafted, the general close of military operations was considered to be “when the last shot has been fired.” [FN38] The Commentary to the Fourth Geneva Convention offers further detail, explaining:

When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation or simply on debellatio. On the other hand, when there are several States on one or both *12 of the sides, the question is harder to settle. It must be agreed that in most cases the

general close of military operations will be the final end of all fighting between all those concerned. [FN39]

This approach is based, above all, on a practical understanding of the facts on the ground and not on the formalities of armistice, peace treaty or other legal instrument. [FN40] One final issue relates to the frequency or sustained nature of the violence. Although the International Criminal Tribunal for the Former Yugoslavia (ICTY) speaks of “protracted armed violence” [FN41] in defining non-international armed conflict in *Prosecutor v. Tadic*, hostilities need not be continuous to qualify as armed conflict or for LOAC to apply constantly throughout the conflict. [FN42]

Beyond this limited guidance from the conventions and the commentaries, we can look to international jurisprudence for some additional understanding of the geographic and temporal parameters of armed conflict. *13 In *Tadic*, the ICTY stated that LOAC mandates a broad geographic and temporal scope for armed conflict. [FN43] Referring to various provisions in the Geneva Conventions demonstrating that their protections extend beyond the actual fighting, the *Tadic* Appeals Chamber declared that in both internal and international armed conflicts, the temporal and geographic limits range beyond the exact time and place of hostilities. [FN44] The Tribunal held that:

[i]nternational humanitarian law applies from the initiation of . . . armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there. [FN45]

As the Tribunal's examination of relevant provisions in the Geneva Conventions demonstrates, the purpose of such a broad scope is to ensure the maximum protection for all persons engaged in or caught up in the conflict.

As an example, Common Article 3 refers to persons “taking no active part in the hostilities,” [FN46] including members of armed forces who have laid down their arms and those who are hors de combat, suggesting that the protections in that article must apply outside the limited locations of actual combat operations. [FN47] Provisions in the Third and Fourth Geneva Conventions relating to the protection of prisoners of war and civilians, respectively, demonstrate that the law applies anywhere within the territory of the parties to the conflict, not simply where hostilities are taking place. [FN48] Similarly, Article 5 of the First Geneva Convention provides that “[f]or the protected persons who have fallen into the hands of the enemy, the present Convention *14 shall apply until their final repatriation.” [FN49] These protections mandate a broad temporal scope as well to ensure that such persons are protected whenever they are in the hands of the enemy party, not just during combat operations. Thus, there need not be actual fighting taking place at all times in every area for such areas to be part of the conflict. [FN50] The next step then is to examine whether this framework can help in determining the boundaries of the zone of combat in today's conflicts.

III. Applying Geographic and Temporal Parameters to Contemporary Conflicts

This Article's central question--where is the battlefield in the conflict with terrorists and how long does it remain the battlefield--is a fundamental and critical component of understanding the parameters of state action in combating terrorism. In traditional conflicts, military operations could take place beyond the territory of any neutral party. [FN51] Today's conflicts, however, pit states against non-state entities; actors and groups who often do not have any territorial nexus beyond wherever they can find safe haven from government intrusion. As state and non-state actors

have often shifted unpredictably and irregularly between acts characteristic of wartime and those characteristic of not-wartime[, t]he unpredictable and irregular nature of these shifts makes it difficult to know whether at any given moment one should understand them as armies and their enemies or as police forces and their criminal adversaries. [FN52]

Once we are outside the traditional belligerent-neutral framework that defined the traditional battlespace, determining the parameters of the contemporary battlefield or zone of combat becomes significantly more complicated. In addition, while human rights law--applicable in peacetime or wartime--treats the use of force in response to a threat as a measure of *15 last resort, [FN53] LOAC contemplates--indeed authorizes--the use of force as a first resort against legitimate targets. [FN54] Thus, above all else, when leaders invoke the battlefield or the zone of combat, they seek to harness the authority to use force as a first resort against those identified as the enemy (terrorists, insurgents, etc.). For this reason alone, it is critical to understand both the parameters of the zone of combat and the ramifications of identifying particular areas as falling within that zone of combat.

A. Contemporary Combat Scenarios: Describing the Zone of Combat

At present, the overwhelming proportion of U.S. military forces are deployed to Afghanistan and Iraq and almost all actual combat operations are taking place in those two locales. There is little doubt that Afghanistan and Iraq form part of the zone of combat and a corresponding recognition that the entire territory of each country forms part of that zone of combat. [FN55] The "global war on terror" is not limited to Afghanistan and Iraq, however. Identifying when other areas become a zone of combat--or form part of a broader zone of combat--as a result of terrorist attacks or subsequent military operations proves challenging and has significant legal and policy ramifications.

1. Terrorist Activities and Attacks

A look at major terrorist attacks in the past nine years shows a wide geographic scope and an obvious focus on major metropolitan areas where civilian casualties, and therefore impact, are maximized. Europe, Africa, Asia--the attacks span the globe and, for many, lend credence to the label "global war on terror." Among countless others in a range of countries, the *16 following are some of the major attacks in the past decade. On October 12, 2002, an Indonesian terrorist group bombed a Bali discotheque popular with Western tourists, killing over 200 people. [FN56] The March 2004 Madrid train bombing killed 191 people and wounded nearly two thousand, the worst terror attack on European soil since the 1988 Lockerbie bombing. [FN57] On July 7, 2005, three suicide bombers hit the London subway and a bomb exploded on a double-decker bus, killing fifty-two and wounding more than seven hundred. [FN58] Mumbai has been the site of two horrific attacks in the past four years, starting with the July 2006 bombings of the Suburban Railway that killed 209 and wounded more than seven hundred. [FN59] Two years later, armed gunmen opened fire at eight sites in a coordinated attack, including a train station, Western hotels, a hospital, a Chabad house, restaurants, and a police station. [FN60]

Al Qaeda and other terrorist groups--working alone or in concert, affiliated or independent--have also attempted attacks on U.S. soil or on aircraft traveling to the U.S. In December 2001, Richard Reid, now known as the shoe bomber, tried to detonate an explosive in his shoe on an American Airlines flight from the United Kingdom to Boston. [FN61] A few years later, in August 2006, authorities in the United Kingdom arrested eight men plotting to use liquid explosives to blow up seven airliners en route from London's Heathrow Airport to the United States. [FN62] Finally, on Christmas Day 2009, Umar Farouk Abdulmutallab attempted to detonate explosives on a Northwest Airlines flight to Detroit. [FN63] U.S. authorities have disrupted and foiled numerous other plots within the United States as well and some attempted attacks have simply failed. Most recently, Faisal Shahzad tried to *17 detonate a car bomb in Times Square in New York City on May 1, 2010. [FN64] Shahzad was subsequently arrested as he tried to leave the country two days later and pleaded guilty in June 2010. [FN65] Other attempts include Jose Padilla's dirty bomb, the planned attack on the New York City tunnels, and newly revealed plots for twin transit attacks in New York and London. [FN66]

In recent years, al Qaeda has begun to retreat from Afghanistan and has regrouped and reorganized in Pakistan's Northwest Frontier Province and Swat Valley. It has also formed offshoots in Iraq, known as al Qaeda in Mesopotamia,

largely ousted by U.S. and allied forces. [FN67] Outside these areas, however, reports suggest that al Qaeda operates and finds sanctuary in a variety of other countries, in particular Yemen, Somalia and the Philippines. [FN68] Al Qaeda has long recruited in or drawn adherents from Yemen and, in recent years, “a resurgent Yemen-based al Qaeda wing that has been trying to strengthen its foothold in the Arabian peninsula state” has made its home in Maarib Province. [FN69] By 2009, al Qaeda leaders from Saudi Arabia had merged with existing al Qaeda forces in Yemen to form Al Qaeda in the Arabian Peninsula, in essence creating a regional franchise. [FN70]

Al Qaeda's influence and foothold in Somalia have grown since Ethiopia's invasion to overthrow the Islamic Courts Union and install the Transitional Federal Government. [FN71] “Foreign fighters trained in Afghanistan *18 are gaining influence inside Somalia's al-Shabab militia, fueling a radical Islamist insurgency with ties to Osama bin Laden, according to Somali intelligence officials, former al-Shabab fighters and analysts.” [FN72] Finally, al Qaeda has long had a presence in the Philippines, although more as a facilitator for the local insurgent groups, Jemaah Islamiyah and the Abu Sayyaf Group, than as an operator. [FN73]

2. U.S. Use of Military Force Outside of Afghanistan and Iraq

For the past few years, the U.S. has engaged in target-specific drone air strikes against Taliban militants in Pakistan. A large proportion of these drone strikes target leaders and members of Tehrik-i-Taliban Pakistan, an umbrella group of what were once locally oriented tribal militias involved in separate conflicts with the state of Pakistan. [FN74] For its part, Tehrik-i-Taliban Pakistan has attacked NATO convoys passing through Pakistan and killed U.S. military advisors in attacks inside Pakistan. [FN75] It launched a “fedayeen style” attack on the U.S. consulate in Peshawar, Pakistan involving both car bombs and an assault team armed with rocket launchers and automatic *19 weapons and likely participated in the suicide bomb attack on Forward Operating Base Chapman that killed seven CIA employees. [FN76]

The U.S. launched what is believed to be its first drone attack inside Pakistan in 2004, targeting and killing Nek Muhammad, the South Waziristan tribal leader. [FN77] The U.S. then launched a total of nine drone strikes in Pakistan through the end of 2007. [FN78] Beginning in 2008, the U.S. dramatically increased its use of drones in Pakistan, launching thirty-four attacks and killing over one hundred militants. [FN79] In 2009, the U.S. launched fifty-three strikes--a rate of one drone strike per week--and more than double that number in 2010. [FN80]

Since 2001, the U.S. has also targeted al Qaeda leaders and other terrorists in other countries on multiple occasions. Given al Qaeda's penchant for seeking sanctuary in Yemen, that country has been a frequent locale of such attacks, including the first use of an armed drone outside Afghanistan after September 11th. [FN81] In that attack, a CIA drone launched a Hellfire missile and killed six suspected al Qaeda members traveling in a car in southern Yemen, including the man believed responsible for the bombing of the U.S.S. Cole. [FN82] More recently, the U.S. has deployed drones to target Anwar al-Aulaqi, the al Qaeda terrorist suspected of planning the failed attack against Britain's ambassador to Yemen in April and allegedly involved in the Fort Hood shooting incident and the Christmas Day bomber's attempted attack. [FN83]

*20 In Somalia, as early as 2007, the U.S. launched attacks against al Qaeda members suspected of involvement in the 1998 Embassy bombings. [FN84] After multiple attempts to target Saleh Ali Saleh Nabhan, the al Qaeda militant suspected of masterminding the 2002 attack on the Paradise Hotel in Mombasa, Kenya, the United States launched a commando raid in broad daylight, killing Nabhan and at least eight others. [FN85] Finally, in an attack related to the war in Iraq, U.S. Special Forces killed eight so-called foreign fighters in Syria in October 2008. [FN86]

B. Traditional LOAC Frameworks and Today's Conflicts

Contemporary conflicts pitting states against terrorist groups, as in the situations described above, significantly challenge traditional frameworks for understanding the parameters of the zone of combat. Simply superimposing the approach applicable in traditional armed conflict onto conflicts with terrorist groups does not provide any means for distinguishing between different conceptions of the battlefield. Just a few weeks after the September 11th attacks, President George W. Bush laid the foundation for the notion of the whole world as a battlefield when he pronounced that “[o]ur war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan.” [FN87] When coupled with statements by other high-ranking administration officials, [FN88] the President's view of a global battlefield, in which the whole world is a war zone, became clear. U.S. resort to military force in numerous countries *21 around the world has borne out this theory over the past nine years since the September 11th attacks. Indeed, in 2004, then-Secretary of Defense Donald Rumsfeld signed a secret order giving the U.S. military authority to strike at al Qaeda targets anywhere in the world. [FN89] In such a global war, the battlefield knows no geographic or temporal boundaries, and the U.S. would be entitled to kill its enemies wherever and whenever it finds them. [FN90]

The primary counter to this notion of a global battlefield is founded on traditional conceptions of armed conflict, according to which “[a]rmed conflicts inevitably have a limited and identifiable territorial or spatial dimension because human beings who participate in armed conflict require territory in which to carry out intense, protracted, armed exchanges.” [FN91] As the discussion of the law of neutrality above demonstrates, spatial is a more accurate description than territorial, because territory is only one component of where combat operations take place. Proponents of this limited conception of the battlefield argue that terrorist attacks do not constitute protracted exchanges--one element necessary to finding the existence of a non-international armed conflict--and therefore action against terrorists, even targeted strikes with military force, do not create a combat zone or battlefield. Thus, while the U.S. may be engaged in an armed conflict with al Qaeda, these scholars believe that such conflict only takes place in limited, defined geographic areas--areas that would thus constitute the battlefield or zone of combat--such as Afghanistan, Iraq and the border areas of Pakistan. [FN92] However, without any explanation beyond these conclusory statements regarding why the conflict, and thus the zone of combat, is limited to these geographic areas, this view offers no more justified conception of the zone of combat than the global battlefield theory.

*22 U.S. practice, where decisions to use force are based on belligerent status or conduct rather than any adherence to geographic or spatial concepts, does indeed compel the conclusion that the U.S. views the whole world as a battlefield. And yet, at the same time, the U.S. also seems to view certain areas as outside the scope of appropriate belligerent activity, most likely based on a conception of what the host nation can or will do to address a particular threat. The co-existence of these two themes suggests that delineating the lines between battlefield and non-battlefield is based more on arbitrary decision-making than on a process stemming from traditional law-based conceptions of the theater of hostilities.

The temporal scope of the conflict with al Qaeda is equally, if not more, perplexing. Terrorism is a phenomenon, not an enemy party; it is thus more likely to be managed over time than defeated outright. [FN93] Terrorist groups morph, splinter, and reconfigure, making it difficult to determine if, let alone when, they have been defeated. Even though some U.S. federal courts have spoken of a time “when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed,” [FN94] counterterrorism does not involve cease-fires, peaceful settlements, or armistices. The notions of “cessation of active hostilities” and “general close of military operations” thus prove difficult to apply and can lead to the conclusion that the conflict with terrorist groups will continue ad infinitum. As one Bush administration official explained, terrorist attacks such as “the Bali bombing, terrorist attacks in the Philippines, Kuwait, and elsewhere--only underscore the fact that this conflict remains ongoing and will continue for the foreseeable future.” [FN95] Traditional notions of repatriation at the end of hostilities may offer helpful guidance in a geographically confined conflict with a non-state actor or terrorist group, such as the Tamil Tigers in Sri Lanka, [FN96] but the diffuse geo-

graphic nature of most conflicts with terrorist groups generally makes traditional temporal concepts unlikely to apply effectively to such conflicts.

*23 Beyond that, although the law of neutrality's fundamental principles and goals are clear, the nature of the current conflict confounds attempts to use the belligerency-neutrality framework effectively. First, terrorist groups are non-state entities, ranging from highly organized groups to amorphous groups of persons with similar aims and tactics. With the exception of Hamas in Gaza, Hezbollah in southern Lebanon, and perhaps a few other groups, most terrorist groups--and al Qaeda in particular--do not have territory that can constitute belligerent territory or be distinguished from neutral territory. As one scholar has explained:

[A]l Qaeda is an armed Sunni Islamist organization . . . seeking to eliminate foreign influence in Muslim countries. Though its exact organization is shrouded in secrecy, most analysts describe it as comprising numerous independent and collaborative cells operating across multiple countries. As such, al Qaeda is not an entity temporally or geographically tied to the prior de facto government of Afghanistan, but rather an independent force engaged in a private war. [FN97]

Applying the concept of neutrality to these situations could lead to perverse results where targets within the states combating terrorists are legitimate military objectives--because those states are belligerents in the conflict against terrorist groups--but targets within states where terrorists may find safe haven, plan attacks, or transit through are not lawful objectives--because the states in those situations are likely not belligerents themselves so their territory is not belligerent territory. Indeed, with the exception of some state sponsors of terrorism, few countries choose to side with a terrorist organization, whether explicitly or implicitly.

Comparing the approach of U.S. courts today to that of U.S. courts addressing issues in wars past highlights the difference between today's conflict between states and terrorist groups, and previous wars between and *24 among multiple sovereign states, such as World War I and World War II. Thus, a 1942 decision upholding the lawfulness of an order evacuating Japanese-Americans to a military area stated plainly:

The field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive. [FN98]

Similarly, the U.S. entrance into World War I brought "the port of New York within the field of active [military] operations." [FN99] In both cases, the U.S. was a belligerent in an international armed conflict; the law of neutrality mandates that U.S. territory was part of the battlefield or combat zone. [FN100] Whereas the law of neutrality applied clearly and directly to the international armed conflict between the U.S. and Japan and the U.S. and Germany and Italy, as discussed above, the current conflict lies outside the framework of the law of neutrality.

The reluctance of U.S. courts to fit the territory of the United States-- itself clearly engaged in the conflict against al Qaeda--within the zone of combat seems a clear recognition that the traditional concepts of belligerency, neutrality and territory may fall short in searching for the parameters of the zone of combat in today's conflicts. In fact, U.S. practice is the clearest example, perhaps, of how the legal conception of today's conflicts with terrorist groups differs from that of conflicts in the past: whereas U.S. territory was considered part of the theater of war in World War I or World War II, case law and the general practice of employing law enforcement measures within the U.S. suggest the opposite is true today.

Second, the United Nations Charter framework and the role of the United Nations in combating terrorism raise substantial questions about the relevance of neutrality in this particular conflict. U.N. member states are bound to accept and

implement Security Council decisions and “are required *25 to give the UN every assistance in any action it takes, and refrain from giving assistance to any state against which the UN is taking preventive or enforcement action.” [FN101] The impact of U.N. Security Council involvement in a conflict or other situation may well be that no country can sit on the side and remain neutral. [FN102] In essence, “when measures of collective security are carried out by the UN in conformity with the Charter, Member States must help one side (the UN force) and refrain from aiding and abetting the other (the aggressor State).” [FN103] Although the Security Council has not imposed measures of collective security in the present conflict between the U.S. and al Qaeda, it has indeed entered the fray. Acting under Chapter VII authority in Resolution 1373, the Security Council decided that

all States shall: (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; [and] (b) Take the necessary steps to prevent the commission of terrorist acts [FN104]

This resolution does not specifically authorize the use of force against terrorist groups or to prevent terrorist attacks, but definitively places all member states in opposition to terrorist groups, leaving no room for a state to be “neutral.”

As a result, the entire concept of neutrality is problematic in this context--but yet it seems hard to imagine that the absence of declaratively neutral states means that no territory is inviolable in counterterrorism and military operations against terrorists. One certainly might argue that any country using military force against terrorists constitutes a belligerent in this type of conflict. Similarly, one could argue that any state acting in concert with or directly supporting terrorist groups on its territory could become a *26 belligerent state as well. But what about states where terrorists operate or find safe haven without state support or even in direct opposition to state policy? Or state sponsors of terrorist groups operating in another state's territory? If the territory of any state where a terrorist group operates or a terrorist is found were to become belligerent territory even against its will, then state sovereignty is simply eliminated. It is thus difficult to translate neutrality law's framework into the murky world of today's conflicts, non-state actors, and dispersed terrorist groups.

IV. Into the Future: Finding a Middle Ground

The ramifications of including areas within the zone of combat, such as the accompanying authority to use lethal force as a first resort, raise a variety of policy considerations. The two primary considerations weigh directly against each other and perhaps, as a result, lend credence to the need for a middle ground in defining the zone of combat. First, some argue that creating geographic limits to the battlefield has the problematic effect of granting terrorists a safe haven. For example, a member of al Qaeda can be a legitimate target as a result of continuous participation in hostilities, thus losing any immunity from attack he might have had by dint of being a civilian. [FN105] If the zone of combat is limited geographically to certain areas, then this member of al Qaeda can avoid being targeted--and thus regain civilian immunity, in essence--simply by crossing an international border even while remaining active in a terrorist organization engaged in a conflict with the U.S. [FN106] Geographic limits designed to curtail the use of governmental military force thus effectively grant terrorists a safe haven and extend the conflict by enabling them to regroup and continue their attacks.

Alternatively, others argue that the lack of geographic limitations on the zone of combat has grave consequences, both locally and globally. In particular, “[t]he implications of allowing the use of armed force to capture or kill enemies outside a country's own territory, and outside a theater of traditional armed conflict, may include spiraling violence, the erosion of *27 territorial sovereignty, and a weakening of international cooperation.” [FN107] Use of military force to target a person inside the territory of another state without its consent inherently violates that state's sovereignty. A conception of the battlefield enabling regular incursions into another state's territory will, over time, have the effect of weak-

ening the importance of state sovereignty as a defining part of the international legal order. It also increases the likelihood of violence on a more regular and more widespread basis, as more and more locations fall within the arena of military operations.

With these tensions as a backdrop, one can look to LOAC to derive a framework or set of parameters. Such factors can be drawn from LOAC itself--from the general principles at the heart of LOAC and from the way we understand whether there is an armed conflict in existence that triggers LOAC.

A. Seeking Guidance from LOAC's General Principles

LOAC is a living body of law rather than a set of static concepts, repeatedly adapting to uncertainties and changing circumstances. As Jean Pictet wrote in 1985:

The international Conventions contain a multitude of rules which specify the obligations of states in very precise terms, but this is not the whole story. Behind these rules are a number of principles which inspire the entire substance of the documents. . . . They serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination. [FN108]

When unforeseen situations have demanded new answers, LOAC's basic principles have guided interpretations and helped find solutions to preserve and protect the law's core values.

The Geneva Conventions, and the laws of war for centuries before that, are based on four key principles: distinction, proportionality, military *28 necessity, and humanity. [FN109] The principle of distinction requires all parties in a conflict to distinguish between those who are fighting and those who are not and only target the former when launching attacks. [FN110] The principle of proportionality seeks to balance military goals with protection of civilians, prohibiting attacks when the expected civilian casualties will be excessive compared to the anticipated military advantage. [FN111] Military necessity recognizes that the goal of war is the complete submission of the enemy as quickly as possible and allows any force necessary to achieve that goal as long as not forbidden by the law. [FN112] Finally, humanity aims to minimize suffering in armed conflict; the infliction of suffering not necessary for legitimate military purposes is therefore forbidden.

For the purposes of this analysis, military necessity and humanity are the two key principles that can help provide guidance in delineating the zone of combat. Military necessity naturally suggests a broad view of the zone of combat in order to offer the most comprehensive opportunity to defeat the enemy effectively. In essence,

[t]he appeal [of invoking armed conflict] is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State's domestic law, and generally provides immunity to State armed forces. Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding *29 compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. . . . [Finally,] labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support. [FN113]

At first glance, the principle of humanity seems to support a broad view of the zone of combat as well. The Commentary to the Fourth Geneva Convention emphasizes that the drafters sought to ensure the widest possible field of application for LOAC's protective goals. First, the Commentary explains that the phrase “‘in the hands of’ is used in an extremely general sense.” [FN114] In particular, Part II of the Fourth Geneva Convention, entitled “General Protection of Populations Against Certain Consequences of War,” has a broad application, covering “the whole of the populations of

the countries in conflict” [FN115] In the past, this goal of maximizing protection has been a driving force facilitating interpretations of complicated questions regarding protected persons or other issues. For example, the ICTY's approach in Tadic and other cases, basing protected person status on allegiance rather than nationality, fulfills LOAC's general need for broad applicability across territory, time, and categories of persons. [FN116]

***30** This goal may not work as effectively, however, when correlated to conflicts with terrorist groups. Simply put, taking a broad view of the time and space dimensions in the war against terrorist groups could--with little imagination--lead one to conclude that a large portion of the world falls within the zone of combat, by dint of terrorist groups having a presence in many countries and terrorist attacks taking place in many countries. While this approach would, theoretically, mean that large numbers of persons might benefit from the rights and protections of LOAC, it also means that large swaths of the globe would fall within the use of force as first resort authority that LOAC grants to belligerents. Thus, the principle of humanity more rationally supports a narrow view of the zone of combat's parameters, one that seeks to protect the most people by keeping conflict, and the battlefield, away from their countries altogether. Because the risk of mistake increases dramatically as we move farther away from the conventional battlefield, humanity and its accompanying limitations on the use of force are ever more critical. This result--broad based on military necessity and narrow based on humanity--mirrors in some ways LOAC's essential and inherent balancing of military necessity and humanity. Nonetheless, even though resort to the general principles of LOAC and the object and purpose of the law can often be a useful tool for resolving complicated or unforeseen issues, here it leaves us with lingering uncertainties regarding how best to fulfill those goals.

B. Factors From LOAC's Armed Conflict Trigger

As explained above, this Article does not address the much-debated question whether the conflict with al Qaeda constitutes an armed conflict as understood within the framework of the Geneva Conventions and LOAC. However, a number of the factors relevant to analyzing whether any conflict situation meets the threshold of LOAC application can be useful here in developing a paradigm for framing the battlefield in the “war on terror.”

Determining whether violence between states, between a state and a non-state actor, or between two or more non-state actors rises to the level of an armed conflict is a foundational analytical step for LOAC, which only applies during armed conflict. The most common and oft-cited contemporary definition of armed conflict is from the Tadic case: an armed conflict exists whenever “there is a resort to armed force between States or protracted armed violence between governmental authorities and organized ***31** armed groups or between such groups within a State.” [FN117] According to the Commentary, recognizing the existence of international armed conflict in accordance with Common Article 2 is straightforward. “Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.” [FN118] The length of the hostilities or the number of casualties does not impact the characterization as armed conflict. [FN119] For this reason, analysis and interpretation of Common Article 2 will not be particularly useful here. Rather, this section draws factors and other relevant insights from LOAC's approach to non-international conflict and Common Article 3.

The parameters of Common Article 3 conflicts can be harder to identify concretely than those of Common Article 2 conflicts; according to the Commentary, no specific test for determining the applicability of Common Article 3 exists. Rather, the goal is to interpret Common Article 3 broadly [FN120] based on a number of indicative--but not dispositive--factors regarding the nature and behavior of both state and non-state parties. For example, the state's response is a critical component, in particular whether it employs its regular armed forces in combating the non-state actor. [FN121] Another

er key factor is the intensity of the hostilities and whether it rises above the level of riots and internal disturbances. [FN122] Finally, the Commentary considers the non-state actor's authority, organization, and territorial connections. [FN123]

The United States, like selected other countries, views itself as operating within an armed conflict paradigm in combating terrorism. [FN124] Much of the *32 continuing debate centers on the nature of this conflict rather than on whether it exists at all. Some argue that this conflict falls outside this framework altogether, [FN125] leaving us with a conflict unregulated by the laws of war, a problematic conclusion, but an armed conflict nonetheless. Alternatively, in *Hamdan v. Rumsfeld*, the U.S. Supreme Court held that the conflict with al Qaeda is a non-international armed conflict governed by Common Article 3 of the Geneva Conventions. [FN126] Finally, some scholars point to a new category of conflict, so-called “transnational armed conflict,” [FN127] which involves the “transnational characteristics of international armed conflict, but the military operational characteristics of noninternational armed conflicts (because of the state versus non-state nature of the operations).” [FN128] However contentious this debate, it rests on the fundamental presumption that the U.S. is engaged in some type of armed conflict. Thus, several factors identified above from traditional LOAC analyses regarding non-international armed conflict can prove helpful to the instant analysis: the nature of the hostilities, the government response, and the territorial connections of the non-state actor or terrorist group.

1. What are Hostilities?

Traditionally, LOAC looks to the intensity of the hostilities to determine whether violence in a particular area or situation has passed the threshold necessary to constitute a non-international armed conflict. For the purposes of this article, it will be helpful to examine the types of violence, attacks and acts that are normally considered to fall within the category of **hostilities** in the framework of LOAC. Analogizing terrorist acts and activities to **hostilities** can be a useful starting point in identifying the parameters of the *33 **zone** of combat. As a general rule, classical definitions of armed conflict and **hostilities** exclude “civil unrest or terrorist activities.” [FN129] But our analysis should not stop there, because just as traditional conceptions of armed conflict may not be effective in analyzing the conflict with al Qaeda, so classical understandings of **hostilities** may not hold all the answers.

First, Article 49 of Additional Protocol I defines an attack as an “[act] of violence against the adversary, whether in offence or in defence.” [FN130] Attack thus “means ‘combat action’” [FN131] and refers to “physical force.” [FN132] The Commentary further defines hostile acts as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces” and explains that the term “‘hostilities’ covers not only the time that [a] civilian actually makes use of a weapon, but also, for example, . . . situations in which he undertakes hostile acts without using a weapon.” [FN133] Most terrorist acts fall within one or more of these definitions with little trouble.

A next step in this analysis is to incorporate information about the types of acts that constitute hostilities for the purposes of analyzing the intensity of hostilities. ICTY cases have involved a wide range of types of hostilities and the Tribunal has concomitantly pointed to a number of considerations in making determinations about intensity. Among those considerations, particularly relevant ones for this analysis include the number of civilian casualties, the extent of material destruction and the types of weapons used. [FN134] By those measures, many terrorist attacks could fall within a general notion of hostilities. Many attacks over the past decade have caused hundreds--even thousands in the case of 9/11--of civilian deaths, have wrought substantial material destruction, and have used sophisticated explosives or coordinated attacks with automatic weapons, such as in Mumbai. One definition of “attack” used at the ICTY is “incidents in which firearms, hand-grenades, and other explosive devices were used against *34 civilians” and enemy forces. [FN135] In addition, the target of particular attacks can be determinative-- attacks on a military target will often be more likely to constitute hostilities that fall within the category of armed conflict. [FN136] One might therefore distinguish the

attack on the U.S.S. Cole--a military target-- from an attack on a civilian vessel or other civilian target in assessing how each might constitute **hostilities** within a **zone** of combat.

Admittedly, the ordinary use of the term “**hostilities**” within LOAC and international criminal jurisprudence does not necessarily translate well to a world in which terrorists attack in diverse geographic locations and seek safe haven in multiple remote locations around the world. But just as there is an emerging “recognition . . . that [LOAC] principles must . . . ‘migrate’ to the realm of transnational armed conflicts,” [FN137] so perhaps the notion of **hostilities** may begin to encompass certain terrorist acts, at least for limited analytical purposes. In the interim, the characterization and description of **hostilities** can be useful in understanding how different types of terrorist attacks can impact identification of the **zone** of combat.

2. Government Response

The nature of the government response is the most adaptable of these three factors to a conflict with terrorist groups. In assessing whether a non-international armed conflict exists, how the government responds to provocation or violence is one way courts have traditionally understood a distinction between riots or internal disturbances and armed conflict. The use of law enforcement personnel is usually a sign that the government views the situation as one falling within the former arena and not within the overall framework of armed conflict. In contrast, armed conflict often requires the government “to have recourse to the regular military forces” to combat the threats or challenges it faces. [FN138] The most oft cited example of this factor is the decision of the Inter-American Commission on Human Rights in the La Tablada case. In analyzing whether LOAC applied to an attack on an Argentine military barracks and the thirty-hour firefight that ensued, the *35 Commission found that the distinctly military nature of the government's response was persuasive, if not determinative. [FN139]

In the context of the current conflict, many see the U.S. government's decision to use military force “to combat terrorism . . . as one important indication of the existence of an armed conflict.” [FN140] Given that the U.S. and other governments have a range of tools at their disposal to combat terrorists--military force, law enforcement options, etc.--the nature of the government response can also be a relevant factor in identifying the parameters of the zone of combat. One complex analysis of how the government's response impacts the nature--and thus location--of the conflict addresses how the government chooses to categorize and characterize the enemy for purposes of targeting and other uses of force. Rules of engagement authorizing targeting based on status, and thus specifically based on the concept of military objective, suggest the existence of an armed conflict; rules of engagement based on conduct would suggest otherwise. [FN141] Applying this type of analysis to the location of a conflict rather than the existence of a conflict, for example, shows how the government's response can be a useful factor in identifying the parameters of the zone of combat.

3. Territory

Although Common Article 3 includes no requirement that a non-state party control or occupy a specific territorial area, territory can play a role in the analysis of whether a particular situation qualifies as an armed conflict. Among the criteria the Commentary mentions are: the non-state actor is “acting within a determinate territory,” or “the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory.” [FN142] As with other factors in the Commentary, these criteria are merely considerations that may play a role in assessing the nature of a conflict under Common Article 3. In contrast, Additional Protocol II only applies to conflicts in which “dissident armed forces or other organized *36 groups . . . , under responsible command, exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations.” [FN143] Whether territorial control is required or merely considered, the link between the non-state forces and some territory is a relevant factor in

analyzing the nature of the conflict.

But the notion of territory and territorial control or administration does not translate effectively to most conflicts with terrorist groups. Terrorist groups generally do not seek to control territory, but rather use particular areas as safe havens, training grounds, or launching pads for attacks. One remote area is often as good as another in many ways. Nonetheless, territorial concepts and links can be a relevant factor in creating a paradigm for understanding the zone of combat, albeit in a more creative way. Those who propound a “global battlefield theory” use territory as a factor by looking at where terrorists are presently located; that is, according to this theory, anywhere one finds a designated terrorist would constitute part of the battlefield. Without going so far, territory can also be useful in a more intermediate approach to defining the zone of combat. Terrorist groups may not occupy or administer territory, but they have a more concrete footprint in certain areas, such as where they find safe haven, where they establish training camps, and if relevant, where they launch repeated attacks. These locations naturally have a stronger connection to the ongoing conflict than other areas where no attacks have taken place or where an identifiable terrorist is located but not engaged in any activity. Another way of looking at this factor is to consider that as an al Qaeda member's connection, geographic or otherwise, to the areas of traditional combat operations grows more attenuated, the presumption of deadly force authority weakens. As such, perhaps, this interpretation of territory can be a helpful factor in defining the geographic parameters of the zone of combat. Similarly, we can add temporal considerations as well, differentiating between time periods when a terrorist group is using certain territorial areas as described above, and when it, perhaps, vacates a safe haven or training camp area.

V. Defining the Zone of Combat

Notwithstanding the complicated nature of the conflict between the U.S. and al Qaeda and affiliated terrorist groups, and the resulting confusion in trying to define the space where that conflict is taking place, identifying the parameters of the zone of combat is a critical task. At the same time that many debate whether a state can even be engaged in an armed conflict with a terrorist group, a critically important question with ramifications for *37 generations to come, the U.S. has declared that it indeed is in such an armed conflict and is operating accordingly. Analyzing how we can understand the parameters of the zone of combat and assessing relevant factors for doing so must become part of the debate and discussion surrounding the appropriate response to and manner of combating terrorism.

This Article demonstrates that traditional conceptions of belligerency and neutrality are not designed to address the complex spatial and temporal nature of terrorist attacks and states responses. Nor can human rights law or domestic criminal law, which are both legal regimes of general applicability, offer a useful means for defining where a state can conduct military operations against terrorist groups. LOAC, in contrast, provides a framework not only for when it applies, but where and for how long. By using this framework and analogizing relevant factors and considerations to the conflict with al Qaeda, we can identify factors that can help define the zone of combat.

First, some terrorist attacks and activities fall closer to the traditional conception of hostilities as understood within LOAC. Areas where these types of attacks occur naturally have a stronger link to a battlefield. In addition, when such attacks or activities occur regularly or over a defined time period, we can more clearly define the temporal parameters of the zone of combat as well.

Second, in declaring that it is “at war with terrorists,” a state may envision the whole world as a battlefield. But the state's actual conduct in response to the threat posed offers a more accurate lens through which to view the battlefield. Areas where the state uses military force, particularly multiple facets of military power, on a regular or recurring basis, should fall within the zone of combat. In contrast, those areas where the state chooses diplomatic or law enforcement measures, or relies on such efforts by another state, do not demonstrate the characteristics of the battlefield. This same

analysis holds true for the temporal parameters as well. Applying this type of analysis in a simplistic manner does indeed leave room for abuse by states that might overuse military power merely to try to squeeze otherwise non-battlefield areas within the zone of combat. While this is certainly a consideration, government response is only one factor to take into account in assessing the parameters of the zone of combat and both the nature of the international community and the great expense, both human and material, of applying military might where not necessary will likely weigh against any such abuse.

The third factor--territory--requires the most creative application. Terrorist groups do not use or connect to territory in the same manner as either states or non-state actors seeking to gain power or independence. Conflicts against terrorist groups, as a result, do not follow the boundaries on a map or the dictates of state sovereignty or international legal niceties. But territory can be a contributing factor to a paradigm defining the zone of combat nonetheless. Looking at territory from a new angle, we can see that terrorists use certain areas for safe havens and training camps and identify certain areas as prime targets for repeated attacks. Those territorial areas must therefore have a stronger connection to the zone of combat than others, both geographically and temporally, because the way terrorists use particular areas will naturally change over time.

Besides these factors drawn from the law of armed conflict, we can look to judicial interpretations and policy considerations as well. Taken as a whole, these analytical tools form a first step in the critical task of identifying where and when a state can conduct operations within an armed conflict framework, a necessary companion to the ongoing debate about whether a state can conduct operations within such a framework.

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[FN2]. Battlefield Definition, Merriam-Webster, <http://www.merriam-webster.com/dictionary/battlefield> (last visited Nov. 20, 2010); see Joint Chiefs of Staff, Joint Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms 64 (2001), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (defining "combat zone" as "[t]hat area required by combat forces for the conduct of operations").

[FN3]. Theater of Operations Definition, Merriam-Webster, <http://www.merriam-webster.com/dictionary/theater%20of%20operations> (last visited Nov. 20, 2010); Theater of War Definition, Merriam-Webster, <http://www.merriam-webster.com/dictionary/theater+of+war> (last visited Nov. 20, 2010). See also Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug 1949, at 617 (Yves Sandoz et al. eds., 1987) [hereinafter Protocol Commentary] (stating that the "zone of military operations" is "the territory where the armed forces of the adverse Parties taking a direct or an indirect part in current military operations, are located").

[FN4]. See Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 *Harv. Nat'l Sec. J.* 45, 53 (2010) (describing "new warfare" as "conflicts generally involv[ing] a state engaged in combat with non-state forces, combat characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects").

[FN5]. Natasha Balendra, *Defining Armed Conflict*, 29 *Cardozo L. Rev.* 2461, 2467 (2008). See also 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, 677 \(2004\)](#) (noting that as the boundaries of warfare continue to expand, the spatial and temporal boundaries of armed conflict break down).

[FN5]. Amos N. Guiora, [Military Commissions and National Security Courts After Guantanamo](#), 103 *Nw. U. L. Rev. Colloquy* 199, 200 (2008).

[FN6]. *Id.*

[FN7]. Warren Richey, [Appeals Court Weighs Who's an Enemy Combatant](#), *Christian Sci. Monitor* (Oct. 31, 2007), <http://www.csmonitor.com/2007/1031/p02s01-usju.html> (describing the government's argument in a brief submitted in the case of Ali Saleh al-Marri before the Fourth Circuit Court of Appeals).

[FN8]. In assessing if a particular detainee is an enemy combatant, courts consider the location of his capture or his activities as one consideration, thus tentatively touching on the parameters of the zone of combat.

[FN9]. [Padilla v. Rumsfeld](#), 352 F.3d 695, 698 (2d Cir. 2003).

[FN10]. [Padilla v. Hanft](#), 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting).

[FN11]. [Boumediene v. Bush](#), 553 U.S. 723, 770 (2008).

[FN12]. See [Hamdi v. Rumsfeld \(Hamdi IV\)](#), 337 F.3d 335, 344 (4th Cir. 2003) (denial of rehearing en banc) (Wilkinson, J., concurring) (“[T]o compare this battlefield capture to the domestic arrest in [Padilla v. Rumsfeld](#) is to compare apples and oranges.”).

[FN13]. [Al Maqaleh v. Gates](#), 605 F.3d 84, 88 (D.C. Cir. 2010).

[FN14]. [Al Maqaleh v. Gates](#), 604 F. Supp. 2d 205, 229 (D.D.C. 2009) (emphasis added) (holding that individuals captured in Afghanistan and detained at the Bagram Theater Internment Facility are not entitled to habeas corpus and specifically distinguishing between detained battlefield enemy belligerents and individuals apprehended outside the zone of combat operations).

[FN15]. See, e.g., Andreas Paulus & Mindia Vashakmadze, [Asymmetrical War and the Notion of Armed Conflict--A Tentative Conceptualization](#), 91 *Int'l Rev. Red Cross* 95 (2009), available at <http://www.icrc.org/eng/assets/files/other/irrc-873-paulus-vashakmadze.pdf> (analyzing the application of the law of armed conflict to asymmetrical wars between states and non-state actors); Helen Duffy, [The 'War on Terror' and the Framework of International Law](#) 250-55 (2005) (discussing armed conflicts with terrorist groups, specifically al Qaeda, since the attacks of September 11, 2001); Silvia Borelli, [Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror,"](#) 857 *Int'l Rev. Red Cross* 39, 45-46 (2005), available at http://www.icrc.org/eng/assets/files/other/irrc_857_borelli.pdf (arguing that the “war on terror” cannot in and of itself constitute an armed conflict within the meaning of the law of war); Mark A. Drumbl, [Judging the 11 September Terrorist Attack](#), 24 *Hum. Rts. Q.* 323 (2002); Gabor Rona, [Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"](#) 27 *Fletcher F. World Aff.* 55 (2003), available at <http://insct.syr.edu/uploadedFiles/insct/uploadedfiles/PDFs/Rona,%20Gabor.Interesting%20Times%20for%20IHL.2003.pdf> (noting that while certain aspects of the “war on terror” do fall within the category of armed conflict, others do not; such that using the terminology of “war” does not automatically make it an armed conflict); Int'l Comm. of the Red Cross [ICRC], [International Humanitarian Law and the Challenges of Contemporary Armed Conflicts](#) (2003), available at <http://www.icrc.org/eng/resources/documents/misc/5xrdcc.htm> (follow “Full text in PDF format” hyperlink)

(analyzing whether the current fight against terrorism is a war in the legal sense). In contrast, many argue that the attacks of 9/11 and the conflict with al Qaeda do constitute an armed conflict. See, e.g., Derek Jinks, [September 11 and the Laws of War](#), 28 *Yale J. Int'l L.* 1 (2003) (arguing that the law of war governs the September 11th attacks and the military operations in response); William Lietzau, *Combating Terrorism: The Consequences of Moving from Law Enforcement to War*, in *New Wars, New Laws?* 31, 36-37 (David Wippman & Matthew Evangelista eds., 2005) (discussing that “the need to respond via the armed conflict model was manifest”); Sean D. Murphy, [Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter](#), 43 *Harv. Int'l L.J.* 41 (2002) (suggesting that the September 11th attacks constituted an armed attack against the United States); Davis Brown, [Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses](#), 11 *Cardozo J. Int'l & Comp. L.* 1 (2003) (arguing that U.S. operations against al Qaeda and the Taliban were lawful in response to the armed attack on the U.S. on September 11th); Greg Travalio & John Altenburg, [Terrorism, State Responsibility, and the Use of Military Force](#), 4 *Chi. J. Int'l L.* 97, 111 (2003) (“There is no doubt that the United States and others are engaged in a ‘war’ against terrorism no less real than many other wars fought in the past.”). Regarding the debate generally, see also Michael W. Lewis et al., *The War on Terror and the Laws of War: A Military Perspective* (2009) (discussing the application of the law of armed conflict to a range of military operations and concluding that, at a minimum, the conflict between the U.S. and al Qaeda and other groups constitutes a transnational armed conflict triggering fundamental principles of the law of war).

[FN16]. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>. All three branches of the U.S. government have demonstrated that they view the situation as an armed conflict. See Authorization for Use of Military Force (AUMF), [Pub. L. No. 107-40, 115 Stat. 224 \(2001\)](#) (characterizing U.S. operations against al Qaeda and other groups as an armed conflict); [Hamdan v. Rumsfeld](#), 548 U.S. 557 (2006) (holding that the conflict with al Qaeda is a non-international armed conflict within the definition of Common Article 3); [Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism](#), 66 *Fed. Reg.* 57,833 (Nov. 16, 2001) (stating that the 9/11 attacks “created a state of armed conflict that requires the use of the United States Armed Forces”); U.S. Dep't of Def., Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (similarly characterizing U.S. operations against al Qaeda and other groups as an armed conflict). See also U.S. Dep't of State, Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 4 (Mar. 10, 2006), available at <http://www.asil.org/pdfs/ilib0603212.pdf> (“The United States is engaged in a continuing armed conflict against Al Qaida, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.”).

[FN17]. U.K. Ministry of Def., *Manual of the Law of Armed Conflict* para. 1.42 (2004) [hereinafter U.K. Manual].

[FN18]. The law of armed conflict is set forth primarily in the four Geneva Conventions of August 12, 1949, and their Additional Protocols: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in [Armed Forces in the Field](#), art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

(Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. LOAC is also commonly called the law of war or international humanitarian law (IHL).

[FN19]. Sean D. Murphy, Symposium on the New Face of Armed Conflict: Enemy Combatants After *Hamdan v. Rumsfeld*: Evolving Geneva Convention Paradigms in the “War on Terrorism,” 75 *Geo. Wash. L. Rev.* 1105, 1150 (2007).

[FN20]. Yoram Dinstein, *War, Aggression and Self-Defence* 25 (4th ed. 2005) (“The laws of neutrality are operative only as long as the neutral State retains its neutral status. Once that State becomes immersed in the hostilities, the laws of neutrality cease being applicable, and the laws of warfare take their place. However, if the neutral State is not drawn into the war, the laws of neutrality are activated from the onset of the war until its conclusion.”).

[FN21]. L. Oppenheim, 2 *International Law* 653 (H. Lauterpacht ed., 7th ed. 1952).

[FN22]. U.K. Manual, *supra* note 17.

[FN23]. Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 1, Oct. 18, 1907, 36 Stat. 2310, 1 *Bevans* 654, 205 *Consol. T.S.* 299 [hereinafter Hague V]. See also Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law* 844 (6th rev. ed. 1992) (“The basic right, beyond any question, is the inviolability of neutral territory...[and] all other neutral rights really are mere corollaries to that fundamental principle...”); Morris Greenspan, *The Modern Law of Land Warfare* 534 (1959) (“The chief and most vital right of a neutral state is that of the inviolability of its territory.”); Georg Schwarzenberger & E.D. Brown, *A Manual of International Law* 179 (6th ed. 1976) (explaining that the rights and duties of neutral powers under international customary law can be summarized in three basic rules: (1) a neutral state must abstain from taking sides in the war and from assisting either belligerent; (2) a neutral state has the right and duty to prevent its territory from being used by either belligerent as a base for hostile operations; and (3) a neutral state must acquiesce in certain restrictions which belligerents are entitled to impose on peaceful intercourse between its citizens and their enemies, in particular, limitations on the freedom of the seas).

[FN24]. John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 *A.F. L. Rev.* 119, 139 (1997).

[FN25]. Dinstein, *supra* note 20, at 26 (“[T]he region of war does not include the territories of neutral States, and no hostilities are permissible within neutral boundaries.”).

[FN26]. Hague V, *supra* note 23. See also Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague Convention XIII), Oct. 18, 1907, 36 Stat. 2415, 1 *Bevans* 723, 205 *Consol. T.S.* 395 (setting forth the principles of neutrality law for conflicts at sea).

[FN27]. Hague V, *supra* note 23, art. 2.

[FN28]. *Id.* art. 3.

[FN29]. U.K. Manual, *supra* note 17, para. 1.43(a).

[FN30]. Dinstein, *supra* note 20, at 27.

[FN31]. *Id.*

[FN32]. Hague V, *supra* note 23, arts. 5, 10.

[FN33]. U.K. Manual, *supra* note 17, para. 1.43(a).

[FN34]. GC I, *supra* note 18, art. 2; GC II, *supra* note 18, art. 2; GC III, *supra* note 18, art. 2; GC IV, *supra* note 18, art. 2. Collectively, Article 2 of Geneva Conventions I-IV is referred to as Common Article 2.

[FN35]. GC I, *supra* note 18, art. 3; GC II, *supra* note 18, art. 3; GC III, *supra* note 18, art. 3; GC IV, *supra* note 18, art. 3. Collectively, Article 3 of Geneva Conventions I-IV is referred to as Common Article 3.

[FN36]. See GC III, *supra* note 18, art. 118 (referring to the release and repatriation of prisoners of war).

[FN37]. See GC IV, *supra* note 18, art. 6 (denoting the end of application of the GC IV in the territory of parties to the conflict, upon the general close of military operations, or in occupied territory, one year after the general close of military operations); see also AP I, *supra* note 18, art. 3(b) (“[T]he application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations....”).

[FN38]. II-A Final Record of the Diplomatic Conference of Geneva of 1949, at 815 (1949), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-2-A.pdf.

[FN39]. Oscar M. Uhler et al., IV Commentary on the Geneva Convention Relative to the Protection of Civilian Person in Time of War 62 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) (footnotes omitted) [hereinafter GC IV Commentary]; see also Wolff Heintschel von Heinegg, *The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions*, 27 *Harv. J.L. & Pub. Pol'y* 843, 845-46 (2004) (arguing that conflict does not necessarily stop when the occupation of a territory is terminated and that GC IV should apply until there is a “cessation of active hostilities” or “general close of military operations”).

[FN40]. For example, the armistice “between France and Germany in 1940 did not represent the general close of military operations in the sense in which the phrase is used.” GC IV Commentary, *supra* note 39, at 62 n.3; see also Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 *Mil. L. Rev.* 186, 206 (1995) (explaining that the “general close of military operations” means the “final end of all fighting between all those concerned”). In contrast, the end of all fighting between the parties can constitute the general close of military operations even in the absence of a formal peace treaty. U.K. Manual, *supra* note 17, para. 3.10 n.25 (“In 1951, the UN Security Council refused to accept Egypt's claim to be exercising belligerent rights in respect of shipping passing through the Suez Canal over two years after the 1949 armistice had put an end to the full-scale hostilities between Israel and Egypt.”).

[FN41]. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[FN42]. Andreas Zimmerman, Preliminary Remarks on Para. 2(c)-(f) and Para. 3: War Crimes Committed in an Armed Conflict Not of an International Character, in *Commentary on the Rome Statute of the International Criminal Court* 262, 285 (Otto Tiffterer ed., 1999) [hereinafter *Commentary on the Rome Statute*] (“The term ‘protracted’ seems to imply a certain time element, which as far as article 1 of the Second Add. Prot. is concerned, is contained in the term ‘sustained.’ However, it has to be noted that, unlike a case of sustained armed violence, the operations need not be kept continuously going by the conflicting Parties. This is confirmed by the French version, which unlike the French version of article 1 para. 1 of the Second Add. Prot., does not refer to military actions which can be qualified as being ‘opérations continues’

but simply to the fact that the armed conflicts between the different parties must take place ‘de maniere prolongée.’”).

[FN43]. Tadic, Case No. IT-94-1-AR72, para. 69.

[FN44]. Id.

[FN45]. Id. para. 70.

[FN46]. GC I, supra note 18, art. 3; GC II, supra note 18, art. 3; GC III, supra note 18, art. 3; GC IV, supra note 18, art. 3.

[FN47]. GC I, supra note 18, art. 3; GC II, supra note 18, art. 3; GC III, supra note 18, art. 3; GC IV, supra note 18, art. 3.

[FN48]. See, e.g., GC III, supra note 18, art. 19 (requiring POWs to be evacuated out of the combat zone; it is important to note that all the protections of the Conventions still apply to POWs outside the combat zone); GC IV, supra note 18, art. 13 (noting that the provisions of Part II of the Fourth Geneva Convention “cover the whole of the populations of the countries in conflict”).

[FN49]. GC I, supra note 18, art. 5; see also Tadic, Case No. IT-94-1-AR72, para. 67 (“[B]oth Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated.”).

[FN50]. Prosecutor v. Zejnir Delalic et al., Case No. IT-96-21-T, Judgment, para. 185 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 16, 1998).

[FN51]. Dinstein, supra note 20, at 20 (“In principle, all the territories of the belligerent States, anywhere under their sovereign sway, are inside the region of war. As a corollary, the region of war does not overstep the boundaries of neutral States, and no hostilities are permitted within their respective domains.”).

[FN52]. Nathaniel Berman, [Privileging Combat? Contemporary Conflict and the Legal Construction of War](#), 43 Colum. J. Transnat'l L. 1, 7 (2004).

[FN53]. See U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Israel, P 15, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003), available at <http://www.unhchr.ch/tbs/doc.nsf/-Symbol/CCPR.CO.78.ISR.En?OpenDocument> (“Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.”); Gabriella Blum & Philip Heymann, [Law and Policy of Targeted Killing](#), 1 Harv. Nat'l Sec. J. 145, 160-61 (2010) (“Domestic law enforcement operations permit shooting to kill a suspected criminal only under very limited circumstances.”); Inter-Am. Comm'n H.R., Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 doc. 5 rev. 1 corr. P 87 (2002), available at <http://www.cidh.oas.org/Terrorism/Eng/exe.htm> (“[Although] the state has the right and obligation to protect the population against [threats of violence] and in so doing may use lethal force in certain situations,” the use of force is strictly proscribed.).

[FN54]. Geoffrey S. Corn, Anniversary Contributions: Use of Force: [Back to the Future: De Facto Hostilities, Transnational Terrorism, and the Purpose of the Law of Armed Conflict](#), 30 U. Pa. J. Int'l L. 1345, 1353 (2009).

[FN55]. Balendra, supra note 4, at 2467, 2502.

[FN56]. Raymond Bonner, Bombing at Resort in Indonesia Kills 150 and Hurts Scores More, N.Y. Times (Abstracts),

Oct. 13, 2002, at 11, <http://www.nytimes.com/2002/10/13/world/bombing-at-resort-in-indonesia-kills-150-and-hurts-scores-more.html>; Bali Bombing Victims Remembered, BBC News, Oct. 12, 2004, <http://news.bbc.co.uk/2/hi/asia-pacific/3735506.stm>.

[FN57]. Madrid Train Attacks, BBC News, <http://news.bbc.co.uk/2/shared/spl/hi/guides/457000/457031/html>.

[FN58]. London Attacks, BBC News, http://news.bbc.co.uk/2/hi/in_depth/uk/2005/london_explosions/default.stm.

[FN59]. Scores Dead in Mumbai Train Bombs, BBC News (July 11, 2006), <http://news.bbc.co.uk/2/hi/5169332.stm>.

[FN60]. Mumbai Rocked by Deadly Attacks, BBC News (Nov. 27, 2008), <http://news.bbc.co.uk/2/hi/7751160.stm>.

[FN61]. Thomas B. Edsall, Passenger Subdued on Plane; Bomb Fears Prompt Incident Over Atlantic, Wash. Post, Dec. 23, 2001, at A1; Derek Rose & Corky Siemaszko, Shoe Bomber Gets Kicked in the Can, N.Y. Daily News, Jan. 31, 2003, at 5.

[FN62]. Mark Rice-Oxley, Foiled Terror Plot on Scale of 9/11, Christian Sci. Monitor, Aug. 11, 2006, at 1, available at <http://www.csmonitor.com/2006/0811/p01s02-woeu.html>.

[FN63]. Josh Meyer, Al Qaeda Link Probed in Jet Incident: Nigerian Man Charged With Trying to Blow Up Plane, Balt. Sun, Dec. 27, 2009, at 14A; David Shepardson & Catherine Jun, Terror Attack Fails on Flight to Detroit, Detroit News, Dec. 26, 2009, at A1.

[FN64]. Al Baker & William K. Rashbaum, Police Find Car Bomb in Times Square, N.Y. Times (May 1, 2010), <http://www.nytimes.com/2010/05/02/nyregion/02timesquare.html>; Alison Gendar et al., Faisal Shahzad, Times Sq. Bomb Suspect, Nabbed Within 'Minutes' of Escape; 2 Held in Pakistan, N.Y. Daily News (May 4, 2010), http://www.nydailynews.com/ny_local/2010/05/04/2010-05-04_times_square_bomb_plot_suspect_faisal_shahzad_says_he_acted_alone_traced_by_cell.html.

[FN65]. Tina Susman, Guilty Plea in NYC Bomb Plot; "Muslim Soldier" Shahzad Predicts More U.S. Attacks, Chi. Trib., June 22, 2010, at 10.

[FN66]. Tom Hays & Matt Apuzzo, Al Qaeda Planned Twin Transit Attacks in US and Britain; New Indictment Adds Key Suspect to N.Y. Bomb Plot, Bos. Globe, July 8, 2010, at 7.

[FN67]. See Jim Landers, Al-Qaeda Ousted in Parts of Iraq, Dallas Morning News, Jan. 23, 2008 (stating that U.S. and Iraqi forces have ousted al Qaeda out of many parts of Iraq).

[FN68]. See Eric Schmitt & David E. Sanger, Some with Qaeda Leave Pakistan for New Havens, N.Y. Times, June 11, 2009, at A1, available at <http://www.nytimes.com/2009/06/12/world/12terror.html> (stating that groups of al Qaeda leaders have moved from Pakistan to Yemen and Somalia).

[FN69]. Mohamed Sudam, Yemen Army Clashes with Tribesmen, Hunts al Qaeda, Reuters (June 9, 2010), <http://in.reuters.com/article/2010/06/09/idINIndia-49167420100609>; Schmitt & Sanger, *supra* note 68; Yemen al-Qaeda Mediator Killed in Air Strike, BBC News (May 25, 2010), http://news.bbc.co.uk/2/hi/world/middle_east/10153486.stm.

[FN70]. Julie Cohn, Islamic Radicalism in Yemen, Council on Foreign Rel. (June 29, 2010), http://www.cfr.org/publication/9369/islamist_radicalism_in_yemen.html.

[FN71]. Julie Cohn, Terrorism Havens: Somalia, Council on Foreign Rel. (June 2010), http://www.cfr.org/publication/9366/terrorism_havens.html; see also International Crisis Group, Counter-Terrorism in Somalia: Losing Hearts and Minds? 8-9 (2005), available at <http://www.crisisgroup.org/~media/files/africa/horn-of-africa/somalia/counter-terrorism%20in%20somalia%20losing%20hearts%20and%20inds.ashx> (detailing al Qaeda's Somalia cell).

[FN72]. Sudarsan Raghavan, Foreign Fighters Gain Influence in Somalia's Islamist al-Shabab Militia, Wash. Post, June 8, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/07/AR2010060704667.html>.

[FN73]. Preeti Bhattacharji, Terrorism Havens: Philippines, Council on Foreign Rel. (June 1, 2009), <http://www.cfr.org/philippines/terrorism-havens-philippines/p9365>; Raymond Bonner, Philippine Camps Are Training Al Qaeda's Allies, Officials Say, N.Y. Times, May 31, 2003, at A1, available at <http://www.nytimes.com/2003/05/31/world/threats-responses-southeast-asia-philippine-camps-are-training-al-qaeda-s-allies.html>.

[FN74]. Brian Fishman, The Battle for Pakistan: Military and Conflict Across the FATA and NWFP 6, 10 (2010), available at <http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/fishman.pdf>.

[FN75]. Robert Fisk, Shadow Lands: Pakistan - A Nation Under Attack, Indep. (U.K.), Apr. 6, 2010, at 2, available at <http://www.independent.co.uk/news/world/asia/shadow-lands-pakistan--a-nation-under-attack-1936507.html>; Chris Brummitt, US Steps Up Missile Attacks in Pakistan, Huffington Post (Jan. 14, 2010), http://www.huffingtonpost.com/2010/01/14/us-steps-up-drone-attacks_n_423066.html; Asif Shahzad, Blast Kills 16 Cadets in Pakistan; NATO Trucks Hit in Separate Attack, Bos. Globe, Aug. 31, 2009, at 4, available at http://www.boston.com/news/world/asia/articles/2009/08/31/bombing_kills_16_cadets_in_pakistan/ (“Bombings targeted a Pakistani police station and set a NATO fuel convoy ablaze yesterday....”); 60 Minutes: War in Pakistan (CBS television broadcast May 31, 2009) (describing TTP attacks destroying hundreds of American and NATO vehicles); Pakistan Fighters Torch Afghan Supply Truck, Al Arabiya, Mar. 14, 2009 (describing a TTP attack with automatic weapons and rocket propelled grenades on a NATO supply convoy resulting in the firing of twenty supply trucks); Mansoor Khan, 3 Hurt as NATO Convoy Ambushed in Karachi, Nation (Pak.), Jan. 28, 2010; Jane Perlez, 100 Trucks of Supplies Destroyed in Pakistan, N.Y. Times, Dec. 8, 2008, at A6; Shahan Mufti, Taliban Hijacking Threatens Key NATO Supply Route, Christian Sci. Monitor, Nov. 12, 2008, at 25.

[FN76]. Roy Gutman & Saeed Shah, Taliban Chief Tied to CIA Bombing Believed Dead; West Confident Despite Denials of Militant Group, Hous. Chron., Feb. 1, 2010, at A6.

[FN77]. David Rohde & Mohammed Khan, The Reach of War: Militants; Ex - Fighter for Taliban Dies in Strike in Pakistan, N.Y. Times, June 19, 2004, at A6.

[FN78]. Peter Bergen & Katherine Tiedemann, The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010, at 3 (2010), available at <http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf> (listing nine strikes from 2004 to 2007 in the table labeled “Number of U.S. drone strikes in Pakistan”).

[FN79]. Id.

[FN80]. Id.; 2010: The Year of the Drone, New Am. Found., <http://counterterrorism.newamerica.net/drones/2010> (last visited Nov. 20, 2010).

[FN81]. Sources: U.S. Kills Cole Suspect, CNN, Nov. 4, 2002, <http://archives.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html>; see also Philip Alston, U.N. Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, P 47, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

[FN82]. Sources: U.S. Kills Cole Suspect, *supra* note 81.

[FN83]. Con Coughlin & Philip Sherwell, American Drones Deployed to Target Yemeni Terrorist, *Telegraph* (U.K.) (May 2, 2010), <http://www.telegraph.co.uk/news/worldnews/middleeast/yemen/7663661/American-drones-deployed-to-target-Yemeni-terrorist.html>. Anwar Awlaki, as referenced in the article, is an alternate spelling for Anwar al-Aulaqi.

[FN84]. See US 'Targets al-Qaeda' in Somalia, *BBC*, Jan. 9, 2007, <http://news.bbc.co.uk/2/hi/africa/6245943.stm> ("White House spokesman Tony Snow said the US action was a reminder that there was no safe haven for Islamic militants. 'This administration continues to go after al-Qaeda,' he said.").

[FN85]. Jeffrey Gettleman & Eric Schmitt, U.S. Kills Top Qaeda Militant in Southern Somalia, *N.Y. Times*, Sept. 15, 2009, at A1, available at <http://www.nytimes.com/2009/09/15/world/africa/15raid.html>; Jeffrey Gettleman & Eric Schmitt, U.S. Forces Fire Missiles into Somalia at a Kenyan, *N.Y. Times*, Mar. 4, 2008, at A9.

[FN86]. Ian Black & Ewen MacAskill, US Forces Kill Eight in Helicopter Raid on Syria, *Guardian* (U.K.), Oct. 27, 2008, at 15, available at <http://www.guardian.co.uk/world/2008/oct/27/syria-helicopter-attack>.

[FN87]. Kenneth Roth, The Law of War in the War on Terror, 83 *Foreign Aff.* 1 (2004), available at <http://www.foreignaffairs.com/articles/59524/kenneth-roth/the-law-of-war-in-the-war-on-terror>.

[FN88]. See, e.g., Condoleeza Rice on Fox News Sunday (Fox News broadcast Nov. 11, 2002), available at http://www.foxnews.com/printer_friendly_story/0,3566,69783,00.html (featuring Secretary of State Condoleeza Rice explaining, "We're in a new kind of war, and we've made very clear that it is important that this new kind of war be fought on different battlefields."); Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 *Duke J. Comp. & Int'l L.* 429, 442 (2010) (noting that this view "'extend[s] the boundaries of the conflict to take in al-Qaeda's operations around the world'" (citing Anthony Dworkin, *Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism*, 13 *Eur. Council on Foreign Rel.* 1, 5 (2009)).

[FN89]. Eric Schmitt & Mark Mazzetti, Order Lets U.S. Strike Al Qaeda Worldwide, *Int'l Herald Trib.*, Nov. 11, 2008, at 1.

[FN90]. Adam Entous, Special Report: How the White House Learned to Love the Drone, *Reuters* (U.S.) (May 18, 2010), <http://www.reuters.com/article/2010/05/18/us-pakistan-drones-idUSTRE64H5SL20100518> ("The battlefield in the 'war on terror' is global and not restricted to a particular nation.... This is war and we are entitled to kill them anywhere we find them." (quoting a former legal advisor to the U.S. Army Special Forces)); Blum & Heymann, *supra* note 53, at 156.

[FN91]. Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 *U. Rich. L. Rev.* 845, 858 (2009).

[FN92]. Rise of the Drones II: Examining the Legality of Unmanned Targeting, Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform, 111th Cong. 2d Sess. 3-4

(2010) (statement of Mary Ellen O'Connell, Professor, Notre Dame Law School). But see *Rise of the Drones II: Examining the Legality of Unmanned Targeting*, Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform, 111th Cong. 2d Sess. 4-5 (2010) (statement of Michael W. Lewis, Professor, Ohio Northern University Pettit College of Law) [hereinafter Lewis, *Rise of the Drones II*] (discussing the argument for a limited geographic scope to the battlefield in the conflict with al Qaeda).

[FN93]. Carrie Vance, *A War to Be Won, to Be Won*, OpEdNews.Com (May 27, 2010), <http://www.opednews.com/articles/A-War-to-Be-Won-to-be-Wo-by-carrie-vance-100524-408.html> (including a statement from Seth Jones, co-author of the July 2008 RAND report: "All terrorist groups end, but terrorism, like crime, never ends."). See also Seth G. Jones & Martin C. Libicki, *How Terrorist Groups End: Lessons for Countering Al Qaeda*, at xvii (2008), available at http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf (describing the ending of terrorist groups and the ways the U.S. government should modify its counterterrorism strategy).

[FN94]. *Padilla v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002).

[FN95]. Anthony Dworkin, *Law and the Campaign Against Terrorism: The View From the Pentagon, Crimes of War Project* (Dec. 16, 2002), <http://www.crimesofwar.org/print/onnews/pentagon-print.html>.

[FN96]. Waxman, *supra* note 88, at 452-53 ("[A] particular organization [may be] sufficiently coherent and could eventually be defeated in some meaningful sense (or its military capacity sufficiently degraded to declare its defeat).").

[FN97]. Murphy, *supra* note 19, at 1135 (citing Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11*, at 245 (2006)); *The Global Reach of Al-Qaeda*, Hearing Before the Subcomm. on Int'l Operations and Terrorism of the S. Comm. on Foreign Relations, 107th Cong. 7 (2001) (statement of Thomas Wilshire, Deputy Section Chief, International Terrorism Operational Section, Federal Bureau of Investigation); *The Global Reach of Al-Qaeda*, Hearing Before the Subcomm. on Int'l Operations and Terrorism of the S. Comm. on Foreign Relations, 107th Cong. 21 (2001) (statement of Michele Flournoy, Senior Advisor, International Security Program, Center for Strategic and International Studies). See generally Jane Corbin, *Al-Qaeda: In Search of the Terror Network That Threatens the World* (2003) (examining the roots and post-9/11 activities and development of al Qaeda); *Al Qaeda Now: Understanding Today's Terrorists* (Karen J. Greenberg ed., 2005) (describing al Qaeda, in some ways, as a growing and changing ideological movement).

[FN98]. *Ex Parte Lincoln Seiichi Kanai*, 46 F. Supp. 286, 288 (E.D. Wis. 1942).

[FN99]. *United States ex rel. Wessels v. McDonald*, 265 F. 754, 763 (E.D.N.Y. 1920). Note, however, that in resolving claims for destruction of trees on a plantation in the Philippines during World War II, the U.S. Court of Claims found that the plantation was not part of the combat zone at the time of the destruction because it was more than fifty miles from where the fighting was at that time. The court defined the combat zone in a narrow way--perhaps specifically for its purposes in that case--as "that part of a theater of operations in which the active operations of the combat units are conducted. Specifically, the area occupied by the field armies, between the front line and the forward boundary of the communications zone." *Baras Plantation Co. v. United States*, 123 Ct. Cl. 150, 154 (1952).

[FN100]. See discussion *supra* Part I.A (examining the law of neutrality).

[FN101]. U.N. Charter art. 2, para. 5; U.K. Manual, *supra* note 17, para. 1.42.2.

[FN102]. See Astley & Schmitt, *supra* note 24, at 147 ("Consider the implications if this approach is valid. In the absence

of neutrality, trade restrictions beyond contraband would apply. Also, since by definition there would be no neutral waters, target-State warships could no longer escape attack by entering the territorial sea of a neutral. Further, neutrals have an obligation to intern belligerent military personnel who come into their hands during a conflict and to police its territory, ensuring that belligerents do not conduct operations or seek sanctuary therein. However, if obligated to support UN-authorized operations, an avowed neutral state would be required to capture and intern military personnel of the declared aggressor, while immediately returning those supporting the UN operation. Moreover, the world community would expect the 'neutral' to preclude the aggressor from operating in or entering its territory, but to allow UN-authorized forces to operate there.”).

[FN103]. Dinstein, *supra* note 20, at 164.

[FN104]. S.C. Res. 1373, P 2(a)-(b), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

[FN105]. Under LOAC, civilians are immune from attack unless, and for such time as, they directly participate in hostilities. AP I, *supra* note 18, art. 51(3). According to the ICRC 2009 Interpretative Guidance on Direct Participation in Hostilities, civilians undertaking a “continuous combat function” lose their immunity from attack at all times while so engaged. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 Int'l Rev. Red Cross 872, 995 (2008), available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>.

[FN106]. Lewis, *Rise of the Drones II*, *supra* note 92. While LOAC would apply to any targeting or use of force against such individual, the argument is that something akin to the law of neutrality would prohibit attacks outside the battlefield, thus granting undue protection to the terrorist.

[FN107]. Blum & Heymann, *supra* note 53, at 163.

[FN108]. Jean Pictet, *Development and Principles of International Humanitarian Law* 59 (1985). See also Murphy, *supra* note 19, at 1106 (“[B]uilt into the 1949 Geneva Conventions and their Additional Protocols are the means for taking account of areas that are not addressed explicitly or in detail. Rather than trying to exploit such gray areas in the law, lawyers should seek to inject the dictates of humanity into them in a manner that best reconciles the competing interests during armed conflict of both governments and persons who are at risk.”).

[FN109]. U.S. Dep't of the Army, *Field Manual 27-10: The Law of Land Warfare*, app. A-1 (1956), available at http://www.aschq.army.mil/supportingdocs/FM27_10.pdf.

[FN110]. AP I, *supra* note 18, art. 48, sets forth what is known as the “basic rule”: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” See also AP II, *supra* note 18, art. 13 (emphasizing the principle of distinction in non-international armed conflict: “Protection of the civilian population. 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.”).

[FN111]. AP I, *supra* note 18, art. 51(5)(b) (“Among others, the following types of attacks are to be considered as indis-

criminate: ... an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”). See also AP I, *supra* note 18, art. 57(2)(a)(iii)-(b) (requiring commanders to refrain from or cancel an attack if the expected loss of civilian life would be excessive in relation to the anticipated military advantage).

[FN112]. U.S. Dep't of the Army, *supra* note 109, para. 3(a).

[FN113]. Alston, *supra* note 81, para. 47.

[FN114]. GC IV Commentary, *supra* note 39, at 47. The Commentary continues, explaining:

It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or 'hands' of the Occupying Power. It is possible that this power will never actually be exercised over the protected person: very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression 'in the hands of' need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question.

Id.

[FN115]. *Id.* at 118 (“In former times the need to protect the civilian population in wartime was not felt to the same degree as since the more recent wars. Military operations nowadays--particularly bombing from the air--threaten the whole population. Consequently the provisions in Part II are as general and extensive in scope as possible.... The provisions in Part II therefore apply not only to protected persons, i.e. to enemy or other aliens and to neutrals, as defined in Article 4 but also to the belligerents' own nationals; it is that which makes these provisions exceptional in character: the mere fact of a person residing in a territory belonging to or occupied by a party to the conflict, is sufficient to make Part II of the Convention applicable to him.”).

[FN116]. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, para. 166 (July 15, 1999).

[I]n modern inter-ethnic armed conflicts....the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.

Id.

[FN117]. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 90 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[FN118]. GC IV Commentary, *supra* note 39, at 20.

[FN119]. *Id.*

[FN120]. *Id.* (“Does this mean Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of [the suggested criteria]? We do not subscribe to this view. We think, on the contrary, that the scope of the application of the article must be as wide as possible.”).

[FN121]. Lewis et al., *supra* note 15, at 16-17.

[FN122]. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, para. 84 (Int'l Crim. Trib. for the Former

Yugoslavia Nov. 30, 2005).

[FN123]. See Pictet, *supra* note 108, at 48 (noting that key factors include whether the non-state actor (1) has an organized military force; (2) has an authority responsible for its acts; (3) acts within a determinate territory; and (4) acts as a de facto governing entity such that its armed forces act are prepared to obey the laws of war).

[FN124]. Koh, *supra* note 16. France recently declared that it is “at war with al-Qaida,” in response to the murder of a French aid worker. Elaine Ganley, *France Declares War Against al-Qaida*, Associated Press, July 27, 2010. See also Waxman, *supra* note 88, at 445 (“If one believes that the law of armed conflict may be an appropriate framework for regulating counterterrorism operations—including capture and detention of or use of lethal force against enemy terrorist agents—a key question then becomes the substantive scope of that authority: against which individuals and under what circumstances does it apply, and what does it permit a state to do against them?”).

[FN125]. Memorandum from White House Counsel Alberto Gonzalez for President George W. Bush, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban* (Jan. 25, 2002), reprinted in *The Torture Papers: The Road To Abu Ghraib* 118-19 (Karen Greenberg & Joshua Dratel eds., 2005).

[FN126]. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that “non-international” does not necessarily only connote internal conflicts, but refers to all conflicts that do not fit within the parameters of state-to-state conflict in Common Article 2 of the Geneva Conventions).

[FN127]. See Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 *Vand. J. Transnat'l L.* 295 (2007) (arguing for recognition of a hybrid category of armed conflict called “transnational armed conflict”).

[FN128]. Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 *Temp. L. Rev.* 787, 802 (2008).

[FN129]. *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Judgment, para. 184 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 16, 1998). See also Commentary on the Rome Statute, *supra* note 42, at 271; Reservation by the United Kingdom to art. 1(4) and art. 96(3) of Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (declaring that “‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation”).

[FN130]. AP I, *supra* note 18, art. 49(1).

[FN131]. Protocol Commentary, *supra* note 2, para. 1880.

[FN132]. Michael Bothe et al., *New Rules for Victims of Armed Conflicts* 289 (1982).

[FN133]. Protocol Commentary, *supra* note 2, paras. 1942-43 (referring to the notion of direct participation in hostilities).

[FN134]. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, para. 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

[FN135]. *Id.* para. 91. One expert used this definition in presenting information about Kosovo Liberation Army attacks

on Serbian forces.

[FN136]. See, e.g., *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. 271, para. 155 (1997) (finding that the military nature of the target was a major factor in concluding that the thirty-hour firefight constituted hostilities that rose above the threshold of armed conflict).

[FN137]. Corn, *supra* note 54, at 1352.

[FN138]. GC IV Commentary, *supra* note 39, at 35.

[FN139]. *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. 271, para. 155 (1997) (“The officer in charge of the La Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsín, exercising his constitutional authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers.”).

[FN140]. Paulus & Vashakmadze, *supra* note 15, at 116.

[FN141]. See Corn & Jensen, *supra* note 128, at 818, 826 (“[Status-based rules of engagement] permit the application of destructive combat power based solely on the determination that the anticipated object of attack is associated with a group or entity that has been ‘declared hostile’ by national authority.”).

[FN142]. GC IV Commentary, *supra* note 39, at 35-36.

[FN143]. AP II, *supra* note 18, art. 1; U.K. Manual, *supra* note 17, para. 3.7.
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