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Geography of Armed Conflict: Why it is a Mistake to Fish for the Red Herring

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I. INTRODUCTION

Identifying a framework for assessing the permissible geography of armed conflict must be driven by both strategic and legal considerations. Armed conflict by its very nature manifests the exercise of national power implicating the most fundamental aspect of sovereignty: the right and obligation of the State to protect itself from internal or external threat.¹ Categories of armed conflict² and their associated legal regimes evolved in response to this reality. Up until recently, almost all threats functionally sufficient in nature and magnitude to necessitate a full-blown military response (the use of military force to execute combat operations, as opposed to constabulary

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1. Deni Elliott, *Terrorism, Global Journalism and the Myth of the Nation-State*, 19 JOURNAL OF MASS MEDIA ETHICS: EXPLORING QUESTIONS OF MEDIA MORALITY 29 (2004).

2. Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 63 THE HAGUE ACADEMY COLLECTED COURSES 131 (1979).

support operations)³ took the form of hostilities between two or more States (characterized by international law as international armed conflicts), and bringing into force the full corpus of the law of armed conflict (LOAC), or internal dissident or insurgent threats involving hostilities between State forces and organized armed groups (characterized by international law as non-international armed conflicts, and bringing into force a less comprehensive albeit substantial body of LOAC regulation). Accordingly, LOAC responded to these two “types” of armed conflicts⁴ with a continual and important progression of regulatory norms applicable to both categories.⁵ These norms, and the constant progression of their content and applicability, were and are intended to balance the strategic needs of the State with the humanitarian objectives that have always animated conflict regulation.⁶

It is debatable, however, whether these two categories of armed conflict were from inception underinclusive, in the sense that they failed to account for situations of armed hostilities falling outside their scope.⁷ This underinclusiveness is illustrated by U.S. military history. Examples of combat operations that would fail to fit nicely within these two dominant categories of armed conflict include the U.S. participation in the multinational response to the 1900 Boxer Rebellion in China; the 1916 U.S. punitive raid against Pancho Villa in Mexico; and the U.S. and Allied intervention in the Russian Civil War (which actually resulted in a U.S. force presence on Russian soil through 1921, long after the end of World War I).⁸ These exam-

3. See Keith Robert Lovejoy, *A Peacekeeping Force for Future Operations: Another Reassessment of the Constabulary Force Concept* (2003), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a414134.pdf>.

4. Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 1, 82–86 (2009) (discussing the different types of armed conflict) [hereinafter Vité].

5. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005), available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (last visited Aug. 9, 2012).

6. ICRC, INTRODUCTION TO THE LAW OF ARMED CONFLICT: BASIC KNOWLEDGE, available at http://www.icrc.org/eng/assets/files/other/law1_final.pdf (last visited Sept. 9, 2012) and Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INTERNATIONAL REVIEW OF THE RED CROSS 125 (1997).

7. Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 295, 296–97 (2007) [hereinafter Corn].

8. Michael Parenti, *Rulers of the Planet: Why US Leaders Intervene Everywhere*, 5 GLOBAL DIALOGUE (2003), available at <http://www.worlddialogue.org/print.php?id=220>.

ples illustrate that in practice armed conflict has never been statically confined to the two “types” that became the dominant focus of conflict regulation following World War II. More important for the purposes of this essay, these two categories of armed conflict have not been the definitive standard for assessing the geographic scope of combat operations.⁹

The post–World–War–II bipolar strategic environment did, however, reinforce the binary nature of armed conflict typology—and with it the assumption that the nature of the armed conflict included an implicit geographic scope limitation. Wars were generally confined to the geography of one or two States. Even the limited inter–State armed conflicts of the period lacked the widespread geographic range of operations that defined the two world wars.¹⁰ Instead, as a result of the immense perceived risks associated with conflagration, most armed conflicts were generally “self-contained” events. Nonetheless, the perceived U.S. need for global engagement capability was a primary characteristic of national security policy. The Cold War was indeed defined by the strategic capacity to meet any threat, in any location, in the form in which it presented itself.¹¹ While history was kind to spare the world from the global consequence of the Cold War turning hot, the practice of forward deployment and global engagement indicates that had this occurred, the conflict would have been worldwide.

The end of the Cold War blew the lid off of a pot that had been simmering for the entire period: the threat of international terrorism. While during the Cold War terrorism was generally treated as a subtext to the global bipolar struggle,¹² it soon came into its own as a national security threat. While the risk associated with international terrorism became increasingly apparent, the modality for protecting against this risk was anything but apparent. During the decade preceding September 11, 2001, this situation manifested itself in tremendous operational uncertainty, especially for the armed forces. Counterterrorism was viewed as one of the many potential military missions that fell into the category of “Low Intensity Con-

9. Department of the Navy, MCDP 1, WARFIGHTING (1997).

10. *See generally* MARTIN GILBERT, THE FIRST WORLD WAR: A COMPLETE HISTORY (1994); RONALD STORY, CONCISE HISTORICAL ATLAS OF WORLD WAR II: THE GEOGRAPHY OF ARMED CONFLICT (2005).

11. *See* ROGER S. WHITCOMB, THE COLD WAR IN RETROSPECT: THE FORMATIVE YEARS 182–84 (1998).

12. WAYNE C. MCWILLIAMS & HARRY PIOTROWSKI, THE WORLD SINCE 1945: A HISTORY OF INTERNATIONAL RELATIONS 1 (6th ed. 2005).

flict” or “Military Operations Other Than War.”¹³ U.S. military doctrine did not, however, address the legal characterization of such missions. Consequently, military counterterrorism was generally understood as military support to international law enforcement,¹⁴ although military action occasionally took the form of combat operations (such as the cruise missile attack against suspected al Qaeda targets in response to the African embassy bombings).¹⁵ Whatever the legal characterization, one thing seemed increasingly clear: the scope of operations would, like virtually all other military missions, be threat driven.

How the U.S. military response to the terrorist attacks of September 11 impacted the typology of armed conflict is arguably yesterday’s news, at least for the United States. While certainly not an accepted theory of armed conflict, the term “transnational armed conflict” (TAC)—indicating a non-international armed conflict, and its accordant LOAC rules, occurring outside the territory of the responding State—has gained increasing traction in the United States and abroad to denote an armed conflict against a non-State threat in various global environments.¹⁶ This usage suggests a broader recognition of the under-inclusiveness of the binary armed conflict framework. There is also no question that assertion of a hybrid category of armed conflict—whether characterized as TAC or an internationalized Common Article 3 armed conflict—has generated substantial consternation that is in large measure the result of the link between TAC and the broad geographic scope of military operations it ostensibly legitimizes.¹⁷

13. See James N. Miller Jr., Assistant Secretary of Defense for Special Operations / Low-Intensity Conflict, available at <http://policy.defense.gov> (last visited Sept. 8, 2012).

14. Joint Publication 3-26, COUNTERTERRORISM, (2009), available at http://www.dtic.mil/doctrine/new_pubs/jointpub_operations.htm.

15. LAUREN PLOCH, CONGRESSIONAL RESEARCH SERVICE, COUNTERING TERRORISM IN EAST AFRICA: THE U.S. RESPONSE 1–2 (2010).

16. Vité, *supra* note 4, at 88; Corn, *supra* note 7; see Geoffrey S. Corn & Eric T. Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL LAW REVIEW 1, 33–34 (2009) (discussing how the continued evolution of TAC, or the acts of “war” carried out by States that attack non-State targets outside of their boundaries, must preserve “the fundamental balance between authority and obligations that lies at the core of the LOAC” to preserve its legitimacy as it becomes more common) [hereinafter Corn & Jensen].

17. Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, 161 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049532 (last visited Sept. 8, 2012) [hereinafter Daskal]; Mary Ellen O’Connell, *Defining Armed Conflict*, 13 JOURNAL OF CONFLICT SECURITY LAW 393 (2008); George Monbiot, *A*

The debate over conflict typology raises this question: is the TAC concept inherently invalid? Put another way, is the invocation of unrestricted geographic scope for an armed conflict against a non-State opponent the true focal point of objection to this typology? The latter proposition may explain why some experts now seek to impose an implied geographic limitation on the conduct of operations within the framework of TAC—such as an implied constraint to what some scholars have labeled “hot zones” of military operations.¹⁸ Ultimately, however, seeking to identify and impose a geographic restriction detached from the threat dynamics triggering the use of combat power is a false solution to the concerns of operational overbreadth associated with TAC. Such limitation is a futile endeavor, for the developing axiomatic reason that once a State commits to the use of force as a remedy against such a transnational non-State threat—like all other conflicts in history—the dynamics of the threat itself will be the predominant consideration in defining the scope of operations.

This latter premise frustrates some international law scholars. They insist that the first step in defining the geographic scope of military operations is to assess the internationally permissible geography of armed conflict. Strategy, they posit, must yield to international legal constraint.¹⁹

This is undoubtedly the “correct” ideological starting point: law imposes its own geography—the geography of permissible policy maneuver space. Decisions related to when, where and how to use instruments of national power are not made in a legal vacuum. Rather, domestic and international law significantly impact these decisions. Legal advisors inform policy decisions by providing the policymaker with the left and right boundaries of permissible conduct. This framework is far more complex on the more specific issue of geography of armed conflict. Even assuming international law categorically constrains permissible strategy options (an assumption that ignores the reality that States periodically choose to violate international law in order to achieve vital national security objectives), the relevant law must be unequivocal. On the question of conflict geography,

Wilful Blindness, THE GUARDIAN, Mar. 11, 2003, available at <http://www.guardian.co.uk/world/2003/mar/11/usa.iraq>.

18. Daskal, *supra* note 17; Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483 (2012) [hereinafter Deeks].

19. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 84 AIR FORCE LAW REVIEW 1, 35–36 (2008).

however, this is not the case. It involves a complex intersection of *jus ad bellum*,²⁰ neutrality²¹ and *jus in bello* principles.²²

None of these sources categorically define a geographic constraint on the execution of combat operations within the context of an ongoing non-international armed conflict. Instead, they combine to provide a general outline of acceptable State action, sometimes by analogy (such as the effort to extend neutrality principles to the inapposite context of non-international armed conflict), or sometimes more directly (such as the invocation of the principle of military necessity as a source of authority to adopt a threat-based scope of combat operations). On the geography of conflict question, the net outcome is anything but an unequivocal international legal standard that nullifies the validity of a —driven scope of military operations. This is unsurprising. The entire TAC concept is an evolution of existing LOAC principles, as is the exercise of national self-defense in response to a transnational non-State threat. Thus, international law has yet to settle on an issue as complex as permissible geography of operations conducted in response to the threat of international terrorism.

Seeking to identify some legally mandated geographic boundary for armed conflict of any type is, thus, a genuine *Red Herring*.²³ Armed conflict is a threat-driven concept, arising when the threat necessitates resort to combat power, and extending to wherever the operational and tactical opportunity to produce a militarily valuable effect on the enemy arises. There are examples of States choosing not to expand the scope of conflicts simply because such an opportunity arose. However, other factors impact such decisions, and it would be an error to equate decisions to refrain from exercising authority with an inherent legal prohibition against such exercise.

The scope of TAC—like that of any armed conflict—must be threat driven for a reason. Admittedly, there exists a perceived and actual risk of

20. Deeks, *supra* note 18.

21. INTERNATIONAL COMMITTEE OF THE RED CROSS, THE LAW OF ARMED CONFLICT NEUTRALITY, available at http://www.icrc.org/eng/assets/files/other/law8_final.pdf (“Belligerent States have a number of duties. They must establish a neutrality policy ensuring respect for neutral space, in particular that armed forces involved in the conflict do not enter neutral space and that neutral States are not affected by the collateral effects of hostilities.”).

22. Most notably the principle of military necessity as a justification for taking the fight to the enemy.

23. Targeting Operations with Drone Technology: Humanitarian Law Implications (Mar. 25, 2011), available at http://www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColumbia.pdf.

an overzealous and overbroad assertion of LOAC-based authority to attack and disable threat operatives inherent in the combined effect of TAC as a theory of armed conflict typology and a threat-driven scope interpretation. Nonetheless, States must avoid attempts to identify or impose some *per se* geographic limitations on this type of armed conflict. Any authority overreach (invoking the power to incapacitate through an application of LOAC principles), triggered by extending the concept of armed conflict to transnational non-State threats, will be more effectively mitigated by focusing on the traditional dynamics of lawful wartime action and tailoring or adjusting traditional sources of LOAC authority to meet the unique challenges of this type of armed conflict. Chief among these particular challenges are, one, ensuring that the targeting process adequately accounts for the complexity of threat identification in this inherently unconventional environment; and two, ensuring that preventive detention processes sufficiently address the unique scope and nature of this type of armed conflict. Focusing on these two practical challenges will produce a better balance between national security realities and the individual interests of potential objects of State action than would be achieved by attempting to confine that action to an arbitrary “hot zone.”

II. INTERNATIONAL TERRORISM, NATIONAL SECURITY AND THE GLOBALIZATION OF NON-INTERNATIONAL ARMED CONFLICT

It is self-evident that a principal function of any government is to protect State interests from external and internal threats.²⁴ To do so, leaders leverage the various components of national power, ideally in a synchronized manner that maximizes strategic success by achieving the protective objective as efficiently as possible.²⁵ Military power is a key tool in the national security arsenal, often providing strategic decision makers with unique capabilities to inflict devastating blows to disrupt or disable threat capabilities.

For the United States, the ability to leverage military power effectively is rooted in its very origins. A nation born of conflict, and unified in part

24. President Barack Obama, Nobel Peace Prize Acceptance Speech (Dec. 10, 2009), available at http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

25. See President George W. Bush, The National Security Strategy of the United States (Sept. 2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss3.html> [hereinafter National Security Strategy].

because of the recognized need to “perfect” our collective ability to provide for a common defense, the use of military power to secure national security objectives has been a constant theme of our national narrative. In this sense, the utilization of military power to contribute to the national objective of neutralizing the capacity of international terrorism is not especially remarkable. Indeed, it seems more noteworthy that it took the devastating attacks of September 11 for national leaders to become overt and unapologetic about this utilization, even though it is well established that such use was ongoing prior to that date.²⁶

No single national security policy shift in recent memory has produced more legal controversy than the overt, robust and ongoing use of a State’s military power as an international counterterrorism tool.²⁷ This is equally unremarkable for two primary reasons. First, never before had the United States engaged in an ongoing military campaign of this magnitude and duration against a non-State opponent operating in various locations throughout the globe. Second, and perhaps more importantly, is the consistent invocation of authority derived from a situation of armed conflict to provide the legal foundation for these military operations. This has produced a profound expansion of national authority to seek out and incapacitate members of terrorist organizations falling within the scope of what the United States considers the “enemy”—defined by the authority to kill as a measure of first resort and subject captives to long-term preventive detention.²⁸

When the Bush administration originally coined the phrase “Global War on Terror” (GWOT), it was intended to put the terrorist enemy on notice that no longer were they functionally immune from the powerful U.S. combat arsenal. However, it also unleashed a decade long barrage of

26. Stephen J. Schulhofer, Statement to the National Commission on Terrorist Attacks upon the United States (Dec. 8, 2003), *available at* http://govinfo.library.unt.edu/911/hearings/hearing6/witness_schulhofer.htm.

27. Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINNESOTA LAW REVIEW 1407, 1407–8 (2007); Monbiot, *supra* note 17.

28. Corn & Jensen, *supra* note 16, at 45–46; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security Harvard Law School: Strengthening Our Security by Adhering to Our Values (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-obrennan-strengthening-our-security-adhering-our-values-an> [hereinafter Brennan Speech]; Eric H. Holder Jr., Department of Justice Attorney General, Northwestern University School of Law, Speech on Targeted Killing (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

controversy, driven in large measure by the suggestion that this new “war” lacked any geographical limitation. Unlike wars of the recent past, all of which were conducted within a *de facto* geographically confined battlespace, the United States would, according to this new theory, take the fight to the enemy—an enemy so unconventional that this might include locations without even the slightest link to a theater of “active” combat operations, areas commonly characterized as “hot zones” today. Although President Obama abandoned the GWOT moniker, his administration nonetheless continues to strike targets of opportunity when and where they emerge, embracing the same threat-based scope of combat operations.²⁹

In practice, these operations have never come close to matching the extreme rhetoric of power assertion invoked by opponents of the armed conflict with al Qaeda. The United States has never engaged in a cavalier assertion of combat power into the territory of a functioning State.³⁰ Opponents to the GWOT concept like to erect the straw man of a U.S. attack in the streets of Berlin, London, Paris or Zurich to demonstrate the consequences of a geographically unconstrained armed conflict against an unconventional terrorist enemy. In reality, however, the actual scope of combat operations has always been much more constrained by the (at least implicit) recognition of sovereignty.

Nonetheless, the concept of armed conflict of international scope conducted against a loosely organized non-State opponent—a typology of armed conflict resulting in the increasingly common characterization of “transnational armed conflict,”—certainly creates the perception, if not the reality, of authority overreach. The central theme of this theory is that the nature of the struggle justifies invoking and applying LOAC-based authorities, while at the same time the dispersed and unconventional nature of the “enemy” necessitates taking the fight to where the attack opportunity arises.

It cannot, however, be disputed that TAC represents a major shift in the conventional understanding of armed conflict typology.³¹ Prior to Sep-

29. Laurie R. Blank, *After “Top Gun”: How Drone Strikes Impact the Law of War*, 33 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 675, 675–76 (2012) (“In 2010, the United States launched 118 drone strikes in Pakistan, an exponential increase over past years. In a broader view, in 2009, the U.S. Army reported a 400% increase in drone flight hours over the previous ten years. Drones are regularly used in combat operations in Afghanistan and Libya, and have been used to launch targeted killings in Somalia and Yemen.”).

30. Deeks, *supra* note 18.

31. Vité, *supra* note 4.

tember 11, these conflicts were almost always confined geographically, rarely if ever raising the question of their legitimacy.³² When they spilled into the territory of neighboring States, no significant debate was ever generated over the legally permissible “zone” of operations. This is no longer the case. Instead, primarily as the result of U.S. military operations against al Qaeda, there is an increasing tendency to assert that *even if* it is possible for the United States to be engaged in an armed conflict against this terrorist enemy, that conflict must be confined to “hot zones” of combat, most notably Afghanistan.³³ This assertion, however, fails to recognize the strategic imperative that drove the development of this TAC typology. It was precisely the need to take this fight to the unconventional enemy—wherever the threat arose—that generated the assertion of an internationalized non-international armed conflict.

III. THE RELATIONSHIP BETWEEN THE TERRORIST THREAT, TRANSNATIONAL ARMED CONFLICT AND GEOGRAPHY OF WAR

Prior to September 11 and the advent of TAC, there was virtually no discourse on the permissible geographic scope of armed conflict. This is unsurprising, considering almost all armed conflicts of this period were internal, or relatively confined inter-State conflicts.³⁴ Even when internal armed conflicts “spilled over” into neighboring territories, no State asserted the authority to conduct “global” operations against the non-State insurgent enemy. Use of the term “Global War on Terror” fundamentally altered the existing paradigm. Suddenly, a State was invoking the authority to engage what it determined were belligerent operatives wherever the opportunity to do so arose. U.S. global reach and dominant combat capability made it clear that this new enemy could not afford the risk of “basing” operations out of operational clusters confined to one geographic area. Because dispersion had to, by necessity, become the *modus operandi* of this new enemy,³⁵

32. *Id.*; Corn, *supra* note 7.

33. Mary Ellen O’Connell, *The Myth of Pre-emptive Self-Defense*, ASIL Task Force on Terrorism (Aug. 2002), available at <http://www.asil.org/taskforce/oconnell.pdf> [hereinafter O’Connell].

34. Balakrishnan Rajagopal, *Invoking the Rule of Law: International Discourses*, in CIVIL WAR AND THE RULE OF LAW 48–53 (Agnes Hurwitz & Reyko Huang eds., 2008).

35. Manuel Almeida, *What’s New in Al-Qaeda’s Suicide Bombings?*, THE MAJALLA: THE LEADING ARAB MAGAZINE (Jun. 17, 2010), available at <http://www.majalla.com/eng/2010/06/article5567539>.

it inherently drove operations to extend beyond the “hot zone” of Afghanistan.³⁶

Of course, it also fueled criticism of the armed conflict characterization. Critics, relying on the “organization” and “intensity” test for assessing the existence of non-international armed conflict adopted in the *Tadic* appeals judgment by the International Criminal Tribunal for the former Yugoslavia, insisted that TAC was a legal nullity.³⁷ In contrast, the United States has adopted more of a totality-of-the-circumstances approach to assess the existence of armed conflict, relying on the intense risk presented by al Qaeda and that organization’s objective of inflicting harm on the United States and its interests wherever and whenever possible to offset the organization element of the *Tadic* test.³⁸ Such an approach is justified when the effectiveness of operations against an opponent disables the ability of that opponent to manifest traditional organizational characteristics. Indeed, proponents of TAC (a typology of armed conflict frequently associated with this author) implicitly understand that a strict two-prong test for assessing armed conflict produces a perverse windfall for the transnational terrorist enemy: as their operations become more unconventional and dispersed, the authority of the State to press the attack dissipates. Recent speeches by Obama administration officials seem to indicate that the assessed risk of future terrorist attacks is driving the decision to mount unrelenting pressure on al Qaeda.³⁹ Depriving the State of legal freedom of maneuver to press the advantage against a degraded non-State enemy is ultimately inconsistent with its strategic and operational imperative. At a minimum, it raises the complex issue of assessing the point at which a non-international armed conflict recedes back into a category of non-conflict and nullifies LOAC applicability—an issue lacking clear and consistent standards.⁴⁰

36. President Barack Obama, *supra* note 24.

37. Vité, *supra* note 4.

38. Brennan Speech, *supra* note 28 (“This Administration’s counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa’ida and its associated forces.”); see also Laurie Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law and the Imperatives of Conflict Recognition*, 46 VANDERBILT JOURNAL OF TRANSNATIONAL LAW ___ (forthcoming, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029989.

39. Brennan Speech, *supra* note 28.

40. Vité, *supra* note 4 (discussing the lack of standards defining when a non-international armed conflict recedes back into a category of non-conflict).

Where the United States presses this advantage has been and remains the other major source of consternation with the TAC concept. Critics assert an inherent invalidity to a claim of armed conflict authority that exceeds the geographic bounds of a “hot zone” of operations.⁴¹ While tactical spillover operations into contiguous States may be tolerable in limited circumstances, extending combat operations to the territory of States far removed from a traditional battlespace is condemned as the ultimate manifestation of an overbroad conception of armed conflict. This criticism cuts to the core of the TAC concept. Expansive geographic scope was the very genesis of TAC, an invocation of LOAC principles to address a transnational non-State belligerent threat.⁴² What these criticisms seem to overlook is a critical strategic foundation for TAC itself: the relationship between the scope of counterterror military operations and the evolution of the TAC concept reveals that like other evolutions of armed conflict typologies, threat dynamics and strategic realities drove the law applicability assessment, and not vice versa.

The U.S. response to the September 11 terrorist attacks indicated the intent to leverage military power to maximum effect whenever and wherever the opportunity arose.⁴³ Employing combat power in a manner indicative of armed conflict—by targeting terrorist operatives as a measure of first resort—would not be the exclusive modality to achieve this objective. However, unlike previous counterterror efforts it did become a significant, and in many cases primary, modality. Of course, selecting between military force and other capabilities involved a complex assessment of a variety of considerations, including the feasibility of alternate means to disable the threat—a classic illustration of national security policy making. What was clear, however, was that the nature of the threat drove a major shift in the response modality.

While the TAC typology seemed to defy accepted international law categorizations of armed conflict, it was never really remarkable. National security strategy is always threat driven: intelligence defines the risk created by various threats; and strategy is developed to prioritize national effort to protect the nation from these threats, including defining the tools of national power that will be leveraged to achieve this objective. When national

41. O’Connell, *supra* note 33; Daskal, *supra* note 17, at 32–33.

42. See Corn & Jensen, *supra* note 16.

43. Philip Alston, Jason Morgan-Foster & William Abresch, *The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the ‘War on Terror’*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 183 (2008).

security policy makers determine that military power must be used as one of these tools, this is translated into a military mission. That mission is then refined in the form of military strategy, which seeks to identify threat vulnerabilities and match combat capabilities to address them.⁴⁴ Once again, the nature of the threat becomes the dominant driving force in this strategic analysis. Thus, when the threat capability and/or vulnerability is identified outside a “hot zone,” it in no way nullifies the imperative of addressing the threat. In short, as others have noted, once the armed conflict door is open, threat-based strategy—focusing military action in response to threat dynamics in order to destroy or disable threat capabilities—is essentially opportunity driven: the conflict follows the belligerent target.⁴⁵

In conventional inter-State armed conflict, this process is almost axiomatic. One need only consider events such as the sinking of the *Bismarck* in the South Atlantic during the opening phase of World War II⁴⁶ or the “small war” in East Africa between Great Britain and Germany during World War I.⁴⁷ These episodes, like countless others throughout history, indicate that the scope of armed conflict is threat driven. But the more unconventional the threat becomes, the less comfortable this concept feels. When non-international armed conflicts were almost exclusively internal in nature, this produced very little concern. It is a mistake, however, to assume this was the result of some inherent international legal invalidity of extending such conflicts beyond the territory of one State or perhaps the border regions of geographically contiguous States. Instead, like all armed conflicts, it was the combined impact of threat dynamics and diplomatic and policy considerations that drove the natural geographic constraint associated with internal armed conflicts. Indeed, examples of cross-border spillover operations bolster this conclusion. From Vietnam, to Turkey, to South Africa, to Angola, to Rwanda, to Afghanistan, when States perceived the strategic necessity of expanding an internal armed conflict into the ter-

44. Joint Publication 3-01, Countering Air and Missile Threats (Mar. 23, 2012), available at http://www.dtic.mil/doctrine/new_pubs/jp3_01.pdf (“Development of the area air defense plan and planning the defensive counter air operations involves integrating friendly force capabilities and limitations against adversary vulnerabilities to achieve optimum results in a dynamic tactical environment.”).

45. Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (May 11, 2009), available at <http://opiniojuris.org/2009/06/06/targeted-killing-in-us-counterterrorism-strategy-and-law/>.

46. See Ward Carr, *Surviving the Bismarck's Sinking*, 20 NAVAL HISTORY 54 (2006).

47. See EDWARD PAICE, *WORLD WAR I: THE AFRICAN FRONT: AN IMPERIAL WAR ON THE DARK CONTINENT* 1–3 (2008).

ritory of a neighboring State based on the threat dynamics, they have always done so.⁴⁸

History demonstrates that the scope of armed conflict—whether international or non-international—is threat driven. Strategic reality indicates that States engaged in armed conflict will, and in fact often must, “take the fight to the enemy.” But this does not mean that other considerations, principally diplomatic and political, are not also relevant to the actual scope of military operations associated with an armed conflict. Like so many other aspects of international law, authority rarely imposes obligation, and States take into account a variety of diplomatic, military and policy considerations when choosing when and where to assert combat power against an enemy. One element in this equation is always the tactical, operational and strategic value of attacking a particular lawful target. This value assessment must be balanced against second and third-order negative consequences of exercising attack authority. In the “hot zone” context, this analysis is central to the tactical and operational targeting process, where commanders routinely refrain from attacking a lawful target because they conclude doing so will not be worth the costs attendant in attack.⁴⁹ At the strategic level, when the target is identified outside the “hot zone,” diplomatic consequences of asserting military power in the territory of another State must be included among these “costs.” Because such costs are so significant, States often refrain from exercising this authority.

In the international armed conflict context, the law of neutrality provides an effective framework for assessing when such military action is lawful.⁵⁰ Neutrality law also provides belligerent States with the legal leverage to demand neutral States refrain from conduct that would trigger the need for such military action.⁵¹ Unfortunately, the principles established by the law of neutrality are inapposite to TAC. Indeed, TAC is in many ways *sui generis*, as it involves a military response to highly dispersed enemy capabilities and fleeting windows of opportunity to target those capabilities. Thus, the value of attacking such targets in TAC has obviously been perceived as

48. Vité, *supra* note 4.

49. International Security Assistance Force–Kabul, Afghanistan, Tactical Directive (July 6, 2009), available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf; Marybeth P. Ulrich, *The General Stanley McChrystal Affair: A Case Study in Civil-Military Relations*, 41 *PARAMETERS: U.S. ARMY WAR COLLEGE* 86, 93 (2011) (discussing General McChrystal’s decision to limit attack authority).

50. *The Law of Armed Conflict Neutrality*, *supra* note 21.

51. *Id.*

far more significant than attacking enemy targets outside “hot zones” of conflict in the context of more conventional inter-State or intra-State armed conflicts.

Consequently, the geographic scope of operations associated with TAC presents unique challenges (if not dilemmas). Unlike the accepted typology of international conflicts—inter-State armed hostilities—the geographic scope of TAC is not framed by the complementary international legal principles of neutrality. However, unlike the accepted non-international conflict typology—internal armed hostilities—the enemy center of gravity and/or attacks that will produce decisive effect will often be located in areas far removed from “hot zones”. Understanding this dynamic is critical to assessing the validity or wisdom of imposing a geographic “box” on permissible TAC scope. Operational range is not an arbitrary element of LOAC regulation. It is, instead, a logical consequence of the nature of the conflicts themselves: in the more conventional context—be it international or non-international armed conflict—the enemy center of gravity is rarely dispersed beyond the hot zone of conflict. In contrast, the enemy in TAC deliberately avoids consolidating its center of gravity in such zones, but instead operates out of whatever safe haven offers the best opportunity for protection from the reach of State military capabilities.⁵²

This does not mean that the uncertainties created by the intersection of threat-based scope and TAC are insignificant. To the contrary, extending the concept of armed conflict to a transnational non-State opponent has resulted in significant discomfort related to the assertion of State military power. But attempting to decouple the permissible geography of armed conflict from threat-driven strategy by imposing some arbitrary legal limit on the geographic scope of TAC is an unrealistic and ultimately futile endeavor. Other solutions to these uncertainties must be pursued—solutions that mitigate the perceived overbreadth of authority associated with TAC. As explained below, these solutions should focus on four considerations:

- (1) managing application of the inherent right of self-defense when it results in action within the sovereign territory of a non-consenting State;
- (2) adjusting the traditional targeting methodology to account for the increased uncertainties associated with TAC threat identification;

52. See National Security Strategy, *supra* note 25.

- (3) considering the feasibility of a “functional *bors de combat*” test to account for incapacitating enemy belligerents incapable of offering hostile resistance; and
- (4) continuing to enhance the process for ensuring that preventive detention of captured belligerent operatives does not become unjustifiably protracted in duration.

This essay does not seek to develop each of these mitigation measures in depth. Instead, it proposes that focusing on these (and perhaps other innovations in existing legal norms) is a more rational approach to mitigating the impact of TAC than imposing an arbitrary geographic scope limitation. Other scholars have already begun to examine some of these concepts, a process that will undoubtedly continue in the future. Whether these innovations take the form of law or policy is another complex question, which should be the focus of exploration and debate. In short, rejecting the search for geographic limits on the scope of TAC should not be equated with ignorance of the risks attendant with this broad conception of armed conflict. Instead, it must be based on the premise that even if such a limit were proposed, it would ultimately prove ineffective in preventing the conduct of operations against transnational non-State threats where the State concludes such operations will produce a decisive effect. Instead, focusing on the underlying issues themselves and considering how the law might be adjusted to account for actual or perceived authority overbreadth is a more pragmatic response to these concerns.

A. Jus ad Bellum and the Authority to Take the Fight to the Enemy

One example of proposals to mitigate the risk of overbreadth associated with TAC is the “unable or unwilling” test highlighted by the scholarship of Professor Ashley Deeks.⁵³ Deeks proposes a methodology for balancing a State’s inherent right to defend itself against transnational non-State threats and the sovereignty of other States where threat operatives are located. Because the law of neutrality cannot provide the framework for balancing these interests (as it does in the context of international armed conflicts), Deeks acknowledges that some other framework is necessary to limit resort to military force outside “hot zones,” even when justified as a measure of national self-defense. The test she proposes seeks to limit self-

53. See Deeks, *supra* note 18.

help uses of military force to situations of absolute necessity by imposing a set of conditions that must be satisfied to provide some objective assurance that the intrusion into another State's territory is a genuine measure of last resort.⁵⁴ This is pure *lex lata*,⁵⁵ so is Deeks, to an extent. However, Deeks, having served in the Department of State Legal Advisor's Office, recognizes that *if* TAC is a reality (which it is for the United States), these innovations are necessary to ensure it does not result in unjustifiably overbroad U.S. military action.

B. Target Identification and Engagement

This is precisely the approach that should be considered in the *jus in bello* branch of conflict regulation to achieve an analogous balance between necessity and risk during the execution of combat operations. Even assuming the "unable or unwilling" test effectively limits the exercise of national self-defense in response to transnational terrorism, it in no way mitigates the risks associated with the application of combat power once an operation is authorized.

The *in bello* targeting framework is an obvious starting point for this type of exploration of the concept and its potential adjustment.⁵⁶ Indeed, it seems increasingly apparent that while TAC suggests a broad scope of authority to employ combat power in a LOAC framework with no geographic constraint, the consternation generated by this effect is a result of the uncertainty produced by the complexity of threat recognition. This consternation is most acute in relation to three aspects of action to incapacitate terrorist belligerent operatives: the relationship between threat recognition and the authority to kill as a measure of first resort (the difficulty of applying the principle of distinction when confronting irregular enemy belligerent forces); the pragmatic illogic of asserting the right to kill as a measure of first resort to an individual subject to capture with virtually no risk to U.S. forces; and the ability to apply this targeting authority against unconventional enemy operatives located outside of "hot zones".⁵⁷

54. *See id.* at 507–8.

55. J. Jeremy Marsh, *Lex Lata or Lex Ferenda? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MILITARY LAW REVIEW 116, 121–25 (2008).

56. *See* YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (4th ed. 2004); Corn & Jensen, *supra* note 16.

57. *See* Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss, *Al-Aulaqi v. Obama*, 727 F.

These concerns flow from the intersection of a battlespace that is functionally unrestricted by geography and the unconventional nature of the terrorist belligerent operative. The combined effect of these factors is a target identification paradigm that defies traditional threat recognition methodologies: no uniform, no established doctrine, no consistent locus of operations and dispersed capabilities.⁵⁸ It is certainly true that threat identification challenges are in no way unique to TAC; threat identification has always been difficult, especially in the context of “traditional” non-international armed conflicts involving unconventional belligerent opponents. Yet, when this threat recognition uncertainty was confined to the geography of one State, it was never perceived to be as problematic as it is in the context of TAC. This is perplexing. In both contexts, the unconventional nature of the enemy increases the risk of mistake in the target selection and engagement process.⁵⁹ Thus, employing the same approach is completely logical.

Two factors appear to provide an explanation for the increased concern over the threat identification uncertainty in the context of TAC. One of these is beyond the scope of “mitigation solutions,” while the other is not. The first is the increased public awareness and interest in both the legal authority to use military force and the legality of the conduct of hostilities, a factor that inevitably increases the scrutiny on military power under the rubric of TAC. This pervasive and intense interest in and legal critique of military operations associated with what is euphemistically called the war on terror is truly unprecedented. In this “lawfare” environment, it is unsurprising that government action that deprives individuals of life as a measure of first resort or subjects them to preventive detention that may last a lifetime—often impacting individuals located far beyond a “hot zone” of armed hostilities—generates intense legal scrutiny.⁶⁰ This factor, whether a

Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-01469); Daskal, *supra* note 17; *Pakistan Unrelenting in Demanding Drone Strike End*, CBS NEWS (July 30, 2012), http://www.cbsnews.com/8301-501363_162-57482623/pakistan-unrelenting-in-demanding-drone-strike-end/.

58. See Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEXAS INTERNATIONAL LAW JOURNAL 337 (2012) [hereinafter Corn & Corn]; Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component*, 77 BROOKLYN LAW REVIEW 437 (2012).

59. Corn, *supra* note 7.

60. The ACLU drone litigation is the first lawsuit in modern history challenging legal authority for wartime targeting. See *ACLU v. DOJ*, No. 10-436, 2011 WL 4005324 (D.D.C. Sept. 9, 2011).

net positive or negative, is a reality that is unlikely to abate in the foreseeable future.

The second factor—a factor that is amenable to adjustments in legal authorities to ameliorate the perceived overbreadth of TAC—is the perception that this risk of targeting error when attacking unconventional forces increases proportionally with the attenuation from a “hot zone” of operations.⁶¹ Whether there is any empirical foundation for this perception is uncertain, nor is it clear that the assumption itself is valid. However, in many ways perception has become reality.

In an article published in the *Brooklyn Law Review*, I proposed a sliding quantum of information related to the assessment of targeting legality based on relative proximity to a “hot zone.”⁶² In essence, I proposed that when conducting operations against unconventional non-State operatives, the reasonableness of a target legality judgment requires increased informational certainty the more attenuated the nominated target becomes to a zone of traditional combat operations. The concept was proposed as a measure to mitigate the increased risk of targeting error when engaging an unconventional belligerent operative in an area that itself does not indicate belligerent activity. Jennifer Daskal offers a similar proposal in her article, *The Geography of the Battlefield*.⁶³ Daskal presents a more comprehensive approach to adjusting the traditional targeting framework when applied to the TAC context. Both of these articles seek to mitigate the consequence of applying broad LOAC authority against a dispersed and unconventional enemy; both methods that should continue to be explored.

C. *The Capture or Kill Dilemma?*

One of the issues Daskal addresses in her article beyond that of target identification is the legitimacy of applying the authority to kill as a measure of first resort to enemy belligerents outside “hot zones” of hostilities.⁶⁴ This issue is obviously a focal point of the contemporary debate over the use of unmanned aerial systems (armed drones) to attack belligerent operatives. It

61. This is the foundation for Daskal’s hot zone article. See Daskal, *supra* note 17.

62. *Targeting, Command Judgment, and a Proposed Quantum of Information Component*, *supra* note 58, at 460–94 (“The greater the presumption that a potential object of attack is not a legal military objective, the greater the quantum of information necessary to justify attacking the target.”).

63. See Daskal, *supra* note 17.

64. *Id.*

is also at the center of the debate related to the authority to engage civilians taking a direct part in hostilities.⁶⁵ What Daskal proposes, which is analogous to the ICRC *DPH Interpretive Guidance*,⁶⁶ is that capture (rather than kill) should be obligatory when it is a feasible alternative to employing deadly force.⁶⁷

No single aspect of the *DPH Interpretive Guidance* generated more controversy than Section IX of the study, which asserted an identical obligation to capture instead of kill civilians engaged in DPH whenever feasible.⁶⁸ In support of this assertion, the study relies on an article published by Jean Pictet (the well-known author of the ICRC commentaries to the 1949 Geneva Conventions) in which he asserts that the principle of humanity obligates belligerents to refrain from using deadly force against enemy belligerents when capture is a “risk free” alternative.⁶⁹ Many LOAC experts, including this author, contest this interpretation of the law, arguing instead

65. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (May 2009) (prepared by Nils Melzer) [hereinafter ICRC DPH Interpretive Guidance], available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (“[T]he kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”); see W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 769 (2010) (responding to the new guidance).

66. ICRC DPH Interpretive Guidance, *supra* note 65.

67. See Daskal, *supra* note 17.

68. See ICRC DPH Interpretive Guidance, *supra* note 65.

69. As found in Parks, *supra* note 65, at 785–87. According to footnote 221 of the *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*,

It is in this sense that Pictet’s famous statement should be understood that “[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil”. See Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht, Nijhoff 1985), pp. 75 f. During the expert meetings, it was generally recognized that the approach proposed by Pictet is unlikely to be operable in classic battlefield situations involving large-scale confrontations (Report DPH 2006, pp. 75 f., 78) and that armed forces operating in situations of armed conflict, even if equipped with sophisticated weaponry and means of observation, may not always have the means or the opportunity to capture rather than kill (Report DPH 2006, p. 63).

See ICRC DPH Interpretive Guidance, *supra* note 65, at 82 n.221.

that unless and until the enemy belligerent becomes *hors de combat*, the law permits the application of deadly force as a measure of first resort.⁷⁰

There is, however, a common thread that runs through the ICRC *DPH Interpretive Guidance*, precursors to the *Interpretive Guidance* (most significantly the Israeli High Court of Justice decision on targeted killings),⁷¹ Daskal's proposal, and Pictet's interpretation of the principle of humanity: the obvious discomfort with a legal norm that permits the killing of a human being when capture provides a risk-free alternative for achieving the goal of incapacitation. In my article *Mixing Apples and Hand Grenades*,⁷² I attempt to explain why this apparent overbreadth of deadly force authority is an unfortunate yet necessary aspect of armed hostilities, and I remain unpersuaded that the law imposes an implicit limitation of the authority to use deadly force based on the unconventional nature of the belligerent opponent or the opponent's geographic location.

While a capture-instead-of-kill obligation remains a controversial assertion, what is undisputed is that LOAC prohibits deliberate attacks on any person not actively participating in hostilities, whether a civilian who has directly participated in hostilities or a belligerent who is *hors de combat*. Traditionally, an enemy belligerent is rendered *hors de combat* only as the result of wounds, sickness or surrender. The normal application of this LOAC principle permits attack on enemy belligerent operatives—members of organized belligerent groups engaged in hostilities—regardless of their location, or the ease with which they might be captured, so long as they are still “combat effective,” even when they pose no immediate or apparent threat.⁷³ This seemingly harsh outcome is justified by a number of considerations. It is ultimately based on the presumption that a fully functional member of an enemy belligerent group represents an ongoing threat, and attacking that individual is linked to bringing about the submission of the group writ large.⁷⁴

This explains why many LOAC experts reject the suggestion that an enemy belligerent operative is somehow immune from attack as the result

70. ICRC DPH Interpretive Guidance, *supra* note 65; Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limits of Applying Human Rights Norms to Armed Conflict*, 1 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 52 (2010).

71. See Parks, *supra* note 65, at 788–93.

72. See *Mixing Apples and Hand Grenades*, *supra* note 70.

73. See Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 JOURNAL OF LEGAL ANALYSIS 115 (2010) (noting how the harshness of this rule has led some to question its continuing validity) [hereinafter Blum].

74. See *Mixing Apples and Hand Grenades*, *supra* note 70; Parks, *supra* note 65.

of being in a location where he can be safely captured. However, the combined effect of being in such a location—especially a location distant from any ongoing active combat operations—with the conclusion that the operative is unarmed and functionally inoffensive (for example, an unarmed al Qaeda operative exiting a commercial airliner at a U.S. airport while under close observation by government agents) explains why this assertion of kill authority is criticized as unjustifiably over-broad.

The debate is symbolic of the overall challenge to the current response to transnational terrorism through the armed conflict modality: it reveals an effort to push a square peg into a round hole. It is clear that the “kill authority” analytical methodology is derived from a predominantly conventional conflict context. In that context, the balance of interests justifies the at times over-broad application of deadly combat power, and altering this equation produces an unjustified shift of risk to attacking forces (a point I attempted to explain in *Mixing Apples and Hand Grenades*).⁷⁵ Perhaps, however, the context of geographically dispersed combat operations within the framework of TAC warrants consideration of imposing a policy-based constraint on this authority, what might be characterized as a functional *hors de combat* test. Such a test would limit “kill authority” when tactical assessment indicates that capture is completely feasible without subjecting friendly forces to risk, and the object of capture is attenuated from *both* an area of active combat operations and other belligerent operatives.

Ironically, when Professor Gabrielle Blum proposed such a limitation in her article *The Dispensable Lives of Soldiers*,⁷⁶ I was quite skeptical. However, my skepticism focused primarily on two considerations. First, her proposal extended to “hot zones”. I remain opposed to such an extension, as I believe it would inject a dangerous dilution of tactical initiative into the execution of combat operations.⁷⁷ Second, it was unclear whether Professor Blum was proposing a legal norm, or a policy constraint on permissible legal authority. Once it was clear that we shared opposition to modifying the existing legal authority to attack even an inoffensive enemy belligerent operative (such as an enemy soldier sleeping in a barracks or assembly area or attempting to retreat from an ongoing attack), and that she was in fact

75. *Mixing Apples and Hand Grenades*, *supra* note 70, at 84–90.

76. Blum, *supra* note 73.

77. See *Mixing Apples and Hand Grenades*, *supra* note 70.

proposing consideration of policy limits on that authority, we were much more closely aligned in our views.⁷⁸

This latter aspect of the “capture or kill” debate is critical, and in my opinion, if such a limitation on targeting authority is justified, it must be framed as a policy limit on otherwise lawful authority: a rule of engagement.⁷⁹ This is because there may be situations, even where these conditions are satisfied, when an attack is justified because of the influence it will produce on enemy leadership and other belligerent operatives. It is this corporate, as opposed to individualized, approach to attack justification that distinguishes targeting belligerent operatives from targeting civilians taking a direct part in hostilities. It therefore requires strictly limiting any “capture or kill” obligation to a policy applique restricting underlying legal authority. In short, even when capture is a completely feasible option to incapacitate an enemy belligerent operative, there still are times when attack is preferred because of the shock effect it will produce on the corporate enemy capability.⁸⁰

Such a policy may also be a useful method to alleviate the uncertainties associated with the intersection of belligerent detention authority and belligerent targeting authority. The complexity of this connection seems to have been highlighted by Justice Kennedy early in our TAC with al Qaeda, when he challenged the government to articulate a unified theory of detention/attack authority in the *Padilla* oral arguments.⁸¹ In response to the government’s assertion that Padilla’s status as an enemy belligerent justified his LOAC-based preventive detention, Justice Kennedy asked a question that the government never answered: would that same status justify killing Padilla as he walked off the plane at Chicago O’Hare Airport?

QUESTION: Would you shoot him when he got off the plane?

MR. CLEMENT: No, I don't think we could for good and sufficient reasons –

78. Gabriella Blum, Address Before the American Society of International Law, *Mind the Gap: International Human Rights Law and the Law of Armed Conflict* (Jan. 25, 2010), audio recording available at <http://www.asil.org/files/100125mindthegap.mp3>.

79. See Corn & Corn, *supra* note 58, at 353–57.

80. *Mixing Apples and Hand Grenades*, *supra* note 70, at 80 (“attacking the enemy with deadly combat power is customarily considered necessary to force an opponent into submission.”)

81. Transcript of Oral Argument at 21, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027).

QUESTION: I assume that you could shoot someone that you had captured on the field of battle.⁸²

The Solicitor General offered a false analogy in response to this question, asserting that once an individual is *captured* the authority to kill dissipates. This is simply an application of the *hors de combat* rule, and is unremarkable. However, what the question really exposed was whether the authority to kill—an authority triggered by enemy belligerent status—applied *prior* to capture where capture was a completely feasible course of action. That question remains relevant, and by subjecting kill authority to a policy-based constraint it will perhaps strike a more effective balance between necessity and humanity and contribute to a logical synchronization between the exercise of detention and targeting authority for individuals captured in situations similar to those of Padilla. (Interestingly, the Solicitor General ultimately relied on rules of engagement to complete his response to the question: “And I think in every case, there are rules of engagement, there are rules for the appropriate force that should be used. And I don't know that there are any.”)⁸³

This “functional *hors de combat*” concept and accordant policy limitation on the use of deadly force as a first resort is something I have only begun to consider. However, it seems clear that addressing the perceived overbreadth of “kill authority” within the context of TAC is an important endeavor that may effectively respond to arguments claiming that the TAC concept is illegitimate. Developing a rational methodology to assess when the kill option is justified, or when capture should be attempted as a condition precedent—even if only in the form of policy—would be a potentially valuable advancement in the complex equation of unconventional enemy belligerent targeting.

D. Long-Term Preventive Detention

Capture, of course, produces its own complex issues of perceived overbreadth, all flowing from subjecting captives to LOAC-based preventive detention. Debates over the legitimacy of designating terrorist operatives as enemy belligerents and subjecting them to LOAC detention principles has raged since the first detainees were transferred to Guantanamo

82. *Id.*

83. *Id.*

Bay, Cuba, in 2001.⁸⁴ While far from a consensus view, for the purposes of U.S. practice, this legitimacy issue has been resolved in favor of the authority to detain individuals based on a determination of status as an enemy belligerent (although how that determination is made, both substantively and procedurally, is an area of U.S. practice that continues to evolve).⁸⁵ Detention review procedures have been another source of controversy, and have developed substantially since the inception of the belligerent detentions.⁸⁶ As long as debates continue in full force over the credibility of the procedures adopted for assessing or revalidating enemy belligerent classifications and the judicial review of these decisions, it is unlikely these current procedures will undergo further substantial modification. Instead, it seems relatively clear that the government has reached the point where it believes these procedures are both operationally effective and legally defensible—an inference bolstered by the overall record of government success in the D.C. Circuit Court of Appeals. Two issues, however, should be subjected to more intense development: who should represent detainees in the status determination process, and how to determine when preventive detention should terminate.

From the inception of the unprivileged detention operation, the United States has chosen not to provide suspected enemy belligerents with assistance of legal counsel.⁸⁷ Instead, the review process implemented to assess this status—both at Guantanamo and in Afghanistan—has relied on lay military officers to assist detainees through the proceedings.⁸⁸ This practice is apparently the result of analogy to the process established in Article 5 of

84. Chris Jenks & Eric T. Jensen, *Indefinite Detention Under the Laws of War*, 22 STANFORD LAW AND POLICY REVIEW 41, 51–55 (2011) (“[T]he deconstructionist approach removes a large portion of internationally recognized and accepted provisions for regulating detention associated with armed conflict—the Geneva Conventions—while leaving the underlying question of how to govern detention unanswered.”)

85. *Id.*

86. *See* 28 U.S.C. § 2241 (2012); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); Exec. Order No. 13,567, 76 Fed. Reg. 13277 (Mar. 7, 2011); Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, THE ARMY LAWYER (DA PAM 27-50-445) (June 2010).

87. Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUMBIA LAW REVIEW 1013, 1037–38 (“[T]he legality of... military detention and interrogation without access to counsel remains unresolved.”).

88. *See* memorandum from Paul Wolfowitz, Deputy Secretary of Def., Order Establishing Combatant Status Review Tribunal (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

the Third Geneva Convention for resolving doubt as to whether captives qualify for prisoner of war status.⁸⁹

In a recently published article, *Unprivileged Belligerents*,⁹⁰ I challenge the underlying rationale for this lay assistance model. Specifically, I argue that the stakes involved in these review proceedings and the inherent complexity of granting status to non-State belligerent actors—a difficulty caused by the need to rely on pre-capture conduct and affiliation as opposed to the much easier reliance on uniform or other formal belligerent identification indicators—justifies assistance of legal officers. While I acknowledge that lay officers are certainly capable of learning the procedures applicable to these review proceedings, I question whether non-lawyers can effectively represent the interests of suspected enemy operatives. In contrast, I assert that the ethos of zealous representation—a core ethical norm of the legal profession—will enhance the quality and legitimacy of the detainee-status-determination process.

This lay-representation paradigm has finally been called into question. The extremely controversial provisions of the National Defense Authorization Act for Fiscal Year 2012, authorizing preventive military detention of U.S. and alien terrorist operatives, include, for the first time, a mandate to provide detainees with legal representation during detention review proceedings.⁹¹ The statute, signed into law by President Obama on December 19, 2011, provides that the Secretary of Defense must submit to Congress within ninety days of enactment a report “setting forth the procedures for determining the status of persons captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107–40) for purposes of section 1021.”⁹² The law then provides, *inter alia*, that

89. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 1355, art. 5 [hereinafter Geneva Convention III].

90. Geoffrey S. Corn & Peter A. Chickris, *Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness: Rethinking the Review Tribunal Representation Model*, SANTA CLARA JOURNAL OF INTERNATIONAL LAW 115 (2012).

91. National Defense Authorization Act for Fiscal Year 2012, Public Law No. 112-81 § 1024(a), 125 Stat. 1298, 1565 (2011).

92. Section 1021 “affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force . . . includes the authority . . . to detain covered persons. . . pending disposition under the law of war.” *Id.* § 1021(a). Persons who may be detained under section 1021 include persons “who planned, authorized, committed, or aided . . . or harbored those responsible” for the attacks occurring on September 11, 2001 as well as persons who were

“an unprivileged enemy belligerent may, at the election of the belligerent, be represented by military counsel at proceedings for the determination of status of the belligerent.”⁹³

It is not yet clear at what point in the detention process this assistance of counsel requirement will become operative. According to the Conference Report on the NDAA:

The Senate amendment contained a provision (sec. 1036) that would require the Secretary of Defense to establish procedures for determining the status of persons captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107–40), including access to a military judge and a military lawyer for an enemy belligerent who will be held in long-term detention. The House bill contained no similar provision.

The House recedes with an amendment clarifying that the Secretary of Defense is not required to apply the procedures for long-term detention in the case of a person for whom habeas corpus review is available in federal court. Because this provision is prospective, the Secretary of Defense is authorized to determine the extent, if any, to which such procedures will be applied to detainees for whom status determinations have already been made prior to the date of the enactment of this Act. The conferees expect that the procedures issued by the Secretary of Defense will define what constitutes “long-term” detention for the purposes of subsection (b). The conferees understand that under current Department of Defense practice in Afghanistan, a detainee goes before a Detention Review Board for a status determination 60 days after capture, and again 6 months after that. The Department of Defense has considered extending the period of time before a second review is required. The conferees expect that the procedures required by subsection (b) would not be triggered by the first review, but could be triggered by the second review, in the discretion of the Secretary.⁹⁴

Thus, legal representation will now turn on the definition of “long-term” detention. Nonetheless, this is an important step forward in the procedural

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

Id. § 1021(b).

93. *Id.* § 1024(b)(2).

94. H.R. REP. NO. 112-329, pt. 1, at 696–97 (2011).

protections afforded individuals subjected to wartime preventive detention. Whatever emerges as the ultimate triggering point, the detention review process will undoubtedly be enhanced by this provision. While no amount of process will ameliorate the concerns of critics of the fundamental concept of applying wartime preventive detention to counterterror operations, even the most ardent of such critics must acknowledge that providing representatives trained in the lawyer ethos of zealous representation is a marked improvement to the lay representation model utilized prior to the enactment of the NDAA 2012.

Preventive detention based on a determination of belligerent status, like targeting based on the same categorization, is central to the entire TAC concept. The ability to use combat power to kill as a measure of first resort compared to detention that prevents a return to belligerent activities are the two most significant authorities triggered by the armed conflict characterization. It is therefore unlikely that the United States will abandon this detention regime, which, as the U.S. Supreme Court noted in *Boumediene v. Bush*, may continue for an entire generation.⁹⁵ When the stakes of a factual determination by a review tribunal—even one not related to punitive sanction—are so obviously profound, it is fair to ask whether reliance on lay military officers to represent the interests of alleged belligerent operatives can genuinely be considered legitimate. If legitimacy is defined by a credible and fair balance between the interests of protecting national security and the interests inherent in safeguards from arbitrary detention, it seems difficult to ignore the potential value legal assistance might add to the accuracy of the belligerent status determination.

Once that decision is made, with or without assistance of counsel, the impact is clear: preventive detention for the duration of hostilities. But this raises an even more complex and in many ways troubling incongruity between the nature of the ongoing TAC against al Qaeda and the LOAC principles upon which this detention model is based: when should detention terminate? This question is critically important to the credibility and legitimacy of asserting LOAC authority to justify detention. The entire unprivileged belligerent detention regime is built on the premise that detention is justified for the duration of hostilities to prevent the belligerent

95. See generally *Boumediene v. Bush*, 553 U.S. 723 (2008) (extending the constitutional writ of habeas corpus to unprivileged enemy belligerents detained at Guantanamo Naval Base based on the conclusion, *inter alia*, that “the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, the risk too significant to ignore.”).

from returning to operations.⁹⁶ This principle derives from LOAC and, in the context of more conventional armed conflicts, is virtually axiomatic.⁹⁷ However, it seems equally clear that the principle of incapacitation by detention for the duration of hostilities was not developed in contemplation of an armed conflict of unlimited duration. This aspect of the current detention regime is exacerbated by the nature of the armed conflict, in which some type of formal or explicit recognition of hostility termination by the belligerent parties is virtually inconceivable (this is certainly not the case in the context of inter-State hostilities, or even intra-State hostilities involving organized armed groups).⁹⁸

It is therefore unsurprising that one of the most consistent criticisms of U.S. detention policy has been that it authorizes indefinite detention.⁹⁹ This is virtually inconceivable in any other context, regardless of whether the individual is detained within a punitive or preventive framework. One solution to this issue, of course, is to abandon LOAC-based preventive detention entirely. This, however, is unlikely in the foreseeable future, which leads some scholars to critique the potential overbreadth of purely status-based preventive detention—even within a LOAC framework. For example, in their article, *Indefinite Detention Under the Laws of War*,¹⁰⁰ Professors (and retired military lawyers) Jenks and Jensen assert that what might be best understood as “conduct-based detention validation” procedures extrapolated from LOAC civilian internment rules would effectively address the risk of unjustified indefinite detention of unprivileged enemy belligerents.¹⁰¹

An alternate modification is the imposition of presumptive detention termination dates linked to adjusted burdens that justify continued deten-

96. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (“We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the necessary and appropriate force Congress has authorized the President to use.”) (internal quotations omitted).

97. See Geneva Convention III, *supra* note 89.

98. List of Recent Peace Agreements, U.S. INSTITUTE FOR PEACE, [http://www.usip.org/publicationstools/latest?filter1=**ALL**&filter0=**ALL**&filter2=2223&filter3=**ALL**&filter4=%20\(last%20visited%20Aug.%2014,%202012\)](http://www.usip.org/publicationstools/latest?filter1=**ALL**&filter0=**ALL**&filter2=2223&filter3=**ALL**&filter4=%20(last%20visited%20Aug.%2014,%202012)).

99. See Laurie R. Blank, *Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS LAW REVIEW 1169, 1183–91 (2011) (noting the “inherently punitive” nature of holding suspected terrorists indefinitely under the guise of prisoners of war).

100. See Jenks & Jensen, *supra* note 84.

101. *Id.* at 87–91 (addressing the various ways detention is authorized to end according to LOAC principles).

tion. Drawing an analogy to procedures for declassification of national security information, this approach would begin by assessing the extreme end state for prisoners of war detentions since 1949. Such an assessment suggests that almost all such detentions terminated within ten years from inception.¹⁰² Thus, for example, a policy might be adopted that would create a presumptive detention termination date ten years from the date of inception. Like the declassification context, this presumption would not be conclusive. Instead, it would impose on the government a rebuttable burden to justify continuing preventive detention beyond—or even until—presumptive termination. Subsequent duration triggers could be adopted that would increase the burden of proof on the government, leading ultimately to a requirement that the government must justify what would be in effect “generational” detention by proving beyond a reasonable doubt that the detainee is likely to return to belligerent activities.

Perhaps neither of these approaches is ideal, but both share the common goal of aligning long-term preventive detention—what is in effect indefinite detention—with a legitimate determination of necessity. Like the other adjustments suggested by this essay, accomplishing this goal will mitigate the actual and perceived overbreadth of asserting LOAC authority within a TAC framework.

Perhaps other modifications to existing LOAC authorities should also be explored to achieve this objective. Devoting academic and policy efforts toward these and other similar authority adjustments will produce a more positive effect than fishing for the *Red Herring* of a defined geography of armed conflict. This is precisely because they will be rooted in both operational logic and humanitarian considerations, thereby increasing the likelihood of being accepted as consistent with strategic imperatives—not as an arbitrary legal fiction inconsistent with a threat-driven strategic reality.

IV. CONCLUSION

The law of conflict regulation is arguably at a critical crossroads. If threat drives strategy, and strategy drives the existence of armed conflict, the concept of TAC seems an unavoidable reality in the modern strategic envi-

102. See Piero Scaruffi, *Wars and Genocides of the 20th Century*, Scaruffi.com, <http://www.scaruffi.com/politics/massacre.html> (last visited Aug. 14, 2012); see also SUSANNE EVERETT, *WARS OF THE 20TH CENTURY* (1986). See generally *List of Wars 1945–1989*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_wars_1945–1989 (last visited Aug. 14, 2012).

ronment. Opponents of TAC will continue to argue for limiting armed conflict to the well-accepted inter-State or intra-State hostilities frameworks, but this would only drive States to adopt *sub rosa* uses of the same type of power under the guise of legal fictions. Concepts such as self-defense targeting, or internationalized law enforcement, might avoid the armed conflict characterization, but they would do little to resolve the underlying uncertainties associated with TAC. Even worse, they would inject regulatory uncertainty into the planning and execution of military counterterror operations, and expose those called upon to put themselves in harm's way to protect the State to legal liabilities based on inapposite legal norms.

If, however, the geographic scope of TAC is accepted as a threat-driven dynamic, then it seems imperative to consider how the law will respond to the uncertainties created by this reality and addressed in this essay. What conduct results in the designation of belligerent status? Should there be an individualized, "imminence" assessment associated with targeting suspected belligerent operatives outside a "hot zone" of conflict? How certain must an operational commander be before reaching this conclusion? Should capture instead of kill be a legal or policy obligation outside the "hot zone?" Should there be a presumptive termination date for belligerent detention authority, requiring the State to justify continued detention by some burden sufficiently weighty to protect individuals from *arbitrary* indefinite detention?

These are all important and legitimate questions that should be the focus of legal debate and analysis. TAC may provide a framework based on core LOAC principles within which to assess these questions, but TAC in no way conclusively resolves them. Instead, it was originally conceived as a typology of armed conflict that reconciled the denial of privileged belligerent legitimacy for the terrorist enemy with the obligation to respect fundamental LOAC norms in the execution of such operations (to include the detention and treatment of captured terrorist belligerents), all within the strategic imperative of robust global counterterror operations. No other typology fully satisfied these goals—goals that drove the U.S. response to September 11. The lingering questions associated with this effort to synchronize strategic objectives with legal regulation must be the focal point of critical analysis regarding the future of irregular warfare.