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Identifying The Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World

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**IDENTIFYING THE START OF CONFLICT:
CONFLICT RECOGNITION, OPERATIONAL
REALITIES AND ACCOUNTABILITY
IN THE POST-9/11 WORLD**

Laurie R. Blank and Benjamin R. Farley***

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INTRODUCTION: FRAMING THE 9/11 PROBLEM

On December 19, 2008, the Convening Authority for the United States Military Commissions at Guantanamo Bay referred charges against Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri for his role in the October 2000 bombing of the U.S.S. *Cole*. The charge sheet alleged that al-Nashiri committed several acts—including murder in violation of the law of war, perfidy, destruction of property—in the context of and associated with armed conflict¹ on or about October 12, 2000 in connection with the bombing. At the time of the attack, the statement that the United States was engaged in an armed conflict would have been a surprise to many. The *Cole* bombing was routinely called a “terrorist attack” and the U.S. response involved numerous parallel investigations into, *inter alia*: identifying and finding those responsible for the attack; reviewing the actions of the commanding officer and crew of the U.S.S. *Cole*; and examining the vulnerabilities of U.S. forces abroad.² And yet, in the aftermath of the 9/11 attacks and the U.S. military response to those attacks, many—including the U.S. government before the military commissions—argued that the *Cole* bombing was “one of the opening salvos of the terrorist war on Americans”³ and therefore part of the U.S. conflict with al-Qaeda.

A look at these differing approaches to characterizing the U.S.S. *Cole* bombing and where it falls along the timeline of U.S. counterterrorism operations and contemporary armed conflicts highlights a significant un-

1. Charge Sheet at 3, 7, United States v. al-Nashiri, M.C. (2008) (AE001).

2. See, e.g., *Lessons Learned from the Attack on U.S.S. Cole, on the Report of the Crouch-Gehman Commission, and on the Navy’s Judge Advocate General Manual Investigation into the Attack, Including a Review of Appropriate Standards of Accountability for U.S. Military Services: Hearing Before the S. Comm. on Armed Services*, 107th Cong. (2001).

3. Steve Vogel, *The Ship that Terror Didn’t Stop; After Months of Repairs, USS Cole Returns to Norfolk, Ready to Fight*, WASH. POST, Apr. 26, 2002, at A1.

certainty in our current understanding of the U.S. conflict with al-Qaeda: the question of when the conflict started. Most Americans would not have answered “yes” if asked whether the United States was at war in 2000—but the rhetorical concept of a “war on terror” has created a different perspective for some who now view pre-9/11 terrorist attacks, including the *Cole* bombing and the 1998 Embassy bombings in Kenya and Tanzania, as part of a coherent conflict. Similarly, our perspective on 9/11 itself, looking back thirteen years hence, is not necessarily the same as it was on the day of the attacks regarding whether America is at war. Many people doubtlessly felt that America was at war upon hearing of and seeing the attacks, but not in the manner or degree that Americans feel, or have been told, that we are in the years since that day. Uncertainty reigns over when this conflict actually started: did it begin on 9/11? When the United States launched its response in October 2001? With the bombing of the U.S.S. *Cole*? The 1998 Embassy bombings? With Osama bin Laden’s 1996 declaration of war? Earlier than that? A complicated web of operational authority, prosecutorial decisions, and legal analysis has left this question unanswered and significantly murkier than might be expected.

Since the fall of 2001, the United States has asserted that it is engaged in an armed conflict with al-Qaeda and associated forces. The existence of an armed conflict triggers the application of the law of armed conflict (LOAC), with its attendant authorities and obligations. These authorities include the use of lethal force as a first resort against enemy personnel,⁴ the detention of captured enemy personnel until the end of hostilities without charge,⁵ and the trial of such persons for violations of the law of armed conflict, including by military commission or other military tribunals.⁶ The concomitant obligations include the protection of civilians from deliberate and excessive incidental harm during conflict,⁷ the mandate to

4. Geoffrey S. Corn, *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, 1352–53 (2009) (“[A]rmed conflict is defined by the authority to use deadly force as a measure of first resort.”).

5. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (describing various prisoner of war categories); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 42, 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (permitting internment).

6. See GC III, *supra* note 5, arts. 84, 99–108.

7. LOAC prohibits both deliberate and indiscriminate attacks on civilians through a comprehensive web of protections. First, the principle of distinction mandates that all parties to a conflict distinguish between those who are fighting and those who are not and that parties only target those who are fighting. In addition, fighters, including soldiers, must distinguish themselves from innocent civilians. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Article 51(2) of AP I prohibits deliberate attacks on civilians (“The civilian population as such, as well as individual civilians, shall not be the object of attack.”). Articles 51(4) and (5) also prohibit indiscriminate attacks on civilians, which include attacks that violate the principle of proportionality. The principle of proportionality states that parties must refrain from attacks

provide humane treatment to all persons detained during the course of the conflict,⁸ and the provision of fundamental fair trial rights to those prosecuted for violations during conflict.⁹

The past thirteen years have been marked by contentious and extensive debates regarding whether and how LOAC applies to the conflict between the United States and al-Qaeda and, in particular, how we should or must characterize individuals in the course of the conflict.¹⁰ Those determinations, of course, drive the rights and protections such individuals have and the range of options available to the United States in combatting the threat from al-Qaeda and holding accountable those who have harmed U.S. persons and interests. Although the Bush and Obama Administrations have taken somewhat different approaches to the parameters of that conflict, the reliance on the existence of an armed conflict has remained unwavering.¹¹ This characterization of the U.S. struggle against al-Qaeda and other terrorist groups as an armed conflict is not universally accepted,

where the expected civilian casualties will be excessive in relation to the anticipated military advantage. *Id.* at 51(5)(b).

8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, 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. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; GC III, *supra* note 5, art. 3; GC IV, *supra* note 5, art. 3. Article 3 appears in an identical form in each of the four Geneva Conventions of 1949 and is, therefore, referred to as “Common Article 3.”

9. *See, e.g.*, GC III, *supra* note 5, arts. 99, 105–07; GC IV, *supra* note 5, arts. 71–73; AP I, *supra* note 7, art. 75.

10. *See, e.g.*, 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, 679–80 (2004); Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counterterror Combat Operations*, 42 ISR. L. REV. 46, 49–50 (2009); Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT’L L. 349, 352–55 (2004); Steven R. Ratner, *Are the Geneva Conventions Out of Date?*, 48 LAW QUADRANGLE NOTES (Univ. of Michigan Law Sch., Ann Arbor, Mich.), Summer 2005, at 66, 69–70; Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. WORLD AFF., Summer/Fall 2003, at 55, 60–61; Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT’L L. 499, 502–03 (2005).

11. 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), 50 U.S.C. 1541 § 2(a) (2001); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001) (stating that the September 11 attacks “created a state of armed conflict that requires the use of the United States Armed Forces”); Department of Defense 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> (showing Executive Branch action); *see also* Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 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.”).

either in the United States or abroad,¹² but the debate regarding whether a state can be in an armed conflict with a terrorist group operating transnationally falls outside the scope of this article. Rather, this Article focuses on a question often skipped over in the course of the debate: assuming there is an armed conflict, exactly when did that conflict start and how should the events that triggered the conflict be characterized and identified?

The military commissions prosecuting individuals at Guantanamo Bay are tribunals constituted under LOAC and only have jurisdiction to try violations of LOAC.¹³ As a result, in order to prosecute al-Nashiri, the prosecution must allege crimes committed during an armed conflict—which means that the prosecution must assert that there was an armed conflict at the time of the U.S.S. *Cole* bombing in October 2000. Similarly, in order to prosecute Khalid Sheikh Mohammed and the other 9/11 attackers, the prosecution must assert that the crimes committed on September 11, 2001 were committed during an armed conflict.¹⁴ Beyond the question of whether there is indeed an armed conflict between the United States and al-Qaeda, which is of course relevant to the jurisdictional authority of the military commissions overall, the question of precisely when the conflict started is directly relevant to the ability to prosecute crimes occurring on or before 9/11.

This Article explores how to identify the starting point of a non-international armed conflict, based on the challenges posed by the U.S. conflict with al-Qaeda. Although the Geneva Conventions and the International Committee of the Red Cross (ICRC) Commentary to the Conventions define the start of international armed conflict—a conflict between two states—and provide guidance as to the identification of non-international armed conflict, neither the Conventions nor the interpretive Commentary offer a methodology for isolating the start of the latter type of conflict. Furthermore, it is only in few non-international armed conflicts, historically or ongoing, that we see a particular start identified; rather, the legal analytical process tends to focus on the identification of conflict itself during one or more timeframes.¹⁵ And yet accountability for violations of

12. See Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U.L. REV. 759, 760 (2007); Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435, 445–46 (2005); Christopher Greenwood, *War, Terrorism and International Law*, 56 CURR. LEG. PROBS. 505, 529 (2004).

13. Military Commissions Act of 2009, 10 U.S.C. § 950p(c) (2012) (Offenses are triable by military commission “only if the offense is committed in the context of and associated with hostilities.”).

14. Charge Sheet, *United States v. Khalid Sheikh Mohammed*, M.C. (2008). Charges 2–8 allege crimes committed on September 11, 2001. *Id.* at 17–19. Charges 1 and 9, on the other hand, allege crimes committed between 1996 and 2001. *Id.* at 1–17, 20.

15. See, e.g., *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment (Mar. 14, 2012); *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005, ¶¶ 74–76; Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, 31 March 2001, ¶ 30. For an

LOAC rests on the existence of an armed conflict at the time of the violations, making a precise determination essential in certain cases. Uncertainty about the start of conflict can produce operational complexities with regard to the assertion of wartime authorities in the targeting and detention arenas as well. Although this Article recognizes that a singular methodology for the identification of precise start dates for non-international armed conflict may not be possible in many situations, it examines the various options for doing so and seeks to clarify, as much as possible, this important but often overlooked question. In addition, the instant analysis questions whether a state can, in effect, “claw back” the start of conflict for the purposes of accountability, as the United States is attempting to do with the assertion of LOAC accountability for acts on September 11, 2001; in October 2000, nearly a year before the 9/11 attacks; and even conduct as far back as 1996.¹⁶

Part I of this Article explains the basic legal regime governing the identification and characterization of armed conflict, whether international or non-international, and highlights the differences between international and non-international armed conflicts with respect to the triggering of the law of armed conflict. Part II then applies this paradigm for identifying the start of conflict to the U.S. conflict with al-Qaeda to flesh out the appropriate mechanism for pinpointing the start of the conflict. After detailing the various approaches to dating the conflict, Part II considers three options for marking the start of the conflict: (1) the now-predominant *Tadić* factors of intensity and organization;¹⁷ (2) the non-state group’s attack as the start of the conflict; or (3) the state’s declaration of the existence of a conflict. The latter two options introduce, in essence, a unilateral trigger for non-international armed conflict that is not part of any existing framework for the recognition of non-international armed conflict. Part II concludes by examining the impact of both operational realities and extraterritorial conflicts on this legal analysis of conflict trigger. Finally, Part III addresses the question of “clawback” and ties the identification of the start of conflict to the fundamental purposes of both LOAC and accountability for violations in order to explore whether redefining the start of conflict for accountability purposes is a valid methodology.

overview of the conflict recognition paradigm for non-international armed conflicts, see generally Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANS. L. 693 (2013).

16. Government Response to Defense Motion to Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission at 2, *United States v. Al Nashiri, M.C.* (2012).

17. See e.g., *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶¶ 37–40 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); *Limaj*, Case No. IT-03-66-T, Judgment, ¶ 84; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 620 (Sept. 2, 1998); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶¶ 561–68 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 66–70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

Just as the characterization and recognition of conflict is in many ways a fluid process that demands a case-by-case analysis of many factors and considerations, the identification of the start of conflict may not be susceptible to concretization and firm rules. Nonetheless, the failure to examine this issue more closely and seek greater clarity regarding the start of conflict has opened the door to wildly fluctuating versions of conflict triggers and great uncertainty with regard to jurisdiction over LOAC violations and the assertion of wartime authorities. This Article provides tools for more effective analysis of the start of conflict and greater clarity in future situations.

I. CONFLICT RECOGNITION

LOAC—otherwise known as the law of war or international humanitarian law—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.¹⁸ Historically, LOAC treaty and customary law applied to situations of declared war between states.¹⁹ The classical definition of war appears in Oppenheim’s treatise on international law: “war is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.”²⁰ Although the definition of war seemed obvious, this paradigm left open multiple possibilities for states to argue that LOAC—and its relevant obligations—were not applicable because there was no declared war.²¹ Recognizing that all possible arguments for denying the applicability of LOAC to conflict had to be eliminated, the drafters of the Geneva

18. *What is International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS, (July 31, 2004), <http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm>. The law of armed conflict is codified primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. GC I, *supra* note 8; GC II, *supra* note 8; GC III, *supra* note 5; GC IV, *supra* note 5; AP I, *supra* note 7; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

19. *See, e.g.*, Convention with Respect to the Laws and Customs of War on Land, art. 2, July 29, 1899, 32 Stat. 1803 (stating that the annexed Regulations on the Laws and Customs of War on Land applied “in case of war”).

20. 2 L. OPPENHEIM, INTERNATIONAL LAW 202 (7th ed. 1952).

21. For example, during World War II, the Japanese claimed that LOAC did not govern their operations in China and Manchuria because they were merely “police operations” or “incidents,” an argument roundly rejected by the International Military Tribunal for the Far East. *See* International Military Tribunal for the Far East, Judgment of 4 November 1948, at 490. Similarly, Adolf Hitler rejected the application of LOAC to the conflict between Germany and the Soviet Union because the latter did not have a legitimate right to the law’s protections, pronouncing that “the war against Russia . . . is one of ideologies and racial differences and will have to be conducted with unprecedented, unmerciful and unrelenting harshness. . . . German soldiers guilty of breaking international law . . . will be excused.” WILLIAM SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 830 (1990).

Conventions created a framework based on an objective analysis of the relevant situation of violence, not the claims or goals of the parties to the conflict. Furthermore, the Geneva Conventions of 1949 use the term “armed conflict” rather than the more traditional term “war.” As the Commentary to the Geneva Conventions explains,

[this] substitution . . . was deliberate. It is possible to argue almost endlessly about the legal definition of “war”. A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression “armed conflict” makes such arguments less easy.²²

Defining armed conflict is therefore the essential prerequisite to the application of LOAC.

The 1949 Geneva Conventions endeavor to address all instances of armed conflict and set forth two primary categories of armed conflict that trigger the application of LOAC: (1) international armed conflict and (2) non-international armed conflict. International armed conflict is conflict between or among two or more states, and non-international armed conflict refers to conflicts between a state and one or more non-state armed groups or among such non-state groups. The definition of armed conflict for each type of conflict is not the same, creating different triggers for the application of LOAC. This Part analyzes the definitions of international armed conflict and non-international armed conflict, the triggering mechanisms for each type of conflict, and the reasons for the difference between those triggers in order to provide a foundation for the analysis in Parts II and III below.

A. *International Armed Conflict*

Common Article 2 to the four Geneva Conventions defines the application of the Geneva Conventions, stating that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”²³ Although Common Article 2 does not specifically define the term “armed conflict,” it is understood to apply to any situation in which the armed forces of two states engage with each other. No matter how short-lived or minor, any hostilities between the armed forces of two or more states constitute an international armed conflict, even if one or both states deny the existence of an armed conflict.²⁴

22. INT’L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Oscar M. Uhler & Henri Coursier eds., 1958), available at http://www.loc.gov/tr/frd/Military_Law/pdf/GC_1949-III.pdf [hereinafter GC III Commentary].

23. GC I, *supra* note 8, at art. 2; GC II, *supra* note 8, at art. 2; GC III, *supra* note 5, at art. 2; GC IV, *supra* note 5, at art. 2.

24. GC III COMMENTARY, *supra* note 22, at 23.

Thus, for example, the Iranian detention of fifteen British sailors in the Persian Gulf in March 2007²⁵ triggered the law of international armed conflict and the Third Geneva Convention governed the treatment of the detained sailors. The fact that neither the United Kingdom nor Iran recognized a state of war or the existence of an armed conflict had no bearing on the application of LOAC. The Commentary clarifies that even if both states deny the existence of an armed conflict, the Geneva Conventions still apply based objectively on the *de facto* situation: “[e]ven in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.”²⁶ Similarly, when Syrian forces shot down and captured U.S. Navy Lt. Bobby Goodman in 1983 when he was flying a bombing mission in support of U.S. peacekeeping forces in Lebanon, Syria treated him as a prisoner of war, as the United States demanded.²⁷ The engagement between Syria and the United States was extraordinarily brief, but nonetheless qualified as an international armed conflict so as to trigger the application of LOAC.

B. *Non-International Armed Conflict*

Before 1949, international law did not apply in a comprehensive manner to conflicts inside the boundaries of a state—whether between the state and a rebel group or among rebel groups fighting for control of the state. The first half of the twentieth century saw a growing recognition that the very protections LOAC guarantees to those engaged in and caught up in international armed conflicts should not be denied to those enmeshed in internal conflicts.²⁸ As a result, the drafters of the Geneva Conventions

25. Sarah Lyall, *Iran Detains British Sailors in Waters Off Iraq*, N.Y. TIMES (Mar. 23, 2007), http://www.nytimes.com/2007/03/23/world/middleeast/23cnd-basra.html?_r=0.

26. GC III COMMENTARY, *supra* note 22, at 23.

27. Terry A. Anderson, ASSOCIATED PRESS, Dec. 31 1983 (“Syria says it considers Goodman a prisoner of war and will release him only ‘after the war is over.’”). Geoffrey S. Corn, “*To Be or Not To Be, That is the Question*”: *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAWYER, June 1999, at 1, 5; Excerpts from Interview with Syrian Defense Minister, ASSOCIATED PRESS, Dec. 30, 1983; Steven Dornfeld, *Jackson Leaves for Syria to Seek Airman’s Freedom*, *The Miami Herald*, Dec. 30, 1983, at 11A; *Red Cross Visits Flier Being Held by Syrians*, N.Y. TIMES, Dec. 9, 1983, available at <http://www.nytimes.com/1983/12/09/world/red-cross-visits-flier-being-held-by-syrians.html>.

28. INT’L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIANS IN TIME OF WAR 26 (Oscar M. Uhler & Henri Coursier eds., 1958) [hereinafter GC IV COMMENTARY] (“Born on the battlefield, the Red Cross called into being the First Geneva Convention to protect wounded or sick military personnel. Extending its solicitude little by little over other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle in ‘all’ cases of armed conflicts, including those of an internal character.”). II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA, 79 (1951) [hereinafter FINAL RECORD 1951] (“Civil wars sometimes leave the most painful wounds in the organism of

took the groundbreaking step of codifying legal principles applicable in non-international armed conflicts for the first time, in Common Article 3 of the four Geneva Conventions. Common Article 3 sets forth a minimum threshold of treatment and conduct applicable “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”²⁹ The fundamental protections in Common Article 3—prohibition on violence to life, torture, degrading treatment, and arbitrary detention for all persons not taking an active part in hostilities, including those who are *hors de combat*—thus provide a baseline of protection in conflicts that do not fall within the definition of international armed conflict in Common Article 2. The inclusion of these protections for non-international armed conflicts was a direct response to the brutality associated with internal wars and, as the Commentary explains,

at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for interventions by the International Committee of the Red Cross or any other impartial humanitarian organization—interventions which in the past were all too often refused on the ground that they represented intolerable interference in the internal affairs of a State.³⁰

Over the past six decades, the international community has steadily expanded and reinforced the application of LOAC to non-international armed conflicts for the critical purpose of mitigating the suffering such conflicts engender and ensuring accountability for those who violate the law.³¹

Over time, Common Article 3 has been understood as establishing LOAC’s minimum protections for all situations of armed conflict, not only internal conflicts. As important as this development has been for the application and enforcement of LOAC, it is equally important to recognize that LOAC does not apply to situations that do not rise to the level of an armed conflict. Thus, “not all forms of armed violence are considered as ‘armed conflicts’ under international humanitarian law.”³² Internal disturbances and tensions—such as riots, looting and “act[s] of banditry”³³—do not constitute armed conflict and therefore do not trigger the application

nations and their healing is most difficult; it was the well-conceived interest of the Parties to the conflict, and above them of the country which they desired to serve, to reduce the excesses and horrors of such conflicts to the greatest possible extent.”).

29. Common Article 3, *supra* note 8.

30. GC IV COMMENTARY, *supra* note 28, at 35.

31. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96-129 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (discussing the steady expansion of fundamental LOAC rules and protections into the realm of non-international armed conflict).

32. Arne Willy Dahl & Magnus Sandbu, *The Threshold of Armed Conflict*, 45 MIL. L. & L. WAR REV. 369, 370 (2006).

33. GC IV COMMENTARY, *supra* note 28, at 36.

of LOAC.³⁴ As a result, identifying the threshold for non-international armed conflict remains an important issue at both the operational level and in the accountability phase: LOAC obligations are triggered by the existence of a conflict, so parties must have guidance for identifying that trigger; and LOAC violations can only be prosecuted if committed during armed conflict, so accountability will often rest on the existence of a conflict.

The drafters of the Geneva Conventions recognized the significance of this LOAC trigger in negotiating and drafting the language of Common Article 3 and ultimately settled on a broad approach that would maximize the protective function of Common Article 3 and the then nascent law of non-international armed conflict. According to the Commentary, identifying a specific test for determining the applicability of Common Article 3 was both impracticable and undesirable; instead, the Commentary proposed a totality of the circumstances analysis designed to enable Common Article 3's underlying humanitarian objectives.³⁵ To this end, the Commentary provides a series of indicative—but not dispositive—factors or characteristics of a Common Article 3 conflict, based on the nature and behavior of both state and non-state parties. For example, the response of the state is a critical component, in particular whether it employs its regular armed forces in combating the non-state actor and whether it has recognized the non-state actor as a belligerent.³⁶ In addition, several considerations can provide useful guidance for understanding whether violence or hostilities have progressed beyond internal disturbances, such as 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, having the means of ensuring respect for the Geneva Conventions; and (4) acts as a *de facto* governing entity, and its armed forces are prepared to obey the laws of war.³⁷ These factors or considerations are not a set of

34. Rome Statute of the International Criminal Court arts. 8(2)(d), 8(2)(f), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute]; Tadić, Case No. IT-94-1-T, Judgment, ¶ 562.

35. GC IV COMMENTARY, *supra* note 28, at 36.

36. *Id.* at 35-6; *see also* Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser. L/V/II.98, doc. 6 rev. ¶ 155 (Nov. 18, 1997), available at <http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm> (noting that one consideration in finding the existence of an armed conflict was that the President "ordered that military action be taken to recapture the base and subdue the attackers"); Geoffrey S. Corn, *What Law Applies to the War on Terror?, in THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 1, 17 (Michael Lewis et al. eds., 2009); Dahl & Sandbu, *supra* note 32 (emphasizing the importance of the state's use of military force as a factor in conflict recognition).

37. GC IV COMMENTARY, *supra* note 28, at 35-36. None of these factors is dispositive; rather, these and other factors may be used to distinguish acts of banditry, short-lived insurrection, or terrorist acts from armed conflict. *See, e.g.*, Prosecutor v. Lukić, Case No. IT-98-32/1-T, Judgment, ¶¶ 879-888 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009) (applying different and overlapping factors to determine whether an armed conflict existed); Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 84

elements that must be checked off or a firm test. The Commentary explains that the idea of defining the term “conflict” was abandoned after some debate, as was the inclusion of a list of “a certain number of conditions on which the application of the Convention would depend.”³⁸ Rather, as explained above, the drafters intended Common Article 3 to have as broad a scope as possible.³⁹

In the absence of a specific definition of armed conflict in the Geneva Conventions, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) provided the now predominant definition of armed conflict. In *Prosecutor v. Tadić*, in response to a defense challenge attacking the Tribunal’s jurisdiction, the Appeals Chamber declared that an armed conflict exists whenever “there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁴⁰ This definition has not only been the driving factor in the ICTY’s jurisprudence, but was also adopted by the drafters of the Rome Statute establishing the International Criminal Court (ICC),⁴¹ by the International Criminal Tribunal for Rwanda (ICTR),⁴² and the Special Court for Sierra Leone. Expounding on this definition in the merits phase of *Tadić*, the ICTY Trial Chamber elaborated on the broad guidelines in the definition above as follows:

The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and

(Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision of Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69, 76–7 (2009).

38. GC IV COMMENTARY, *supra* note 28, at 35.

39. *Id.*

40. *Tadić*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶; *see also* INT’L LAW ASS’N [ILA], THE HAGUE CONFERENCE: FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 3 (2010) (noting that the *Tadić* decision is “widely cited for its description of the characteristics of armed conflict”) [hereinafter ILA REPORT]; Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 98 (2005).

41. Rome Statute, *supra* note 33, art. 8(2)(f) (defining non-international armed conflicts as conflicts “that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”).

42. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 619–620 (Sept. 2, 1998) (citing the *Tadić* criteria for determining the existence of an armed conflict).

short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.⁴³

The *Tadić* definition quickly became the determinative statement on what constitutes armed conflict. Subsequent cases at the ICTY, as well as other cases at the ICTR, the ICC, and the Special Court for Sierra Leone, relied on the definition of armed conflict as protracted violence between the government and organized armed groups or between two or more armed groups as the paradigm for identifying the existence of an armed conflict.⁴⁴ Over time, the factors highlighted in the initial *Tadić* merits decision—intensity and organization—have become the international community’s foundational framework for analyzing the existence of non-international armed conflict.⁴⁵

In a variety of cases, the ICTY has highlighted key factual information that helps to demonstrate the intensity of fighting, such as the number, duration, and intensity of individual confrontations; the types of weapons and other military equipment used; the number of persons and types of forces engaged in the fighting; the geographic and temporal distribution of clashes; the territory that has been captured and held; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.⁴⁶ Frequency of confrontations and the involvement of the UN Security Council also prove to be indicative of intensity for the

43. *Tadić*, Case No. IT-94-1-T, Judgment, ¶ 562.

44. *See, e.g.*, Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶ 41 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2007) (quoting the *Tadić* definition of armed conflict); Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶¶ 160–73 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005) (considering the facts and determining that an armed conflict existed in the territories of Bosnia and Herzegovina); Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (applying the *Tadić* definition of armed conflict); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 327 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (applying the “control test” from *Tadić*); Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 603.

45. *See, e.g.*, ILA REPORT, *supra* note 40, at 2–3 (“At least two characteristics are found with respect to all armed conflict: 1.) The existence of organized armed groups; 2.) Engaged in fighting of some intensity For non-state actors to move from chaotic violence to being able to challenge the armed forces of a state requires organization, meaning a command structure, training, recruiting ability, communications, and logistical capacity. Such organized forces are only recognized as engaged in armed conflict when fighting between them is more than a minimal engagement or incident.”).

46. *See* Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia April 3, 2008); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 135–43 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Tadić*, Case No. IT-94-1-T, Judgment, ¶¶ 564–565; *see also* Prosecutor v. Mrkšić, Case No. IT-95-13/1-T, Judgment, ¶ 407 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007) (summarizing the Tribunal’s overall approach to the intensity factor as: “Relevant for establishing the intensity of a conflict are, *inter alia*, the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and if so whether any resolutions on the matter have been passed.”).

purposes of identifying an armed conflict.⁴⁷ Additional relevant factors often noted include the collective nature of the fighting, the state's resort to its armed forces, the duration of the conflict, and the frequency of the acts of violence and military operations.⁴⁸

Similarly, with regard to organization, cases have focused on a range of information about the groups involved in the conflict, such as whether they employ a hierarchical structure; the extent of their territorial control and administration; their ability to recruit and train combatants; their ability to launch operations using military tactics; their ability to enter peace or cease-fire agreements; their ability to issue internal regulations; and their ability to coordinate multiple units.⁴⁹

Although early cases focused on whether the hostilities involved at least two sides fighting against each other, without too much further detail,⁵⁰ as the ICTY's jurisprudence evolved, organization began to be understood as a strictly independent requirement, analyzed as a series of factors. For example, the *Boškoski* case sets forth five categories of factors for identifying the relevant organization: (1) factors signaling the presence of a command structure, (2) factors indicating the ability to carry out military operations in an organized manner, (3) factors indicating a level of logistics, (4) factors relevant to whether the group has sufficient discipline to implement the LOAC, and (5) factors demonstrating that the group can speak with "one voice."⁵¹ Other useful metrics for examining the organization of parties to a conflict can include, as suggested by the ICRC, the authority to launch attacks bringing together different units and the existence or promulgation of internal rules.⁵²

47. See Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49; Vité, *supra* note 37, at 76–77 (discussing a range of indicators of armed conflict beyond those referenced in the text above, including the government's response and the collective nature of the fighting); see also Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶¶ 34–40 (Mar. 14, 2012).

48. Vité, *supra* note 37, at 76.

49. See, e.g., Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60; Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 95–109; Prosecutor v. Lukić, Case No. IT-98-32/1-T, Judgment, ¶ 884 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009).

50. Thus, the ICTY has regularly referred to "some degree of organization" when broadly characterizing this pillar of its armed conflict analysis. Limaj, Case No. IT-03-66-T, Judgment, ¶ 89 (referring to a 1999 ICRC Working Paper submitted to the Preparatory Commission for the establishment of the elements of crimes for the International Criminal Court, which stated that armed conflict involves hostilities between armed forces that are organized to a greater or lesser extent). This phrasing coincides with the ICRC's characterization of "a minimum amount of organisation" as a feature of non-international armed conflicts. *How Is the Term "Armed Conflict" Defined in International Humanitarian Law?* 5 INT'L COMM. OF THE RED CROSS Opinion Paper (2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>. (2008).

51. See Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶¶ 199–203 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008); see also Vité, *supra* note 37, at 77.

52. See Vité, *supra* note 37, at 77 (listing criteria that are also subsumed within the *Boškoski* factors).

Although formalistic and formulaic application of intensity and organization can pose significant problems for effective conflict recognition,⁵³ the *Tadić* framework offers a useful analytical starting point for identifying the existence of a non-international armed conflict. The discussion in Part II below thus applies the *Tadić* framework as one possible tool in analyzing the nature and existence of the U.S. armed conflict with al-Qaeda, before questioning whether it can provide the answer to the central question of this Article: when did the conflict with al-Qaeda start?

C. *Understanding the Purposes of the Different Armed Conflict Triggers*

The Geneva Conventions, international jurisprudence, and international practice all consistently reaffirm that the identification of international armed conflict and non-international armed conflict rests on different thresholds or triggers. In essence,

[w]hen the armed forces of two States are involved, suffice it for one shot to be fired or one person captured (in conformity with government instructions) for [LOAC] to apply, while in other cases (e.g. a summary execution by a secret agent sent by his government abroad), a higher level of violence is necessary.⁵⁴

Although the distinctions between the law applicable in international armed conflicts and that applicable in non-international armed conflicts have abated over time, several key differences remain, most notably the status of persons caught up in hostilities and the rules governing detention of both fighters and civilians.⁵⁵ As a result, the different paradigms for identification of conflict remain highly relevant for determining the applicable law during times of conflict. Equally important, however, is the recognition that the differing triggers for international and non-international armed conflict also mean that LOAC will be triggered at different stages of the violence, often depending on whether a situation would be an international armed conflict or a non-international armed conflict. As the ICTY has held, in international armed conflicts,

the existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law. In [non-international armed conflicts], in order to distinguish from

53. See Blank & Corn, *supra* note 15 (arguing that the strict and formulaic application of the so-called “elements test” undermines the original objectives of Common Article 3).

54. MARCO SASSOLI ET AL., *HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW*, Ch. 2, 22 (3d ed., 2011).

55. In international armed conflicts, combatants (as defined in the Third Geneva Convention, art. 4, and Additional Protocol I, art. 43) are entitled to prisoner of war status and combatant immunity. In contrast, there is no combatant status in non-international armed conflict. Furthermore, the Third and Fourth Geneva Conventions establish a comprehensive framework for detention of prisoners of war and protected persons in international armed conflict; in non-international armed conflict, there are very few treaty provisions governing detention.

cases of civil unrest of terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organization of the parties involved.⁵⁶

To address that distinction, it is useful to explore the reasons behind the different triggering thresholds for the two types of conflict.

The threshold for the existence of an international armed conflict is deliberately set quite low in order to maximize LOAC's protective purposes. The Commentary therefore explains that "it makes no difference how long the conflict lasts, how much slaughter takes place or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4 [of the Third Geneva Convention]."⁵⁷ ICTY jurisprudence has followed this same low threshold approach for international armed conflict, as can be seen in the definition of armed conflict set forth in *Tadić* and subsequent cases.⁵⁸

Although some commentators posit that the definition of international armed conflict requires some level of intensity to trigger LOAC and distinguish mere "border incidents" or "skirmishes" from armed conflict,⁵⁹ nothing in the Geneva Conventions, the Commentary, or the jurisprudence of the international criminal tribunals supports such an analysis. Indeed, the effect of introducing an intensity threshold for international armed conflict, absent any such requirement in the law, is to exclude situations where LOAC's protective purposes are in demand, thus effectively narrowing LOAC's application and undermining the fulfillment of its goals. If two states detain members of each other's armed forces, although no shots are fired, for example, it is an international armed conflict and LOAC applies, according to Common Article 2 and the ICRC Commentary. This low threshold stems directly from and fulfills LOAC's core protective purposes: the soldiers are in the hands of an adverse party and the

56. Prosecutor v. Muciæ, IT-96-21-T, Judgment, ¶ 184 (Int'l Trib. for the Former Yugoslavia, Nov. 16, 1998).

57. GC III COMMENTARY, *supra* note 22, at 23. See also Hans-Peter Gasser, *International Humanitarian Law: an Introduction*, in HUMANITY FOR ALL: THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND RED CRESCENT MOVEMENT, at 24 ("[A]s soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention.").

58. In *Tadić*, the Appeals Chamber stated that armed conflict "exists whenever there is a resort to armed force between States," as detailed above. See *supra* note 38 and accompanying text; see also Prosecutor v. Delaliæ, IT-96-21-T, Judgment, ¶ 208 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) ("In its adjudication of the nature of the armed conflict with which it is concerned, the Trial Chamber is guided by the Commentary to the Fourth Geneva Convention, which considers that '[a]ny difference arising between two States and leading to the intervention of members of the armed forces' is an international armed conflict and '[i]t makes no difference how long the conflict lasts, or how much slaughter takes place.'").

59. See, e.g., ILA REPORT, *supra* note 40, at 3.

law mandates humane treatment and other protections. Indeed, LOAC “will apply immediately, since no other legal system can provide adequate protection given the clash of two domestic systems.”⁶⁰ The low threshold for international armed conflict thus fulfills the law’s mandate for such protections regardless of any level of intensity, and ensures humane treatment when individuals are in the hands of another state. If some level of intensity were required, then “effectively . . . no law governs the conduct of military operations below that level of intensity, including the opening phase of hostilities.”⁶¹ Such a result would run directly counter to LOAC. The parameters for conflict identification and classification thus stem directly from LOAC’s purposes and operate to fulfill those goals.

In contrast to international armed conflict’s so-called one-shot trigger, non-international armed conflict has a higher threshold that requires some level of intensity of violence beyond riots and internal disturbances. Understanding the purposes and reasoning behind this higher threshold helps provide a framework for the analysis of the 9/11 attacks below and how to identify the start of the conflict between the United States and al-Qaeda. At the time of the negotiations and drafting of the Geneva Conventions, the states were unable to reach a firm consensus on either an actual definition of non-international armed conflict or even whether such a definition was desirable. Therefore, states left the concept and framework deliberately vague so as to focus attention and emphasis on the humanitarian provisions and protections of Common Article 3.⁶² However, notwithstanding the lack of specific criteria or further detailed guidance, the deliberations demonstrate that, in discussing non-international armed conflict and what it means, states were envisioning conflicts that looked like the inter-state conflicts that international law had historically governed.

The three primary—and indeed only—considerations discussed in the negotiating conference reinforce this conception of non-international armed conflict. First, the states involved in the debate over Common Article 3’s terms and framework devoted significant attention to the need “to distinguish between [full-scale war] and local uprisings.”⁶³ Thus, as the

60. Andreas Paulus, *Non-International Armed Conflict Under Common Article 3*, in *Proceedings of the Bruges Colloquium, Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities* 30, 30 (2009).

61. Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 32, 41 (Elizabeth Wilmshurst ed., 2012).

62. See, e.g., SANDUSH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 161 (2012) (“Indeed, the drafting history suggests that this [lack of explicit definition or criteria] was deliberate and the scope of application of common Article 3 left open on purpose, as every attempt to elaborate or to provide guidance led to disagreement and lack of consensus.”); *FINAL RECORD* 79 (quoting General Slavin of the U.S.S.R.) (1949) [hereinafter *FINAL RECORD* 1949] (“It was of paramount importance that upon the outbreak of a conflict, the application of the Conventions should be automatic” in order to ensure humanitarian protections.).

63. *FINAL RECORD* 1949, *supra* note 62 at 15 (quoting Mr. W.R. Hodgson of Austl.) (1949).

Special Committee tasked with formulating the text of what would become Common Article 3 reported in July 1949, the notion of armed conflicts not of an international character “presupposed an armed conflict resembling an international war in dimensions, and did not include a mere strife between the forces of the State and one or several groups of persons (uprisings, etc).”⁶⁴ These understandings are then reflected in the Commentary’s explanation that riots, banditry and internal disturbances do not rise to the level of non-international armed conflict.⁶⁵

Second, states sought to preserve their ability to pursue and punish criminals and traitors in the course of repressing riots and uprisings against state authority. As the United States delegation emphasized, “[e]very government had a right to suppress rebellion within its borders and to punish the insurgents in accordance with its penal laws.”⁶⁶ The Special Committee’s report thus explained that a common theme in all of the proposals for legal regulation of non-international armed conflict was that “it would be dangerous to weaken the State when confronted by movements caused by disorder, anarchy and banditry, by compelling it to apply to them, in addition to its peacetime legislation, Conventions which were intended for use in a state of declared war or undeclared war.”⁶⁷ The deliberations—as well as the resulting differentiated threshold for non-international armed conflict—manifested the unwillingness of states “to cede their sovereign prerogative to deal with internal dissident challenges . . . by committing to extensive international legal regulation”⁶⁸ Here one distinction underlying the triggers for international and non-international armed conflict is evident: states do not have domestic legal frameworks for addressing threats and attacks from other states; that is the very *raison d’être* of international law. In contrast, one of the central functions of the state internally is to maintain public order and security. For many states, therefore, the notion of a one-shot or very low threshold for non-international armed conflict was and remains simply anathema to the inherent sovereign authority of the state.

Third, as expressed in both the state deliberations at the Diplomatic Conference and in the Commentary, the reluctance to grant any belligerency or legitimacy to internal uprisings, insurgencies or other groups was a driving force in the debates over the threshold for non-international

64. *Id.* at 121. In this light, Australia argued that the “Conventions should apply when civil war was of such magnitude as to be a full-scale war,” *Id.* at 42, and the Joint Committee noted that “it was clear that [armed conflict not of an international character] referred to civil war, and not to a mere riot or disturbances caused by bandits.” *Id.* at 129. Similarly, the Swiss delegation declared that “outbreaks of individual banditism, or even movements of the kind, complicated or aggravated by the existence of a conspiracy, do not really constitute an armed conflict in the proper sense of the term. Nor does a mere riot constitute an armed conflict.” *Id.* at 335.

65. GC IV COMMENTARY, *supra* note 28, at 36.

66. FINAL RECORD 1949, *supra* note 62, at 42 (quoting Mr. Yingling of the U.S.).

67. *Id.* at 121.

68. GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 77 (2012).

armed conflict.⁶⁹ The overwhelming majority of the critiques of proposed Common Article 3 (which was originally paragraph 4 of Article 2 until the final version) addressed this question of status and legitimacy. As the representative of the United Kingdom explained, the new provision “was a source of serious difficulties, not only because the Conventions would be applicable to situations which were not war, but because the application of the Conventions would appear to give the status of belligerents to insurgents, whose right to wage war could not be recognized.”⁷⁰ For this reason, many of the early proposals for a provision regulating non-international armed conflicts focused on specific criteria as a pre-condition of application, seeking to restrict the types of situations to which the provisions and principles of the Geneva Conventions would apply.⁷¹ In the end, because these concerns about legitimacy and status presented a serious obstacle to any provision regulating non-international armed conflict, Common Article 3 includes an essential final provision, reaffirming that “[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”⁷² These same concerns about legitimacy and status persist today, as the debates over the categorization of conflicts with terrorist groups demonstrate. For example, President Uribe of Colombia resisted characterizing the armed violence between the government and the FARC as an armed conflict because such a designation “would place both the rebels and the Armed Forces on equal footing.”⁷³

Together, the considerations that lay at the heart of the deliberations on Common Article 3 in 1949 demonstrate that the threshold for non-international armed conflict does not mirror the “one-shot” low threshold for international armed conflict. If the states had intended for non-international armed conflict to be triggered upon one act, that intention would likely be reflected in the discussions and debates in the *travaux préparatoires* and the Commentary. Instead, nowhere in either the Commentaries to the Geneva Conventions or the *travaux préparatoires* for

69. GC III COMMENTARY, *supra* note 22 at 32, 43.

70. FINAL RECORD 1949, *supra* note 62, at 10.

71. See The Australian, French and United States proposals at the Diplomatic Conference, for example, included components aimed in this direction. The Australian proposal included the following criteria: “(1) the *de jure* government had recognized the insurgents as belligerents, or; (2) the *de jure* government had claimed for itself the right of belligerent, and; (3) the *de jure* government had accorded the insurgents recognition as belligerents for the purposes only of the present Conventions.” FINAL RECORD 1949, *supra* note 62 at 15; see also David A. Elder, *The Historical Background of Common Article 3 of The Geneva Convention of 1949*, 11 CASE WEST. R. J. INT’L. L. 37, 44–45 (1979).

72. Common Article 3, *supra* note 8. See GC III COMMENTARY, *supra* note 22 at 43 (noting that without the final provisions, “Article 3 would probably never have been adopted”).

73. Guillermo Otálora Lozano & Sebastián Machado, *The Objective Qualification of Non-International Armed Conflicts: A Colombian Case Study*, 4 AMSTERDAM L. FORUM 58, 60 (2012). “Uribe was concerned that the recognition of an armed conflict, and thus the implicit recognition of the FARC as an armed group party to an armed conflict, would result in the application of international humanitarian law, which he suspected would grant some special protection to the rebels.” *Id.* at 60–61.

Common Article 3 is there any discussion whether, or suggestion that, a single attack or event could constitute or trigger a non-international armed conflict. The entirety of the debates and discussions evinces the opposite preoccupation, instead seeking to foreclose international legal regulation for internal violence until that situation reached a level beyond the state's ordinary law and order capabilities.

To be sure, the ultimate decision to avoid any definition of or even criteria for the identification of non-international armed conflict manifested the desire of states to focus on the humanitarian imperatives of regulating non-international armed conflict rather than the structural and procedural components of such a conflict.⁷⁴ In so doing, the text of Common Article 3 and the subsequent explanatory discussion in the Commentary highlight that the identification of non-international armed conflict involves a recognition of two important considerations: (1) the imperative need to mitigate the brutality of internal conflicts, regardless of who is involved or the perceived justness of any one side's cause; and (2) the vital concern of states with upholding their sovereign prerogative to address and suppress internal unrest. Too restrictive a threshold undermines the first consideration—as seen in the debates over the characterization of the situation in Syria⁷⁵—while too permissive a threshold risks overstating the second—as seen in the debates over the character of the United States conflict with al-Qaeda.⁷⁶

Even in the absence of a particular definition and in light of the complexities that lie at the heart of Common Article 3's formulation, the historical backdrop to and practical considerations inherent in Common Article 3 demonstrate that the trigger for non-international armed conflict was never intended, nor understood, to be analogous to the trigger for international armed conflict. The nature of the two thresholds, and the very purposes of these thresholds, reinforces this distinction:

Violence between States is an exceptional situation, which implies that as soon as there is violence between the armed forces of States - even if only isolated incidents of violence - that the threshold of international armed conflict is reached. In non-interna-

74. Elder, *supra* note 71, at 53 (“There emerged during the long and often heated discussions of the various drafts, a consensus that, at a minimum, fundamental humanitarian norms would be binding in armed conflict not of an international character which surpassed in severity and organization mere rioting or terrorism but which are not in all respects analogous to an international war within the confines of a single state.”).

75. See Blank & Corn, *supra* note 15 (arguing that the artificially high threshold caused by an overly formalized test for the recognition of non-international armed conflict undermines the original objective of Common Article 3 of the Geneva Conventions: to mitigate the brutality inherent in internal conflicts and to ensure a pragmatic totality of the circumstances approach to the imposition of international legal regulation for non-international armed conflict).

76. See generally Kenneth Roth, Comment, *The Law of War in the War on Terror*, 83 FOREIGN AFF. 2 (2004) (describing the divergent authorities that result from an inconsistent application of LOAC and law enforcement paradigms to al-Qaeda suspects in the United States and abroad).

tional armed conflict however, the threshold of violence is much higher since violence within a State happens all the time. Only if violence reaches a high level of intensity, out of the control of the normal law enforcement paradigm, does the situation escalate to become a non-international armed conflict. Determining the right threshold is often difficult and . . . one should not allow States to apply the laws of armed conflict too easily to situations of internal violence.⁷⁷

The following Part applies this foundational analysis and these central purposes for the international armed conflict and non-international armed conflict triggers to the start of the United States conflict with al-Qaeda.

II. APPLYING THE PARADIGM TO THE U.S. CONFLICT WITH AL-QAEDA

The conflict between the United States and al-Qaeda has spawned an extensive literature—articles, policy papers, case law—and generated innumerable conferences on the question of whether a state can be in a conflict with a transnational terrorist group and, if so, what the parameters of such a conflict could be. These debates have centered primarily on whether such a conflict exists,⁷⁸ where it is taking place,⁷⁹ and what law applies to the conduct of hostilities and the protection of persons in such a conflict.⁸⁰ The temporal parameters of the conflict have garnered less attention, although they figure prominently in several cases before the military commissions—regarding the beginning of the conflict⁸¹—and in policy statements and legislative hearings—with respect to a potential end to the conflict.⁸² Furthermore, within the context of the beginning of the conflict, the primary question has been whether al-Qaeda or al-Qaeda-

77. *Discussion—Session 1: Categories of Armed Conflict: Notions and Interpretations*, in Proceedings of the Bruges Colloquium, Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities 44, 44 (2009).

78. *See, e.g.*, Paust, *supra* note 12; Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003).

79. *See, e.g.*, Jake William Rylatt, *An Evaluation of the U.S. Policy of “Targeted Killing” under International Law*, 44 CAL. W. INT'L L.J. 39 (2013); Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L 1 (2010); Jinks, *supra* note 78.

80. *See, e.g.*, Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT'L REV. RED CROSS 189 (2011); Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 AM. J. INT'L L. 56 (2007); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1 (2004); Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1 (2004).

81. *See, e.g.*, Def.'s Mot. to Dismiss, United States v. Al-Nashiri M.C. (2012).

82. *See, e.g.*, Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., *The Conflict Against Al Qaeda and Its Affiliates: How Will It End?* (Nov. 30, 2012); *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before the Senate Committee on Foreign Relations*, 113th Cong. 2 (2014) (statement of Mary E. McLeod, Principal Deputy Legal Adviser, U.S. Dep't. of State); *Authorization for Use of Military Force After Iraq and Af-*

linked attacks before September 11, 2001 are part of the conflict. The question of the legal effect of the 9/11 attacks themselves and whether the conflict between the U.S. and al Qaeda started with the attacks has simply been lost in the shuffle.

The rhetorical “war on terror” surely began on 9/11. But the question of whether a non-international armed conflict between the United States and al-Qaeda began on that day—whether it even could, under LOAC’s parameters, begin on that day—is wholly different. For purposes of legal analysis, clarity, accountability and various other considerations, however, it is an essential question. This Part first analyzes how the United States’ efforts to combat al-Qaeda have generally been viewed and the justifications for those views. Next, this Part examines three possible paradigms for conflict recognition in this type of conflict: (1) the *Tadić* framework; (2) the idea of the non-state group’s attack starting the conflict; and (3) the idea that a state can unilaterally declare war against a non-state group. Each of these approaches results in different conclusions regarding the starting point of the conflict and, more importantly, raises significant issues regarding how conflict recognition paradigms accord with LOAC’s core purposes and framework. Finally, this Part goes beyond the doctrinal legal analysis and explores the operational considerations that go hand-in-hand with, and must be seen as an essential component of, this analysis.

A. *The Dominant Perspectives on the Existence and Timeframe for the Conflict*

There are three primary views regarding the existence and onset of the United States’ conflict with al-Qaeda: (1) there is no armed conflict between the United States and al-Qaeda; (2) an armed conflict between the United States and al-Qaeda began before September 11, 2001; or (3) an armed conflict between the United States and al-Qaeda began after the September 11, 2001 attacks. The third view is the predominant one and also the most supportable under LOAC’s traditional framework. As the discussion below demonstrates, however, this generally accepted analysis does not extend to a more discriminating examination of precisely when the conflict started and why.

1. There Is No Armed Conflict Between Al Qaeda and the United States

Notwithstanding the now strong consensus that the United States and al-Qaeda are in an armed conflict, a number of commentators continue to deny the existence and possibility of such a conflict. Accordingly, although the United States is in an armed conflict in Afghanistan as a result of U.S. intervention and the internationalization of the non-international armed conflict there on October 7, 2001,⁸³ they argue that the United States can-

Afghanistan: Hearing Before the Senate Committee on Foreign Relations, 113th Cong. 2 (2014) (statement of Harold Hongju Koh, Sterling Professor of Int’l Law, Yale Law Sch.)

83. Paust, *supra* note 12, at 764.

not be engaged in a non-international armed conflict with al-Qaeda apart from that conflict. Some proponents of this argument believe that al-Qaeda lacks competency to be engaged in an armed conflict.⁸⁴ Essentially, they label al-Qaeda a criminal organization and its hostile acts directed at the United States as criminal acts. “In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals”⁸⁵ The criminal nature of al-Qaeda, the organization, as well its hostile acts—and its failure to qualify as an insurgency⁸⁶—render al-Qaeda incapable of engaging in an armed conflict with the United States.⁸⁷ As a result, regardless of the scale or effect of the attacks of September 11, 2001, this argument posits that those attacks were mere acts of terrorism to which “‘war’ or ‘armed conflict’ and the laws of war could not have applied . . . even though the attacks undoubtedly triggered other international laws.”⁸⁸

A second school of dissenters argues that al-Qaeda’s attacks and any U.S. responses simply do not rise above the threshold for a non-international armed conflict:

the acts of terrorism and the responses thereto that have been taking place since 11 September 2001 cannot be qualified as a global non-international armed conflict within the meaning of common article 3 to the Geneva Conventions. At present, there is insufficient factual evidence that would allow the violence that is taking place to be imputed to a specific non-state “party” to the conflict. It is also evident that most of the activities being undertaken to prevent or suppress terrorist acts do not amount to an armed conflict.⁸⁹

If, indeed, there can be no armed conflict between the United States and al-Qaeda, then the significance of 9/11 for conflict recognition is no longer relevant. The absence of an armed conflict means LOAC is inapplicable. It also means that al-Qaeda operatives cannot be tried before mili-

84. *Id.* at 767–68.

85. Christopher Greenwood, *War, Terrorism, and International Law*, 56 CURRENT LEGAL PROBS. 505, 529 (2004).

86. See Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 326 (2003); Amnesty Int’l, *Yemen: The Rule of Law Sidelined in the Name of Security* (2003), <http://www.amnesty.org/en/library/asset/MDE31/006/2003/en/084dc66b-d6a7-11dd-ab95-a13b602c0642/mde310062003en.html>. Cf. John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT’L L. 207, 208 (2003).

87. See Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors through a Global War on Terror?*, 43 COLUM. J. TRANSNAT’L L. 435, 445–46 (2005); see also Paust, *supra* note 86, at 326.

88. Paust, *supra* note 86, at 327.

89. Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT’L L. 71, 87 (2004).

tary commissions except as part of the United States conflict in Afghanistan.⁹⁰

2. The Armed Conflict between the United States and al-Qaeda Began Before September 11, 2001

Although the proponents of the “no armed conflict” viewpoint continue to press their arguments, they have lost out to the consensus that the United States can be, and is, engaged in an armed conflict with al-Qaeda.⁹¹ However, when one digs below the surface, little consensus appears regarding the actual timeframe of the conflict.

For accountability purposes at the military commissions, the U.S. government argues that the armed conflict with al-Qaeda predates the September 11, 2001 attacks. According to this view, al-Qaeda and al-Qaeda-linked attacks on U.S. diplomatic and military facilities throughout the 1990s triggered the armed conflict. Between 1992 and 2000, al-Qaeda or entities believed to be associated in some fashion with al-Qaeda launched a number of attacks, including the bombing of two hotels frequented by U.S. troops in Aden, Yemen in 1992; the first World Trade Center bombing (and, some argue, the infamous Blackhawk Down episode in Mogadishu, Somalia) in 1993; the 1998 embassy bombings in Kenya and Tanzania; and the 2000 attack on the U.S.S. *Cole*.⁹²

90. Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 5–8 (2002) (“The President’s Commander-in-Chief power to set up military commissions applies only during actual war within a war zone or relevant occupied territory and apparently ends when peace is finalized. The United States was clearly at war . . . in Afghanistan after the insurgency between the Taliban and the Northern Alliance was upgraded to an international armed conflict when the United States used military force in Afghanistan on October 7. . . . While ‘war’ remains in Afghanistan, the United States can set up a military commission in Afghanistan . . . to try those reasonably accused of war crimes . . .”). Although Paust’s argument is tailored to the military commissions established by presidential military order in November 2001 and not those established with congressional endorsement under the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (2009), his main point, that the United States cannot establish military commissions with jurisdiction exceeding the bounds established for such tribunals by international law, continues to apply. Jordan J. Paust, *Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit*, 45 CORNELL INT’L L.J. 367, 374–75 n. 29 (2013).

91. See Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, OCCASIONAL PAPERS SERIES OF THE PROGRAM ON HUMANITARIAN POL’Y AND CONFLICT RES. AT HARV. U., no. 6, Winter 2996, at 8, 42, available at <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf> (noting that “existing IHL determines that a sustained ‘war’ between one or several states, on the one side, and a transnational terrorist group, on the other, may fall under the concept (and law) of a non-international armed conflict.”). See also Inter-American Commission on Human Rights, REPORT ON TERRORISM AND HUMAN RIGHTS, ¶12 OEA/Ser. L/V/II.116 Doc. 5 rev. 1 corr. October 22, 2002, available at www.cidh.oas.org/Terrorism/Eng/toc.htm, para 7; Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L. J. 99-100 (2002); see also Noëlle Quéniévet, *The Applicability of IHL to Situations of a (Counter-)Terrorist Nature*, in INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY’S CONFLICTS 53–56 (Arnold & Hildbrand, eds., 2005).

92. NAT’L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 59–70, 152–53 (2004) [hereinafter 9/11 COMMISSION REPORT]. Robert Burns, *U.S.*

To the Bush administration, although al-Qaeda's attacks on America are not entirely continuous, they are also not "isolated" or "sporadic"; on the contrary, the September 11 attacks were part of a series of attacks that began with the 1993 bombing of the World Trade Center and continue to this day, although no attacks have been as spectacular or deadly as the September 11 attacks.⁹³

Thus, "Al Qaeda's campaign throughout the 1990s against American targets . . . amounted to a war," if one views these attacks as a "coherent campaign rather than isolated acts of individuals."⁹⁴

By charging several individuals with war crimes for conduct dating back to 1996, the United States has adopted the position that the armed conflict with al-Qaeda began before 9/11, and no later than 1996. For example, the United States charged Yasser Hamdan, bin Laden's bodyguard and driver, with conspiracy⁹⁵ before a military commission, specifying that:

Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, conspire and agree with Usama bin Laden . . . and various members and associates . . . of the al Qaeda organization . . . and said al Qaeda engaged in hostilities against the United States.⁹⁶

Likewise, before transferring the case to an Article III court, the United States charged Ahmed Khlafan Ghailani with conspiracy before a military commission, specifying:

Ship Rammed, 4 Sailors Killed, ASSOCIATED PRESS, Oct. 12, 2000 available at 2000 WLNR 7809230; Karin Davies, *Kenya, Tanzania Blasts Kill 107*, ASSOCIATED PRESS, Aug. 8, 1998 available at <http://apnewsarchive.com/-Blasts-Kill-107/82c2173e67b83f71bddc3faba5915148>; Michael R. Gordon & Thomas L. Friedman, *Details of U.S. Raid in Somalia: Success So Near, a Loss So Deep*, N.Y. TIMES, Oct. 25, 1993, at A5; Tom Hays, *Huge Blast Shakes World Trade Center, Killing 5; Car Bomb Suspected*, ASSOCIATED PRESS, Feb. 27, 1993; *Hotels Bombed*, THE INDEPENDENT, Dec. 31, 1992, available at <http://www.independent.co.uk/news/world/hotels-bombed-1566099.html>.

93. Brooks, *supra* note 10, at 718.

94. Ruth Wedgewood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002).

95. Conspiracy is not generally accepted as a violation of the law of war. See, e.g., Raha Wala, Note, *From Guantanamo to Nuremberg and Back: An Analysis of Conspiracy to Commit War Crimes Under International Humanitarian Law*, 41 GEO. J. INT'L L. 683 (2010); George P. Fletcher, *The Hamdan Case and Conspiracy as a War Crime: A New Beginning for International Law in the U.S.*, 4 J. INT'L CRIM. JUST. 442 (2006); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). However, conspiracy was included as a separate offense, chargeable before military commissions in both the 2006 and 2009 Military Commissions Acts. Thus, according to the United States, conspiracy is a distinct violation of LOAC. The D.C. Circuit recently affirmed the viability of conspiracy as a separate LOAC offense, as a domestic statutory matter under the 2009 Military Commission Act, in *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (*en banc*).

96. Charge Sheet at 3, *United States v. Hamdan*, M.C. (2008) (AE001).

Ghailani . . . a person subject to trial by military commission as an alien unlawful enemy combatant, did, at various locations, from in or about 1996 to on or about August 7, 1998, conspire and agree with Usama bin Laden . . . to commit . . . offenses triable by military commission.⁹⁷

The United States also accuses Abd al-Rahim al-Nashiri of being the “mastermind” of the October 2000 bombing of the U.S.S. *Cole*, charging him with various violations of the law of war related to that bombing, as well as the attempted bombing of the U.S.S. *Sullivans* earlier that year.⁹⁸

The Convening Authority—a senior military officer who is responsible, ultimately, to the President of the United States—adopted the charges described above. Thus, by charging these and other individuals associated with al-Qaeda with LOAC violations before the military commissions for conduct from 1996 onward, the United States demonstrates that it believes the armed conflict with al-Qaeda must have begun no later than 1996.⁹⁹

By statute and by custom, military commissions are tribunals with jurisdiction to try individuals for violations of the law of war, and cannot try non-LOAC violations.¹⁰⁰ Both the 2006 and 2009 Military Commissions Acts granted military commissions jurisdiction “to try persons . . . for any offense made punishable by . . . the law of war”¹⁰¹ and, although they granted military commissions jurisdiction to try individuals for conduct on or before September 11, 2001,¹⁰² they were limited to trying only offenses “committed in the context of and associated with hostilities.”¹⁰³ Thus, any charges before a military commission imply that the United States believes the relevant conduct occurred during an armed conflict.¹⁰⁴

Moreover, the United States has explicitly argued that an armed conflict between the United States and al-Qaeda existed by 1996. In rejecting Hamdan’s motion for a bill of particulars, Judge Allred found that:

97. Charge Sheet at 1, *United States v. Ghailani*, M.C. (2009) (AE018).

98. Charge Sheet, *United States v. Al-Nashiri*, M.C. (2008) (AE001).

99. See UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, *LAW OF WAR DESKBOOK* (Brian J. Bill ed., 2010); Military Commission Ruling on Defense Motion to Dismiss Because the Convening Authority Exceeded his Power in Referring this Case to a Military Commission at 2-3, *United States v. al-Nashiri*, M.C. (2013) (AE-104F) (“Congress, with the President’s concurrence, has impliedly made a political judgment regarding the existence of hostilities through its recognition of military commissions as a forum for adjudication of violations of the laws of war occurring “before, on, or after September 11, 2001.”).

100. See *LAW OF WAR DESKBOOK*, *supra* note 99, at 17–24 (“The law of war is triggered by conflict.”); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *HARV. L. REV.* 2127–33 (2005); *Hamdan* (plurality opinion).

101. 10 U.S.C.A. § 948(d) (West, Westlaw through P.L. 113–180).

102. See *id.*

103. 10 U.S.C.A. § 950(p)(c) (West, Westlaw through P.L. 113–180).

104. Cf. Government Response to Defense Motion to Dismiss Because the Convening Authority Exceeded His Power in Referring the Case to a Military Commission at ¶ 6, *United States v. Al-Nashiri* M.C. (2012) (AE104).

[t]he Government has repeatedly declared that its theory at trial will be that the armed conflict between the United States and al-Qaeda/ bin Laden began not later than 1996, and that the accused's support for and assistance to bin-Laden [sic] after that date was therefore related to or connected with a period of armed conflict.¹⁰⁵

However, the United States has also held out the possibility that an armed conflict existed between it and al-Qaeda even *before* 1996.¹⁰⁶ During the *Hamdan* military commission, the prosecution introduced evidence of the string of declarations bin Laden issued from 1992 onward,¹⁰⁷ as well as evidence of al-Qaeda-authored attacks or attempted attacks beginning in 1991.¹⁰⁸ The prosecution also asserted that al-Qaeda employed a military committee and continuously operated training camps in Afghanistan from 1992 until 2001, and that from 1996-2001 the training camps in Afghanistan were operated by al-Qaeda exclusively, without the Taliban government's involvement.¹⁰⁹ The prosecution also highlighted al-Qaeda's 1996 declaration of war against the United States and asserted that it is a factor to consider in assessing the existence of a non-international armed conflict.¹¹⁰ Finally, the prosecution introduced evidence designed to show

105. Military Commission Ruling on Motion for Bill of Particulars at 1, *United States v. Hamdan* M.C. (2008) (AE 214). See, e.g., Transcript of Record at 582, *United States v. Hamdan* M.C. (2008) (In response to a question from Judge Allred concerning when the armed conflict with al-Qaeda began, the Government responded, "It's the government's position that this period of armed conflicts included all events in the dates alleged so that would be part of the Court's determination, but the government's position is that this case goes forward because the period of armed conflict includes all the offenses and dates alleged, in other words, from February 1996 through November 24, 2001.")

106. *Id.* at 586 ("In February of 1996, that was essentially the date when Mr. Hamdan entered Afghanistan, and therefore that would be the date that we contend that he joined the ongoing hostilities which were taking place. So that's the significance of us choosing that particular date.")

107. *Id.* at 407.

108. *Id.* at 408–09, 2853–57. *But see* testimony of Prosecution witness Evan Kohlmann, *Id.* at 3108:20-3109:6 ("A [MR. KOHLMANN]: Well, the first—I would say the first official attack carried out by al Qaeda would probably be the 1998 East Africa embassy bombings. However, Arab Afghans, in other words, Arab mujahideen, who confessed to training at camps in Afghanistan run by Usama bin Laden, had carried out attacks as early as February of 1993 in New York, the World Trade Center bombing. Also in November of 1995 there was a bombing in Riyadh outside of a joint Saudi-U.S. National Guard complex that was again carried out by Arab mujahideen who had trained at al Qaeda camps in Afghanistan. There was a suicide bombing carried out in Croatia in 1995.")

109. *Id.* at 2848, 2851.

110. *Id.* at 2854:15-5855:7. Under cross-examination, Professor Geoffrey Corn testified:

Q [LCDR STONE]: Now, you agree that the declaration of war in 1996 is in and of itself one factor that you must consider to whether or not an armed conflict between al-Qaeda and the United States existed; correct?

A [MR. CORN]: No, I think in my direct testimony I—I—I qualified that by indicating I'm not sure what the effect of an assertion of an existence of a state of war between the non-state entity and the state actually is. The discussion of declaration

that al-Qaeda viewed the 1998 embassy bombings, the 2000 *Cole* bombing, and the 9/11 attacks to be hostile acts in the course of an ongoing armed conflict.¹¹¹

3. Armed Conflict with al-Qaeda After the September 11, 2001 Attacks

The most common perspective on the conflict between the United States and al-Qaeda recognizes an armed conflict that began following the 9/11 attacks. Although most discussion in this vein simply takes a monolithic approach without parsing the actual starting point, the predominant view—or certainly the predominant assumption—is that the conflict started on 9/11 or immediately thereafter when President Bush declared that the United States was “at war” with al-Qaeda.¹¹² Others, however, assert that the conflict began when United States forces launched military operations in Afghanistan in late September or early October 2001.

Those who see the 9/11 attacks as the start of the conflict focus on the attacks’ scale, the targets, the reaction of the United States, and sometimes al-Qaeda’s previous attacks and putative declarations of war against the United States.¹¹³ For the United States, the attacks were “an implicit declaration of war by al-Qaeda and simultaneously an act of war . . . by al-Qaeda acting independently as a transnational terrorist group and not on behalf of any state.”¹¹⁴ Those who purport to preserve the non-international armed conflict recognition paradigm and still have 9/11 as the starting point try to fit the attacks into the intensity framework. “The main

of war in the commentary refers to—is a commentary to Common Article 2. But I’ll concede that it—it would be something to look at.

Q [LCDR STONE]: And did you not testify on direct that the declaration of war was a factor but not dispositive in this armed conflict?

A [MR. CORN]: As I just said, I’ll concede that it’s something to look at. *Id.*

111. *Id.* at 3007, 3010, 3018–19, 3101–02, 3109.

112. See, e.g., U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (2006); Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. 1165, 1176 (2013); Jinks, *supra* note 78, at 33–4; Stephan Hadley, Remarks at the Moritz College of Law of the Ohio State University (Sept. 24, 2004).

113. Yoo & Ho, *supra* note 86 CITE OLD ID=“_Ref401860689”>, at 209–13 (“whatever the ‘level of intensity’ required to create an armed conflict, the gravity and scale of the violence unleashed on the United States on September 11 crossed that threshold.”).

114. Avril McDonald, *Declarations of War and Belligerent Parties: International Law Governing Hostilities Between States and Transnational Terrorist Networks*, 54 NTIR. 279, 285 (2007). President Bush called the attacks “an act of war,” President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), in SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH, 2001–2008, 66, http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf (last visited Nov. 24, 2014). Others argue that the attacks’ “coordinated applications of force resulting in enormous property destruction and an astonishing loss of life” initiated the conflict. Jinks, *supra* note 78, at 33.

argument of these scholars is that a situation can be of such intensity that it changes the law enforcement paradigm to the application of the laws of war.”¹¹⁵ In essence, the attacks went far beyond riots and isolated acts of violence that lie below the armed conflict threshold. Rather, these proponents argue, “[al-Qaeda] carried on a sustained campaign against the United States, culminating in September 11 with a devastating series of coordinated attacks resulting in a massive death toll.”¹¹⁶

The extension of this theory focuses on President Bush’s rhetoric in the days immediately following September 11, effectively pronouncing the existence of a conflict at that moment. For example, on September 20, President Bush declared that “[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”¹¹⁷ Several days later, President Bush reaffirmed that the United States was at war, revisiting the “war on terror” theme once more.¹¹⁸

For those who focus on U.S. military action and the exchange of hostilities, the conflict began on October 7, 2001, when the United States began bombing Afghanistan.¹¹⁹ Some therefore tie the conflict with al-Qaeda directly—and only—to the conflict in Afghanistan but still recognize a conflict between the United States and al-Qaeda. This view sees no armed conflict between the United States and al-Qaeda outside of Afghanistan because armed conflicts are necessarily tied to geography¹²⁰ and do not extend to any location in the world where a member of al-Qaeda may be present.¹²¹ Thus, as the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions stated:

Al-Qaeda and entities with various degrees of “association” with it are indeed known to have operated in numerous countries

115. Paulus, *supra* note 60, at 30–31.

116. Yoo & Ho, *supra* note 86, at 213.

117. Bush, *supra* note 114, at 68.

118. See Roth, *supra* note 76, at 2 (quoting President Bush’s statement made on September 29, 2001: “Our [W]ar on [T]error will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan.”).

119. See, e.g., John Bellinger, *Armed Conflict with Al Qaida?* OPINIOJURIS.ORG (Jan. 15, 2007), <http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida/>.

120. Cf. U.N. Human Rights Council, *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings*, ¶¶ 53–56, U.N. Doc. A/HRC/14/24/Add.6; Human Rights Council 14th Sess., (May 28, 2010) [hereinafter Special Rapporteur Report]; Mary Ellen O’Connell, *When Is a War not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT’L COMP. L. 535, 538 (2005) (“Some try to argue that a war began on September 11 because the attacks were an ‘act of war,’ or those attacks plus others by Al Qaeda during the previous ten years. Wars, however, do not begin with an attack. They begin with a counter-attack. States may have the right to engage in a war of self-defense following an attack. If they chose not to do so, there is no war. War, as discussed above requires exchange, intensity and duration.”). *But see* Brooks, *supra* note 10, at 724, 744 (characterizing strict application of territorial bounds to an armed conflict as “formalistic” and the United States’ expansive approach as “plausible”).

121. See Special Rapporteur Report, *supra* note 120 at ¶ 52.

around the world including in Saudi Arabia, Indonesia, Pakistan, Germany, the United Kingdom and Spain, among others, where they have conducted terrorist attacks. Yet none of these States, with the possible exception of Pakistan, recognize themselves as being part of an armed conflict against al-Qaeda or its “associates” in their territory.¹²²

In general, however, the debate in this arena focuses on whether the United States-al-Qaeda conflict is a global conflict—i.e., unlimited geographically—or a series of conflicts between the United States and al-Qaeda or al-Qaeda-associated groups in different locations. The United States characterizes the conflict as a “global non-international armed conflict,” taking an expansive view of the application of LOAC.¹²³ According to the United States, it has the legal authority to kill or detain anyone who is “part of” or “substantially supported” al-Qaeda, the Taliban, or associated forces, anywhere in the world, subject to limiting *policy* and *jus ad bellum* considerations.¹²⁴ Another somewhat comparable formulation is the idea of “transnational armed conflict,”¹²⁵ which is a conflict between a state and a non-state group outside its territory, one that does not fit neatly into the Common Article 2-Common Article 3 paradigm. Finally, many—namely the ICRC—favor a case-by-case approach, assessing the violence between two parties in each country or geographic location to determine whether the intensity and organization, or the totality of the circumstances, meets the threshold for an armed conflict.¹²⁶ As a result, the United States and al-Qaeda may be engaged in numerous locations around the world, such as Yemen, Pakistan, perhaps Somalia, but are not in one single all-encompassing conflict.

B. *Methodologies: How to Identify the Start of the Armed Conflict between the United States and al-Qaeda*

Applying LOAC’s traditional framework to the situation between the United States and al-Qaeda leads to the conclusion that after a number of isolated terrorist attacks, to which the United States responded predomi-

122. *Id.* at ¶ 54.

123. U.S. DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QAEDA OR AN ASSOCIATED FORCE (White Paper 2011), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ White Paper on Targeted Killing]; David E. Graham, *Defining Non-International Armed Conflict: A Historically Difficult Task*, 88 INT’L L. STUD. 43, 50–2 (2011).

124. DOJ White Paper on Targeted Killing, *supra* note 123; Daskal, *supra* note 112, at 1176.

125. See Geoffrey S. Corn, Hamdan, Lebanon, and the Regulation of Armed Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict, 40 VAND. J. TRANSNAT’L L. 295, 296 (2007); Corn & Jensen, *supra* note 10.

126. See 31st International Conference of the Red Cross and Red Crescent, Nov. 28-Dec. 1, 2011, Geneva, Switz. International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 31IC/11/5.1.2, at 9–11 (Oct. 2011).

nantly with law enforcement measures, the United States eventually resorted to military force and extensive military operations after the most egregious and consequential attack, in an attempt to defeat al-Qaeda and end its threat to the United States. Yet, popular discourse, U.S. policy rhetoric, and a substantial number of international commentators view the conflict as starting earlier than this point—either on or before September 11, 2001. This divergence raises important questions about the application of LOAC's framework to a conflict with a transnational terrorist group and, equally important, whether this type of conflict demands or justifies a different approach to conflict recognition. For example, if one concludes that the conflict could not have started until after the United States responded and hostilities began in Afghanistan in the fall of 2001, consider the consequences for the operational authority for United States action on and immediately after 9/11: was the United States therefore restricted only to law enforcement measures? Alternatively, if one views the 9/11 attacks as sufficient to start the conflict, consider what that would have meant if the United States had not responded with military action at all: was there a conflict based only on the action of a non-state group? This Section and the following Section explore several possible methodologies for conflict recognition in this scenario, and how effective or potentially problematic such methodologies could be, and then introduce operational considerations as well to obtain a more complete picture of the conflict recognition process and its ramifications.

1. Applying the Commentary and *Tadić* to the Armed Conflict between the United States and al-Qaeda

The classic LOAC framework relies on a threshold that differentiates non-international armed conflict from other situations of violence, such as “riots, isolated and sporadic acts of violence and other acts of a similar nature.”¹²⁷ Whether one relies on a strict application of the *Tadić* elements or prefers a more totality of the circumstances approach, this conflict recognition framework rests on some level of intensity of violence and some measure of organization of the parties. The nature of the state's response is also an important factor, whether packaged within the intensity analysis or considered separately. As noted in Part I above, courts and other bodies throughout the international system regularly apply this framework.¹²⁸ Indeed, interestingly, the military commissions also appear to use this methodology (although the military commissions have gener-

127. AP II, *supra* note 17, art. 1(2).

128. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 620 (Sept. 2, 1998) (“For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the armed conflict.”); U.N. GAOR, *Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, ¶ 55, U.N. Doc. A/68/382, GAOR 68th Sess., (Sept. 13, 2013) [hereinafter *Special Rapporteur on Extrajudicial Killings*]; Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 95 (Feb. 25, 2009).

ally reached a different conclusion), as jury instructions demonstrate. For example, in *Hamdan*, the judge instructed the members:

With respect to each of the ten specifications before you, the government must prove beyond a reasonable doubt that the actions of the accused took place in the context of and that they were associated with armed conflict. *In determining whether an armed conflict existed between the United States and al Qaeda and when it began, you should consider the length, duration, and intensity of hostilities between the parties, whether there was protracted armed violence between governmental authorities and organized armed groups, whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat, the number of persons killed or wounded on each side, the amount of property damage on each side, statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect, and any other facts or circumstances you consider relevant to determining the existence of armed conflict.*¹²⁹

These instructions concerning the existence of an armed conflict—and similar instructions provided in *Bahlul*¹³⁰—closely track the indicia of armed conflict identified by the ICTY and other international bodies.

Using this framework, the armed conflict between the United States and al-Qaeda did not begin before October 7, 2001, when the United States launched its bombing campaign to oust the Taliban from Afghanistan, or perhaps a week or two earlier, when United States Special Forces began fighting alongside the Northern Alliance.

a. Intensity

Hostilities between the United States and al-Qaeda did not rise to the level of intensity requisite for a non-international armed conflict before the United States launched extensive military operations against Taliban and al-Qaeda forces in Afghanistan on October 7, 2001. Up to that point, the sum total of violent incidents between the United States and al-Qaeda consisted of the bombing of the U.S. embassies in Nairobi and Dar es Salaam on August 7, 1998; the U.S. cruise missile strikes in Afghanistan

129. Panel Member Instructions, *United States v. Hamdan M.C.* (2008).

130. Military Judge's Instructions on Findings at 2, *United States v. Bahlul* (M.C. 2008). ("In determining whether an armed conflict existed between the United States and al Qaeda and when it began, you should consider the length, duration and intensity of hostilities between the parties; whether there was protracted armed violence between governmental authorities and organized armed groups; whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat; the number of persons killed or wounded on each side; the amount of property damage on each side; statements of the leaders of either side indicating their perceptions regarding the existence of an armed conflict including the presence or absence of a declaration to that effect; and any other facts and circumstances you consider relevant to the existence of armed conflict.").

and Sudan on August 20 responding to the embassy bombings; the bombing of the U.S.S. *Cole* on October 12, 2000; and the attacks of September 11, 2001.¹³¹ Together, these four incidents involved attacks on ten targets: two U.S. embassies; one pharmaceutical factory; four training camps; one U.S. naval vessel; the World Trade Center; and the Pentagon.

There is no denying the scale or seriousness of these attacks—together, these incidents killed some 4,000 individuals and inflicted billions of dollars of damage.¹³² But, based on existing jurisprudence and commentary, these attacks did not rise to the level of intensity associated with hostilities in armed conflicts, despite the magnitude of destruction attending them. The acts were quintessentially sporadic and infrequent—ten attacks taking place on four separate days and spread over more than three years. If several weeks of relative calm between clashes was sufficient to prevent a chain of hostilities from rising to the level of armed conflict, as the ICTY held in *Prosecutor v. Haradinaj*,¹³³ then year-long periods of quiescence between attacks preclude this string of attacks from attaining sufficient intensity to constitute a non-international armed conflict. Indeed, such infrequent, instantaneous attacks do not approach the sort of protracted armed violence considered necessary to constitute a non-international armed conflict.¹³⁴

Additionally, these incidents of violence involving the United States and al-Qaeda were not “clashes”¹³⁵ as that term is commonly understood. Instead, these four incidents were short-lived attacks directed by one party

131. A number of other attacks against the United States are sometimes attributed to al-Qaeda, including the so-called Black Hawk Down incident in Mogadishu, Somalia in 1993, and the bombing of a joint U.S.-Saudi training facility in 1995. According to the National Commission on Terrorist Attacks upon the United States, none of these attacks is directly attributable to al-Qaeda. Instead, al-Qaeda or its affiliates were responsible for funding, training, or inspiring individuals responsible for these attacks but did not direct them. See 9/11 COMMISSION REPORT, *supra* note 92, at 59–60. See also Leah Farrall, *How al-Qaeda Works: What the Organization's Subsidiaries Say About its Strength*, FOR. AFF., (March/April 2011). The Khobar Towers bombing in 1996 is also sometimes attributed to al-Qaeda. The 9/11 Commission Report characterizes the evidence of responsibility pointing strongly to Iran with some indications of al-Qaeda involvement. 9/11 COMMISSION REPORT, *supra* note 92, at 60.

132. 2,996 people were killed in the 9/11 attacks; 17 U.S. sailors were killed in the U.S.S. *Cole* bombing; an unknown number of individuals were killed in the 1998 cruise missile strikes on the al-Qaeda's training camps in Afghanistan and the al-Shifa pharmaceutical plant in Sudan; 224 people were killed in the 1998 embassy bombings.

133. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T at ¶¶ 92–99 (finding that three clashes over two months followed by periods of calm were insufficient to meet the *Tadić* intensity prong).

134. *Cf. Prosecutor v. Limaj*, Case No. IT-03-66-T at ¶¶ 48, 49, 135 (describing the 4 clashes between Serbian and KLA forces from November 1997 through March 1998 as “sporadic.”); *Haradinaj*, Case No. IT-04-84bis-T, Retrial Judgment, ¶ 410; *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 175 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

135. The ICTY distinguishes between “clashes,” in which there was an exchange of violence between two or more parties, and “attacks,” in which one party directs violence at another party. *Compare Limaj*, Case No. IT-03-66-T, *supra* note 15, at ¶49 (using “attack” to

at another with no exchange of fire or reciprocal hostilities involved. Even if these attacks could be considered clashes, they did not increase in number and frequency over time: two attacks on August 7, 1998; five attacks three weeks later (one target in Sudan, four in Afghanistan); one attack more than two years after that; and two attacks nearly a year later on September 11, 2001. Moreover, of these attacks, only five involved heavy weapons.¹³⁶ Seven strikes were directed at military objectives—the cruise missile strikes on the training camps in Afghanistan, the pharmaceutical plant in Sudan, the attack on the U.S.S. *Cole*, and the attack on the Pentagon. The attacks on the embassies and on the World Trade Center were, in contrast, classic examples of terrorist attacks: unlawful acts targeting civilians for the purpose of advancing a particular social or political goal.¹³⁷

Furthermore, the U.S. response to attacks by al-Qaeda principally involved law enforcement measures. Although it employed cruise missiles on August 20, 1998, the United States did not otherwise engage al-Qaeda with military force or by deploying regular military units until October 7, 2001. The United States sent civilian law enforcement agents to East Africa after the embassy bombings and to Yemen in the wake of the *Cole* bombing,¹³⁸ and it indicted the alleged perpetrators of those attacks in civilian courts.¹³⁹ In addition, the United States characterized al-Qaeda's attacks as terrorism, and it continued to describe itself as at peace—as opposed to at war or engaged in an armed conflict—even after the *Cole* bombing.¹⁴⁰ When describing U.S. responses to the bombing, President

describe Serbian forces striking Albanian villages), *with id.* at ¶ 48 (using “clash[es]” to describe reciprocal hostilities between Serbian forces and the KLA).

136. The United States believes that the al-Shifa pharmaceutical plant was used to produce chemical weapons and linked to al-Qaeda. *See, e.g.*, Statement of William Cohen to the 9/11 Commission, March 23, 2004, at 9. A chemical weapons factory clearly qualifies as a military objective. CLAUDE PILLOUD, YVES SANDOZ, CHRISTOPHE SWINARSKI, BRUNO ZIMMERMAN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 632 n. 3 (Yves Sandos et al. eds., 1987); A.P.V. ROGERS, LAW ON THE BATTLEFIELD 37 (1996); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 88 (2004). Thus, although the United States may have been mistaken in its belief, viewing the strike prospectively, we must conclude that it was a strike against a military objective.

137. *Cf.* UN G.A. Res. 49/60 (“Measure to eliminate international terrorism”).

138. 9/11 COMMISSION REPORT, *supra* note 92, at 192–93.

139. *See, e.g.*, Indictment, United States v. Bin Laden 132 F.Supp.2d 168 (S.D.N.Y. 2001) (No. S(7)98CR.1023(LBS)).

140. Sec’y of Def. Cohen, Testimony Before the Senate Armed Services Comm. (Oct. 6, 1998) (acknowledging that “Osama bin Laden declared war against the United States” but affirming that “[w]e will follow the legal route as far as seeking the arrests and apprehension of those responsible [for the embassy bombings] and bring them to justice”). Even after 9/11, former President Clinton and his National Security Adviser implicitly described the *Cole* bombing as having occurred outside of an armed conflict. *Cf.* 9/11 COMMISSION REPORT, *supra* note 92 at 192–195 (“[Ambiguous indicators of al-Qaeda responsibility for the *Cole* bombing], President Clinton and Berger told us, was not the conclusion they needed to go to war or deliver an ultimatum to the Taliban threatening war.”) (emphasis added).

Clinton publicly stated that “America is not at war” and that it “was a time of peace” in and around Yemen.¹⁴¹

Many of the other indicia of intensity considered relevant by the ICTY and other tribunals addressing the identification of non-international armed conflict since *Tadić* are also missing from the incidents of violence between August 1998 and September 2001. Neither party attempted to take and hold the other’s territory, nor was there an exchange of territory. Civilians were not forced to flee a combat zone.¹⁴² Indeed, there was no zone of combat. There were no efforts to conclude cease-fires, although al-Qaeda did repeatedly declare war on the United States. The United Nations Security Council, while encouraging counterterrorism efforts, was not involved in the putative conflict between the United States and al-Qaeda in any way comparable to its involvement in the conflicts in Yugoslavia or other conflicts.¹⁴³ Despite the many casualties, destruction and economic loss from the isolated al-Qaeda attacks before 9/11, the violence between the United States and al-Qaeda from August 1998 through September 2001 was simply too sporadic to constitute an armed conflict. Instead, al-Qaeda’s attacks on the United States were the very sort of terrorist activities that the ICTY, the Commentary, and other sources distinguish from situations of armed conflict that would trigger LOAC.¹⁴⁴ As the United Kingdom noted in submitting a reservation upon ratification of Additional Protocol I, “the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of

141. William Clinton, The President’s Radio Address (Oct. 14, 2000), in ADMINISTRATION OF WILLIAM J. CLINTON (“This tragic loss should remind us all that even when America is not at war, the men and women of our military risk their lives every day in places where comforts are few and dangers are many. No one should think for a moment that the strength of our military is less important in times of peace, because the strength of our military is a major reason we are at peace.”).

142. See *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 177 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008) (citing *Prosecutor v. Kordić and Ćerkez*, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 340 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 565 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 139, 167 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); and *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶¶ 49, 97 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

143. U.N. Security Council resolutions from 1998 until September 2001 concerning Afghanistan addressed, and were clearly cognizant of, a conflict there between the Taliban and the Northern Alliance. There were no resolutions during that period that addressed or were cognizant of a conflict between the United States and al-Qaeda, or between al-Qaeda and any other party. References to al-Qaeda or bin Laden are made only in connection with the “sheltering and training of terrorists,” or bin Laden’s extradition to the United States for trial in civilian court, see *S.C. Res. 1333, para. 1-2, U.N. Doc. S/RES/1333 (Dec. 19, 2000)*. See also *S.C. Res. 1214, para. 13, U.N. Doc. S/RES/1214 (Dec. 8, 1998)*. Individual attacks, like those of September 11 or the embassy bombings, are addressed as “international terrorism.” See also *S.C. Res. 1383, paras. 4-6, U.N. Doc. S/RES/1383 (Dec. 6, 2001)*; *S.C. Res. 1189, paras. 3, 5, U.N. Doc. S/RES/1189 (Aug. 13, 1998)*.

144. See *Tadić*, Case No. IT-94-1-T, Judgment, ¶ 562.

ordinary crimes including acts of terrorism whether concerted or in isolation.”¹⁴⁵

b. Organization

Descriptions of al-Qaeda and its organizational structure vary, and the nature and extent of that organization and its structural control remains somewhat unclear. Nonetheless, available information suggests that al-Qaeda comfortably met the basic requirement of “a minimum amount of organisation”¹⁴⁶ by or before 9/11. As originally understood, the concept of organization simply focuses on the need to have two identifiable sides to a conflict. By most accounts, al-Qaeda certainly fulfilled that requirement, even if it looked and operated differently from traditional rebel groups.¹⁴⁷

Even by the more detailed and formalistic¹⁴⁸ standards of later ICTY jurisprudence, al-Qaeda exhibited many of the indicia international tribunals and other bodies have pointed to in determining whether a group is organized enough to be a party to a non-international armed conflict.¹⁴⁹ For example, the ICTY has identified “five broad groups” of factors for determining whether an armed group is sufficiently organized to constitute a party to an armed conflict.¹⁵⁰ Al-Qaeda seems to have met all five: (1) it possessed a command structure; (2) it could carry out operations in an organized manner; (3) it demonstrated logistics competency; (4) it imposed discipline that would likely have provided for Common Article 3

145. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Reservations, June 8, 1977, www.icrc.org/ihl.nsf. See also LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 56 (3d ed. 1993) (“[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism . . . are outside the scope of international humanitarian law.”).

146. ICRC, *Armed Conflict*, *supra* note 50.

147. This is not to say that it was a large, effective, or even successful organization, however. Farrall, *supra* note 1351, at 130-31 (al-Qaeda’s membership “included a core of just under 200 people, a 122-person martyrdom brigade, and several dozen foot soldiers recruited from the 700 or so graduates of its training camps”); see BARBARA SUDE, *AL-QAEDA CENTRAL: AN ASSESSMENT OF THE THREAT POSED BY THE TERRORIST GROUP HEADQUARTERED ON THE AFGHANISTAN-PAKISTAN BORDER 2* (2010); 9/11 COMMISSION REPORT, *supra* note 92 at 66-67 (“Thousands flowed through the [bin Laden-supported training] camps, but no more than a few hundred seem to have become al Qaeda members.”).

148. Blank & Corn, *supra* note 15 (critiquing the *Tadić* framework of determining non-international conflict).

149. See, e.g., Special Rapporteur for Extrajudicial Killings, *supra* note 128, at ¶ 56 (“An armed group will be considered to constitute a party to a non-international armed conflict only if it is sufficiently organized. International jurisprudence has determined the relevant indicative criteria, which include the existence of a command structure, of headquarters and of a group’s ability to plan and carry out military operations.”) (citing *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 94-134 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) and *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment ¶¶ 536-538 (Mar. 14, 2012)).

150. See *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶¶ 199-205 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008).

compliance had it desired such compliance; and (5) it was able to speak with one voice.

First, the idea of a command structure focuses on the division and concentration of authority and the hierarchical or other style of provision and execution of orders. In *Prosecutor v. Limaj*, the ICTY looked at the role and operation of the Kosovo Liberation Army's General Staff as one factor in assessing the group's level of organization. The KLA divided command authority on the basis of geography but vested the General Staff with responsibility for appointing regional commanders.¹⁵¹ These commanders were generally responsive to orders issued by the General Staff,¹⁵² but were also vested with command authority over brigades they established within their zones of control.¹⁵³ The General Staff was also responsible for appointing other important KLA officers like the officer charged with the "development and professionalisation of the KLA."¹⁵⁴ Significant to the ICTY's findings concerning the organization of the KLA was that the KLA was governed by written regulations that established ranks and delineated a clear chain of command, including directing dissemination and execution of orders down the chain.¹⁵⁵ Likewise, in *Boškoski*, the Trial Chamber emphasized the Albanian National Liberation Army's (NLA) concentration of authority in its leader,¹⁵⁶ its hierarchical structure,¹⁵⁷ and its use of written regulations¹⁵⁸ in finding that the NLA was sufficiently organized to be a party to an armed conflict.¹⁵⁹ The *Boškoski* Trial Chamber weighed all of these factors in concluding that the NLA was "a hierarchically structured armed group, with a functioning chain of command."¹⁶⁰

Like the KLA and the NLA, al-Qaeda in 2001 was a hierarchical organization governed by written regulations—in al-Qaeda's case, a constitution and by-laws.¹⁶¹ It employed a clear chain of command¹⁶² and

151. See *Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 95–96.

152. See *id.* at ¶ 98.

153. See *id.* at ¶¶ 106–07, 109.

154. *Id.* at ¶ 99.

155. *Id.* at ¶¶ 110–16.

156. See *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 268 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

157. *Id.* at ¶ 271.

158. *Id.* at ¶¶ 271–74.

159. *Id.* at ¶ 291.

160. *Id.* at ¶ 252.

161. See, e.g., Al-Qaida Constitutional Charter, available at <http://www.ctc.usma.edu/wp-content/uploads/2013/10/Al-Qaida-Constitutional-Charter-Translation.pdf>; AL-QAIDA STRUCTURE AND BYLAWS 21, 35 <http://www.ctc.usma.edu/wp-content/uploads/2013/10/Al-Qa%E2%80%99ida%E2%80%99s-Structure-and-Bylaws-Translation1.pdf> (last visited Nov. 24, 2014).

162. J.M. Berger, *War on Error*, FOREIGN POL'Y, Feb. 5, 2014, at 2. See also 9/11 COMMISSION REPORT, *supra* note 92, at 67.

utilized ranks to ensure succession and continuity.¹⁶³ Al-Qaeda also developed specialized organs responsible for discrete functions or subject matter. Whereas the KLA's General Staff named an officer responsible for professionalizing the KLA and a spokesman, al-Qaeda established committees with specific jurisdiction over, *inter alia*, its political program, its military program, and its public relations.¹⁶⁴

Second, the ability to carry out operations in an organized manner evinces a group's capabilities for fighting as a coherent entity, as differentiated from riots or other chaotic, anarchic events. Here, the ICTY has looked to factors such as a group's ability to determine a unified military strategy or conduct large-scale military operations, capacity to control territory, capacity for operational units to coordinate actions, and effective dissemination of written and oral orders.¹⁶⁵ Al-Qaeda coordinated its military activities, deploying fighters to engage in specific operations¹⁶⁶—including the execution of global operations. Like the KLA in *Limaj* and the NLA in *Boškoski*,¹⁶⁷ al-Qaeda not only deployed its fighters—both within and outside Afghanistan—but also provided them with resources and materiel to undertake those operations. It disseminated instructions to operatives plotting terrorist attacks throughout the world. Al-Qaeda also maintained an overarching military strategy—to attack the United States—for at least five years, while simultaneously contributing fighters and resources to the Taliban's struggle against the Northern Alliance. Although al-Qaeda operated several training camps and enjoyed great freedom of movement within Afghanistan, it did not exert territorial control or administration. However, failure to control or administer territory is neither dispositive nor required as a criterion for non-international armed conflict generally.¹⁶⁸ Indeed, in Kosovo, “the KLA General Staff, also sometimes referred to in the evidence as general headquarters, did not have a consistent place of location. The KLA was forced to function as an underground organisation.”¹⁶⁹

Third, al-Qaeda demonstrated all the components considered part of logistical competency for the ICTY's purposes: the ability to recruit new members, provide training, organize the supply of weapons, and maintain

163. Sude, *supra* note 147, at 2.

164. See, e.g., AL-QAIDA STRUCTURE AND BYLAWS, *supra* note 162, at 35.

165. Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 200 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

166. Cf. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 108 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

167. Cf. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 107–108; Boškoski, Case No. IT-04-82-T, Judgment, ¶¶ 278–279, 281–282.

168. Additional Protocol II does require some territorial control, but Common Article 3 does not. Common Article 3, *supra* note 8 and Additional Protocol II, *supra* note 18. Cf. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 602, 622–23, 626–27 (Sept. 2, 1998); Prosecutor v. Sesay (RUF Case), Case No. SCSL-04-15-T, Judgment, ¶¶ 978–981 (Mar. 2, 2009).

169. Limaj, Case No. IT-03-66-T, Judgment, ¶.

communication between its headquarters and remote units.¹⁷⁰ It recruited new members from around the world. It put those recruits through various levels of training and heavily screened them before allowing them to join al-Qaeda. It also acquired weapons and provisioned its members with them. It dispatched fighters to serve with the Taliban on the front lines against the Northern Alliance, often in units that acted as a vanguard for Taliban fighters. It even dispatched members throughout the world to surveil potential terrorist targets, plan operations, and report those plans for approval by al-Qaeda's central authority.

The fourth *Boškoski* organization factor examines the armed group's ability to enforce compliance with Common Article 3. There is no doubt that al-Qaeda made no effort to adhere to Common Article 3's key precepts; rather, directly and repeatedly targeting civilians is its *modus operandi*. This failure, however, does not preclude the group from fulfilling this fourth factor. As the ICTY concluded in *Boškoski*:

[S]o long as the armed group possesses the organisational *ability* to comply with the obligations of international humanitarian law, even a pattern of [Common Article 3] violations would not necessarily suggest that the party did not possess the level of organisation required to be a party to an armed conflict.¹⁷¹

Fifth, a group's ability to negotiate political arrangements on behalf of its members with foreign countries or to negotiate and conclude cease-fires and other agreements are indicators of an organization's ability to speak with one voice.¹⁷² Although al-Qaeda did not enter into cease-fire agreements or peace accords, it did negotiate with the Taliban, for example, and engaged with representatives of the governments of Sudan,¹⁷³ Iran, and Iraq at different times. In the course of these engagements, al-Qaeda was able to establish refuge initially in Sudan and, although it lost that refuge, to negotiate its extrication from Sudan as an organization.¹⁷⁴ It then established itself in Afghanistan, where it negotiated various terms for its continued presence. Although it violated the terms of its agreement with the Taliban, this was apparently intentional, and done so on bin Laden's command, not as a result of insufficient control over an errant commander.¹⁷⁵

170. *Boškoski*, Case No. IT-04-82-T, Judgment, ¶.

171. *Id.* at ¶ 205.

172. *Id.* at ¶ 203.

173. 9/11 COMMISSION REPORT, *supra* note 92, at 57. After being invited to Sudan by Foreign Minister Hassan al-Turabi, bin Laden agreed to support Turabi in the then-ongoing civil war in South Sudan. *Id.*

174. *Id.* at 62–64. Note, however, that al-Qaeda lost significant resources to Sudanese expropriation after its flight from Sudan. *Id.* at 65.

175. *See id.* at 65; *See also id.* at 61 (describing al-Qaeda honoring an agreement with Turabi to cease supporting efforts targeting Saddam Hussein to improve Sudan-Iraq relations).

Al-Qaeda also developed and operated a unified media effort, another manifestation of its ability to speak with one voice. Like the KLA's issuance of communiqués to “inform the public of KLA activity, but . . . also used as propaganda . . . in order to boost KLA morale, raise KLA standing and encourage recruitment,”¹⁷⁶ highlighted in *Haradinaj*, al-Qaeda engaged in significant propaganda efforts designed to both inform the public and boost the group's international standing. By 2001, al-Qaeda's public relations effort had moved beyond merely faxing missives to London-based newspapers to producing propaganda and recruitment videos,¹⁷⁷ orchestrating press conferences, and even facilitating interviews with Western media like CNN or ABC.¹⁷⁸

Notwithstanding al-Qaeda's sufficient organization before and on September 11, 2001, the lack of sufficiently intense hostilities between it and the United States precluded the situation from meeting the threshold for a non-international armed conflict. Although one can argue effectively that situations of high intensity and low organization should be recognized as non-international armed conflicts,¹⁷⁹ the alternative argument is harder to sustain and produces problematic results. There are countless examples of highly organized and peaceful opposition movements, which frequently can quickly organize mass protests and other actions of civil disobedience.¹⁸⁰ However, suggesting that organization, even coupled with widespread non-violent activity in opposition to the government or perhaps isolated acts of violence, qualifies as an armed conflict would be inconsistent with the Commentary's conception of the armed conflict threshold. Unless and until such organized opposition involves some significant level of violence—violence that triggers a military response by the government utilizing the traditional tools and tactics of combat—it does not meet the test for armed conflict, under either the *Tadić* framework or a more flexible totality of the circumstances approach.¹⁸¹

176. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 88 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

177. See, e.g., 9/11 COMMISSION REPORT, *supra* note 92, at 191.

178. See, e.g., 9/11 COMMISSION REPORT, *supra* note 92, at 65, 70; BLAKE W. MOBLEY, TERRORISM AND COUNTERINTELLIGENCE: HOW TERRORISTS GROUPS ELUDE DETECTION 120-126 (2012); Rohan Gunaratna & Aviv Oreg, *Al Qaeda's Organizational Structure and Its Evolution*, 33 STUD. CONFL. & TERROR, 1043, 1063 (2010); Henry Schuster, *Al Qaeda's Media Strategy*, CNN (Jan. 30, 2006), http://www.cnn.com/2006/US/01/20/schuster.column/index.html?_s=PM:US.

179. Blank & Corn, *supra* note 15, at 1063.

180. See, e.g., *Argentina: Information on the Mothers of the Plaza de Mayo*, IMMIGRATION AND REFUGEE BD. OF CAN., (May 1, 1992), <http://www.unhcr.org/refworld/docid/3ae6abf940.html>; Kirit Radia, *Thousands To Protest Against Putin in Moscow in Final Demonstration Before Election*, ABC NEWS (Feb. 26, 2012), <http://abcnews.go.com/blogs/headlines/2012/02/thousands-to-protest-against-putin-in-moscow-in-final-demonstration-before-election/>; *Timeline: Egypt's Revolution*, AL JAZEERA, <http://www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html> (last updated Feb. 14, 2011) (Qatar).

181. See GC IV COMMENTARY, *supra* note 28, at 36 (noting that Common Article 3 conflicts are “armed conflicts, with armed forces on either side engaged in hostilities”).

Beginning in late September and early October 2001, however, United States and al-Qaeda forces engaged directly in hostilities with each other in numerous locations around Afghanistan. Frequent and regular clashes, use of extensive military units and assets, detention of enemy fighters—all the hallmarks of an armed conflict—were then present. At that time, the combination of increased intensity and al-Qaeda’s existing structural organization met the threshold for a non-international armed conflict according to LOAC’s traditional and commonly accepted framework.

2. A Non-State Group’s Attack Triggers a Non-International Armed Conflict

Although international jurisprudence and discourse uses the *Tadić* framework almost exclusively, it is not the only method by which one might delineate peace and war, and thus LOAC’s applicability to a given situation. One of the significant features of the traditional framework—whether the Commentary’s totality of the circumstances or the *Tadić* elements—for determining the existence of a non-international armed conflict is its focus on the exchange of hostilities between two opposing forces. An alternative approach might focus on the actions of just one of the parties to a putative armed conflict, essentially vesting one party with the ability to unilaterally trigger a non-international armed conflict and, therefore, the application of LOAC. A non-state actor’s actions vis-à-vis a state, for example, could determine the existence of a non-international armed conflict. This Section briefly examines a framework in which a non-state actor is able to unilaterally trigger the application of LOAC to a conflict with a state; the following section similarly explores the option of a state declaring war on a non-state group as the trigger for non-international armed conflict.

In Military Order No. 1 of November 13, 2001 establishing the military commissions, President Bush proclaimed that “[i]nternational terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict.”¹⁸² Notably absent from the President’s finding of an extant armed conflict with al-Qaeda was any reference to hostile actions taken by the United States against al-Qaeda, implying that al-Qaeda, a non-state actor, had unilaterally initiated an armed conflict with the United States. In this regard, Military Order No. 1 echoed statements made by the Bush Administration immediately following September 11 characterizing the attacks as “acts of war.”

If the 9/11 attacks initiated the United States-al-Qaeda conflict, then either those attacks were the capstone event in a chain of hostilities, sufficient to convert previously isolated and sporadic attacks into “protracted armed violence,” or the attacks themselves were sufficiently intense to initiate an armed conflict (and for a few weeks were the only feature of that

182. Military Order, *supra* note 11, at 831.

conflict). The former theory simply does not comport with the *Tadić* or totality of the circumstances framework.¹⁸³ Undoubtedly, the attacks were massive and caused greater casualties than any terrorist attack in history.¹⁸⁴ For that reason alone, many argue that the *Tadić* intensity factor was satisfied and an armed conflict initiated because of the scale of the attacks. But in the absence of any military action or reciprocal hostilities by the supposed adversary in the putative conflict, this argument actually boils down to a different theory altogether, one not part of the traditional framework. Identifying the 9/11 attacks as the start of the conflict thus rests, ultimately, on a theory that a non-state group's attack or action alone can trigger a non-international armed conflict.

Even though the 9/11 attacks seem to be a likely candidate for such a theory, looking at how this type of paradigm for non-international armed conflict recognition would operate demonstrates significant practical problems and undermines key foundational understandings at the heart of LOAC's framework. First, purely from a pragmatic perspective, one needs to consider whether *any* attack by a non-state group would then start a non-international armed conflict. The consequences of that option are self-evident and extraordinarily problematic: an outbreak of conflict and a spiraling of violence, in direct contravention to the central efforts of the United Nations and the international community to "save succeeding generations from the scourge of war."¹⁸⁵ If only some non-state group attacks trigger a non-international armed conflict, how would we determine which ones? One might consider the magnitude of the attack, the nature of the target or its victims, the types of weapons used, the nature of the non-state group itself, the location of the attack, or the location of the non-state group. In addition, one would need to decide whether any of these considerations were sufficient alone to trigger the conflict, or whether most or all were necessary in combination.

Interestingly, these are the very considerations highlighted in the Commentary and addressed in the *Tadić* analysis. The argument that the 9/11 attacks started the conflict really is simply a claim that that attacks were an exception to the overall framework, one that justified a different conclusion than what that analysis would normally provide. The exception, however, leads to an entirely new paradigm, one with significant conse-

183. Cf. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 37–40 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 84 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 620 (Sept. 2, 1998); Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶¶ 561–568 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 66–70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

184. Wm. Robert Johnston (compiled), *Worst Terrorist Strikes—Worldwide*, JOHNSTON ARCHIVES, <http://www.johnstonsarchive.net/terrorism/wrjp255i.html> (last updated Dec. 21, 2014).

185. U.N. Charter, pmbi.

quences for both the protection of individuals and for the integrity and continued effectiveness of the law itself.

Alternatively, one could rely wholly on the magnitude of the attack and apply LOAC to any situation in which a terrorist attack crosses Article 51's "armed attack" threshold. That is, any attack by a non-state actor sufficient to trigger a state's right to self-defense could trigger a non-international armed conflict and the application of LOAC.¹⁸⁶ Although attractive in its simplicity, this approach is not *lex lata* and may also lead to the impermissible conflation of *jus ad bellum* and *jus in bello*,¹⁸⁷ something that is already occurring in the context of so-called self-defense targeting.¹⁸⁸

If a non-state group's attack, without more, can start a non-international armed conflict, then this direct parallel to state action and international armed conflict would essentially put non-state groups on an equal footing with states. International armed conflict includes "all cases of declared war or of any other armed conflict which may arise between two or more [states] even if the state of war is not recognized by one of them."¹⁸⁹ Any resort to armed force by one state against another or between two or more states is thus an international armed conflict—but this framework only applies to acts by states and conflict between states.¹⁹⁰ Accepting the notion that a non-state group can unilaterally start a conflict, irrespective of the opposing force's response, means accepting a role for non-state groups akin to that of states: when a state declares war on another state or

186. See Claus Kieß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SEC. L. 245, 258–59 (2010) (discussing the so-called "congruity model," under which the threshold for self-defense against a non-state group's attack and the threshold for the application of the law of non-international armed conflict are identical; and contrasting it with the "discrepancy model," in which "one can also conceive of a lower threshold for the right to self-defense against a non-State armed attack compared with the threshold for the applicability of the law of non-international armed conflict").

187. Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgement, ¶¶ 529–30, 534 (May 28, 2008) (noting that the "basic distinction and historical separation between *jus ad bellum* and *jus in bello* [is] a bedrock principle" of the LOAC); OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (Jun. 13, 2000) ¶¶ 30-34, reprinted in (2000) 39 I.L.M. 1257 (2000).

188. Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello*, 88 INT'L LAW STUD. 57 (2012); Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655 (2012) (generally discussing targeting strikes); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010).

189. Common Article 2, *supra* note 5.

190. E.g., Prosecutor v. Duch, Case No. ECCC 001, Judgment, ¶ 414 ("*De facto* hostilities between States may be sufficient to [trigger an IAC], where these [hostilities] are conducted through the States' respective armed forces."); GC III Commentary, *supra* note 22, at 23.

employs its armed forces against another state, an armed conflict exists and LOAC applies.

But a legal regime that recognizes such authority for non-state actors presents obvious challenges. First, as described above, it extends to non-state groups a characteristic otherwise reserved to states and, as such, a sovereign-like quality, elevating them in the international arena. Historically, states have been understandably averse to granting non-state actors any of the trappings of sovereignty.¹⁹¹ For example, states alone are competent to declare war; purported declarations of war by non-state actors are illegitimate and without effect in international law.¹⁹² Some limited recognition that non-state actors are able to act like states in discrete circumstances is not without precedent, however. Although the notion that non-state actors could carry out “armed attacks” for purposes of triggering a state’s self-defense rights under Article 51 of the U.N. Charter was highly questionable before September 11, 2001,¹⁹³ the proposition has become widely accepted if not settled in the years since the 9/11 attacks.¹⁹⁴ The question of whether a non-state group can launch an armed attack goes solely to the state’s authority to act in self-defense, however, and does not extend to the application of LOAC, the rights and duties of parties under LOAC, or any other similar considerations. Notwithstanding this limited recognition that non-state actors can affect the international system in this one erstwhile state-like manner, vesting non-state actors

191. See Dawn Steinhoff, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, 45 *TEX. INT’L L.J.* 297, 308 (2009).

192. 2 L. OPPENHEIM, *INTERNATIONAL LAW* §94 (2d ed. 1912); see also McDonald, *supra* note 114, at 298 (“It seems impossible for the declarations of war issued by Al Qaeda in 1996 and 1998 to have brought a state of war into being, since the obligation to declare war in the Third Hague Convention and to bring into existence a state of war merely by means of declaration belongs only to states.”). Indeed, a non-state actor’s perception of whether it is at war with a state is not even a factor to consider in determining the existence of a non-international armed conflict. See, e.g., Kevin Jon Heller, *Judge Pohl: The U.S. and AQ were Engaged in Hostilities in 1775*, *OPINIO JURIS* (Jan. 16, 2013, 7:57 PM), <http://opiniojuris.org/2013/01/16/judge-pohl-the-us-and-aq-were-engaged-in-hostilities-in-1775/> (“Whether a non-state actor believes it is ‘at war’ with a state is irrelevant to that determination; it is not ‘a factor among many.’”).

193. E.g., Antonio Cassese, *Terrorism is Also Disrupting Some Critical Legal Categories of International Law*, 12 *EUR. J. INT’L L.* 993, 997 (2001).

194. See, e.g., YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 227-30 (5th ed. 2011); Christopher Greenwood, *International Law and the Preemptive Use of Force: Afghanistan, al-Qaeda, and Iraq*, 4 *SAN DIEGO INT’L L. J.* 7, 17 (2003) (discussing the effects of attacks made by non-State actors); Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 109, 126 (Michael N. Schmitt ed., 2009) (Vol. 85, U.S. Naval War College International Law Studies) (“While this area of the law remains somewhat uncertain, the dominant trend in contemporary interstate relations seems to favor the view that States accept or at least tolerate acts of self-defense against a non-State actor.”); Raphaël Van Steenberghe, *Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?*, 23 *LEIDEN J. INT’L L.* 183, 184 (2010) (concluding that recent State practice suggests that attacks committed by non-State actors alone constitute armed attacks under Article 51).

with a unilateral ability to trigger LOAC—and all the concomitant authorities it entails—raises the sort of legitimating concerns that led the drafters of the 1949 Geneva Conventions to employ the term “armed conflict” rather than “war” in the first place,¹⁹⁵ and drove states to reject any formulation for non-international armed conflict that suggested legitimacy for non-state groups.¹⁹⁶

Second, this unilateral framework could expand LOAC’s application to situations well below the threshold for non-international armed conflict and thus wholly alien to international regulation through LOAC. Internal disturbances, riots, or acts of banditry—the very situations the drafters of the Geneva Convention sought to exclude from LOAC regulation and states seek to address through their regular law enforcement apparatus¹⁹⁷—could easily be subject to LOAC under a framework that focuses only on whether a non-state actor has employed force against a state. Imagine if a single attack by a disgruntled group launched a non-international armed conflict: rather than the comparably restrictive law enforcement measures permissible under human rights law, the state could simply call on the military and use lethal force as a first resort. States could likewise institute indefinite detention without charge for as long as the armed conflict continues, or employ the manifold other coercive measures which are not permitted outside of armed conflict. Interestingly, the non-lethal measures normally used to quell internal disturbances or riots, such as tear gas or other riot control agents, would suddenly be unavailable to restrain post-attack disturbances and restore order in a less forceful manner because such tools are prohibited in armed conflict.¹⁹⁸ At the same time, no state is likely to welcome the suggestion that, as a result of a domestic group’s single violent attack, it is in an armed conflict—a situation traditionally viewed by states as a sign of loss of sovereignty and control over law and security.

Indeed, it is difficult to envision how this framework could be acceptable to states (other than perhaps the state in the immediate situation that wants permissive parameters for responding to an attack and taking otherwise prohibited action against a potentially threatening group), judicial bodies or others in the international community, most notably human rights bodies. Such concerns may appear less significant to states when the attack comes from outside its borders, eliminating or certainly diminishing the responding state’s concerns about sovereign control over law and order and other internal matters. But any legal regime allowing a one-shot trigger for external or cross-border attacks will quickly bleed over to domestic attacks and disturbances. Furthermore, the very same concerns about the loss of protection for individual rights remain equally valid

195. GC IV COMMENTARY, *supra* note 28, at 20–21.

196. See GC III COMMENTARY, *supra* note 22, at 32, 43.

197. GC IV COMMENTARY, *supra* note 28, at 36.

198. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 263–65 (2005).

whether the purported non-international armed conflict is internal or cross-border.

In addition, from a practical perspective, it may not be clear that the increased authority found in LOAC offers added practical utility in the face of non-state actors who, like al-Qaeda until the late 1990s, launch infrequent terrorist attacks against a state that draw comparatively little attention. For example, the U.S. government ties al-Qaeda to several relatively low-intensity attacks in the early 1990s. At the time of these attacks, there were perhaps a few hundred individuals associated with al-Qaeda; the organization was distributed and decentralized; and it did not control any territory—it did not even control all the camps in which its members then trained, nor were these camps used exclusively to train prospective al-Qaeda members.¹⁹⁹ Under such circumstances, a state would likely rely heavily, if not exclusively, on robust law enforcement measures, including intelligence sharing, rather than wartime authorities. Employing lethal force as a first resort against al-Qaeda would have been extraordinarily difficult, for example—indeed, the United States had a hard time identifying al-Qaeda-linked targets to strike even in the late 1990s, when al-Qaeda was substantially larger and more developed.²⁰⁰

This unilateral framework also presents the option of a non-state group triggering a non-international armed conflict by declaring war on a state. Apart from the lack of any authority for such a possibility in the international legal system,²⁰¹ this scenario may lead to the bizarre result of a state being in a non-international armed conflict without the state's knowledge. In fact, al-Qaeda declared war on the United States at least three times: in 1992, 1996, and 1998.²⁰² It did so multiple times in part because its earlier declarations went unnoticed or unheeded by the United States and other objects of the declarations. Suggesting that such pronouncements by a non-state group nonetheless created an armed conflict—a situation with specific meaning, parameters and authorities—is absurd. If al-Qaeda were able to trigger a non-international armed conflict by declaring war on the United States, the United States would have been unwittingly subject to the rights and duties found in LOAC from 1992 onward. That result is contrary to the role LOAC plays in regulating the exe-

199. Throughout the 1990s, Afghanistan hosted camps operated by manifold terrorist organizations. Bin Laden operated some of these camps, provided financial support for others, and had little or no affiliation with still other camps.

200. *E.g.*, 9/11 COMMISSION REPORT, *supra* note 92, at 126–43 (highlighting difficulties in implementing cruise missile and “boots on the ground” initiatives against al Qaeda).

201. McDonald, *supra* note 114, at 298 (“It seems impossible for the declarations of war issued by Al Qaeda in 1996 and 1998 to have brought a state of war into being, since the obligation to declare war in the Third Hague Convention and to bring into existence a state of war merely by means of declaration belongs only to states.”).

202. 9/11 COMMISSION REPORT, *supra* note 92, at 48 (summarizing a “long series of [bin Laden’s] public and private call since 1992 . . . singl[ing] out the United States for attack); *Id.* at 59 (describing the 1992 “fatwa calling for jihad against the Western ‘occupation’ of Islamic lands”); *Id.* at 66 (noting the 1998 declaration of war).

duction of military operations and in holding parties to an armed conflict accountable.

3. A State Can Unilaterally Trigger Non-International Armed Conflict By Word or By Deed

If unilateral action is a possible trigger for non-international armed conflict, then one might also look exclusively to state action vis-a-vis or state pronouncements regarding a non-state group. Many thus believe that the United States declared war on al-Qaeda after the 9/11 attacks.²⁰³ Using this as the governing conflict recognition regime would allow states to impose non-international armed conflicts on non-state actors, irrespective of the actions taken by those non-state actors. States would thus be able to choose to invoke LOAC authorities essentially as a matter of convenience, inviting LOAC application to become ends-driven, eroding its humanitarian protections and undermining the critical compliance and accountability functions it performs.

Under the prevailing *Tadić* framework for identifying the existence of an armed conflict, objective ascertainable criteria related to the actions and character of both parties involved determine whether and when LOAC applies. These criteria include the manner in which states respond to the threat posed by non-state actors, such as whether a state uses its armed forces against the non-state actor and whether a state describes itself as in a war or armed conflict.²⁰⁴ Internal violence is fundamentally a threat to the government's authority; therefore, analyzing how the government responds to that violence must be a major component of any objective determination.²⁰⁵ At the same time, the nature of the government's actions cannot be the exclusive component, for the very reason that the Conventions substituted the term armed conflict for war. Any trigger for the law that rests solely on governmental rhetoric or action will lose the modern paradigm's essential objectivity.²⁰⁶

203. FRITS KALSHOVEN & LIESBETH ZEGVELD, INT'L COMM. OF THE RED CROSS, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 220 (4th ed. 2011); Kenneth Roth, *The Law of War in the War on Terror: Washington's Abuse of "Enemy Combatants,"* 83 FOREIGN AFFAIRS, Jan.-Feb. 2004 at 1.

204. Some of the Commentary's convenient criteria focus precisely on this question of the state's perception and legal response: "(3)(a) That the de jure government has recognized the insurgents as belligerents; (b) that it has claimed for itself the rights of a belligerent; (c) that it has accorded the insurgents recognition as belligerents for purposes 'only' of the present Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression." GC IV COMMENTARY, *supra* note 28, at 35.

205. *Id.* (listing one relevant criterion as "[t]hat the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory").

206. *Id.* at 20 (noting that the Convention would apply even in the absence of a formal declaration of war in the presence of "de facto hostilities").

Importantly, therefore, neither of these criteria is dispositive. A state's choice to characterize a situation as an armed conflict or not cannot be determinative because LOAC requires an objective analysis. Although the problem of subjective conflict characterization traditionally arises when states refuse to recognize the existence of an armed conflict,²⁰⁷ it holds equal force in the opposite situation, as seen in the extensive pushback to the United States' unilateral conception of a global "war on terror" and assertion of LOAC authority.²⁰⁸ Similarly, although a state's actual use of military forces in fact is an important factor, it is not determinative in and of itself. States often use military personnel and units in support of law enforcement and other peacetime operations, and many states maintain permanent national military police or gendarmerie.²⁰⁹ Thus, "[e]ven if the armed forces are called out to assist the police, this may not be enough to convert the situation into an armed conflict."²¹⁰ An objective evaluation of the actions and character of both parties stays true to LOAC's core purposes, limits the ability of either party to invoke LOAC authorities strategically, and works to prevent either party from relying on LOAC to justify its actions in situations in which LOAC does not apply.

It is here that the distinctions between, and purposes of, the international armed conflict and non-international armed conflict triggers are critical: unlike international armed conflict, where a low threshold is essential to ensure protection for individuals, "[t]he evidence of a [] [non-international armed conflict] must . . . be stronger in order to prevent premature derivation [sic] from normal human rights protection."²¹¹ A framework resting solely on a state's declaration of war or other unilateral action eviscerates these core purposes by removing the limits and the accountability found in LOAC. Essentially, such a regime would allow states to use lethal force as a first resort against non-state actors—regardless of

207. For example, Russia regularly resisted characterization of the situation in Chechnya as an armed conflict, instead describing it as "a tightly focused counterterrorism operation," HUMAN RIGHTS WATCH, IN THE NAME OF COUNTERTERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE 18-19 (Mar. 2003), even though the Russian Constitutional Court had already ruled that the situation was a non-international armed conflict governed by Additional Protocol II. See Decision of the Constitutional Court of the Russian Federation on the Constitutionality of Presidential Decrees (July 31, 1995), available at <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF%281996%29001-e>. See also A.P.V. Rogers, *Unequal Combat and the Law of War*, 7 Y.B. INT'L HUMAN L. 3, 8 (2007) ("[O]nce heavy armour, artillery and ground attack aircraft had been deployed in action, it was clear that the intensity threshold had been crossed and that common Article 3 applied.").

208. See, e.g., ILA REPORT, *supra* note 40, at 33 (discussing the chances of human rights violations when states assert belligerent powers outside the context of an armed conflict).

209. Gendarmeries are paramilitary law enforcement units that retain a mix of military and police functions. Notable examples include the Italian *Carabinieri*, the Turkish *Jandarma*, and the French *Gendarmerie Nationale*. While these states organize these forces differently, the melding of traditional police work with the attributes and duties of military forces is the common thread.

210. Rogers, *supra* note 207, at 8.

211. Paulus, *supra* note 60, at 30.

the character of the non-state actor in question—as a mechanism to trigger a conflict and all the authorities of LOAC that come along with it, inviting abuse and undermining the humanitarian principles that underlie modern LOAC.²¹²

Consider, for example, riots or internal disturbances—situations quintessentially regulated by domestic law and international human rights law, not LOAC.²¹³ In those situations, force may only be used as a last resort²¹⁴ and the law does not provide for the incidental loss of civilian life.²¹⁵ As the Special Rapporteur for Extrajudicial Killings noted, under international human rights law, “the intentional, premeditated killing of an individual would generally be unlawful. Where intentional killing is the only way to protect against an imminent threat to life, it may be used. This could be the case, for example, during some hostage situations or in response to a truly imminent threat.”²¹⁶ In stark contrast, LOAC authorizes the use of force as a first resort, as constrained and regulated by the principles of distinction, proportionality, and precautions.²¹⁷ Specifically, during armed conflict, “it is often permissible to deliberately kill large numbers of humans . . . even though such an act would be considered mass murder in times of peace. . . .”²¹⁸

A state’s declaration of war against another state alters the relationship between the two states, from a state of peace to a state of war, a

212. Laurie R. Blank, *The Consequences of a “War” Paradigm for Counterterrorism: What Impact on Basic Rights and Values?*, 46 GA. L. REV. 719, 726–27 (2012); see also Krefß, *supra* note 186, at 260 (“[I]n light of the (perceived) threat posed by violent non-State actors, States seem to be more interested in availing themselves of the wider powers they can derive from the application of the law of non-international armed conflict (compared with international human rights law) than they are concerned by the restraining effect of the ensuing obligations.”).

213. LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 37 n. 22 (2002). The Rodney King riots in Los Angeles in 1992 are a useful example “of violence on a large scale, but in a context which was clearly not an internal armed conflict due to the absence of organisation on the part of the rioters, and their lack of any political objective.” *Id.* at 37 n.22.

214. Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT’L HUMANITARIAN LEGAL STUD. 52, 74–77 (2010).

215. See Blank, *supra* note 212, at 727. Cf. Robin Geiß & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 INT’L REV. RED CROSS 11, 24 n.69 (2011) (noting that although “the justification of so-called collateral damage . . . is not illegal *per se* under international human rights law, [it] would be far more difficult than it is under [LOAC].”).

216. Special Rapporteur for Extrajudicial Killings, *supra* note 128, at ¶ 25.

217. The principle of distinction requires parties to an armed conflict to distinguish between combatants (or fighters) and civilians and target only the former (the same rule applies to the distinction between military objects and civilian objects). AP I, *supra* note 7, art. 48. The principle of proportionality mandates that commanders refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained. *Id.* art. 51(5)(b). The principle of precautions requires parties to take extensive precautions before launching attacks and to take precautions to protect their own civilians and civilian areas from the effects of attacks by the other party, *Id.* art. 57–58.

218. Brooks, *supra* note 10, at 702.

condition with specific parameters in the international legal system.²¹⁹ It also triggers the law of neutrality, which governs the rights and responsibilities of third states in relation to the warring parties.²²⁰ Such relationships and frameworks do not exist in the context of state versus non-state interactions, however, making a state's declaration of war against a non-state group simply a tool to harness the permissive authorities of LOAC and side-step other international law protections essential to the protection of individuals and the international order.²²¹ Consider three examples that illustrate the dangers inherent in a paradigm that leaves armed conflict recognition to the whim of state rhetoric and pronouncements.

First, imagine a state that declares war on a domestic opposition group in the absence of or in advance of any violent action by that group. Whereas the state's domestic law likely protects the group members from deprivation of or interference with basic human rights, including the right to life, the right not to be arbitrarily detained, freedom of expression, and many others, as soon as the state declares war, it can target members of the group as a first resort based on their status and detain them without charge until the end of the conflict (a timeframe that also will be solely at the discretion of the state in such a paradigm). This result is wholly at odds with the fundamental premises of both LOAC and international human rights law and eviscerates the protections both regimes hold dear.

Now, imagine the same scenario but the group is located in another country. If a state can start a non-international armed conflict simply by declaring war on the group, without the now-required intensity of violence serving as the key objective indicator of such a conflict, the constraints of the international law of self-defense will be seriously weakened. International law prohibits the use of force by one state in the territory of another with three exceptions: (1) consent of the territorial state, (2) operations authorized by the U.N. Security Council under Chapter VII, or (3) self-defense. The last of these depends on an armed attack triggering that right of self-defense; if a state can justify the use of force in another state by declaring war without any such armed attack triggering self-defense, sovereignty and the international legal framework restraining the use of force across borders thus becomes another victim alongside the drastically diminished individual rights for both members of the group and those facing incidental harm.

Finally, if a state can unilaterally declare the existence of a non-international armed conflict, counterterrorism will simply be subsumed into war. The targeted killing of Anwar al-Awlaki illustrates this consequence, as well as the concerns raised above. Al-Awlaki, a U.S. citizen who was a radical English language preacher and member of al-Qaeda in the Arabian

219. DINSTEN, *supra* note 194, at 9–10.

220. *Id.* at 25.

221. Enactment of a domestic statute authorizing the use of military force—such as the Authorization for the Use of Military Force Against Terrorists, Pub. L. No. 107-40, 115 Stat. 224 (2001)—does, of course, have domestic law effect, but does not change the international law analysis of whether there is a conflict.

Peninsula (“AQAP”), was killed by a U.S. drone strike in Yemen on September 30, 2011, along with three other individuals.²²² The United States justified the strike as either an exercise of self-defense or as part of its armed conflict with al-Qaeda, by asserting that al-Awlaki was an operational commander who was responsible for AQAP’s efforts to strike the United States.²²³ Al-Awlaki was neither prosecuted nor convicted in any U.S. court.

Debates over the legality of al-Awlaki’s killing have focused on whether al-Awlaki was a member of an organized armed group engaged in an armed conflict with the United States or whether the United States had a viable claim of self-defense in the face of the imminent threat al-Awlaki posed.²²⁴ If the former can be shown, there is then a strong argument that the strike was a lawful attack on an enemy operative in the course of an armed conflict. If, however, there was no armed conflict involving the United States and in which al-Awlaki was participating, then the strike could only be lawful within the much more narrowly constrained parameters of the law of self-defense.²²⁵

If, however, international law allows a state declaration of war against a non-state group to trigger a non-international armed conflict, without any of the other indicia of such conflict, then neither of these considerations would impact the legality of a strike like that on al-Awlaki. Rather, as soon as the state declares a war, the strike would be unambiguously lawful—whether or not an armed conflict involving al-Awlaki actually and

222. Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011; New America, *Drone Wars: Yemen, Friday, September 30, 2011*, INTERNATIONAL SECURITY, <http://securitydata.newamerica.net/drones/yemen/010-2011> (last visited Nov. 24, 2014).

223. U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR THE ATTORNEY GENERAL: APPLICABILITY OF FEDERAL CRIMINAL LAWS AND THE CONSTITUTION TO CONTEMPLATED LETHAL OPERATIONS AGAINST SHAYKH ANWAR AL-AULAQI, at 20-21 (July 16, 2010). See generally DOJ White Paper on Targeted Killing, *supra* note 123 (discussing the general framework for targeted killings of U.S. citizens engaged in terrorist activities against the United States).

224. Blank, *supra* note 188, at 1662, 1669; Beth Van Schaack, *The Killing of Osama Bin Laden & Anwar al-Aulaqi: Uncharted Legal Territory*, 14 Y.B. INT’L HUM. L. 1, 2, 13, 19(2012); Benjamin R. Farley, *Targeting Anwar al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killings*, 2 AM. U. NAT’L SEC. L. BRIEF 57, 57–58 (2011); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT’L HUM. L. 1, 4 (2010). The United States government also addressed the legal justifications and issues extensively in a series of public speeches by high-ranking national security officials and by releasing various legal documents related to the strike. Eric Holder, U.S. Attorney Gen., Address at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Harold Koh, Legal Adviser, U.S. Dep’t of State, Keynote Address at the Annual Meeting of the American Society of International Law: the Obama Administration and International Law (Mar. 25, 2010) available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

225. See, e.g., Blank, *supra* note 188. Notably, the United States did not notify the U.N. Security Council of the strike targeting al-Awlaki as required by Article 51 for a lawful invocation of self-defense.

objectively existed prior to the strike. Perhaps even more problematic, this methodology would undermine the *jus ad bellum* framework because once the declaration of war created an armed conflict, many would argue that the existence of that conflict provides sufficient justification to use force across borders, even in the absence of an armed attack or any other *jus ad bellum* justification. Allowing unilateral state action to trigger a non-international armed conflict leads to the same consequence: even if there were no armed conflict before the strike, the strike itself would trigger an armed conflict and therefore would always be lawful under LOAC (assuming targeting rules are followed and lawful weapons are used).²²⁶ The logical conclusion of a legal paradigm in which a state's pronouncement or action unilaterally triggers an armed conflict, and therefore LOAC authorities, is the emasculation of international human rights protections for peaceful dissidents, suspected terrorists, and any other persons in the vicinity of the state's use of force.

C. Matching Legal Analysis with Operational Realities

Applying the prevailing armed conflict identification regimes suggests that the conflict between the United States and al-Qaeda did not start until sometime after the United States responded to the 9/11 attacks with military force in Afghanistan, whether in late September with the entry of Special Forces to fight alongside the Northern Alliance or in early October 2001 with the initiation of the bombing campaign. The start of the bombing campaign on October 7, 2001 certainly initiated an international armed conflict between the United States and Afghanistan. One could also argue that the international armed conflict began when U.S. forces began fighting alongside the Northern Alliance against the Taliban government of Afghanistan in late September, internationalizing the existing non-international armed conflict between the Taliban and the Northern Alliance (or perhaps creating two parallel conflicts).²²⁷ The traditional approach to identifying the existence of a non-international armed conflict suggests that the conflict between the United States and al-Qaeda also began around the same time, when U.S. forces and al-Qaeda forces began to engage directly in hostilities against each other. Because non-international armed conflict does not exist until the situation meets the requisite threshold—unlike international armed conflict, which begins with a single intentional use of armed force by one state against another—the 9/11 attack itself could not trigger or constitute a non-international armed conflict without U.S. action and reciprocal hostilities between the two parties.

226. Note that there is an extensive debate in the United States over whether LOAC governs the implementation of a strike launched in self-defense—i.e., outside of armed conflict. See Blank, *supra* note 188, at 1680. But this debate does not suggest that the launching of a strike in self-defense against a non-state group actually *is* a non-international armed conflict.

227. Yoram Dinstein, *Concluding Remarks on Non-international Armed Conflict*, 88 INT'L L. STUD. SER. 399, 400, 414–15 (2012).

Although an international law analysis demonstrates that the conflict between the United States and al-Qaeda could not have started before or even on 9/11—but rather only after the United States began to take military action in Afghanistan against al-Qaeda units and operatives—a broader operational analysis raises additional questions that demonstrate the complexity of the entire inquiry. The operational considerations explored in this Section reinforce the need to ensure that law remains rooted in and connected to pragmatic realities. Effective implementation of LOAC depends on the clarity of the legal principles, their application during the heat of battle, and their credible post hoc application in investigations and prosecutions. Commanders and their troops can best adhere to the law and carry out its central tenets when the law, and the rights and obligations it imposes, are predictable and operationally logical. This same need for operational clarity applies to the identification of conflict altogether—if there is uncertainty about whether a particular situation is even an armed conflict, then operational clarity will be obscured and diminished.

1. A Threat-Driven Paradigm

To explore how the above analysis regarding the start of the conflict with al-Qaeda interacts with the operational realities of conflict and military operations, it is useful to highlight a primary factor in strategic and military decision making: threat. The threat posed by an enemy, by an attack or imminent attack, and what is required to disable, degrade, and defeat that threat is the underlying framework for military planning and action. Thus, “[a]rmed 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.”²²⁸ A state’s first obligation is to protect its people from attack; doing so will always require an assessment of likely threats and a determination of the action needed to respond to or deter such threats. To this end:

[n]ational 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 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. . . . [T]he nature of the threat becomes the dominant driving force in this strategic analysis.²²⁹

228. Geoffrey S. Corn, *Geography of Armed Conflict: Why it is a Mistake to Fish for the Red Herring*, 89 INT’L L. STUD. 77, 82 (2013).

229. *Id.* at 88–89.

Understanding this framework for state action is essential to examining the appropriate framework—and any ramifications from such framework—for analyzing non-international armed conflict recognition. Although the legal rules and parameters play a critical role in setting the boundaries for lawful state action in response to such a threat, international law in a vacuum will not drive state behavior.²³⁰

A threat in this context can take many different forms. It could be an actual attack, or the threat of a future attack, or similar danger posed to the nation. It could be terrorist in nature, or linked to a separatist group or other insurgency, or be the direct result of the actions of another sovereign state. It is also important to distinguish between strategic threats, which can result in “significant geopolitical policy shift[s]” if successful, and tactical threats, which can result in death and destruction if successfully carried out, but not a broader policy shift.²³¹ In an environment where states are often “forced to act quickly to respond to twenty-first century escalation of attacks and meet emerging threats,”²³² the nature of threats, particularly terrorist threats, can have a substantial impact on both the application of relevant legal frameworks and the coordination of such frameworks with strategic decision making.

Here, it is important to remember that, as a set of parameters guiding and governing lawful action during conflict, LOAC is not only a framework for accountability for legal violations. LOAC provides rules and guiding principles for lawful and effective military action during armed conflict. At the same time, LOAC does not apply in non-conflict situations. Given that states respond to threats as needed, in accordance with strategic and tactical assessments, a system where the law and its triggers for applicability are divorced from operational realities can be problematic. When a state faces a threat to which it needs to respond in order to protect its citizens, ensure its borders, or preserve its sovereignty, for example, the difference in the relevant legal regimes that could govern that response is dramatic, as noted above, including the parameters for the use of force and detention authority.²³³

230. Indeed, the opposite is true. State practice is integral for the evolution of customary international law. I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115, 119–20 (1957).

231. Fred Burton and Scott Stewart, *Al Qaeda and the Strategic Threat to the U.S. Homeland*, SECURITY WEEKLY, July 25, 2007, available at http://www.stratfor.com/al_qaeda_and_strategic_threat_u_s_homeland#axzz3A8zQ34BM.

232. Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429, 429 (2010).

233. As explained above, during armed conflict, LOAC authorizes the use of lethal force as first resort against enemy persons and objects within the parameters of the armed conflict. Corn, *supra* note 4 at 1352–53. Outside of armed conflict, human rights law authorizes the use of force only as a last resort on the basis of an individualized threat determination and has no conception of incidental casualties or collateral damage. Corn, *supra* note 219 at 74–75. LOAC also provides, based on treaty provisions and the fundamental principle of military necessity, for the detention without charge of enemy fighters and civilians posing imperative security risks. GC III, *supra* note 5, art. 4; GC IV, *supra* note 5, arts. 42, 78. Outside of armed conflict, individuals can only be detained in accordance with the domestic

The challenge of matching operational realities to legal analyses is significant in the context of the triggering threshold for non-international armed conflict. Based on the conclusion reached above that the non-international armed conflict between the United States and al-Qaeda could not have started until sometime after the United States began to take military action against the Taliban and al-Qaeda in Afghanistan in late September or early October 2001, human rights law would have governed any action the United States took on September 11 to respond to the attacks, deter further attacks, and apprehend any remaining perpetrators. This conclusion may make sense analytically from a legal perspective, but putting it into practice operationally raises questions about how the United States would determine the appropriate action—and the limits on that action—it could take. For example, based on the determination that the situation at 10 am on September 11 could not yet be a non-international armed conflict, one would question whether the United States could have shot down any aircraft in the skies over the United States once U.S. airspace was closed,²³⁴ on the belief that any such aircraft was declared hostile in a wartime paradigm.²³⁵ Likewise, it is questionable whether the United States—if it knew that day that al-Qaeda perpetrated the attack and if it were able to identify individuals as members of al-Qaeda—could target such individuals with lethal force as a first resort, based on their status as members of a force declared hostile during a conflict. It is similarly questionable whether the United States could launch attacks likely to cause collateral damage among civilians. And yet the strategic, operational and tactical determinations made at the time may well have led to those decisions as the measures necessary to respond to the immediate and continuing threat. To be sure, the United States could take action in self-defense against individuals, planes or other targets in order to repel further attacks, but the authority for such action would be more restrictive than that found in LOAC. If one assumes that “threat drives strategy, and strategy drives the existence of armed conflict,”²³⁶ then one would likely conclude that the nature of the threat posed on 9/11 was sufficient to trigger a non-international armed conflict and the entire conflict recognition determination on that date would change. But not all threats are automatically an armed conflict, nor do all threats result in an armed conflict—that is the message of the Commentary and *Tadić* and the entire non-international armed conflict recognition paradigm developed over the past sixty-five years.

criminal justice system or in administrative detention, based on individualized threat determinations and where specific statutory authority exists.

234. 9/11 COMMISSION REPORT, *supra* note 92, at 37 (describing that by 10:25 am on September 11, 2001, the President had authorized the military to shoot down commercial aircraft); *id.* at 326 (explaining that all “nonemergency civilian aircraft” had been grounded).

235. This is a different question from whether the United States could have shot down an aircraft believed to pose an imminent threat at that moment, of course, which highlights the difference between the law enforcement and LOAC regimes.

236. Corn, *supra* note 228, at 106.

2. External vs. Internal Non-International Armed Conflict

This notion of state response to threat as the driving force for state action lies at the heart of the “story” of non-international armed conflict recognition. As the “conflict recognition story” proceeds, a state faces internal disturbances or other domestic unrest, responds with ordinary law enforcement measures to restore and maintain public order and security, the unrest increases and at some point the military is called upon to counter the continued threat from the uprising. As clashes between the non-state forces and the military continue and develop in degree and frequency, we reach the threshold of non-international armed conflict. This is the classic story of how a non-international armed conflict comes into being, as told in the Commentary and through the *Tadić* analysis and its progeny. But does this story hold true for any and all varieties of non-international armed conflict?

Although Common Article 3 uses the term “non-international armed conflict,” at the time the Geneva Conventions were drafted, a more accurate descriptive term might have been “internal armed conflict.” The conflicts into which the drafters of the Geneva Conventions sought to inject some humanitarian norms and some regulation were most often understood as conflicts between a government and a domestic uprising.²³⁷ Interestingly, although this may have been the primary or only construct in the minds of the drafters and the state delegates, the actual language of Common Article 3 is not limited to such intra-state conflicts, but rather encompasses any conflict “not of an international character.” The United States Supreme Court interpreted that phrase to mean any conflict that did not satisfy the requirements for an international armed conflict.²³⁸

Indeed, in the years since 9/11, the idea of an external non-international armed conflict—a conflict between a state and a non-state group occurring outside that state and in the territory of one or more other states—has become significantly more prevalent. The United States and its coalition partners in the International Security Assistance Force in Afghanistan are engaged in a non-international armed conflict in Afghanistan.²³⁹ Many considered Israel’s 2006 conflict with Hezbollah to be a non-international armed conflict.²⁴⁰ The U.S. conflict with al-Qaeda is another type of non-international armed conflict occurring outside the state’s territory, with some arguing that it is occurring primarily in Afghanistan and the border regions of Pakistan,²⁴¹ some suggesting that it is a global con-

237. See GC IV COMMENTARY, *supra* note 28, at 26–27.

238. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006).

239. Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 INT’L REV. RED CROSS 47, 51 (2011).

240. See Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INT’L REV. RED CROSS 95, 112 (2009).

241. See, e.g., Robert P. Barnidge, Jr., *A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, 30 B. U. INT’L L.J. 409, 436–38 (2012).

flict,²⁴² and others averring that it is in fact a series of non-international armed conflicts based on the situation in any particular country, such as Yemen.²⁴³

The law applicable to these different types of non-international armed conflict is the same: Common Article 3 of the Geneva Conventions and all customary law applicable to non-international armed conflict. In the conflicts where the territorial state is a party to the conflict, the methodology used for conflict recognition is also the same from one conflict to another—whether one prefers the *Tadić* elements test or a totality of the circumstances approach, one can use that same approach across the board and reach a fairly consistent set of conclusions about conflict recognition and LOAC's trigger. Thus, in Afghanistan after 2002 or in Yemen subsequently, the description of United States involvement in a non-international armed conflict generally rests on the fact that the host state is engaged in a non-international armed conflict and the United States is fighting alongside the host state.²⁴⁴ In such situations, one can use the analysis set forth in Part I above to assess the nature of the parties who are fighting, the level and intensity of the violence, how the state is responding to internal challenges, and other considerations, and fit that into the story told in the Commentary and international jurisprudence of escalating violence, state efforts to restore law and order, and so forth. In the context of a conflict between a state and a non-state group located outside that state's territory, the story is likely to be quite different, calling into question how well this classic story of non-international armed conflict actually matches the reality of how such conflicts develop.

Imagine a situation in which a state is attacked by a group located outside its borders, for example, such as an attack by Hezbollah against Israel. The notion—inherent in the Common Article 3 analysis—that the state will first use law enforcement to respond to the attack and to restore public order and security may not be an option at all.²⁴⁵ In such a situation, the state likely needs to rely on the military to stop the attack and deter the attackers from continuing their operations as a first step, because there would be no other option. One might therefore question whether one of the important considerations highlighted in the Commentary to Common Article 3, that “the legal Government is obliged to have recourse to the regular military forces,”²⁴⁶ can still demarcate a threshold for armed

242. See John C. Dehn & Kevin Jon Heller, *Debate: Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 190–91 (2010).

243. Challenges of Contemporary Armed Conflicts, *supra* note 126, at 10–11.

244. Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 690 (2014).

245. Of course, states do use law enforcement measures and cooperation regularly to address crimes committed or attempted by individuals or groups outside their territory, whether small-scale criminal activity or large attacks, such as the attack on the U.S.S. *Cole*, the subject of the al-Nashiri prosecution. But law enforcement is not likely to be a feasible response to an attack by military forces of a non-state group, such as Hezbollah or Hamas.

246. GC IV COMMENTARY, *supra* note 28, at 35.

conflict if the state has no lesser force to employ. That is, relying on state recourse to military force could thus turn the non-international armed conflict trigger into a more instant threshold, akin to the international armed conflict trigger, when the non-state group is outside the state's borders.²⁴⁷ If this lower threshold then becomes accepted as a suitable mechanism for analyzing conflict recognition in the non-international armed conflict arena, it will then likely be used for conflicts occurring inside the territory of a state as well—unless, however, extant international law is significantly revised to embrace a third category of armed conflict distinct from international or non-international armed conflict.

The distinction between the nature of a non-international armed conflict arising and occurring within the territory of the state involved and a non-international armed conflict between a state and one or more groups outside its territory is therefore consequential with regard to the LOAC trigger paradigm. Maintaining a consistent paradigm across the two types of non-international armed conflict suggests that either the traditional “story” of non-international armed conflict must apply to externally-triggered conflicts, or that some lower threshold akin to international armed conflict would be more appropriate, such that an attack like that of 9/11 would trigger a non-international armed conflict. Each of these options has significant ramifications not just for how we think about the start of non-international armed conflict—important in and of itself—but also for what a given approach to conflict trigger means for the object and purpose of LOAC itself.

First, if an attack by an external non-state group alone, or such an attack followed by a limited retaliatory response with no further violence, were considered sufficient to trigger a non-international armed conflict, that methodology would most likely bleed over into the conflict recognition paradigm for purely internal armed conflicts. The result would be a lower threshold for non-international armed conflicts and LOAC applicability to domestic terrorist attacks and other isolated acts of violence. A lower threshold similar to that applicable to international armed conflict does not match the intention of the drafters and does not comport with state perceptions of the balance between sovereignty and the application of international law, as Part I highlights in greater detail above. For this reason alone, reinterpreting the threshold for non-international armed conflict to be more permissive cannot be taken lightly. More important,

247. One commentator has looked at the series of terrorist attacks before September 11th and the 9/11 attacks themselves as following the non-international armed conflict pattern of using law enforcement measures until such measures are no longer sufficient to address specific attacks or the threat of new attacks. Thus, “[t]he magnitude of the September 11 attacks demonstrated that the almost exclusive law enforcement responses to past terrorist attacks were no longer sufficient and that the use of military force had become not just a legitimate option, but a necessity.” William K. Lietzau, *Combating Terrorism: Law Enforcement or War?* in *TERRORISM AND INTERNATIONAL LAW, CHALLENGES AND RESPONSES*, 75, 76–77 (Michael N. Schmitt & Gian Luca Beruto eds., 2003). At the same time, this analysis also fits within the argument that the non-state actor's attack was so significant that it alone constituted the trigger for an armed conflict.

however, are the consequences of a lower threshold for the protection of individual rights. The difference between armed conflict and a peacetime paradigm are particularly stark—the legal regime applicable during armed conflict permits the use of lethal force as a first resort against legitimate targets and detention without charge, and collateral damage in the form of civilian injury and death, and damage to civilian property. As a result, although extension of LOAC to non-international armed conflict was originally designed to enhance protection for individuals in situations of violence, “given the dramatic development of international human rights, categorization of a situation as one of armed conflict, rather than internal unrest, may serve to weaken the protection offered to potential victims rather than to strengthen it.”²⁴⁸

Alternatively, if attacks by non-state groups did not signal the existence of a conflict—meaning that external non-international armed conflicts only develop when there is an escalation of violence, attempts to use law enforcement and other non-military measures, continued violence, and other commonly understood hallmarks of internal non-international armed conflicts—the result could be a problematic mismatch between the operational realities and imperatives for state action, on the one hand, and the legal framework, on the other. If the law does not provide the state with sufficient authority to respond to threats as needed to protect its citizens, secure its borders, and preserve its sovereignty, states will be left with two options: refrain from taking action to protect their citizens from attack, or disregard the law. Neither option fulfills the goals and purpose of international law and, faced with that choice, states will ultimately view the law as irrelevant, a result with devastating long-term consequences.

3. Clarity and Predictability: Matching Law to Action

In any military operation—whether occurring during an armed conflict or not—rules of engagement (ROE) are essential to the planning and execution of that operation. ROE are directives to military forces regarding the parameters of the use of force during military operations. ROE are based on three key components: law, strategy, and policy—the legal framework provided by LOAC or other applicable international law, the military needs of strategy and operational goals, and the national command policy of the state or states involved. In particular, ROE govern the use of force, setting forth the parameters for who can be targeted, when they can be targeted, and how. In both international and non-international armed conflict, LOAC provides for the use of deadly combat power against all members of the enemy forces, based on their status as such, and in most conflicts, the ROE will operationalize that authority by declaring certain groups “hostile.” For example, the ROE for U.S. forces in Iraq in 2009 stated that members of several insurgent groups were “declared hostile” and could be engaged based on status, including Al Quds, the Mahdi

248. David Kretzmer, *Rethinking the Application of International Humanitarian Law in Non-International Armed Conflicts*, 42 *ISR. L. REV.* 8, 21 (2009).

Army, the Fedayeen Saddam, and the Ba'ath Party Militia, among others.²⁴⁹ In contrast, outside of armed conflict, ROE do not provide for the use of force as a first resort, but only for the use of force in self-defense.²⁵⁰

Lack of clarity about the applicable legal framework—conflict or not conflict—can conceivably make the process of developing, training and implementing ROE highly complex and unpredictable. The combination of rhetoric and action exacerbates these complexities further. For example, when the national leadership declares that a particular group is “the enemy,” is that a determination that the situation is in fact an armed conflict and that such group should be considered to be declared hostile? The impact of U.S. rhetoric on the U.S. conduct of counterterrorism operations in the years after 9/11 demonstrates that the rhetoric of war can have significant consequences for the parameters for state action and the protection of individual rights.²⁵¹ When such rhetoric is combined with potential uncertainty about the threshold for application of the relevant legal paradigms, it is important to question whether such uncertainty can hamper operational clarity for the execution of military operations. In most situations, the state will respond to the threat as needed based on strategic and operational assessments, and the law will play catch up. Thus, in the context of the U.S. conflict with al-Qaeda and the determination of the appropriate legal paradigm, “threat dynamics and strategic realities drove the law applicability assessment, and not vice versa.”²⁵² Near term clarity may be the immediate result, but, as the post-9/11 years demonstrate, there may be no mechanism for law to guide action and to set expectations for future lawful conduct and decision making.

These operational considerations may lead some to favor one of the two alternative theories analyzed in Section B above that rest on unilateral action or pronouncements by a non-state group or a state. A unilateral trigger could offer greater clarity—as soon as the state declares an armed conflict, there would be no uncertainty regarding the applicable legal framework. The United States takes a variation on this approach with the Department of Defense Law of War Program Directive, which declares that “[i]t is [Department of Defense] policy that . . . Members of the [United States military and Department of Defense] comply with the law of war during all armed conflicts, however such conflicts are characterized,

249. Annex E (Consolidated ROE) TO 3-187 FRAGO 02, OPOD 02-005, 3.B.(1)(A) (2009); see also GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 507, 507 (2010).

250. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, *OPERATIONAL LAW HANDBOOK* 74 (2010); Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 44 A.F.L. REV. 245, 246–47 (1997).

251. See, e.g., Blank, *supra* note 212 (discussing where the rhetoric of war can have consequences for parameters of state action and the protection of individual rights).

252. Corn, *supra* note 230 at 88.

and in all other military operations.”²⁵³ This policy minimizes confusion on the ground, creates a standard set of rules, provides for training without the ambiguities of multiple legal frameworks, and generally facilitates certainty of action for troops and commanders. As such, it has great value. However, although the United States then uses mission-specific ROE to provide the necessary parameters to tailor this policy to the legal and operational needs of a given situation, not every military and not every country has the capability or the political will to do so. Clarity and consistency may then be achieved at the expense of accurate and appropriate law application and implementation—which ultimately undermines the law’s goals and its effectiveness.

* * * *

Concerns about operational realities and the practical effects of the law generally arise more often in the implementation of LOAC, rather than in the applicability context.²⁵⁴ But applicability is intrinsically linked to implementation; and both applicability and implementation flow into enforcement. Thus, the right balance between legal analysis and operational realities must be struck in all three areas. The question of 9/11 and the non-international armed conflict trigger highlights this challenge in dramatic fashion. The LOAC applicability paradigm strongly suggests that the non-international armed conflict between the United States and al-Qaeda could not have started with the 9/11 attacks. “One attack is not necessarily an armed conflict,”²⁵⁵ and the facts as of the morning of 9/11 do not satisfy the objective criteria of a non-international armed conflict. One useful tool for analysis is to consider how 9/11 would have looked if the United States had never responded with military force. Most likely, no one would have talked of war or armed conflict—perhaps at most in a rhetorical sense—just as in the aftermath of the earlier al-Qaeda attacks. If that is indeed the case, it is difficult to see how the 9/11 attacks themselves could constitute an armed conflict, without the state response, an essential component of the analysis.²⁵⁶

253. DEP’T OF DEF. DIRECTIVE 2311.01E: DoD LAW OF WAR PROGRAM ¶ 4.1 (2011), available at <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.

254. See, e.g., Int’l Humanitarian Law Clinic at Emory Univ. Sch. of Law, Operational Law Experts Roundtable on the *Gotovina* Judgment: Military Operations, Battlefield Reality and the Judgment’s Impact on Effective Implementation and Enforcement of International Humanitarian Law 7, 10–15 (2012) (discussing ways in which the Trial Chamber’s judgment in *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgement (Int’l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011), could have proved detrimental to the military’s ability to conduct lawful operations and protect civilians).

255. Noam Lubell, *Transnational Armed Conflicts?*, in PROCEEDINGS OF THE BRUGES COLLOQUIUM, ARMED CONFLICTS AND PARTIES TO ARMED CONFLICTS UNDER IHL: CONFRONTING LEGAL CATEGORIES TO CONTEMPORARY REALITIES, 56, 62 (2009).

256. See, e.g., *Abella v. Argentina*, Judgment, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser. L./V/II.98, doc. 6 rev. ¶ 155 1997, <http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm> (noting that one consideration in finding the existence of an armed conflict was that the President “ordered that military action be taken to recapture the base and subdue the attackers.”).

Calling the 9/11 attacks themselves an armed conflict thus effects a dramatic, indeed drastic, change in LOAC's very framework for applicability and runs counter to the central purposes behind the non-international armed conflict trigger and paradigm. In contrast, the operational challenges potentially wrought by uncertainty regarding the applicable framework and corresponding authorities were complex and difficult, but not existential for the legal framework. The United States could take action and prepared to do so, buttressed by the robust authorities available in the law enforcement paradigm and the clarity imposed by Department of Defense Directive 2311.01E as needed. Ultimately, although clarity is vital to success and uncertainty should be minimized, neither should be achieved at the expense of undermining the law's central goals and purposes, which is the likely effect of wholly undoing the non-international armed conflict paradigm.

III. CLAWBACK: "WE WERE AT WAR THEN TOO"

United States rhetoric and policy post-9/11 tells the story of a country at war that reaches back to before the contemporaneous period of hostilities to demarcate an earlier starting point for the conflict. The primary reason for this "clawback"²⁵⁷ is to assert jurisdiction under LOAC for crimes committed before the outbreak of hostilities. Thus, as detailed in Part II above, the United States prosecuted Hamdan and al-Bahlul for conspiracy and material support for terrorism dating back to 1996, five years before 9/11; charged al-Nashiri for the bombing of the U.S.S. *Cole* and attempted bombing of the U.S.S. *Sullivans*, one year before 9/11; and charged Khalid Sheikh Mohammed and four others with war crimes related to the 9/11 attacks. If one accepts that an objective analysis, as LOAC requires, leads to the conclusion that the United States conflict with al-Qaeda actually began in 1996 or earlier, then these assertions of criminal jurisdiction under the law of war—through the use of military commissions and the charging of LOAC violations—would be unexceptional. As the analysis herein demonstrates, however, the conflict could not have started before the United States responded with military force in Afghanistan, therefore turning any assertion of jurisdiction before that time into a "clawback." This Part addresses the validity of a retroactive conflict recognition, focusing on two possible clawback options—pre-9/11 or 9/11 itself—and examines how well such attempts comport with LOAC's basic purposes and goals.

Note that the question of clawback is different from the question of conflict recognition in some ways because it only addresses conflict status for purposes of criminal accountability. One could envision a theory justifying a broader temporal scope looking back after a conflict is well underway or has ended as a tool to enhance and ensure accountability. As the

257. "Claw back." WEBSTER'S DICTIONARY "to get back (as money) by strenuous or forceful means (as taxation)," available at <http://www.merriam-webster.com/dictionary/claw%20back>.

discussion below evinces, such an approach has costs as well as benefits. However, precisely because decisions about the start of conflict for such accountability purposes will then influence future conflict recognition determinations, it is equally important to explore the long-term consequences that clawback can have for how we view the entire conflict recognition process, including looking back for enforcement purposes and looking forward for implementation and execution purposes.

A. *Aligning with LOAC's Purposes*

Effective realization of LOAC's central goals takes place at multiple levels: training and dissemination, implementation in planning and execution of operations, and enforcement and accountability for violations after a conflict comes to an end. Militaries and organized armed groups must instruct and train their forces in LOAC's fundamental principles regarding the use of force and treatment of persons, an obligation set forth in the Geneva Conventions.²⁵⁸ Effective implementation of LOAC is essential to lawful and effective military operations and to the protection of civilians and all persons in zones of conflict. LOAC also depends on enforcement and accountability as key components of ensuring that states and individuals adhere to the law and face appropriate legal consequences for failure to do so. The first two of these components cannot be enhanced through a retroactive restating of the onset of conflict, because they occur either before or during conflict. Accountability, in contrast, is pursued once conflict is well under way and, most often, after conflict is over. Here, reaching back to an earlier starting date can have significant consequences; understanding how it bolsters or undermines LOAC's core purposes is therefore essential for assessing the validity of any framework that incorporates a retroactive trigger for the application of LOAC.

At the most basic level, accountability for LOAC violations accomplishes the same retributive and deterrent effect as prosecution for ordinary domestic crimes: punishment and, most often, removal from society through incarceration to prevent the repeat commission of crimes. In the arena of armed conflict, accountability also has several broader thematic purposes:

The regular prosecution of war crimes would have an important preventive effect, deterring violations and making it clear even to those who think in categories of national law that [LOAC] is law. It would also have a stigmatizing effect, and would individualize

258. GC I, *supra* note 8, art. 47; GC II, *supra* note 8, art. 48; GC III, *supra* note 5, art. 127; GC IV, *supra* note 5, art. 144. Common to all four Geneva Conventions, this provision states: "The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to their armed forces and to the entire population."

guilt and repression, thus avoiding the vicious circle of collective responsibility and punishment at the level of the individual.²⁵⁹

Individual criminal responsibility for LOAC violations thus completes the continuum of efforts to regulate the conduct of war and provide protection for both civilians and combatants or fighters during armed conflict: dissemination, implementation and enforcement. The inclusion of accountability—both crimes and the obligation to investigate and prosecute perpetrators of those crimes—in the 1949 Geneva Conventions reaffirmed the essential role of enforcement in LOAC's effectiveness. As the Commentary explains, “[t]he events of the Second World War led the International Committee of the Red Cross to the conclusion that any international convention dealing with laws and customs of war must necessarily include a chapter concerned with the punishment of violations of the Convention.”²⁶⁰

To this end, the Geneva Conventions of 1949 set forth a category of the most serious violations of LOAC, which are called grave breaches,²⁶¹ and mandate a comprehensive system of prevention, investigation and enforcement. The central components of the grave breaches regime, in terms of state obligations, are to enact legislation penalizing grave breaches, search for and then either extradite or prosecute those alleged to have committed or ordered such crimes, and suppress all other violations of the Geneva Conventions.²⁶² Additional Protocol I adds to the list of grave breaches in two ways: (1) it expands the category of persons protected against grave breaches and (2) it adds an extensive list of grave breaches drawn directly from the Protocol's provisions governing the conduct of hostilities and the protection of the civilian population during conflict.²⁶³

The grave breaches regime in the four Geneva Conventions and Additional Protocol I only applies during international armed conflict, when the full panoply of the Geneva Conventions and Additional Protocol I is

259. SASSOLI, *supra* note 45, at Ch. 13, 44.

260. GC IV COMMENTARY, *supra* note 28, at 584–85.

261. Grave breaches are set forth in GC I, *supra* note 8, art. 50; GC II, *supra* note 8, art. 51; GC III, *supra* note 5, art. 130; and GC IV, *supra* note 5, art. 147, and include: willful killing of persons protected by the Conventions; torture or inhuman treatment; wanton destruction of property; compelling a prisoner of war or protected person to serve in the forces of the hostile power; or unlawful deportation or transfer of a protected person, for example.

262. GC I, *supra* note 8, art. 49; GC II, *supra* note 8, art. 50; GC III, *supra* note 5, art. 129; GC IV, *supra* note 5, art. 146.

263. Article 85(2) of AP I adds the following categories of persons and objects protected under the Protocol: persons who have taken part in hostilities and have fallen into the power of adverse party under Article 44; persons who have taken part in hostilities under Article 45; refugees and stateless persons under Article 73; wounded, sick and shipwrecked as expanded under Article 8; and medical and religious personnel, medical units and transports as categorized in Article 8. Article 85(3) and (4) then list additional acts that constitute grave breaches, including unlawful attacks on civilians; indiscriminate attacks; attacks on works or installations containing dangerous forces; transfer of the civilian population of an occupying power into occupied territory or deportation of population within or outside the occupied territory; or attacks on specially protected religious or cultural property.

in effect. Although neither Common Article 3 nor Additional Protocol II contains any statements regarding grave breaches, a general consensus has developed that violations of Common Article 3's fundamental protections and other serious violations of the law of non-international armed conflict entail individual criminal responsibility.²⁶⁴ When the ICTY and ICTR faced challenges to jurisdiction over atrocities committed during non-international armed conflict, both tribunals drew directly from the customary international law related to international armed conflict and applied it to non-international armed conflict.²⁶⁵ International jurisprudence has thus reaffirmed time and again that violations of Common Article 3 trigger individual criminal responsibility, solidifying the international community's efforts to hold perpetrators of atrocities accountable, regardless of the type of conflict.²⁶⁶ In fact, as the ICTY declared in *Prosecutor v. Delalić*, "maintain[ing] a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person."²⁶⁷ The nature of the conflict between the United States and al-Qaeda—a non-international armed conflict—does not alter the essential purpose and goal of seeking accountability for violations of LOAC in the course of that conflict. However, the difficulty of marking the starting point of that conflict presents additional challenges to the accountability process by injecting uncertainty into the process of identifying which crimes—based on their timing—are suitable for prosecution under a LOAC paradigm.

Identifying a precise starting date for any non-international armed conflict can prove to be challenging, and international tribunals and other bodies generally do not narrow the start of conflict to a particular day. Rather, most cases and investigations note that an armed conflict existed at the time of the relevant crimes in order to establish jurisdiction over the accused and the alleged crimes.²⁶⁸ In a few rare cases, tribunals or commissions of inquiry have had to address the specific timing of an armed

264. See generally, EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS (2008) (discussing at large accountability for war crimes in non-international armed conflict).

265. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 129 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect 'elementary considerations of humanity' widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.")

266. *Id.* at ¶¶ 96-129; *Prosecutor v. Delalić*, Case No. IT-96-21-A, Appeals Judgment, ¶ 172 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶¶ 611-17 (Sept. 2, 1998).

267. See *Delalić*, Case No. IT-96-21-A, Appeals Judgment, ¶ 172.

268. *E.g.*, *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶; *Delalić*, Case No. IT-96-21-T, Judgment, ¶ 192.

conflict more directly. Even then, as the Libya Commission of Inquiry noted, “the precise date for determining when this change from peace to non-international armed conflict occurred is somewhat difficult.”²⁶⁹ Similarly, neither the ICC nor the ICRC identified a particular start date: the Prosecutor of the ICC referred to an armed conflict in Libya “since the end of February”²⁷⁰ and the ICRC noted the existence of the armed conflict in March 2011 but did not specify any starting date.²⁷¹

The ICTY faced the challenge of specifying a start date in *Prosecutor v. Haradinaj*, where the parties agreed that a conflict existed “from and including 22 April 1998 onwards” but the Indictment alleged an armed conflict beginning March 1, 1998.²⁷² Jurisdiction over certain crimes during the March 1–April 22 period therefore rested on whether the conflict existed at that time. The ICTY thus examined “(1) the intensity of the conflict between the Serbian forces and the KLA in Kosovo and (2) the level of organization of the KLA from 1 March to 21 April 1998.”²⁷³ Of particular relevance to the instant analysis, the Tribunal found there was not yet an armed conflict during that period, even though there were attacks by KLA forces, shelling of villages by Serbian forces, and “intense fighting”²⁷⁴ in at least one area. Rather, the Trial Chamber viewed these attacks and firefights, including a clash between KLA and Serbian forces at the accused’s compound, “as incidents that contributed to the escalation of the tension which had not yet reached the requisite level of intensity”²⁷⁵ to trigger an armed conflict. In contrast, the United States since 2001 has focused on the crimes it wants to charge and then piggybacked the armed conflict recognition process onto the charges. With little legal framework to buttress the identification of armed conflict, the paradigm thus became one of retroactive armed conflict recognition, or clawback.

B. Clawback Options—and Consequences

Accountability is certainly essential to LOAC—and extending the starting point of a conflict back earlier in time should expand options for accountability. And yet such expansion of accountability options may not automatically be a desirable result, particularly in light of the costs incurred. Based on the conclusion that, under LOAC, the conflict between the United States and al-Qaeda did not start until late September or early

269. Rep. of the Int’l Comm. of Inquiry to Investigate all Alleged Violations of Int’l Human Rights Law in Libyan Arab Jamahiriya, Rep. of the Human Rights Council, ¶62, U.N. Doc. A/HRC/17/44 (June 1, 2011).

270. International Criminal Court, Office of the Prosecutor, First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970, ¶ 37 (May 4, 2011) [hereinafter Libya COI Report].

271. News Release, ICRC, Libya: urgent to apply the rules of war (Mar. 10, 2011).

272. *Prosecutor v. Haradinaj*, Case No. IT-04-84bis-T, Retrial Judgment, ¶ 400 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2012).

273. *Id.*

274. *Id.* at ¶ 404.

275. *Id.* at ¶ 410.

October, when U.S. forces engaged in hostilities in Afghanistan, two possible clawback scenarios exist: (1) to go as far back as 1996 or earlier, or, (2) in a more limited way, to go back to September 11, 2001 and include the attacks of that day in the armed conflict.

1. Including Acts Prior to 9/11 as LOAC Violations in the Present Conflict

Looking back to the 1996–2001 time period, every indication suggests that no one, with the exception of Osama bin Laden,²⁷⁶ thought that the United States was in an armed conflict with al-Qaeda. And yet, since it first charged Salim Ahmed Hamdan before a military tribunal in July 2004,²⁷⁷ the United States has asserted that acts taken before 9/11 that were part of or contributed to al-Qaeda attacks on United States property, territory or persons are violations of the law of war, in an attempt—considered dubious by many²⁷⁸—to assert military commission jurisdiction to a situation not perceived at the time as a conflict. This approach rests on two possible theories: (1) the United States was in a conflict at the time and did not know it or even entertain the possibility; or (2) even if we accept that at the time there was no recognition of a conflict, it is acceptable to reach back and incorporate that conduct into the conflict's penumbra now for purposes of a more all-encompassing accountability strategy. The first theory is addressed and dismissed in Section II.B.2 above. Notwithstanding LOAC's emphasis on an objective determination of the existence of conflict, it is hard to countenance that this methodology could mean that a state could be in a non-international armed conflict without its knowledge at all.

The second theory is, one could argue, a more blatant attempt simply to assert LOAC jurisdiction, whether through domestic military tribunals or an international criminal tribunal, over crimes that would not be identified as LOAC violations at the time of commission.²⁷⁹ At first glance, do-

276. See *supra* Part II.A.3 and Part II.B.1.

277. Charge: Conspiracy, United States v. Hamdan (2004), <http://www.defense.gov/news/jul2004/d20040714hcc.pdf>.

278. See Nick Baumann, *Obama Administration Fires Up the Military Commissions (Again)*, MOTHER JONES (Jan. 20, 2011, 12:30 PM), <http://www.motherjones.com/mojo/2011/01/obama-administration-fires-military-commissions-again>; Kevin Jon Heller, *The United States' Radical Charges Against al-Nashiri*, OPINIO JURIS (Sept. 28, 2011, 9:14 PM), <http://opiniojuris.org/2011/09/28/the-united-states-radical-charges-against-al-nashiri>. See also David Frakt, *Guest Post: Al Nashiri and the Existence of an Armed Conflict*, OPINIO JURIS (May 9, 2014, 2:00 PM), <http://opiniojuris.org/2014/05/09/guest-post-al-nashiri-existence-armed-conflict/>.

279. David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55, 119 (2006); David Glazier, *A Self-Inflicted Wound: A Half Dozen Years of Turmoil Over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008); Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, J. NAT'L SEC. L. & POL'Y, 295 (2010); Kevin Jon Heller, *No, the Attack on the USS Cole Did Not Take Place in an Armed Conflict*, OPINIO JURIS.ORG, (May 6, 2014, 5:42 PM), <http://opiniojuris.org/2014/05/06/attack-uss-cole-take-place-armed-conflict/>.

ing so seems to enhance LOAC's goals of accountability for violations, essential to improved implementation of and adherence to LOAC in future conflicts, but at what cost? Defense counsel and *amici* have argued that prosecuting pre-2001 conduct as LOAC violations part of the United States conflict with al-Qaeda raises significant retroactivity concerns. Thus, al-Nashiri, for example, had no "notice that the laws of war applied in Yemen in 2000 and 2002. To the contrary, the President's and Congress's pronouncements that the United States was not at war in Yemen provided notice that the *laws of war did not apply*."²⁸⁰ Applying LOAC to such conduct, whether through retroactive application of the 2009 Military Commissions Act or other mechanism, undermines both *ex post facto* and due process protections.²⁸¹ Beyond these concerns and other domestic considerations,²⁸² however, reaching back to before a time when any objective observer—again, a different question from the state's subjective political or rhetorical determination—would not have identified an armed conflict has significant consequences for LOAC and its application.

First, the idea that events years before an outbreak of reciprocal hostilities could form part of that armed conflict introduces much greater uncertainty into the non-international armed conflict recognition paradigm. As the history of Common Article 3 demonstrates, "it is easy to understand why leading commentators have opined that '[n]o one has been completely sure as to what factual situations the article applies' and '[i]t is difficult to know where the border line should properly be drawn."²⁸³

Notwithstanding the more concrete definition and overarching framework *Tadić* and its progeny have since provided, the debates over conflict recognition in Syria and the contrast between the international community's reticence to recognize an armed conflict there and the quick recognition of an armed conflict in Libya just one year before²⁸⁴ demonstrate that the precise parameters of non-international armed conflict remain unset-

280. Brief of *Amici Curiae*—Retired Military Admirals and Generals—In Support of Appellant and Reversal, *Al Nashiri v. MacDonald* at 16 (2012), <http://www.lawfareblog.com/wp-content/uploads/2012/10/Brief-of-Amici-Curiae-Retired-Military-Admirals-and-Generals-In-Support-of-Appellant-and-Reversal.pdf.pdf>.

281. *Id.* at 18 ("By changing the dates affixed to hostilities in Yemen, the appellee has retroactively changed the substantive law and Constitutional rights applicable to an accused. Simply defining a time period as one of 'hostilities' suspends certain constitutional protections and creates criminal liability, *i.e.*, making certain conduct criminal that was not. In short, the appellee made what was not a crime in 2000 and 2002 a crime now in 2012. The accused is being charged with violation of 10 U.S.C. §§ 950t(2), (3), (13), (15), (17), (23), (24), (28), and (29), all of which are triable only if they are committed during a period of hostilities. Simply put, one cannot violate the laws of war—substantive crimes—if there was no war.").

282. Lyle Denniston, *Constitution Check: Should Terrorism Trials Only be Held in Military Tribunals*, CONSTITUTION DAILY (Apr. 10, 2014), <http://blog.constitutioncenter.org/2014/04/constitution-check-should-terrorism-trials-only-be-held-in-military-tribunals/>; *The Ghailani Trial: Justice Served*, JURIST (Nov. 24, 2010, 1:14 AM), <http://jurist.org/forum/2010/11/the-ghailani-trial-justice-served.php>.

283. SIVAKUMARAN, *supra* note 62, at 160.

284. Blank & Corn, *supra* note 15, at 726–27; Libya COI Report, *supra* note 270, at 6.

tled. But debates over the threshold for non-international armed conflict have centered on where along a chain of connected events LOAC is triggered²⁸⁵—not on whether events years before an unforeseen conflict are suddenly sufficiently linked to move that conflict threshold back in time. This latter approach does not simply complicate the analytical process; it eliminates methodology and process all together, leaving courts, the international community and other decision-makers with no rational process for determining the threshold for non-international armed conflict. Although the Geneva Conventions' revolutionary requirement of an objective analysis for conflict recognition left open room for debate and some subjective contribution to the process, the framework enabled general consensus that facilitated the injection of international regulation into non-international armed conflict. When this consensus approach is overtaken by uncertainty and chaos in the general framework for analysis, the law's ability to regulate conflict and protect people is diminished.

Second, when the accountability process includes a substantial clawback, it undermines the clarity and predictability essential to effective implementation of LOAC during operations. Law is, at a basic level, about expectations—what conduct is allowed, what is forbidden, how the other side is expected to behave and react, and so on. When future accountability decisions about the threshold for conflict have no relation to understandings or expectations at the time of events, predictability about how those expectations should and will be carried out simply disappears. Here, we see the consequences of significant disparity between the potential “deciders” regarding conflict recognition. LOAC does not rely on one single entity to make definitive decisions about law applicability. Rather, there are many answers to the question of “who decides,” such as national command authority, courts and tribunals, international organizations, non-governmental organizations, and the international community. As a look at the discourse about almost any conflict demonstrates, these various actors will not all agree on the precise starting point for a conflict, but they also are unlikely to diverge by more than weeks or possibly months at most.²⁸⁶ In contrast, the idea of clawback to either October 2000 or sometime in 1996 for the conflict between the United States and al-Qaeda means that the military commissions see a starting point of one to five years earlier than other actors. Unlike the difference of weeks or months between conflict recognition views in other situations, this is an extraordinary amount of time for uncertainty and disagreement about when the armed conflict

285. See, e.g., *Documentation*, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/HRC/HRCISyria/Pages/Documentation.aspx> (regularly parsing events and the development of the Syrian opposition to identify a starting point for the conflict, within the series of UN Commission on Inquiry reports on Syria). See also *Prosecutor v. Haradinaj*, Case No. IT-04-84bis-T, Public Judgment with Confidential Annex, ¶¶ 410–11 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2012).

286. The debate over conflict recognition in Syria is a notable exception, although it will be interesting to see how a future accountability mechanism will measure the start of the conflict with the benefit of hindsight. Even in the debate over Syria, however, the differences of opinion over when the conflict started were less than a year.

started. Indeed, such divergent views create two entirely different conflict stories, a result that is hard to accept.

These divergent results can have real consequences for the fulfillment of LOAC's core purposes. Imagine the effect for the protection of persons if, far-fetched as it may seem, political and military leaders were to jump to an armed conflict paradigm immediately upon the perpetration of any violent act, on the assumption that any acts could be linked to a potential future conflict years down the road. The notion of the non-international armed conflict threshold as creating space for the state to address situations of violence without going straight to war would no longer exist. Lethal force as a first resort and detention without charge would be tools of first resort long before any currently accepted notion of a threshold for LOAC applicability—with the result of more persons at risk of death, injury and deprivation of liberty. There is no doubt that maintaining an overly strict and formalized threshold for non-international armed conflict can undermine LOAC's core purposes in restraining the brutality inherent in many such conflicts.²⁸⁷ By the same token, however, enabling that threshold to disappear entirely is equally, if not much more disastrous for the protection of persons and the regulation of conduct during situations of violence.

2. Including September 11, 2001 for Accountability Purposes

Unlike the pre-9/11 clawback, including September 11, 2001 in the conflict with al-Qaeda for accountability purposes is a much more rational approach on first blush. Apart from the instinctive belief of many that the conflict with al-Qaeda began on 9/11 and the consistent rhetoric of the United States in the immediate and more distant aftermath of that day that the attacks started the conflict, the pragmatic analysis differs greatly from that immediately above with regard to the earlier clawback. First, the conclusion that the conflict began when the United States took action in Afghanistan in late September or early October 2001 rests on the fact that those military operations were a response to the 9/11 attacks. One might reasonably argue that in prosecuting perpetrators of violations committed in that conflict, it would be inconsistent not to prosecute those who perpetrated the gravest crime with the most victims—which also sparked the resulting conflict—as part of the conflict. Alternatively, if such persons were accused of crimes committed during the conflict later on, one might question the practicality, as well as the equity, of trying the same perpetrators in two different courts for two sets of crimes connected to the same overall situation. Imagine, for example, if Khalid Sheikh Mohamed or another of the 9/11 defendants were charged with a similar crime later in the fall of 2001: not including September 11 for accountability purposes would mean that such defendant would be tried for ordinary domestic crimes for the first attack on September 11 and then tried for war crimes for the second similar attack.

287. Blank & Corn, *supra* note 15, at 716.

From a legal perspective, neither of these seemingly practical concerns is relevant. The fact that September 11, 2001 is not included in the timeframe of the conflict does not eliminate or minimize opportunities for criminal prosecution, as demonstrated by the Obama Administration's initial decision to prosecute Khalid Sheikh Mohamed and the other 9/11 defendants in federal court in Manhattan.²⁸⁸ Nor does the prosecution for mass murder in one situation and war crimes in the other diminish the retributive effect of either conviction. In fact, under the United States Uniform Code of Military Justice, crimes committed during conflict are charged as ordinary crimes of murder, torture, destruction of property, etc., not as specific LOAC violations.²⁸⁹ Clawback to September 11, 2001 may add neat and tidy packaging from a rhetorical and political perspective, but it does not lead to any notable difference in the effectiveness of enforcement or fulfillment of accountability's purposes.

In contrast, the longer-term effect on LOAC's overall framework may well be significant. Section II.B.2 discusses a possible paradigm where a non-state actor's initial attack or declaration of war could trigger a non-international armed conflict and highlights the dangers with such an approach. Whereas the clawback to 1996 or 2000 is noticeably a retroactive application of LOAC to earlier events perceived as not sufficiently connected to the conflict to be part of one continuous conflict, a clawback to September 11, 2001 serves more as a reaffirmation that the 9/11 attacks started the conflict, in line with the consistent United States rhetoric to that effect and its actual response. A new framework for non-international armed conflict is not far behind—a framework that overturns the foundational precepts underlying the existing paradigm. Nothing in the *travaux préparatoires* or the Commentary mentions, let alone suggests or affirms, that any single act by a non-state group could be determinative in the non-international armed conflict recognition process. The history behind Common Article 3 and consistent practice since its inception demonstrates precisely the opposite: non-international armed conflict is distinct from acts of terrorism, internal disturbances, or other situations of violence and only exists when there is a sufficient intensity of hostilities between two sides²⁹⁰—which inherently eliminates action by one side only. The 9/11 attacks were monumental in scale, tragedy and impact, to be sure. But that effect does not mean that the entire paradigm for non-international armed conflict recognition must or should change as a result. Nothing in the arena of conflict recognition since 9/11 suggests that the existing framework has changed or is believed to be changed;²⁹¹ rather, the analysis in

288. *Accused 9/11 Plotter Khalid Sheikh Mohammed faces New York Trial*, CNN (Nov. 13, 2009), <http://www.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html?eref=onion>.

289. See 2012 Manual for Courts-Martial, Rule 307(c)(2).

290. See *supra* Part I.

291. In contrast, the international community's response to the 9/11 attacks with regard to the *jus ad bellum* right of self-defense suggests a comprehensive shift in the understanding of who can launch an armed attack triggering the right of self-defense. UN Security Council

all other conflict situations has remained the same, focused on the *Tadić* definition, the factors of intensity and organization, and the totality of the circumstances approach presented in the Commentary. A clawback—however short in time—that has the consequential effect of changing the international community’s methodology for the essential step of law applicability will have lasting and detrimental effects on the implementation of LOAC.

CONCLUSION

Conflict recognition is intrinsically linked to LOAC’s core purposes: knowing when LOAC is triggered is essential to ensuring the protection of persons and the regulation of the means and methods of warfare during conflict. Clarity with respect to conflict recognition also facilitates accountability, which in turn maximizes law compliance. Just as training and implementation bolster the ability of militaries and armed groups to comply with LOAC, so accountability for violations enhances deterrence and prevents future atrocities. The efforts to reframe conflict recognition in the U.S. conflict with al-Qaeda, in the context of the military commission charges for events before and on September 11, 2001, highlight both the challenges of conflict recognition in this particular conflict and the detrimental consequences of retroactively identifying an earlier start date for the conflict.

The threshold for non-international armed conflict is higher than that for international armed conflict, reflecting not only the intentions and concerns of states at the time the Geneva Conventions were drafted, but also the very nature of the differences between international and non-international armed conflicts. Identifying September 11, 2001 as the start of the conflict effectively imports international armed conflict’s low threshold

Resolution 1368, for example, recognized the inherent right of self-defense against the September 11 attacks and “[u]nequivocally condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regard[ed] such acts, like any act of international terrorism, as a threat to international peace and security.” S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (emphasis added). Similarly, the North Atlantic Council issued a statement activating the collective self-defense provision in Article 5 of the North Atlantic Treaty, as did the Organization of American States regarding its constituent treaty. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; Press Release, N. Atl. Treaty Org., Statement by the N. Atl. Council (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>; Inter-American Treaty of Reciprocal Assistance art. 3.1, Sept. 2, 1947, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93; Terrorist Threat to the Americas, RC.24/RES.1/01, OAS Doc. OEA/Ser.F/II.24/Res.1/01 (Sept. 21, 2001) (24th Meeting of Consultation of Ministers of Foreign Affairs). Similarly, Australia activated the collective self-defense provision of the ANZUS Pact. Security Treaty Between Australia, New Zealand and the United States of America, art. IV, U.S.-Austl.-N.Z., Sept. 1, 1951, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86; Brendan Pearson, *PM Commits to Mutual Defence*, AUSTRALIAN FINANCIAL REV., Sept. 15, 2001, at 9. Several other states have also asserted the same right, including Turkey, Israel, Colombia and Russia. For an extensive treatment and discussion of the use of force in self-defense and State practice, see Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483 (2012).

into the context of a non-international armed conflict—with significant ramifications for the protection of persons and the development of the law going forward. Indeed, if a non-state group's attack were to be accepted as the trigger for non-international armed conflict, we would see a permanent alteration in the Geneva Conventions paradigm, the framework for conflict recognition, and LOAC applicability. Beyond this fundamental transformation, allowing either a non-state group's attack or a state's declaration of war against a non-state group to trigger non-international armed conflict unilaterally will result in a significantly lower and more permissive threshold for LOAC in non-international armed conflict, drastically loosening the restraints on the use of force.

A look at the multitude of past and current non-international armed conflicts demonstrates an extraordinary amount of nuance in the way non-international armed conflicts develop. There may be sporadic violence, a changing and developing state response, and a growing and coalescing group that opposes the government—in effect, a myriad of remarkably fluid and dynamic situations. In few, if any, non-international armed conflicts is there a well-formed group that opposes a government and has a substantial military capability and then, in an instant, a full-blown conflict starts. And yet, in a slightly over-simplified way, that is how international armed conflict starts. Superimposing this state versus state, one-shot trigger onto a non-international armed conflict scenario is far too simplistic. It misrepresents the threshold established by Common Article 3 and fleshed out over time through international jurisprudence and state practice. More importantly, the reluctance to recognize an armed conflict upon a single non-state group attack has an essential protective purpose.

A world in which a single anti-government violent act triggers an armed conflict and, with it, the government's right to use force as a first resort against all persons it identifies as "the enemy" is a frightening prospect. Such a framework is a recipe for escalating violence and overly expanded government powers neither foreseen nor desired by the drafters of the Geneva Conventions, and emasculates state obligations to protect human rights even while taking action to maintain law and order. Rhetoric and policy surely lead to and benefit from a determination that the 9/11 attacks started the conflict—or even that events before 9/11 were part of the conflict. But the comprehensive legal framework for conflict recognition rejects the "easy" answer of unilateral non-state or state action, and instead demands a nuanced and principled analysis of the totality of the circumstances, the operational imperatives, and the core purposes of LOAC.

