

2007

Hamdan, Lebanon, and the Regulation of Hostilities

Geoffrey S. Corn

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Humanitarian Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Geoffrey S. Corn, Hamdan, Lebanon, and the Regulation of Hostilities, 40 *Vanderbilt Law Review* 295 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol40/iss2/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.



Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict

*Geoffrey S. Corn**

ABSTRACT

For more than fifty years following the 1949 revision of the Geneva Conventions, legal scholars, government experts, and military practitioners understood the articles that defined when the protections of these treaties came into force—Common Articles 2 and 3—as the exclusive criteria which triggered the laws of war. From these two articles emerged an “either/or” law-applicability paradigm: inter-state, or international, armed conflicts triggered the full corpus of the laws of war, whereas intra-state, or internal, armed conflicts triggered the limited humanitarian protection reflected in the terms of Common Article 3. Because many military operations during the past two decades did not fit neatly into either of these categories, however, the armed forces of several states, beginning with those of the United States, adopted policies requiring application of the foundational principles of the laws of war to all military

* Assistant Professor of Law, South Texas College of Law. Prior to joining the faculty, Professor Corn served as the Special Assistant for Law of War Matters to the U.S. Army Judge Advocate General, the Army’s senior law of war advisor and representative to the Department of Defense Law of War Working Group. Prior to serving in this position, Professor Corn spent twenty-one years on active duty in the Army, retiring in the rank of Lieutenant Colonel in the Judge Advocate General’s Corps.

operations, regardless of how those operations were characterized as a matter of law. These policies reflected a pragmatic recognition that the regulatory framework provided by these principles was essential for the effective and disciplined execution of military operations.

This policy-based application of the principles of the laws of war proved generally effective in addressing operational and tactical issues during this period. However, the terrorist attacks of September 11, 2001 and the subsequent initiation of large-scale extraterritorial military operations against non-state armed entities exposed the gap in legal regulation of armed conflict and challenged the efficacy of this policy-based application of legal principles. With regard to the treatment of captured and detained personnel, the issue of legal regulation came to a head in *Hamdan v. Rumsfeld*, with the U.S. Supreme Court ultimately rejecting the Bush administration's reliance on this "either/or" law-triggering paradigm as a basis to deny the applicability of the humane treatment mandate to captured al Qaeda personnel. It was the conflict between Israel and Hezbollah in Lebanon that exploded soon after that opinion, however, that truly exposed the unacceptable consequences of this gap in legal regulation. In response to that conflict, numerous voices from the international community invoked the principles of the laws of war related to the application of combat power as a basis to condemn both parties, with virtually no consideration of the reality that, like the global war on terror, the conflict defied traditional categorization under the Common Article 2/3 paradigm.

This Article asserts that the changing nature of warfare necessitates recognition of a hybrid category of armed conflict for purposes of triggering the foundational principles of the law of war. Called "transnational armed conflict," this category is based on the *de facto* existence of armed conflict, regardless of the geographic scope of the conflict. The Article explains how such a *de facto* trigger for application of the foundational principles of the laws of war—necessity, distinction, discrimination, humane treatment, and the prohibition against inflicting unnecessary suffering—is derived from the history of regulating warfare, the purposes of the Geneva Conventions, and the pragmatic logic that animated application of law of war principles as a matter of national military policy. The Article also explains how this pragmatic logic was reflected in *Hamdan* but that the impact of that decision is underinclusive because it failed to address principles related to the application of combat power. This Article cites other authorities in support of this

hybrid law-triggering category. The Article concludes with a recommendation that the U.S. Department of Defense take the lead in recognizing this category of armed conflict, which could be the first step in a broader recognition.

TABLE OF CONTENTS

I.	INTRODUCTION	298
II.	CONFLICT CLASSIFICATION: THE INHERENT INSUFFICIENCY OF THE TRADITIONAL APPROACH TO DETERMINING APPLICABILITY OF THE LAWS OF WAR	300
III.	HOW A PRAGMATIC UNDERSTANDING OF THE DEVELOPMENT OF NATIONAL SECURITY POLICY BOLSTERS THE NECESSITY OF RECOGNIZING A HYBRID CATEGORY OF ARMED CONFLICT.....	311
IV.	RECOGNIZING THE REGULATORY GAP: HOW MILITARY POLICIES REFLECT THE NECESSITY OF A “PRINCIPLED” APPROACH TO MILITARY OPERATIONS	315
V.	EMPLOYING NATIONAL COMBAT POWER TO ENGAGE TRANSNATIONAL NON-STATE ACTORS: EXPOSING THE LIMITS OF POLICY-BASED REGULATION OF ARMED CONFLICT	321
VI.	A PRAGMATIC RESPONSE TO THE REGULATORY GAP: THE TRANSNATIONAL ARMED CONFLICT TRIGGER	330
VII.	THE TRANSNATIONAL ARMED CONFLICT TRIGGER AND THE CONTINUING RELEVANCE OF COMMON ARTICLE 3’S ARMED CONFLICT ASSESSMENT CRITERIA.....	341
VIII.	CONCLUSION: RESTORING THE BALANCE NECESSITY AND HUMANITY	347
APPENDIX 1:	PRINCIPLES OF THE LAWS OF WAR IN THE OPERATIONAL LAW HANDBOOK.....	351

I. INTRODUCTION

*United Nations Official: Israeli Bombardment of Lebanon Violates Humanitarian Law*¹

The headline above, representative of the barrage of commentary generated by the recent conflict in Lebanon,² presumes that humanitarian law—the laws of war³—applies to extraterritorial armed conflicts between states and non-state armed entities. When juxtaposed with the images of death and destruction inflicted by the application of combat power by both the Israeli Defense Forces and

1. *United Nations Official: Israeli Bombardment of Lebanon Violates Humanitarian Law*, IMEMC NEWS, July 23, 2006, <http://www.imemc.org/article/20260>.

2. See Gaby El Hakim & Joe Karam, *Beirut Bleeding: Law Under Attack in Lebanon*, JURIST, July 24, 2006, <http://jurist.law.pitt.edu/forumy/2006/07/beirut-bleeding-law-under-attack-in.php>; see also Anthony D'Amato, *War Crimes and the Mideast Conflict*, JURIST, July 24, 2006, <http://jurist.law.pitt.edu/forumy/2006/07/war-crimes-and-mideast-conflict.php>; Nick Wadhams, *Annan: Israel Raid May Be Part of Pattern*, FOXNEWS.COM, Aug. 7, 2006, <http://www.foxnews.com/wires/2006Aug07/0,4670,MideastFightingUNQana,00.html>.

3. The term “laws of war” or “law of war” will be used throughout this Article to refer to the law governing the conduct of belligerents engaged in armed conflict. This term, while certainly less in favor than “humanitarian law,” is the term used in official U.S. Department of Defense doctrine. See U.S. DEP’T OF DEF., DOD DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM (2006); see also CHAIRMAN, JOINT CHIEFS OF STAFF, CJSCI 5810.01B, IMPLEMENTATION OF THE DOD LAWS OF WAR PROGRAM (2002). The following excerpt demonstrates the continuing significance of retaining this characterization in lieu of the more popular “humanitarian law”:

In this Article, I have used the term “laws of war” referring to those streams of international law, especially the various Hague and Geneva Conventions, intended to apply in armed conflicts. To some, the term “laws of war” is old-fashioned. However, its continued use has merits. It accurately reflects the well-established Latin phrase for the subject of this inquiry, *jus in bello*, and it is brief and easily understood. It has two modern equivalents, both of which are longer. One of these, the “law applicable in armed conflicts” is unexceptionable, but adds little. The other, “international humanitarian law” (IHL), often with the suffix “applicable in armed conflicts,” has become the accepted term in most diplomatic and U.N. frameworks. *However, it has the defect that it seems to suggest that humanitarianism rather than professional standards is the main foundation on which the law is built, and thus invites a degree of criticism from academics, warriors and others who subscribe to a realist view of international relations.*

Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT’L. L. 11, 14 (1995) (emphasis added).

the armed component of Hezbollah, such a proposition seems unremarkable, if not essential to protect the innocent civilians invariably victimized by such conflicts. When analyzed in accordance with the well-established legal paradigm that has evolved since 1949 to define when this regulatory framework comes into force, however, this proposition is indeed remarkable. Prior to the recent conflict in Lebanon, Professor Adam Roberts highlighted this reality in the following perspective:

What is the role of the laws of war in the ongoing “war on terror” proclaimed and initiated by the U.S. following the terrorist attacks of 11 September 2001? The body of international law applicable in armed conflict does appear to have a bearing on many issues raised in anti-terrorist military operations in Afghanistan as well as elsewhere, including particularly the issues of discrimination in targeting, protection of civilians, and status and treatment of prisoners. Because of the unusual character of the armed conflict, different in important respects from what was originally envisaged in the treaties embodying the laws of war, a key issue in any analysis is not just the law’s application or otherwise by the belligerents, but also its relevance to the particular circumstances of this war. *It is not just the conduct of the parties that merits examination, but also the adequacy of the law itself.*⁴

This Article will attempt such an examination: it will demonstrate how the existing paradigm, originally conceived to ensure maximum applicability of the humanitarian protections of the laws of war to situations involving the application of combat power by armed forces, unfortunately became too restrictive to achieve this important purpose. As a result, and in response to the changing nature of warfare so publicly illustrated by this recent conflict in Lebanon and the international response it evoked, a new evolution is necessary to effectively reconcile the expectations of both professional military forces and the international community with the applicability of the law regulating combat operations. This Article will propose such an evolution and, accordingly, will argue that it is necessary for the international community, and the United States in particular, to endorse a new trigger for the application of the foundational principles of the laws of war—principles that provide a baseline of regulation not only for the treatment of captured or detained personnel, but also the application of combat power. This trigger will be characterized as “transnational armed conflict,” a term used to represent the extraterritorial application of military combat

4. Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, 44 SURVIVAL 7, 7 (2002), available at <http://www.ssrc.org/sept11/essays/roberts.htm> (emphasis added).

power by the regular armed forces of a state against a transnational non-state armed enemy.

In a sense, however, this evolution will actually reflect a reversion to the historical concept of *ipso facto* regulation of combat operations by professional armed forces. As this Article will suggest, the history of warfare reflects a basic truism: military leaders have always understood the necessity of imposing a regulatory framework on the use of combat power. While the law-triggering paradigm that emerged out of the 1949 revision to the Geneva Conventions sought to ensure such regulation, it unfortunately evolved to impose a legal impediment to such *ipso facto* regulation. The policy response by the U.S. armed forces, emulated by other professional armed forces and even the United Nations, however, reflects the continuing validity of the military logic that animated this history of internal regulation. Ensuring such regulation through national policy is an insufficient response to this impediment. Therefore, the transnational armed conflict trigger proposed in this Article is necessary to reconcile operational reality with international legality.

II. CONFLICT CLASSIFICATION: THE INHERENT INSUFFICIENCY OF THE TRADITIONAL APPROACH TO DETERMINING APPLICABILITY OF THE LAWS OF WAR

To understand why endorsing a new category of armed conflict—transnational armed conflict—is the necessary answer to respond to the realities of contemporary military operations, it is first necessary to understand the limitations inherent in the traditional Geneva Convention-based law-triggering paradigm. This paradigm is based on Common Articles 2 and 3 of these four treaties. Common Article 2 defines the triggering event for application of the full corpus of the laws of war: international armed conflict.⁵ Common Article 3, in

5. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Each of these Conventions includes the following identical article:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other

contrast, provides that the basic principle of humane treatment is applicable in non-international armed conflicts occurring in the territory of a signatory state.⁶ Although neither of these treaty provisions explicitly indicate that they serve as the exclusive triggers for application of the laws of war, they rapidly evolved to create such an effect.⁷ As a result, these two treaty provisions have been long understood as establishing the definitive law-triggering paradigm. In accordance with this paradigm, application of the laws of war has

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. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

E.g., First Geneva Convention, *supra*, at art. 2.

6. First Geneva Convention, *supra* note 5, at art. 3; Second Geneva Convention, *supra* note 5, at art. 3; Third Geneva Convention, *supra* note 5, at art. 3; Fourth Geneva Convention, *supra* note 5, at art. 3. Each of these Conventions includes the following identical article 3:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

E.g., First Geneva Convention, *supra* note 5, at art. 3.

7. See INT'L & OPERATIONAL LAW DEPT, THE JUDGE ADVOCATE GEN.'S SCH., LAW OF WAR WORKSHOP DESKBOOK 25-34 (Bill J. Brian et al. eds., 2004) [hereinafter LAW OF WAR WORKSHOP DESKBOOK]; see also U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 3.1 (2004); ADVISORY SERV. ON INT'L HUMANITARIAN LAW, INT'L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? 1 (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf). The fact sheet clearly reflects the international or internal evolution of the triggering paradigm:

International humanitarian law distinguishes between international and non-international armed conflict. *International armed conflicts* are those in which at least two States are involved. They are subject to a wide range of rules, including those set out in the four Geneva Conventions and Additional Protocol I.

Non-international armed conflicts are those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. A more limited range of rules apply to internal armed conflicts and are laid down in Article 3 common to the four Geneva Conventions as well as in Additional Protocol II.

ADVISORY SERV. ON INT'L HUMANITARIAN LAW, *supra*, at 1.

always been contingent on two essential factors: first, the existence of armed conflict and second, the nature of the armed conflict.⁸

The first of these triggering requirements is the existence of armed conflict. Although there is no definitive test for assessing when a situation amounts to armed conflict—a term undefined by the express language of either Common Article 2 or 3—the International Committee of the Red Cross (ICRC) commentary⁹ to these Articles (often referred to as the Pictet Commentary in recognition of the reporter who wrote them) has been relied on as the primary interpretive aid. This Commentary provides several factors for assessing the existence of armed conflict, which are today widely regarded as the most authoritative and effective criteria for making such a determination.¹⁰

The use of force by opposing regular armed forces makes the determination of the existence of armed conflict fairly straightforward. The ICRC Commentary indicates that the two principal concerns that motivated the adoption of the armed conflict trigger with respect to intra-state conflict were the danger of “compliance avoidance” by refusal to acknowledge a state of war and the concern that the brevity or lack of intensity of such hostilities could be used as a justification to deny existence of a situation triggering humanitarian protections.¹¹ Both of these concerns grew out of the pre-1949 experience. With regard to the first concern, the term armed conflict was adopted as a trigger for law of war application for the specific purpose of emphasizing that such application must be triggered by *de facto* warfare and not *de jure*

8. See LAW OF WAR WORKSHOP DESKBOOK, *supra* note 7, at 25-34.

9. See COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 19-23 (Jean S. Pictet ed., 1960) [hereinafter ICRC Commentary]. A similar Commentary was published for each of the four Geneva Conventions. Because Articles 2 and 3 are identical—or *common*—to each Convention, however, the Commentary for these articles is also identical in each of the four Commentaries.

10. See LAW OF WAR WORKSHOP DESKBOOK, *supra* note 7, at 25-34. The International Criminal Tribunal for the former Yugoslavia (ICTY), while not explicitly relying on these criteria, nonetheless followed the general logic reflected therein when it determined in the first opinion addressing the jurisdiction of the ICTY 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.” *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996) [hereinafter *Tadic*].

11. See ICRC Commentary, *supra* note 9, at 32 (“It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims.”).

war.¹² As for the second concern, the ICRC Commentary emphasizes that the existence of armed conflict is in no way affected by the scope, duration, or intensity of hostilities. Instead, the term armed conflict was intended to apply to *de facto* hostilities no matter how brief or non-destructive they might be.¹³ When such hostilities occurred between the regular armed forces of two states, the armed conflict prong of the triggering test for application of the laws of war would be satisfied.

Determining the existence of armed conflict in the non-international context has been more problematic. The key concern addressed by the ICRC Commentary in this context was determining the line between internal civil disturbances, which are subject to domestic legal regimes, and military conflict, which trigger application of the basic principle of humanity derived from the laws of war.¹⁴ As the ICRC Commentary emphasizes, there is no single factor that establishes this demarcation line. Instead, a number of factors, when considered in any combination or even individually, were proposed to assess when a situation rises above the level of internal disturbance and crosses the legal threshold into the realm of armed conflict.¹⁵ Of the numerous factors offered by the ICRC Commentary, perhaps the most instructive was the focus on the state response to the threat: when a state resorts to the use of regular (and by "regular" it is fair to presume that the ICRC Commentary refers to combat) armed forces, the situation has most likely crossed the threshold into the realm of armed conflict.¹⁶

Although applying this armed conflict prong of the Common Article 2/3 conflict classification paradigm has been controversial, the ICRC Commentary criteria have proved remarkably effective in practice. Accordingly, short duration or small scale hostilities between states have been treated as falling into the category of armed conflict. For example, the shoot down of U.S. Naval pilot Lieutenant Bobby Goodman by Syrian forces while flying a mission in relation to the U.S. peacekeeping presence in Lebanon in 1982 was characterized by the United States as an armed conflict.¹⁷ Even in the non-

12. *See id.*

13. *See id.*

14. *See id.* at 49-50.

15. *See id.*

16. *See id.*

17. Interview with W. Hays Parks, Special Assistant to the Judge Advocate General of the Army for Law of War Matters, Office of the Judge Advocate General, in Rosslyn, Va. (April 23, 1999). Mr. Parks was personally involved in developing the U.S. position on the status of Lieutenant Goodman and indicated during the interview that the United States asserted prisoner of war status for Goodman as a matter of law

international realm, resort to the use of regular armed forces for sustained operations against internal dissident groups that cannot be suppressed with only law enforcement capabilities makes it difficult for a state to credibly disavow the existence of armed conflict.

This is not, however, the exclusive analytical aspect of the Common Article 2/3 law-triggering paradigm. It is the second consideration of this paradigm—the nature of the armed conflict—that has been strained by the evolving nature of warfare. This consideration links application of the laws of war to what is defined as the international or non-international character of a given armed conflict. As noted above, pursuant to the structure of the Geneva Conventions, armed conflicts falling into the category of international armed conflicts within the meaning of Common Article 2 trigger the full corpus of law of war regulation.¹⁸ In contrast, those conflicts falling into the category of non-international armed conflicts trigger a much less comprehensive body of regulation: the principle of humane treatment reflected in the substantive mandate of Common Article 3.¹⁹

Because there is no defined meaning of “international” or “non-international” in Common Articles 2 or 3, uncertainty has developed regarding the application of this prong of the legal trigger.²⁰ As a result, reliance on the ICRC Commentary has produced operative definitions of these terms. With regard to international armed conflict, the ICRC Commentary makes the existence of a dispute between states the dispositive consideration.²¹ While this has been a generally effective *de facto* criterion, it has not eliminated all uncertainty related to when the use of armed force by one state in the territory of another state is the product of such a dispute, thereby triggering the law applicable to international armed conflicts. Such uncertainty emerges when the intervening state disavows the existence of the requisite dispute as the predicate for the intervention.

due to the existence of an “armed conflict” between the United States and Syria within the meaning of Common Article 2.

18. See U.K. MINISTRY OF DEF., *supra* note 7, ¶ 2.1; LAW OF WAR WORKSHOP DESKBOOK, *supra* note 7, at 25-34.

19. See LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 59-61 (2d ed. 2000); LAW OF WAR WORKSHOP DESKBOOK, *supra* note 7, at 25-34.

20. See JENNIFER ELSEA ET AL., CONGRESSIONAL RESEARCH SERVICE REPORT: TERRORISM AND THE LAWS OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 1-2 (2001), available at <http://www.fas.org/irp/crs/RL31191.pdf> (analyzing whether the attacks of September 11, 2001, triggered the law of war); see also Roberts, *supra* note 4 (discussing the role of the laws of war in the U.S.’s “war on terror”).

21. See ICRC Commentary, *supra* note 9, at 32.

This “hostilities without dispute” theory was clearly manifest in the recent conflict in Lebanon, where neither Israel nor Lebanon took the position that the hostilities fell into the category of international armed conflict.²² Nor was this was not the first example of the use of such a theory to avoid the acknowledgement of an international armed conflict. In fact, the U.S. intervention in Panama in 1989 represents the quintessential example of the theory of “applicability avoidance” due to the absence of the requisite dispute between nations. Executed to remove General Manuel Noriega from power in Panama and destroy the Panamanian Defense Force (the regular armed forces of Panama),²³ Operation Just Cause involved the use of more than 20,000 U.S. forces who engaged in intense combat with the Panamanian Defense Forces.²⁴ Nonetheless, the United States asserted that the conflict did not qualify as an international armed conflict within the meaning of Common Article 2.²⁵ The basis for this assertion was the fact that General Noriega was not the legitimate leader of Panama. Accordingly, the U.S. dispute with him did not qualify as a dispute with Panama.²⁶ Although this rationale was ultimately rejected by the U.S. district court that adjudicated Noriega’s claim to prisoner of war status,²⁷ it is an example of an assertion of a lack of a dispute between states as a basis for denying the existence of a Common Article 2 inter-state conflict.²⁸

Thus, despite the best efforts of the drafters of the Geneva Conventions to provide an effective *de facto* standard for determining the existence of international armed conflicts, and thereby avoid the type of compliance avoidance that resulted from linking application of the laws of war to the existence of a state of war in the international legal sense, gaps in coverage remain problematic. However, this aspect of determining the applicability of the law of war has had

22. See Statement by Group of Eight Leaders—G-8 Summit 2006, Israeli Ministry of Foreign Affairs (July 16, 2006), available at http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2006/Statement%20by%20Group%20of%20Eight%20Leaders%20-%20G-8%20Summit%202006%2016-Jul-2006

23. See generally RONALD H. COLE, OPERATION JUST CAUSE: THE PLANNING AND EXECUTION OF JOINT OPERATIONS IN PANAMA, FEBRUARY 1988 – JANUARY 1990 (1995), available at <http://www.dtic.mil/doctrine/jel/history/justcaus.pdf>.

24. See generally *id.*

25. See generally *id.*

26. See *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992).

27. *Id.*

28. A similar rationale was relied upon to conclude that combat operations conducted by U.S. forces in Somalia during Operation Provide Comfort did not result in an international armed conflict. See generally CTR. FOR LAW & MILITARY OPERATIONS (CLAMO) & THE JUDGE ADVOCATE GEN.’S SCH., CLAMO REPORT: THE MARINES HAVE LANDED AT CLAMO (1998).

virtually no impact on the analysis of conflicts like those between Israel and Hezbollah or the United States and al Qaeda, because there is no plausible basis on which to conclude that such combat operations, although manifesting all the classic indicia of armed conflicts, are the result of disputes between states. Regarding these armed conflicts, it is instead the uncertainty related to whether the transnational geographic scope of operations excludes them from the definition of non-international—with the accordant uncertainty as to what law such combat operations trigger—that has generated the greatest regulatory challenge.²⁹

The inclusion of Common Article 3 in the revision of the Geneva Conventions in 1949 represented the first interjection by treaty of international humanitarian regulation into the realm of non-international armed conflicts.³⁰ This was without question a landmark development in the regulation of conflict. Undeniably, the scope of the obligation imposed by Common Article 3 was minimal and, in fact, regarded by Pictet as essentially redundant with principles of law recognized by civilized nations even during

29. This uncertainty is clearly reflected in the analysis prepared by the Office of Legal Counsel in response to the terrorist attacks of September 11, 2001. Compare Memorandum from U.S. Department of Justice, Office of Legal Counsel, to William Haynes II, General Counsel, Department of Defense, on Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf> (concluding, inter alia, that Common Article 3 was inapplicable to the armed conflict with al Qaeda because Common Article 3 applied exclusively to intra-state conflicts and conflict with al Qaeda was “international” in scope) with Memorandum from William Howard Taft, III, to Counsel to the President, Comments on Your Paper on the Geneva Conventions” (Feb. 2, 2002), available at <http://www.fas.org/sgp/othergov/taft.pdf> (arguing that the Geneva Conventions should be interpreted to apply to the armed conflict with both the Taliban and al Qaeda).

30. See ICRC Commentary, *supra* note 9, at 38. According to the Commentary:

This Article is common to all four of the Geneva Conventions of 1949, and is one of their most important Articles. It marks a new step forward in the unceasing development of the idea on which the Red Cross is based, and in the embodiment of that idea in the form of international obligations. It is an almost unhopd for extension of Article 2 above.

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 to 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 to all cases of armed conflicts, including those of an internal character.

peacetime.³¹ Because the conflicts subject to this provision of international law fell within what was at that time regarded as the exclusive realm of state sovereignty, the development was regarded as a major step forward in humanitarian regulation of conflict.³²

Because Common Article 3 responded primarily to the brutal civil wars that ravaged Spain, Russia, and other states during the years between the two world wars,³³ the trigger for this baseline humanitarian provision came to be understood as conflicts that were primarily intra-state, or internal armed conflicts.³⁴ Irrespective of this historical context for the creation of Common Article 3, however, nowhere does the article expressly use “internal” as the indication of the type of armed conflict triggering its humanitarian mandate. Instead, Common Article 3 expressly indicates that its substantive protections are applicable to all non-international armed conflicts.³⁵ Nonetheless, during the five plus decades between 1949 and 2001, the term “non-international” evolved to become synonymous with internal. This is primarily attributed to a combination of two factors: the original motivation leading to the development of Common Article 3—the concern over civil wars—and the qualifying language of Common Article 3 indicating that it applies only to non-international armed conflicts occurring within the territory of a High Contracting Party.³⁶ Although this “within the territory” qualifier became increasingly less meaningful as the Geneva Conventions progressed rapidly towards their current status of universal participation,³⁷ it is difficult to ignore the logical impact of this term in the context of 1949: it limited the scope of application of this “mini-Convention” to true intra-state conflicts.³⁸

31. *See id.*

32. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1319-33 (Yves Sandoz et al. eds., 1987).

33. *See* ICRC Commentary, *supra* note 9, at pp. 28-35.

34. *See* U.K. MINISTRY OF DEF., *supra* note 7, ¶ 2.1; LAW OF WAR WORKSHOP DESKBOOK, *supra* note 7, at 30-31.

35. *E.g.*, First Geneva Convention, *supra* note 5, at art. 3.

36. *E.g., id.*

37. *See* Press Release, International Committee of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance (Aug. 21, 2006), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-news210806?opendocument> (last visited March 30, 2007).

38. This point was relied upon by the Department of Justice Office of Legal Counsel in the first law of war applicability analysis provided to the President after the attacks of September 11, 2001:

Common article 3 complements common article 2. Article 2 applies to cases of declared war or of any other armed conflict that may arise between two or more of the High Contracting Parties, even if the state of war is not recognized

Based on this original understanding of Common Article 3, coupled with the reality that the vast majority of non-international armed conflicts between 1949 and 2001 were predominantly intra-state, what can best be described as an either/or paradigm emerged in the legal determination of law of war applicability. Armed conflicts falling under the definition of international within the meaning of Common Article 2 of the Geneva Conventions would trigger the entire corpus of the law of war. In contrast, intra-state or internal armed conflicts—those between a state and internal dissident forces—would trigger the far more limited humane treatment mandate of Common Article 3.³⁹ This paradigm is reflected in the following excerpt from a 2004 presentation by the ICRC legal advisor:

Humanitarian law recognizes two categories of armed conflict—international and non-international. Generally, when a State resorts to force against another State (for example, when the “war on terror” involves such use of force, as in the recent U.S. and allied invasion of Afghanistan) the international law of international armed conflict applies. When the “war on terror” amounts to the use of armed force within a State, between that State and a rebel group, or between rebel groups within the State, the situation *may* amount to non-international armed conflict⁴⁰

by one of them. Common article 3, however, covers “armed conflict not of an international character”—a war that does not involve cross-border attacks—that occurs within the territory of one of the High Contracting Parties.

Common article 3’s text provides substantial reason to think that it refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory. First, the test of the provision refers specifically to an armed conflict that a) is not of an international character, and b) occurs in the territory of a state party to the Convention. It does not sweep in all armed conflicts, nor does it address a gap left by common article 2 for international armed conflicts that involve non-state entities (such as an international terrorist organization) as parties to the conflict. Further, common article 3 addresses only non-international armed conflicts that occur within the territory of a single state party, again, like a civil war. This provision would not reach an armed conflict in which one of the parties operated from multiple bases in several different states.

See JAY S. BYBEE, ASSISTANT ATT’Y GEN., MEMORANDUM FOR ALBERTO R. GONZALES, COUNSEL TO THE PRESIDENT, AND WILLIAM J. HAYNES II, GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE: APPLICATION OF TREATIES AND LAWS TO AL QAEDA AND TALIBAN DETAINEES 6 (2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

39. See U.K. MINISTRY OF DEF., *supra* note 7, ¶ 2.1; see also LAW OF WAR WORKSHOP DESKBOOK, *supra* note 7, at 30-31.

40. Gabor Rona, Legal Advisor, Int’l Comm. of the Red Cross, When is a War Not a War? – The Proper Role of the Law of Armed Conflict in the “Global War on Terror,” Presentation at The Workshop on the Protection of Human Rights While

This excerpt is illustrative of the accepted interpretation of the situations that trigger application of the laws of war. According to this interpretation, there are only two possible characterizations for military activities conducted against transnational terrorist groups: international armed conflict (when the operations are conducted outside the territory of the state) or non-international armed conflict (limited to operations conducted within the territory of the state).

Unfortunately, this either/or analytical approach fails to acknowledge the possibility that an extraterritorial non inter-state combat operation launched by a state using regular armed forces could qualify as an armed conflict triggering law of war regulation. Such an operation would fail to satisfy the requisite "dispute between states" necessary to qualify as an international armed conflict within the meaning of Common Article 2. However, based on the traditional understanding of non-international armed conflict—an understanding shared by virtually all scholars and practitioners prior to 9/11—the possibility that an armed conflict falling somewhere between an internal armed conflict and an inter-state, state-armed conflict could theoretically be subject to the regulatory effect of the laws of war was necessarily excluded. Accordingly, these transnational armed conflicts fell into a regulatory gap that necessitated the application of regulation by policy mandate.

Both the military component of the U.S. fight against al Qaeda and the recent conflict between Israel and Hezbollah have strained this traditionally understood paradigm for triggering application of the laws of war.⁴¹ While this strain has produced international and national uncertainty as to the law that applies to such conflicts,⁴² it has also provided what may actually come to be appreciated as a beneficial reassessment of the trigger for application of the fundamental principles of the laws of war. As a result, the pragmatic logic that has animated military policy on this subject for decades is

Countering Terrorism (Mar. 15-16, 2004), *transcript available at* <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList575/3C2914F52152E565C1256E60005C84C0>.

41. See, e.g., Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L 1, 1 (2004) (discussing the complex challenge of conflict categorization-related military operations conducted against highly organized non-state groups with transnational reach); see also Kirby Abbott, *Terrorists: Combatants, Criminals, or . . . ?*, in *THE MEASURES OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS, AND VALIDITY* 366, 384 (2002); ELSEA, *supra* note 20, 1-2 (analyzing whether the attacks of September 11, 2001 triggered the law of war).

42. See generally Human Rights Council, *Report of the Commission of Inquiry on Lebanon*, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006), *available at* <http://www.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf>.

now being adopted as a matter of law by nations confronting the challenge of transnational armed conflicts.

The logical necessity for such a reassessment was actually articulated by Judge Williams in his concurring opinion in the D.C. Circuit decision in *Hamdan v. Rumsfeld*.⁴³ In his opinion, Judge Williams responded to the majority conclusion that Common Article 3 did not apply to armed conflict with al Qaeda because the President has determined that this conflict is one of international scope and therefore not purely internal:

Non-State actors cannot sign an international treaty. Nor is such an actor even a "Power" that would be eligible under Article 2 (§ 3) to secure protection by complying with the Convention's requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The gap being filled is the non-eligible party's failure to be a nation. Thus the words "not of an international character" are sensibly understood to refer to a conflict between a signatory nation and a non-State actor. The most obvious form of such a conflict is a civil war. But given the Convention's structure, the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-State actor is a conflict "not of an international character." In such a conflict, the signatory is bound to Common Article 3's modest requirements of "humane" treatment and "the judicial guarantees which are recognized as indispensable by civilized peoples."⁴⁴

Although the logic expressed by Judge Williams seems pragmatically compelling, the fact remains that he was unable to convince his peers to adopt this interpretation.⁴⁵ This reflected the profound impact of Common Articles 2 and 3—and the legal paradigm they spawned—on conflict regulation analysis. But, as Judge Williams recognized, it is fundamentally inconsistent with the logic of the law of war to detach the applicability of regulation from the necessity for regulation.⁴⁶ What was needed was a pragmatic reconciliation of these two considerations. As will be illustrated below, the U.S. armed forces have long recognized the need for such a reconciliation. As the *Hamdan* case demonstrated, however, using policy to effect such a reconciliation is ultimately too malleable to provide an effective solution to this regulatory gap.

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

44. *Id.* at 44 (Williams, J., concurring).

45. *Id.*

46. *Id.*

III. HOW A PRAGMATIC UNDERSTANDING OF THE DEVELOPMENT
OF NATIONAL SECURITY POLICY BOLSTERS THE
NECESSITY OF RECOGNIZING A HYBRID CATEGORY OF
ARMED CONFLICT

The principal purpose of the laws of war is to ensure armed conflict is subject to regulatory limits serving both the interests of armed forces and the victims of war.⁴⁷ However, the advent of armed conflict between states and transnational non-state entities, when coupled with the either/or Common Article 2/3 law-triggering paradigm unfortunately produced a conflict between the application of this paradigm and the policy interests of states. This reality was exposed by the Bush administration's decisions related to the applicability of the laws of war to the conflict with al Qaeda.⁴⁸ The legal basis for these policies was influenced by the perceived strategic ramifications of conflict characterization under this paradigm. While some might argue that policy considerations should not influence the analysis of legal obligations, national security determinations related to the applicability of the laws of war to a given military operation are not immune from such influences. In relation to armed conflict with transnational terrorist groups, it is this context that truly exposes the deficiency of the traditional either/or construct resulting from interpreting Common Articles 2 and 3 as the exclusive triggers

47. See A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 3-7 (1996) (characterizing military necessity and humanity as two "basic principles" of the law of armed conflict); see also U. S. DEPT OF ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE* (1956), ¶ 3 [hereinafter FM 27-10]. According to this authoritative Department of the Army statement:

The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:

- a. Protecting both combatants and noncombatants from unnecessary suffering;
- b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
- c. Facilitating the restoration of peace.

Id. at ¶ 2. This discussion regarding the policy considerations related to conflict classification is drawn from the Author's original treatment of this issue in Geoffrey S. Corn, *Taking the Bitter with the Sweet: A Law of War Based Analysis of the Military Commission*, 35 *STETSON LAW REV.* 811 (2006).

48. See BYBEE, *supra* note 38; see also ELSEA, *supra* note 20, at 1-2 (analyzing whether the attacks of September 11, 2001 triggered the law of war).

for application of the laws of war and the accordant imperative of endorsing a hybrid law-triggering category.

When national security policymakers decide when the laws of war apply to a given military operation, they invariably seek to satisfy three primary objectives. First, they emphasize to their forces and to the international community uncompromising commitment to the basic humanitarian principles reflected in the Geneva Conventions. Second, they invoke the authority derived from the principle of military necessity on behalf of the armed forces called upon to engage an enemy, an authority inherent in all such operations to take those measures not expressly prohibited by international law to bring about the prompt submission of the designated enemy.⁴⁹ The third objective, and perhaps most significant for purposes of exposing the deficiency of the current law-triggering paradigm, is the perceived need to achieve these first two objectives without suggesting that the enemy is vested with any international legal status to which it is not legitimately entitled. The influence of this concern on U.S. policy is emphasized by Adam Roberts:

For at least 25 years, the United States has expressed a concern, shared to some degree by certain other states, regarding the whole principle of thinking about terrorists and other irregular forces in a laws-of-war framework. To refer to such a framework, which recognizes rights and duties, might seem to imply a degree of moral acceptance of the right of any particular group to resort to acts of violence, at least against military targets. Successive US administrations have objected to certain revisions to the laws of war on the grounds that they might actually favor guerrilla fighters and terrorists, affording them a status that the United States believes they do not deserve.⁵⁰

Relying exclusively on the internal or international Common Article 2/3 triggering paradigm compromises the ability to satisfy all of these policy objectives. Using the example of military operations directed against an al Qaeda safe haven illustrates this point. One option would be to stretch the definition of international armed

49. While it may be appealing to assert that such operations should conform to a "law enforcement" paradigm because they might not technically qualify as "conflict" for purposes of invoking this authority, such an assertion is, in the opinion of this Author, unrealistic. Armed forces assigned a mission will naturally apply the combat operational paradigm they are trained to execute regardless of the nature of the operation, and in most cases will perceive the decision to rely on their capabilities as an indication that national policymakers feel compelled to move to a level of force well beyond law enforcement capabilities.

50. Adam Roberts, *The Laws of War in the War on Terror*, in 79 INT'L L. STUD. 178, 186 (2003) (citations omitted).

conflict to apply to such operations on the theory that al Qaeda should be treated as a de facto state armed force for purpose of law of war application. Assuming the credibility of this theory for the sake of argument, it reveals a basic flaw: it purports to vest members of al Qaeda with a status reserved for members of regular state-sponsored armed forces, a status in no way justified by either their character or conduct. Thus, while this approach certainly satisfies the objective of invoking the principles of humanity and necessity, it forces policymakers to articulate why the enemy is not entitled to the beneficial status normally associated with international armed conflict, a process that has occurred with respect to individuals captured in Afghanistan.⁵¹

The second option would be to characterize the military operation as a non-international armed conflict triggering the humane treatment mandate of Common Article 3. This theory certainly seems more plausible than characterizing such an operation as a Common Article 2 conflict, and if confined to the either/or choice between Common Article 2 and Common Article 3, seems the more acceptable option. However, it not only requires adoption of the expanded definition of Common Article 3 endorsed by the *Hamdan* Court, but also ignores the plain language of this article purporting to confine applicability to "the territory of a High Contracting Party."⁵² Furthermore, while it is indisputable that the laws of war emphasize a strict distinction between the law that regulates the conduct of armed conflict (*jus in bello*) and the law that governs the legality of the armed conflict (*jus ad bellum*), the global war on terror has revealed the concern among national security policymakers that characterizing an armed conflict that transcends national borders as falling within the scope of Common Article 3 will subtly undermine the legitimacy of extraterritorial military operations. This consequence is due to the inference that such conflicts do not trigger the authority to engage in military operations of international scope.⁵³ As a result, policymakers responsible for acting on the recommendations of government legal advisors have perceived such a characterization as presenting an unacceptable degradation to the

51. See Memorandum from U.S. Department of Justice, Office of Legal Counsel to William Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>.

52. *E.g.*, First Geneva Convention, *supra* note 5, at art. 2.

53. See Memorandum from U.S. Department of Justice, *supra* note 51.

necessity-based authority for the conduct of transnational military operations.⁵⁴

What is even more problematic from a pragmatic military perspective is that characterizing an out-of-territory/non-intrastate operation as a Common Article 3 conflict fails to address application of the principles of the law related to the application of combat power. As noted above, Common Article 3's substantive mandate is focused only on the treatment of persons placed *hors de combat* and not on the regulation of combat operations producing such a consequence. Thus, even when Common Article 3 is expansively defined to encompass any combat operation falling outside the scope of Common Article 2, the trigger for application of these additional foundational principles of the law—the principles primarily implicated by the recent conflict in Lebanon and essential to the disciplined application of combat power—remains undefined.

When considered in this context, the limits of the either/or paradigm derived from the Common Article 2/3 conflict characterization criteria become apparent. Treating this paradigm as the exclusive trigger for application of the principles of the laws of war provides insufficient legal regulation for the type of intense combat operations exemplified by the recent conflict in Lebanon and fails to satisfy the underlying policy objectives associated with national conflict characterization. This paradigm has resulted in a confused and sometimes contradictory legal posture for U.S. forces.⁵⁵ Fortunately, the policy-based application of the principles of the law to the entire range of combat operations has mitigated this uncertainty and provided a consistent regulatory framework at the operational and tactical level of command. Nonetheless, as Lebanon, Somalia, and Afghanistan all demonstrate, establishing such a framework by way of policy is no longer sufficient to meet the needs of conflict regulation.

Abandoning this either/or paradigm associated with Common Articles 2/3 in favor of the pragmatic transnational armed conflict trigger reconciles these typical national policy concerns with the need to provide this essential regulatory framework. Transnational armed

54. See Memorandum from President Bush, on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (announcing the President's determination that although the conflict against Afghanistan triggered the Geneva Conventions, captured Taliban forces were not entitled to prisoner of war status because they failed to meet the implied requirements imposed by the Convention on members of the regular armed forces).

55. See JEFFREY RECORD, BOUNDING THE GLOBAL WAR ON TERRORISM 6-9 (2003).

conflicts, although international in scope, do not fall within the definition of international armed conflict for law of war triggering purposes, because they do not involve a dispute between states. Accordingly, they cannot be regarded as triggering the full corpus of regulation established by the many law of war treaties, because states have simply never bargained to apply the full panoply of Geneva Convention obligations to such armed conflicts, a category of armed conflict they most likely did not even consider. Regardless of any bargain made, however, there is sufficient evidence to suggest that the principles of the law of war, including the humanitarian principles reflected in Common Article 3, should nonetheless apply to any armed conflict, even those not contemplated by the drafters of the Geneva Conventions and the states that became parties to them.

IV. RECOGNIZING THE REGULATORY GAP: HOW MILITARY POLICIES REFLECT THE NECESSITY OF A "PRINCIPLED" APPROACH TO MILITARY OPERATIONS

The need to provide a regulatory framework based on the foundational principles of the laws of war for all combat operations, even those ostensibly falling outside the accepted law-triggering categories derived from Common Articles 2 and 3, is not something that critics of Israeli operations targeting Hezbollah have only recently exposed. For more than three decades prior to this conflict, U.S. armed forces have followed a clear and simple mandate codified in the Department of Defense Law of War Program:⁵⁶ comply with the principles of the law of war during all military operations.⁵⁷ While this policy mandate has never explicitly articulated the content of the term "principles,"⁵⁸ this term is generally understood to refer to the concepts that reflect the fundamental balance between the

56. See U.S. DEP'T OF DEF., DOD DIRECTIVE 2311.01, DOD LAW OF WAR PROGRAM (2006).

57. The actual language from the Department of Defense Policy reads as follows: "Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations." See *id.* at ¶ 4.1.

58. See *id.* The purported justification for this omission is that each subordinate service is then able to define the content of this term for purposes of its forces. For examples of U.S. service and coalition definitions of these principles, see *infra* Appendix 1. Leaving definition of these principles to individual services creates obvious concerns of inconsistent practice. This concern is unacceptable in the contemporary environment of joint operations. It is likely, however, that a joint standard will be established by the Department of Defense in a Department of Defense Law of War Manual, which is currently under development.

dictates of military necessity (the authority to take those actions necessary to bring about the prompt submission of an enemy)⁵⁹ and humanity (the obligation to mitigate the suffering associated with armed conflict)—concepts that provide the foundation for the more detailed rules that have evolved to implement these principles. This foundational principle/specific rule relationship is explained by Professor Roberts:

Although some of the law is immensely detailed, its foundational principles are simple: the wounded and sick, POWs and civilians are to be protected; military targets must be attacked in such a manner as to keep civilian casualties and damage to a minimum; humanitarian and peacekeeping personnel must be respected; neutral or non-belligerent states have certain rights and duties; and the use of certain weapons (including chemical weapons) is prohibited, as also are other means and methods of warfare that cause unnecessary suffering.⁶⁰

A more concise articulation of these principles, one that is consistent with U.S. military practice, is contained in the recently revised U.K. Ministry of Defense Manual for the Law of Armed Conflict:

Despite the codification of much customary law into treaty form during the last one hundred years, four fundamental principles still underlie the law of armed conflict. These are military necessity, humanity, distinction, and proportionality. The law of armed conflict is consistent with the economic and efficient use of force. It is intended to minimize the suffering caused by armed conflict rather than impede military efficiency.⁶¹

Pursuant to the Department of Defense policy mandate, U.S. armed forces are required to treat any military operation, and especially any armed conflict, as the trigger for application of these foundational principles of the laws of war.⁶² This policy has provided

59. See Roberts, *supra* note 4, at 8; see also U.K. MINISTRY OF DEF., *supra* note 7, ¶ 2.1 (“Despite the codification of much customary law into treaty form during the last one hundred years, four fundamental principles still underlie the law of armed conflict. These are military necessity, humanity, distinction, and proportionality.”).

60. Roberts, *supra* note 4, at 8.

61. See U.K. MINISTRY OF DEF., *supra* note 7, ¶ 2.1. The manual also provides an extensive definition of these principles.

62. See U.S. DEP’T OF DEF., *supra* note 3, ¶ 4. The exact language is:

5.3.1. Ensure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.

Id. ¶ 5.3.1. See generally Maj. Timothy E. Bullman, *A Dangerous Guessing Game Disguised as an Enlightened Policy: United States Laws of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152 (1999) (analyzing the potential that the U.S. law of war policy could be asserted as evidence of a customary

the basis for applying these foundational principles during every phase of the military component of what the Bush administration has characterized as the global war on terror.⁶³

The motive for this policy was two-fold. First, it was intended to provide a common standard of training and operational compliance during the range of military operations.⁶⁴ Second, it responded to the reality that such operations are often initiated prior to a clear government determination of the legal applicability of the laws of war.⁶⁵ Ultimately, the armed forces valued this policy because they

norm of international law). Other armed forces have implemented analogous policy statements. For example, the German policy to apply the principles of the law of war to any armed conflict, no matter how characterized, was cited by the ICTY in the *Tadic* jurisdictional appeal as evidence of a general principle of extending application of the law of war principles derived from treaties governing international armed conflict to the realm of internal armed conflict. See *Tadic*, *supra* note 10, ¶ 118. This policy has recently been updated, and has been made even more emphatic by omitting the “principles” qualifier to require compliance with the law of war during all military operations. According to the most recent version:

4. POLICY

It is DoD policy that:

4.1. Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.

U.S. DEPT OF DEF., *supra* note 3, ¶ 4.

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

64. Interview with W. Hays Parks, Special Assistant to the Judge Advocate General of the Army for Law of War Matters, Office of the Judge Advocate General, in Rosslyn, Va. (April 23, 1999). Parks is the Chair of the Department of Defense Law of War Working Group, is a recognized expert on the law of armed conflict, and is one of the original proponents of the Law of War Program.

65. For example, the uncertainty related to the application of the laws of war to Operation Just Cause in Panama is reflected in the following excerpt from a submission related to judicial determination of General Noriega’s status: “[T]he United States has made no formal decision with regard to whether or not General Noriega and former members of the PDF charged with pre-capture offenses are prisoners of war, but has stated that each will be provided all prisoner of war protections afforded by the law of war.” See U.S. Dep’t of the Army, Memorandum of Law (1990), *quoted in* United States v. Noriega, 808 F. Supp. 791, 794 n.4 (S.D. Fla. 1992). In Somalia, although U.S. forces engaged in intense combat operations against non-state organized armed militia groups, see MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* 3 (1999), there was never a formal determination of the status of the conflict. See Maj. Geoffrey S. Corn and Maj. Michael L. Smidt, *To Be or Not to Be, That is the Question:*

intuitively understood that a framework for the execution of combat or other military operations is essential to the preservation of a disciplined force. This is a critically important purpose of legally regulating the battlefield, a consideration often overlooked by contemporary commentators. It is particularly instructive, however, that this purpose was prominent in one of the most important precursors to the twentieth century evolution of the conventional laws of war, the *Oxford Manual of the Laws of War on Land*:⁶⁶

By [codifying the rules of war derived from state practice], it believes it is rendering a service to military men themselves A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts—which battle always awakens, as much as it awakens courage and many virtues—it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.⁶⁷

The compelling logic reflected in this excerpt is also at the core of the contemporary policy that mandates extending application of these principles to all military operations: that the application of combat power must always be subject to a basic regulatory framework. The gap in the accepted scope of legally required application of the laws of war, coupled with this logic, led other nations to follow the practice of imposing such regulation by policy.⁶⁸ Even the United Nations, habitually called upon to use military forces in situations of uncertain legal classification, implemented an analogous mandate for forces operating under its control.⁶⁹ However, no matter how logical such

Contemporary Military Operations and the Status of Capture Personnel, ARMY LAW., June 1999.

66. INST. OF INT'L LAW, THE LAWS OF WAR ON LAND (1880), <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument>.

67. *Id.*

68. See *Tadic*, *supra* note 10, ¶ 118 (citing the German Military Manual of 1992, the relevant provision of which is translated as follows: "Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts."); see also U.K. MINISTRY OF DEF., *supra* note 7, ¶¶ 14.9 – .10 (indicating that during what it defines as "Peace Support Operations"—military operations that do not legally trigger application of the law of armed conflict—"such fighting does not take place in a legal vacuum" and describing that "[q]uite apart from the fact that it is governed by national law and the relevant provisions of the rules of engagement, the principles and spirit of the law of armed conflict remain relevant").

69. In 1999, the Secretary General of the United Nations issued a Bulletin titled "Observance by United Nations Forces of International Humanitarian Law." U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), available at http://www.un.org/peace/st_sgb_1999_13.pdf. This Bulletin mandated compliance with foundational principles of the law of war (humanitarian law) during any operation that qualified as an "armed

mandates may be in terms of military efficiency and humanitarian protections, their status as policies reveals a perceived gap between situations necessitating application of the laws of war and the technical legal triggers for such application. Furthermore, designation as policy indicates that these mandates are ultimately subject to modification.⁷⁰

Ironically, it was the status of a “detainee”—albeit from a conflict that pre-dated 9/11— that exposed the limits on the effectiveness of this policy application. This occurred in relation to the legal status of General Noriega after he was captured by U.S. forces in Panama. In what today seems like a prescient rebuke to the executive branch’s position that the treatment of Noriega consistently with that law as a matter of policy obviated the need to determine applicability of the laws of war, Judge Hoeveller noted:

The government’s position provides no assurances that the government will not at some point in the future decide that Noriega is *not* a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against.⁷¹

Although Judge Hoellever was addressing the issue of prisoner of war status, the logic extends to all armed conflicts: policy application of the critical principles of the laws of war is an insufficient substitute for legally required application. What the transnational armed conflicts of the recent years demonstrate is that the regulatory framework established by these principles must now extend to a new type of conflict.

conflict.” *Id.* § 1.1. No characterization qualification was included, and the application paragraph demonstrates an extremely expansive interpretation of the concept of armed conflict to which such principles apply:

Section 1

Field of application

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

Id.

70. See *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992) (indicating that a policy-based application of the laws of war is insufficient to protect the rights of General Noriega because it is subject to modification at any time at the will of the Executive).

71. *Id.*

Regardless of the malleable nature of policy application of these principles, policy-based regulation of combat operations has continued to be essential for the regulation of operations falling outside the context of accepted legal triggers for application of the laws of war.⁷² As noted above, operations such as those launched by Israel against Hezbollah defy categorization as either international or internal armed conflicts. The statement below, taken from the U.K. Ministry of Defense Law of Armed Conflict Manual, provides a quintessential illustration of the limitations to applicability of the laws of war derived from this paradigm:

The law of armed conflict applies in all situations when the armed forces of a state are in conflict with those of another state or are in occupation of territory. The law also applies to hostilities in which some of those involved are acting under the authority of the United Nations and in *internal* armed conflicts. Different rules apply to these different situations.⁷³

Published in 2004, after an extensive revision of this manual and well after the initiation of military operations against al Qaeda, this statement of the applicability of the law demonstrates how deeply entrenched this paradigm has become. In spite of the nature of combat operations ongoing during this revision period—operations that actually involved U.K. armed forces—the U.K. military legal experts responsible for this revision retained the strict inter-state or internal paradigm. This is no oversight but is instead a reflection of the widely accepted legal interpretation of the triggering conditions necessary to bring into force the laws of war. Indeed, the pervasive influence of the interpretation of the law-triggering requirements reflected in this extract explains why the U.S. Department of Defense has always characterized the mandate that principles of the laws of war apply to “any” military operation as a *policy* and not as a legal obligation. But it also reveals why it is necessary to reassess whether national policy is sufficient to ensure the application of such principles to transnational combat operations between regular armed forces and non-state armed entities.

72. See *infra* notes 86-88 and accompanying text.

73. See U.K. MINISTRY OF DEF., *supra* note 7, ¶ 3.1.

V. EMPLOYING NATIONAL COMBAT POWER TO
ENGAGE TRANSNATIONAL NON-STATE ACTORS:
EXPOSING THE LIMITS OF POLICY-BASED
REGULATION OF ARMED CONFLICT

If the military profession has indeed recognized that a regulatory framework is an essential aspect for any combat operation, why would the application of such a framework be reliant on a policy mandate? One explanation is that for most of this period the nature of armed conflicts involving U.S. forces rendered the policy redundant with the legal triggers related to application of these principles as a matter of law.⁷⁴ The limit of this redundancy, however, was initially exposed during combat operations in Somalia⁷⁵ and ultimately laid bare in the aftermath of the terrorist attacks of September 11, 2001.⁷⁶

Ironically, despite the effort to reject a hyper-technical trigger for the application of the law that regulates the application of combat power,⁷⁷ because of the international/internal focus, the Common Article 2/3 paradigm that evolved after 1949 did not eliminate this handicap. Nonetheless, prior to 9/11 few scholars or practitioners questioned the Common Article 2/3 paradigm as the exclusive trigger for application of the laws of war.⁷⁸ Instead, this paradigm was almost universally regarded as the definitive standard for determining such application.⁷⁹ However, the large scale combat operations that the United States conducted with global scope to engage and destroy al Qaeda military capabilities stressed the

74. See *supra* notes 62-70 and accompanying text.

75. During these operations, U.S. armed forces engaged in intense close quarters combat with militia groups. This combat, which occurred in densely populated areas, implicated a full range of law of war issues, including the principles of military objective, distinction, proportionality, and the treatment of detained personnel. The limits of policy application, however, were made painfully apparent when the militia forces captured a wounded U.S. pilot, Chief Warrant Officer Michael Durant. The lack of a clearly applicable legal rule related to his status and treatment contributed to the uncertainty related to his ultimate disposition. See BOWDEN, *supra* note 65, at 329.

76. See Donald H. Rumsfeld, *Afghanistan: Five Years Later*, WASH. POST, Oct. 7, 2006, at A23, available at <http://www.washingtonpost.com/wpdyn/content/article/2006/10/06/AR2006100601373.html> (discussing initiation of combat operations in Afghanistan). See generally ANDREW FEICKERT, CRS REPORT FOR CONGRESS: U.S. MILITARY OPERATIONS IN THE GLOBAL WAR ON TERRORISM: AFGHANISTAN, AFRICA, THE PHILIPPINES, AND COLOMBIA, available at <http://www.fas.org/man/crs/RL32758.pdf>.

77. See ICRC Commentary, *supra* note 9, at 32-33.

78. See generally Roberts, *supra* note 4, at 7-32 (discussing the role of traditional laws of war in anti-terrorist military actions).

79. See LAW OF WAR WORKSHOP DESKBOOK, *supra* note 7, at 28-32; see also GREEN, *supra* note 19, at 54-61.

traditional law of war applicability paradigm as never before.⁸⁰ This either/or paradigm of applicability created by Common Articles 2 and 3 proved too restrictive to cover this new category of armed conflict between state armed forces and transnational non-state military entities.⁸¹

80. See Watkin, *supra* note 41, at 1; see also Abott, *supra* note 41, at 384; ELSEA, *supra* note 20, at 1-2 (analyzing whether the attacks of September 11, 2001, triggered the law of war); Eric Talbot Jensen, *The Laws of War: Past, Present, and Future: Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209 (2005); Derek Jinks, *The Laws of War: Past, Present, and Future: The Applicability of the Geneva Conventions to the "Global War on Terrorism,"* 46 VA. J. INT'L L. 165 (2005).

81. See 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, 681-85 (2004). Professor Brooks proposes reliance on international human rights law as a regulatory framework:

As traditional categories lose their logical underpinnings, we are entering a new era: the era of War Everywhere. It is an era in which the legal rules that were designed to protect basic rights and vulnerable groups have lost much of their analytical force, and thus, too often, their practical force.

....

In the long run, the old categories and rules need to be replaced by a radically different system that better reflects the changed nature of twenty-first century conflict and threat. What such a radically different system would look like is difficult to say, and the world community is unlikely to develop a consensus around such a new system anytime soon. This article suggests, nonetheless, that international human rights law provides some benchmarks for evaluating U.S. government actions in the war on terror, and ultimately for developing a new analytical framework that can successfully balance the need to respond to new kinds of security threats with the equally important need to preserve and protect basic human rights.

Unlike domestic U.S. law and the law of armed conflict, human rights law applies to all people at all times, regardless of citizenship, location, or status. Although human rights law permits limited derogation in times of emergency, it also outlines core rights that cannot be eliminated regardless of the nature of the threat or the existence or non-existence of an armed conflict. Applying the standards of international human rights law in both domestic and international contexts would not solve all the problems created by the increasing irrelevance of other legal frameworks, but it would provide at least a basic floor, a minimum set of standards by which international and domestic governmental actions could be evaluated.

Id. While such a concept of conflict regulation might indeed be effective to achieve the concurrent humanitarian objectives of both the law of armed conflict and human rights law, in the opinion of this Author the traditional culture among professional armed forces linking regulation to the laws of war makes this a less feasible response than expanding the triggering criteria for principles of the laws of war. Indeed, the reliance by many armed forces over the past two decades on a policy-based application of these principles instead of reliance on human rights norms as a source of operational regulation in situations of legal uncertainty corroborates the significance of this

Like an operational commander exploiting a seam between the defensive positions of opposing enemy units, during the five years following 9/11 the Bush administration arguably sought to exploit the seam created by this either/or Common Article 2/3 law-triggering paradigm. During this period, the administration persistently relied on this traditional paradigm to justify denying legal applicability of the laws of war to combat operations directed against al Qaeda.⁸² While never abandoning the policy commitment to apply law of war principles at the operational level of command,⁸³ deviation from these principles in relation to al Qaeda detainees became a lightning rod for criticism of U.S. policy.⁸⁴ The Bush administration's interpretation of

cultural dynamic, a consideration that seems to be ignored by proponents of a human rights military regulatory framework. Nonetheless, the mere fact that such an alternate regulatory approach is offered supports both the conclusion that the traditional regulatory paradigm is insufficient to meet the requirements of the contemporary battlefield and that some legally based regulatory framework is essential on that battlefield.

82. See, e.g., BYBEE, *supra* note 38; ALBERTO R. GONZALES, MEMORANDUM FOR THE PRESIDENT: DECISION RE APPLICATION OF THE GENEVA CONVENTION ON PRISONERS OF WAR TO THE CONFLICT WITH AL QAEDA AND THE TALIBAN (2002), available at <http://www.msnbc.msn.com/id/4999148/site/newsweek/>; DONALD RUMSFELD, MEMORANDUM FOR CHAIRMAN OF THE JOINT CHIEFS OF STAFF: STATUS OF TALIBAN AND AL QAIDA (2002), available at <http://news.findlaw.com/hdocs/docs/dod/11902mem.pdf>. In a message dated January 21, 2002, the Chairman notified combatant commanders of the Secretary of Defense's determination. STATUS OF TALIBAN AND AL QAIDA, (2002), available at <http://news.findlaw.com/hdocs/docs/dod/12202mem.pdf>; see also GEORGE W. BUSH, MEMORANDUM FOR THE VICE-PRESIDENT, ET AL.: HUMANE TREATMENT OF TALIBAN AND AL QAEDA DETAINEES (2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (announcing the President's determination that although the conflict against Afghanistan triggered the Geneva Conventions, captured Taliban forces were not entitled to prisoner of war status because they failed to meet the implied requirements imposed by the Convention on members of the regular armed forces). This determination endorsed the analysis provided by the Office of Legal Counsel of the Department of Justice to the General Counsel of the Department of Defense that reflected a restrictive interpretation of legal applicability of the laws of war. See generally BYBEE, *supra* note 38.

83. See BUSH, *supra* note 82, at 1-2. According to that directive:

Of course, our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

Id. ¶ 3.

84. See, e.g., ELSEA, *supra* note 20, at 3; Human Rights Watch, *U.S. Officials Misstate Geneva Convention Requirements*, Jan. 28, 2002, <http://hrw.org/press/2002/01/us012802-ltr.htm> (last visited Feb. 14, 2007); Human Rights Watch, *United Nations Finds that U.S. Has Failed to Comply with International Obligations at Guantanamo*

the laws of war that sparked this critical reaction focused on two principle factors: the non-state nature of al Qaeda and the global nature of the conflict.⁸⁵ Al Qaeda's non-state character resulted in the legitimate conclusion that the global war on terror could not properly be classified as a Common Article 2 conflict.⁸⁶ The second factor led to the more controversial conclusion that the global scope of the conflict placed it outside the realm of a Common Article 3 non-international armed conflict. In a critical legal determination, the President stated,

I also accept the legal conclusion of the Department of Justice and determine that Common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."⁸⁷

This interpretation is reflected in the following language from the Department of Justice analysis of the applicability of the laws of war to al Qaeda and Taliban detainees:

Analysis of the background to the adoption of the Geneva Conventions in 1949 confirms our understanding of Common article 3. It appears that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general *international* concern at the time: armed conflict between nation-States (subject to article 2), and large-scale civil war within a nation-State (subject to article 3).

....

... If the state parties had intended the Conventions to apply to all forms of armed conflict, they could have used broader, clearer language. To interpret common article 3 by expanding its scope well beyond the meaning borne by its text is effectively to amend the Geneva Conventions without the approval of the State parties to the treaties... Giving due weight to the state practice and doctrinal understanding of the time, the idea of an armed conflict between a nation-State and a transnational terrorist organization... could not have been within the contemplation of the drafters of common article 3.⁸⁸

The accordant denial of the substantive humanitarian protections of Common Article 3 to detainees subject to trial by military commission

Detention Center, <http://hrw.org/english/docs/2006/02/16/usdom12833.htm> (last visited Feb. 14, 2007).

85. See GONZALES, *supra* note 82 (articulating the basis for the conclusion that al Qaeda detainees did not fall under either the law triggered by Common Article 2 or the humane treatment obligation of Common Article 3).

86. *Id.*

87. See BUSH, *supra* note 82, ¶ 2.c.

88. BYBEE, *supra* note 38, at 7-8.

was ultimately challenged in the Supreme Court. In *Hamdan v. Rumsfeld*, the Court confronted the legal obligations related to the applicability of the humane treatment mandate of Common Article 3 to the armed conflict between the United States and al Qaeda.⁸⁹

The Supreme Court's decision in *Hamdan* rejected the Bush administration's interpretation of non-international armed conflict and held that the substantive protections of Common Article 3 applied to individuals detained during the course of this non-international armed conflict.⁹⁰ The Court interpreted Common Article 3 as occupying the field-of-conflict regulation for any armed conflict not falling under the definition of Common Article 2, reflecting the exact "residual conflict" concept explicitly rejected in the Department of Justice analysis of this treaty provision.⁹¹ According to Justice Stevens's majority opinion:

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations.⁹²

Ironically, this analysis mirrors the logic that animated Department of Defense policy for decades. This was no statement of policy, however, but instead an enunciation of a legal obligation derived by the Supreme Court's controlling interpretation of a binding treaty.⁹³ Hailed as landmark by some and criticized as invalid by others,⁹⁴ this holding is limited by one critical reality: the gap it filled related only to the principle of humane treatment.⁹⁵

89. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006).

90. See *id.*

91. See *id.* at 2795. See generally BYBEE, *supra* note 38.

92. *Hamdan*, 126 S. Ct. at 2795 (citations omitted).

93. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006). According to Chief Justice Roberts: "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court.'" *Id.* (citations omitted).

94. See Marc Goldman & Michael D. Mori, Editorial, *What the Hamdan Ruling Really Meant*, WASH. POST, July 26, 2006, at A16. But see Jess Bravin, *Trial and Error: Justices Bar Guantanamo Tribunals; High Court Says President Exceeded War Powers; He May Turn to Congress; Ruling Won't Free Prisoners*, WALL ST. J., June 30, 2006, at A1.

95. See *Hamdan*, 126 S. Ct. at 2798. Common Article 3 provides substantive protection exclusively to individuals who are "out of combat," and does not deal with the methods and means of warfare:

Nothing in that opinion addressed the applicability of the other foundational principles of the law of war to extraterritorial non-state armed conflicts, principles such as necessity, distinction, proportionality, and the prohibition against inflicting unnecessary suffering, all of which are clearly essential to regulate the application of combat power.⁹⁶

This limited impact was highlighted almost immediately following this decision, when the world witnessed five weeks of intense combat operations between the Israeli Defense Forces and the armed component of Hezbollah.⁹⁷ The intensity of this conflict, and especially the resulting collateral damage inflicted on civilians and civilian property, immediately shifted the international focus of law of war applicability from the humane treatment principle implicated in the *Hamdan* decision to these other foundational principles of distinction, proportionality, and necessity.⁹⁸ This conflict and the international response it evoked indicate an obvious reality: the international community now expects application of these principles to all armed conflicts not merely as a matter of policy but as a matter of law. In essence, the international reaction to this conflict implicated the same rationale relied on by the Supreme Court in

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

E.g., First Geneva Convention, *supra* note 5, at art. 3.

96. See generally Roberts, *supra* note 4 (discussing the role of traditional laws of war in anti-terrorist military actions).

97. See Scott Wilson & Anthony Shadid, *Israel Fights To Secure Key Region In Lebanon; Limited Ground Invasion May Suffice, Officials Say*, WASH. POST, July 23, 2006, at A1.

98. See Richard Cohen, Editorial, . . . *No, It's Survival*, WASH. POST, July 25, 2006, at A15.

Hamdan: that all armed conflicts are subject to legal regulation and therefore any conflict not qualified as an international armed conflict is *ipso facto* a non-international armed conflict. The issues of concern related to that conflict, however, indicate that such armed conflicts not falling within the scope of Common Article 2 must trigger not only the humane treatment obligation but all foundational principles of the law of war.

The combination of these two events—the *Hamdan* decision and the conflict in Lebanon—has made it necessary to consider a critical evolution of the legal trigger for application of the principles of the laws of war. This evolution reflects the emerging legalization of the policy approach adopted by the U.S. armed forces more than two decades ago and relied upon since then to provide a pragmatic response to the stoic legal paradigms that grew out of the Geneva Conventions. The time has now come for states to acknowledge and endorse this new paradigm of law of war applicability, which is best categorized as the transnational armed conflict trigger. Like the Common Article 2/3 triggers, the key factor related to this trigger is the *de facto* existence of armed conflict. Unlike the Common Article 2/3 trigger, this new trigger is not limited by either the non-state status of a party to the conflict or the geographic scope of the conflict. Instead, it represents an *ipso facto* application of the foundational principles of the law of war to any situation involving *de facto* hostilities where at least one of the parties to the conflict is a state.

It is, of course, plausible to assert that such an evolution is unnecessary because Common Article 3's plain meaning indicates it has always served as a trigger for such an expansive definition of armed conflicts. However, such a response ignores the reality that the Common Article 2/3 international/internal armed conflict paradigm did not contemplate such transnational armed conflicts. As noted above, this reality was reflected by the perceived necessity of establishing national policies to extend application of foundational law of war principles to all military operations, no matter how characterized. Because this paradigm made conflict characterization the *sine qua non* of the law applicability determination, only such a policy extension could satisfy the military need to ensure all operations were subject to this regulatory framework. Absent such a policy, uncertainty as to the nature of a conflict operation would result in analogous uncertainty as to what rules should apply, an uncertainty unacceptable from a military efficiency and discipline perspective. Thus, the policy extension is a powerful indication that *ipso facto* application of these principles to any armed conflict is in

fact consistent with the purposes of the law of war,⁹⁹ the needs of military discipline and efficiency, the humanitarian objective of these treaties (which emphasizes the significance of underlying principles),¹⁰⁰ and the historical internal disciplinary codes of regular armed forces.¹⁰¹

99. See U.S. DEP'T OF ARMY, FIELD MANUAL 27-10 ¶ 3 (1956), available at <http://faculty.ed.umuc.edu/~nstanton/FM27-10.htm>. According to this authoritative Department of the Army statement:

The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:

- a. Protecting both combatants and noncombatants from unnecessary suffering;
- b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
- c. Facilitating the restoration of peace.

Id. ¶ 2.

100. See ICRC Commentary, *supra* note 9, at 19-23. In addition to discussing the basic humanitarian purpose of the four Geneva Conventions, the Commentary indicates:

However carefully the texts were drawn up, and however clearly they were worded, it would not have been possible to expect every soldier and every civilian to know the details of the odd four hundred Articles of the Conventions, and to be able to understand and apply them. Such knowledge as that can be expected only of jurists and military and civilian authorities with special qualifications. But anyone of good faith is capable of applying with approximate accuracy what he is called upon to apply under one or other of the Conventions, provided he is acquainted with the basic principle involved.

Id. at 21.

101. See GREEN, *supra* note 19, at 20-33; see also Leslie C. Green, *What is—Why is There—the Law of War*, in 71 THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 141, 176 (Michael N. Schmitt & Leslie C. Green eds., 1998). This conclusion is not only reflected in the extension of this regulatory framework by military policy. It is also reflected in the history from which these principles evolved. Throughout the post-Westphalian history of warfare, armed forces complied with such codes. See GREEN, *supra* note 19, at 20-33. Because such codes took the form of internal disciplinary mandates, little attention was given to the question of whether they were derived from legal obligation. The content of these internal military codes of conduct, however, provided the seeds from which grew the contemporary international legal principles regulating armed conflicts. See Green, *supra*, at 176; see also Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 112-14 (2001). Thus, while treating application of these principles to any armed conflict as a matter of legal obligation is a significant shift from the pre-2001 legal paradigm, the substantive impact of such application is not only consistent with the practices of many professional armed forces, but also with the historic understanding by armed forces that a battlefield without rules was an anathema to a disciplined force.

The either/or law-triggering paradigm may have proved generally sufficient to address the types of armed conflicts occurring up until 9/11. This fact, however, no longer justifies the conclusion that no other triggering standard should be recognized. Instead, as the events since 9/11 have illustrated so convincingly, such a recognition is essential to keep pace with the evolving nature of armed conflicts themselves. The prospect of an unregulated battlefield is simply unacceptable in the international community—a fact that is demonstrated by the response to the conflict in Lebanon.¹⁰² The ultimate question, therefore, is whether it is best to continue to try and fit the proverbial square “armed conflict” peg into the round “Common Article 3” hole, or whether the time has come to endorse a new category of armed conflict. It is the limited impact of Common Article 3 itself that compels the conclusion that recognizing a new law-triggering category is essential.

Several prominent law of war scholars who have written on this subject begin with a discussion of these historical roots to the contemporary legal regime for the regulation of armed conflict. For example, A.P.V. Rogers begins with the following introduction:

Writers delve back through the history of centuries to the ancient civilizations of India and Egypt to find in their writings evidence of practices intended to alleviate the sufferings of war. This evidence is to be found in agreements and treaties, in the works of religious leaders and philosophers, in regulations and articles of war issued by military leaders, and in the rules of chivalry. It is said that the first systematic code of war was that of the Saracens and was based on the Koran. The writers of the Age of Enlightenment, notably Grotius and Vattel, were especially influential. It has been suggested that more humane rules were able to flourish in the period of limited wars from 1648 to 1792 but that they then came under pressure in the drift towards continental warfare, the concept of the nation in arms and the increasing destructiveness of weapons from 1792 to 1914. *So efforts had to be made in the middle of the last century to reimpose on war limits which up to that time had been based on custom and usage.*

A.P.V. ROGERS, *LAW ON THE BATTLEFIELD 1* (1996) (citations omitted) (emphasis added). Professor Leslie Green has also written extensively on the historical underpinnings of the laws of war, highlighting the fact that throughout history, military leaders from a wide array of cultures have always imposed limits on the conduct of hostilities by their own forces. See GREEN, *supra* note 19, at 20-33; see also Green, *supra*, at 176. In so doing, Professors Rogers and Green remind readers not only that the regulation of warfare is as ancient as organized warfare itself, but that the logic of such regulation transcends hyper-technical legal paradigms defining what is war and when such rules should apply.

102. See Human Rights Watch, *Lebanon/Israel: U.N. Rights Body Squanders Chance to Help Civilians*, Aug. 11, 2006, http://hrw.org/english/docs/2006/08/11/leban013969_txt.htm (containing statements by Louise Arbour); see also Human Rights Watch, *U.N.: Open Independent Inquiry into Civilian Deaths*, Aug. 8, 2006, <http://hrw.org/english/docs/2006/08/08/leban013939.htm> (containing statements by Kofi Annan).

VI. A PRAGMATIC RESPONSE TO THE REGULATORY GAP:
THE TRANSNATIONAL ARMED CONFLICT TRIGGER

The stress on the existing paradigm of law of war application reflected in the diverging conclusions of both the D.C. Circuit and the Supreme Court in *Hamdan* is in no way fatal to the ability of the law to adapt to the necessities of the changing nature of warfare. All law is adaptive, but this is particularly true with regard to the laws of war—a conclusion illustrated by the fact that this law has endured for centuries.¹⁰³ This area of international legal regulation has been historically resilient precisely because the law has always responded to changes in the nature of warfare. Perhaps more importantly, these responses have been implemented in a manner considered credible by states and the armed forces called upon to execute military conflicts. This adaptive character of the laws of war is highlighted in the following comment by Professor Charles Garraway, the former Stockton Chair of International Law at the U.S. Naval War College and a recognized expert in the field:

All new warfare operates to stress existing law. This is true for every war and every conflict occurring over the last several hundred years. The new type of warfare involved in “the war on terrorism” is no exception. Caution should be taken, however, not to throw out the existing regime but instead we should study and analyze these stresses, for such stresses are not necessarily fatal.¹⁰⁴

Consistent with the pragmatic interpretation of the law reflected in the excerpt from Judge Williams cited previously and the flexibility highlighted by Professor Garraway, it is essential that the applicability of the principles of the laws of war—principles that operate to limit the brutality of war and mitigate the suffering of victims of war—not be restricted by an overly technical law-triggering paradigm. Accordingly, the time has come for states to reject any interpretation of the Common Article 2/3 paradigm that results in denial of applicability of these principles to situations of armed conflict where the regulatory effect of the law is essential to ensure this mitigation of suffering and the disciplined application of combat power. Therefore, the ongoing evolution in the nature of warfare requires acknowledgment that any armed conflict triggers the foundational principles of the laws of war. If this outcome is achieved by characterizing such military operations as Common Article 3

103. See generally Green, *supra* note 101 (discussing the history of the laws of war).

104. Charles Garraway, *Panel II Commentary – Jus in Bello, International Law and the War on Terror*, 79 INT’L L. STUD. 231, 231 (2003).

conflicts that trigger the humane treatment obligation *plus additional* customary law of war principles, the regulatory purpose of the law can be achieved. Given that Common Article 3 conflicts have become generally synonymous with internal conflicts, however, it is more pragmatic to expressly endorse a hybrid category of armed conflict: transnational armed conflict.¹⁰⁵

The recognition of this hybrid category would not render Common Articles 2 or 3 irrelevant. Instead, these Articles would continue to serve as triggers for application of the treaty provisions to which they relate. But this new category would be responsive to the rapidly changing nature of warfare, a change that creates an increased likelihood that states will resort to the use of combat power to respond to threats posed by non-state armed entities operating outside their territory.¹⁰⁶ Such armed conflicts justify a more precise interpretation of the de facto conditions that trigger the foundational principles of the laws of war, supporting the conclusion that any de facto armed conflict serves as such a trigger. Common Articles 2 and 3 would then serve to trigger layers of more defined regulation in some ways redundant to and in other ways augmenting these principles. This layered methodology will ensure no conflict falls outside the scope of essential baseline regulation while preserving the technical triggers for more detailed regulation required by application of specific treaty provisions.

This bifurcated methodology of distinguishing between treaty provisions per se and the principles providing the foundation for these treaty provisions was an essential aspect of the first major international war crimes trial since the advent of Common Articles 2 and 3. The *Tadic* appeals chamber decision by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ad hoc war court created by the U.N. Security Council to bring alleged war criminals from the conflict that followed the breakup of the former Yugoslavia relied on a similar methodology.¹⁰⁷ The ICTY was able to

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

106. See Scott Baldauf and Mike Pflanz, *U.S. Takes Hunt for Al Qaeda to Somalia*, CHRISTIAN SCIENCE MONITOR, Jan. 10, 2009, available at <http://www.csmonitor.com/2007/0110/p01s02-woaf.html> (discussing a U.S. military strike against an alleged al Qaeda base camp in Somalia).

107. *Tadic*, *supra* note 10.

sustain many war crimes allegations only by extending to the realm of non-international armed conflict fundamental principles of the laws of war derived from treaty articles applicable only to international armed conflicts.¹⁰⁸ According to this seminal decision, the requirements for application of individual criminal responsibility under Article 3 of its statute (vesting the ICTY with competence to adjudicate violations of the laws or customs of war) were that:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature *or, if it belongs to treaty law, the required conditions must be met*¹⁰⁹

Accordingly, the ICTY relied on this methodology to fill a regulatory gap essential to establish individual criminal responsibility in relation to the armed conflict, the exact same logic that supports further reliance on this methodology to regulate transnational armed conflicts.

As noted above, the pragmatic logic of adopting an *ipso facto* application of these foundational principles to any armed conflict has long been at the core of U.S. military policy. It also provided the *ratio decidendi* for the *Hamdan* majority holding that the principle of humane treatment applied to the armed conflict between the United States and al Qaeda. By essentially adopting the same logic articulated by Judge Williams at the appellate level, the *Hamdan* majority endorsed a modified version of the Common Article 2/3 either/or paradigm. The scope of international armed conflict defined by Common Article 2 was left intact. However, instead of endorsing the intra-state qualifier to the alternate type of armed conflict, the Court concluded that the term “non-international,” as used in Common Article 3, operates in contradistinction to international armed conflicts, and therefore covers all armed conflicts falling outside the scope of Common Article 2.¹¹⁰ Accordingly, the Court determined that a non-international armed conflict includes the traditional category of internal armed conflicts, but also extraterritorial armed conflicts between a state and non-state forces. As Justice Stevens noted:

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to *Hamdan* because the conflict with

108. See generally Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66 (2005) (providing an excellent analysis of the significance of the *Tadic* ruling).

109. *Tadic*, *supra* note 10, ¶ 94 (emphasis added).

110. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794-96 (2006).

al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-à-vis the nonsignatory if "the latter accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). *In context, then, the phrase "not of an international character" bears its literal meaning.*¹¹¹

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

Making the existence of armed conflict, and not the nature of armed conflict, the trigger for a regulatory framework is consistent with the history of the military profession. Recognition that combat is an endeavor that must trigger an effective regulatory framework is reflected in self-imposed regulatory codes adopted by professional armed forces. As is suggested by A.P.V. Rogers in *Law on the Battlefield*,¹¹² prior to the development of the law-triggering mechanisms controlling application of this regulatory framework, armed forces did not appear to consider "conflict typing" as an essential predicate for operating within the limits of such a framework. While it is true that throughout most of history this framework took the form of self-imposed limits on warrior conduct, these limits provided the seed for what are today regarded as the foundational principles of the laws of war.¹¹³ Thus, the pragmatic military logic reflected in both the *Hamdan* decision and the Department of Defense law of war policy is deeply rooted in the history of warfare.

111. *Id.* at 2795-96 (citations omitted) (emphasis added).

112. See generally ROGERS, *supra* note 47.

113. See Green, *supra* note 101, at 176.

This history includes examples of combat operations conducted by the regular armed forces of states against non-state armed groups prior to the development of Common Article 3. These operations ranged from colonial expeditions to what would today be characterized as coalition operations, such as the multi-national response to the Boxers in China.¹¹⁴ In *Savage Wars of Peace*, Max Boot provides several examples of such combat operations conducted by the armed forces of the United States prior to World War II, ranging from the conflict against the Barbary pirates to the punitive expedition against Pancho Villa.¹¹⁵ Armed forces executing such operations must have invoked what today would be characterized as the principle of military necessity, asserting the authority to take all measures not forbidden by international law necessary to achieve the prompt submission of their opponents. However, these forces also respected what would today be regarded as the principle of humanity, as understood in historical context.¹¹⁶ While the nature of the constraint on the conduct of these operations may have been understood more in terms of chivalry and less in terms of law,¹¹⁷ the basic premise that runs through this history to the contemporary battlefield is that combat operations trigger a framework of regulation necessary for disciplined operations. Today, this framework is best understood not in terms of a chivalric code, but in terms of compliance with the principles of necessity, humanity, distinction, and the prohibition against inflicting unnecessary suffering.¹¹⁸

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

Historically, international law was concerned only with the relations between states. As a result, the international law of armed conflict developed in relation to inter-state conflicts was not in any way

114. See MAX BOOT, *SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* 69-98 (2002).

115. *Id.* at 3-30, 182-204.

116. See GREEN, *supra* note 19, at 54-55.

117. *Id.*

118. See *supra* note 59-60 and accompanying text.

concerned with conflicts occurring within the territory of any state or with a conflict between an imperial power and a colonial territory.¹¹⁹

This history suggests, however, that the seeds that grew into the foundational principles of the contemporary laws of war were derived from these internal military codes. Indeed, the fact that the contemporary laws of war find their origins in the practices of armed forces is also highlighted by Professor Green: “[t]he law of armed conflict is still governed by those principles of international customary law which have developed virtually since feudal times”¹²⁰ It therefore seems significant that armed forces did not historically qualify application of these internal codes of conflict regulation on the character of the armed conflict. Nor can it be legitimately asserted that armed forces bound by such internal codes were employed exclusively in the realm of state versus state conflict. While this may have been the most common type of combat operations, the history of the nineteenth and twentieth centuries also include military engagements falling outside this category.¹²¹

Nonetheless, the historical context of the range of combat operations engaged in by regular armed forces during this critical period of legal development is significant when assessing the appropriate scope of the application of the contemporary principles of the laws of war. This history supports the inference that regular armed forces historically viewed combat operations—or armed conflict—as an *ipso facto* trigger for principles that regulated combatant conduct on the battlefield. This history is also instructive in exposing the fact that this basic framework concept was severely strained during the years between World Wars I and II. This strain was exacerbated by the fact that the scope of the emerging treaty based regulatory regime was strictly limited to war, which was understood in the classic terms of a contention between states.¹²²

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

120. *Id.* at 52.

121. Without even considering the colonial conflicts of this period, *see* GREEN, *supra* note 19, at 54-55, examples of such “non inter-state” military operations include several campaigns conducted by the armed forces of the United States, such as the operations during the Boxer Rebellion, Pershing’s campaign against Pancho Villa, and numerous “stability” operations in Haiti, the Dominican Republic, the Philippine Islands, and Nicaragua. *See generally* BOOT, *supra* note 114.

122. During this period, brutal internal conflicts in Spain, Paraguay, Russia, and China challenged this customary expectation that professional armed forces engaged in armed conflict would conduct themselves in accordance with principles of disciplined warfare. The estimated number of people killed in civil wars during the inter-war years are: 18,800,000 in the Russian Civil War (1918-21); 3,000,000 in the Chaco War (Paraguay and Bolivia) (1932-35); 2,500,000 in the Chinese Civil War (1945-49); 365,000 in the Spanish Civil War (1936-39). Matthew White’s Homepage,

In this regard, it is important to recall that even Common Article 2¹²³ was a response to a perceived failure of the traditional expectation that armed forces would apply a regulatory framework derived from either the laws and customs of war or from internal disciplinary codes when engaged in war between states.¹²⁴ The

Historical Atlas of the Twentieth Century, <http://users.erols.com/mwhite28/20centry.htm> (last visited Feb. 14, 2007). This created a perceived failure of international law to provide effective regulation for non-international armed conflicts, ultimately providing the motivation for the development of Common Article 3. It is, however, worth questioning whether Common Article 3 is properly understood as “necessary” to ensure compliance with such foundational principles during non-state conflicts. Within the context of the history of armed conflicts—a history that was characterized up until the inter-war years by relative obedience to internally imposed regulatory frameworks during all combat operations—Common Article 3 might instead be legitimately viewed as a fail-safe to provide the international community a basis to demand compliance with the most fundamental component of such a framework: respect for the humanity of persons placed *hors de combat* when armed forces refuse to comply with the customary standards of conduct related to any combat operation, including non-international conflicts.

123. *E.g.*, First Geneva Convention, *supra* note 5, at art. 2.

124. According to the ICRC Commentary:

Since 1907 experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the Hague Convention. Furthermore, there have been many cases where States at war have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation, has been put forward as a pretext for not observing one or other of the humanitarian Conventions. It was necessary to find a remedy to this state of affairs, and the change which had taken place in the whole conception of such Conventions pointed the same way. They were coming to be regarded less and less as contracts concluded on a basis of reciprocity in the national interests of the parties and more and more as a solemn affirmation of principles respected for their own sake, a series of unconditional engagements on the part of each of the Contracting Parties “vis-à-vis” the others. A State does not proclaim the principle of the protection due to civilians merely in the hope of improving the lot of a certain number of its own nationals. It does so out of respect for the human person.

....

By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient.

It remains to ascertain what is meant by “armed conflict.” The substitution of this much more general expression for the word “war” was deliberate. It is possible to argue almost endlessly about the legal definition of “war.” A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or

rejection of war as a trigger for application of the laws of war during inter-state conflicts in favor of an armed conflict trigger was an attempt to prevent what one might understand as bad faith avoidance of compliance with the customary standards related to the *jus in bello*.¹²⁵ The qualifier “international” was, as indicated in the ICRC Commentary, an effort to emphasize that specific provisions of the Geneva Conventions were triggered by armed conflicts conducted under state authority.¹²⁶ As that same Commentary indicates, however, it is the armed conflict aspect of military operations that distinguish such activities—and the law that regulates them—from the wide range of government activities not involving the application of combat power by armed forces.¹²⁷ It is therefore thoroughly consistent with the purpose and history of the Geneva Conventions to place principal emphasis on the existence of armed conflict when assessing the appropriate trigger for the foundational principles reflected in those and other law of war treaties.

Support for an *ipso facto* application of conflict regulation to any armed conflict is also reflected in the pragmatic mandate of the Martens Clause. Adopted more than a century ago in the first comprehensive law of war treaty regulating the methods and means of warfare, the clause indicates that in the absence of an applicable rule of law, when armed conflict continues to affect the inhabitants of a nation, they should be protected by fundamental norms of humanity.¹²⁸ The International Court of Justice in the advisory

acting in legitimate self-defence. The expression “armed conflict” makes such arguments less easy. Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.

COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 17-20 (Jean S. Pictet ed., 1960) (emphasis added).

125. ICRC Commentary, *supra* note 9, at 19-23

126. *Id.* at 32.

127. *Id.*

128. “Martens Clause” is in honor of Feodor Martens, the Russian diplomat responsible for first proposing the language in the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, available at <http://www.icrc.org/ihl.nsf/0/dbe0afb2065e0d7ec125641e0031f38c?OpenDocument>. See ROGERS, *supra* note 47, at 6-7, 6 n.36. This language was inserted into the Preamble of the Hague Convention of 1899 and has been replicated in subsequent law of war treaties, see *id.* at 7 n.37, and states:

[I]n cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized people, from the laws of humanity, and the dictates of the public conscience.

opinion on the legality of the threat or use of nuclear weapons emphasized the continuing relevance of this provision when analyzing the framework of regulation applicable during armed conflicts.¹²⁹ Professor Leslie Green also persuasively summarizes this continuing significance and the implication to look beyond the strict terms of treaties when determining law applicable to armed conflict:

As is made clear by the Martens Clause, which the World Court has indicated is just as significant today as it was when Martens introduced it, *when seeking the law of war it is not enough to look merely at the written documents which have been drawn up and accepted by States as treaties*. These may be considered as reflecting what has developed in practice as representing what States are prepared to impose upon their armed forces by way of restrictions on their freedom of action. Although it may not always be easy to ascertain what are claimed to be the customary rules in this regard, *the principles of humanity and the dictates of public conscience, taken together with considerations of the accepted practices of the most significant military forces*, are probably sufficiently well known and accepted to provide guidance necessary to understand what is meant by those terms.¹³⁰

Although rarely considered as a source of substantive obligation, this treaty provision seems ironically prescient in the current geopolitical context. The clause provides additional support for the proposition that no conflict can be permitted to fall outside the regulation of the foundational principles of the laws of war. Accordingly, the Martens Clause bolsters the rationale for adopting a new conflict classification category, because it suggests that the requirement to ensure

Convention Respecting the Laws and Customs of War on Land pmbL., Oct. 18, 1907, 36 Stat. 2277, *reprinted in* DEPARTMENT OF THE ARMY PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) [hereinafter Convention Respecting the Laws and Customs of War on Land].

Interestingly, it was omitted from the Geneva Conventions of 1949 but subsequently reappeared in a somewhat modified form in Additional Protocol I to the Geneva Conventions:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 3.

129. See Convention Respecting the Laws and Customs of War on Land, *supra* note 128, at pmbL.; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); see also Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 1997 INT'L REV. OF THE RED CROSS 125, 125-34.

130. Green, *supra* note 101, at 176 (emphasis added).

humanitarian regulation of de facto conflict was historically considered preeminent to the technical interpretation of treaty obligations.

This general proposition that effective regulation of de facto armed conflicts warrants resort to foundational principles reflected in treaties that are technically inapplicable to a given conflict has also been implicitly endorsed by the ICTY. In the seminal decision defining the jurisdiction of the ICTY, *Prosecutor v. Tadic*,¹³¹ the Tribunal held that:

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.¹³²

Of course, because the question before this ICTY dealt with the application of the laws of war to international armed conflict, internal armed conflict, or a combination of both, the significance of this language is primarily related to these traditional categories.¹³³ However, what was far more significant about this decision was the recognition that non-international armed conflicts trigger a regime of regulation more comprehensive than only humane treatment. In ruling on the obligations applicable to participants in such non-international armed conflicts that provide a basis for individual criminal responsibility, the ICTY looked beyond the humane treatment mandate of Common Article 3.¹³⁴ In addition to that obligation, the ICTY concluded that many of the fundamental rules related to the methods and means of warfare applicable by treaty exclusively to international armed conflicts had evolved to apply as a matter of customary international law to non-international armed

131. *Tadic*, *supra* note 10, ¶¶ 96-127. It is interesting to note that the ICTY cites U.S. policy in support of this conclusion:

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

Id.

132. *Id.* ¶ 70.

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

134. *See id.* ¶¶ 96-127.

conflicts.¹³⁵ While the ICTY noted that this evolution did not result in a mechanical transfer of rules from one category of armed conflict to the other, this ruling clearly encompassed what are characterized by many sources as the foundational principles of the law of war.¹³⁶ According to the ruling, these principles:

cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.¹³⁷

It was only by recognizing the applicability of these principles to non-international armed conflicts that the Tribunal was able to sustain many of the war crimes allegations related to the conflict in Bosnia. The wisdom of this judgment and the accordant extension of principles originally associated with international armed conflicts into the realm of non-international armed conflict has been revealed by the realities of both internal and transnational armed conflicts. Indeed, there seemed to be virtually no hesitation among legal scholars and diplomatic officials for demanding a similar extension of these principles to the recent conflict in Lebanon.¹³⁸ Obviously, the alternative—that intense combat operations could fall beyond the scope of any legal regulation—was unthinkable. Nor would application of the *Hamdan* ruling on the expanded scope of Common Article 3 does not satisfy the perceived necessity to regulate such a conflict, as that ruling in no way addressed application of principles regulating the methods and means of warfare. Instead, the reaction to the conflict indicated an emerging international expectation that participants in such conflicts—and especially state forces—would be legally bound to comply with a range of law of war principles intended to mitigate the suffering inflicted by combat operations. This evolution is achieving the imperative proposed by Professor Roberts:

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

135. *See id.*

136. *Id.* ¶¶ 126-27.

137. *Id.* ¶ 127.

138. *See Hakim & Karam, supra note 2; see also D'Amato, supra note 2; Wadhams, supra note 2.*

nevertheless be made to apply the law to the maximum extent possible.¹³⁹

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

VII. THE TRANSNATIONAL ARMED CONFLICT TRIGGER
AND THE CONTINUING RELEVANCE OF COMMON
ARTICLE 3'S ARMED CONFLICT
ASSESSMENT CRITERIA

The transnational armed conflict trigger for application of foundational law of war principles addresses the two most problematic consequences of characterizing such combat operations as Common Article 3 conflicts: first, the conclusion that the conflicts are regulated only by the humane treatment mandate of Common Article 3 and, second, the conclusion that the conflicts must be geographically confined. The premise of this proposal is that combat operations conducted against transnational non-state entities are de facto armed conflicts and therefore must trigger application of all foundational law of war principles.¹⁴⁰ However, triggering applicability of the substantive component of Common Article 3—the principle of humane treatment—in no way implies that such conflicts are internal. Transnational armed conflicts are anything but internal because they are defined as conflicts of international scope.¹⁴¹ The

139. Roberts, *supra* note 4, at 26.

140. See *supra* note 59-60 and accompanying text.

141. This was the basis for the majority holding in the D.C. Circuit Court review of *Hamdan v. Rumsfeld*, 415 F.3d 33, that Common Article 3 was not applicable to the armed conflict between the U.S. and al Qaeda:

But is the war against terrorism in general and the war against al Qaeda in particular, an “armed conflict not of an international character”? President Bush determined, in a memorandum to the Vice President and others on February 7, 2002, that it did not fit that description because the conflict was “international in scope.” The district court disagreed with the President’s view of Common Article 3, apparently because the court thought we were not engaged in a separate conflict with al Qaeda, distinct from the conflict with the

key consideration would therefore shift from the nature of the armed conflict to the *prima facie* analysis of the existence of armed conflict.

The critical *de facto* criteria for determining the existence of transnational armed conflict is resort by a nation to the use of combat military power to respond to a threat posed by a non-state armed entity. For *jus in bello* purposes, the only meaningful distinction between applying this criteria to transnational armed conflict and the traditional application to determine the existence of internal armed conflict is that the military response is directed to a threat operating outside the territory of the responding state. Accordingly, when making the determination of what constitutes an armed conflict for purposes of this transnational trigger, the ICRC Commentary to Common Article 3¹⁴² continues to provide the most effective interpretive aid. According to this Commentary, a critical factor when assessing the line is crossed between a purely internal disturbance (such as a riot, which is immune from international regulation under the laws of war) and an armed conflict subject to the laws of war, is whether “the legal government is obliged to resort to the regular military forces to combat the party in revolt.”¹⁴³ This interpretive aid indicates that the nature of the military activities, and not the geographic confines where the conflict is fought, is instructive on the applicability of the foundational principles of the laws of war to any given military operation.

While this analytical factor does provide useful insight into the nature of a given military operation, the effectiveness is compromised in relation to transnational military operations for two reasons. First, internal military operations were the original intended context for application of this consideration. In the internal context, national resort to use of regular armed forces in response to a threat is indeed an extraordinary measure, responsive to a threat that exceeds the capabilities of law enforcement authorities. Such contextual significance is less compelling when conducting transnational

Taliban. We have difficulty understanding the court’s rationale. Hamdan was captured in Afghanistan in November 2001, but the conflict with al Qaeda arose before then, in other regions, including this country on September 11, 2001. Under the Constitution, the President “has a degree of independent authority to act” in foreign affairs, and, for this reason and others, his construction and application of treaty provisions is entitled to “great weight. . . .” To the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members, the President’s reasonable view of the provision must therefore prevail.

Id. at 41-42 (citations omitted).

142. See ICRC Commentary, *supra* note 9, at 43-53.

143. See *id.* at 49.

operations for the simple reason that it is less likely that the state will be able to resort to its own domestic law enforcement capabilities in such a context. The second reason, a reason which exacerbates the significance of this contextual difference, is the routine use of military forces to conduct non-conflict peace operations (Peace Support Operations or PSOs).¹⁴⁴ Such operations have become a major tool in the maintenance of international peace and security. When conducted under the authority of a legal mandate that is principally defensive in nature (normally granted by the U.N. Security Council), these extensive extraterritorial uses of military force are not normally considered to trigger the laws of war because they do not involve armed conflict, a point emphasized in the U.K. Manual:

The extent to which PSO forces are subject to the law of armed conflict depends upon whether they are party to an armed conflict with the armed forces of a state or an entity which, for these purposes, is treated as a state. . . .

Where PSO forces *become party to an armed conflict* with such forces, then both sides are required to observe the law of armed conflict in its entirety. . . .

. . . .

. . . [A] PSO force which does not itself take an active part in hostilities does not become subject to the law of armed conflict simply because it is operating in territory in which an armed conflict is taking place between other parties. That will be the case, for example, where a force with a mandate to observe a cease-fire finds that the cease-fire breaks down and there is a recurrence of fighting between the parties in which the PSO force takes no direct part.

144. See generally INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 56-67 (Maj. Derek I. Grimes et al. eds., 2006) [hereinafter OPERATIONAL LAW HANDBOOK]. The Handbook summarizes Peace Operations as follows (drawing from other Department of Defense doctrinal sources):

Peace Operations

1. Peace Operations is a new and comprehensive term that covers a wide range of activities. FM 3-07 defines peace operations as: "military operations to support diplomatic efforts to reach a long-term political settlement and categorized as peacekeeping operations (PKO) and peace enforcement operations (PEO)."

2. Whereas peace operations are authorized under both Chapters VI and VII of the United Nations Charter, the doctrinal definition excludes high end enforcement actions where the UN or UN sanctioned forces have become engaged as combatants and a military solution has now become the measure of success. An example of such is Operation Desert Storm. While authorized under Chapter VII, this was international armed conflict and the traditional laws of war applied.

Id. at 56 (citations omitted).

It is not always easy to determine whether a PSO force has become a party to an armed conflict or to fix the precise moment at which that event has occurred. Legal advice and guidance from higher military and political levels should be sought if it appears possible that the threshold of armed conflict has been, or is about to be, crossed.¹⁴⁵

There is, however, an additional analytical factor that provides critical insight into the existence of armed conflict, particularly for U.S. and most coalition armed forces: the type of rules of engagement (ROE) authorized for the military operation.

The ROE, although frequently and mistakenly equated to the laws of war, are in fact not international legal limitations on the use of force. Instead, they are national command directives used to regulate the application of combat power within the range of legally permissible conduct.¹⁴⁶ At the most basic level, these rules are used by commanders to inform subordinates of the conditions in which they may permissibly resort to the use of combat power, most logically understood by the soldier as the shoot or don't shoot decision: ROE are "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States [naval, ground, and air] forces will initiate and/or continue combat engagement with other forces encountered."¹⁴⁷

When the armed forces participate in missions that fall generally under the category of peace support operations, such as those in Bosnia or post-conflict Kosovo, the ROE are essentially conduct-based.¹⁴⁸ This simply means that the employment of force decision is dictated by identification of hostile conduct that justifies the application of combat power for primarily defensive purposes. The underlying legal basis for the application of force in such circumstances is the inherent right of self-defense.¹⁴⁹ When,

145. See U.K. MINISTRY OF DEF., *supra* note 7, ¶¶ 14.3-4, 14.6-7 (citations omitted) (emphasis added).

146. See OPERATIONAL LAW HANDBOOK, *supra* note 144, at 89-122. "Rules of Engagement (ROE) are the primary tools used to regulate the use of force and thereby serve as one of the cornerstones of the Operational Law discipline." *Id.* at 89.

147. See DEP'T OF DEF., DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 471 (2006).

148. See OPERATIONAL LAW HANDBOOK, *supra* note 144, at 66 ("The use of deadly force [in peacekeeping missions] is justified only under situations of extreme necessity . . . and as a last resort when all lesser means have failed . . .").

149. According to the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement:

Inherent Right of Self-Defense.

Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.

however, the force employment decision is based on a designated status, the ROE become status-based.¹⁵⁰ Under this category of the ROE, the decision to employ combat power is dictated by identification of individuals or equipment with the designated status, normally characterized as hostile forces.¹⁵¹ Such status establishes the basis to engage a target with combat power regardless of the conduct manifested by the target.¹⁵²

For many armed forces, and particularly for U.S. armed forces, the nature of the ROE will almost certainly reveal the national command authority perception as to whether they are dispatching their armed forces to conduct a non-conflict peace operation or to engage in armed conflict. Thus, whenever the rules of engagement related to a transnational military operation authorize targeting based on status, as opposed to conduct, the “shoot or don’t shoot” decision will be regulated by principles of the laws of war. In other words, once a target is identified as being within a category of hostile force, engagement will normally be restricted only by foundational law of war principles. This is perhaps the clearest indicator of de facto armed conflict.

Status-based ROE are essentially a reflection of the historic “threat recognition” process related to distinguishing enemy forces from friendly or civilian personnel. This threat recognition process is used to identify members of the hostile force or designated enemy. Target engagement decisions based on status are therefore based not on the inherent right of self-defense, but on the law of war principle of military objective/distinction. Accordingly, a military operation conducted under the authority of status-based ROE is a compelling indication of a determination by the relevant national command authority that the situation falls into the category of de facto armed conflict. This is because use of status-based ROE should only occur after a group or entity has been designated as a hostile force, and more importantly, status-based ROE render the principles of the law

Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self defense by members of their unit. Both unit and individual self-defense includes defense of other U.S. military forces in the vicinity.

OPERATIONAL LAW HANDBOOK, *supra* note 144, at 87.

150. *See id.*, at 104-07 (discussing the general guidelines for determining when to engage in hostilities).

151. *See id.* at 106.

152. *See id.* at 105-06.

of war controlling when deciding what is or is not a permissible application of combat power. While the process of threat recognition will likely be far more difficult when engaging a non-state entity because of the lack of clearly identifiable distinguishing characteristics, the key consideration is that the engagement decision will ultimately be dictated by such recognition and not exclusively by the conduct of the object of attack.¹⁵³ From the warrior perspective, there is virtually no better indication of difference between peace and war than the criteria used to make this decision. It is therefore appropriate to consider this factor in assessing the line between non-conflict operations and armed conflict operations.

Combining these two considerations—the employment of combat forces by the state in response to a threat and the authorization for these forces to engage an enemy not exclusively in response to hostile act or intent, but based on status identification—provides an effective means of determining the existence of any armed conflict. Any military operation in which such authority is granted and exercised must rely, *de facto*, on the principle of military objective to determine permissible target engagement. It is therefore both logical and essential to treat such operations as bringing into force all other foundational principles of the laws of war. Doing so will ensure the armed forces operate within the framework of essential regulation derived from the history of warfare, prevent a non-state enemy from claiming a status or legitimacy unjustified by the conflict, and prevent national policymakers from avoiding the most basic obligations of the laws of war through the assertion of technical legal arguments devoid of pragmatic military considerations.

153. There are certainly factors that complicate this proposition. Most significant is the reality that when fighting insurgent terrorist forces, determination of “status” may often turn on assessment of “conduct.” For example, it is probable that a terrorist entity, such as al Qaeda in Iraq, might be designated as a “hostile force” subject to status-based ROE. Accordingly, members of that force may be engaged with combat power upon positive identification. However, unlike members of a uniformed enemy force, it is unlikely that positive identification will be based on a uniform or some similar distinguishing characteristics. Instead, it may be necessary to assess individual conduct to make this positive identification associating an individual as a member of the hostile force.

This “conduct to status” relationship does not, however, render the nature of the ROE irrelevant in assessing the existence of armed conflict. What is critical is not how a hostile force is identified but the fact that a hostile force has been designated with the accordant authority to engage members of that force based on law of war principles and not pure self-defense principles. It is this fact that reveals the assertion of armed conflict authorities by the state and, therefore, the existence of armed conflict between the state and the non-state entity.

VIII. CONCLUSION: RESTORING THE BALANCE NECESSITY AND HUMANITY

Any critique or proposed evolution of the laws of war must be cognizant of a critical reality: that the issues involved are as much about war as they are about law. Although often regarded today as the exclusive realm of legal experts, this body of international law is primarily intended to strike a pragmatic and effective balance between the necessities related to efficiently executing violent combat operations and the requirements to limit the consequences of that violence and to mitigate the suffering it causes to the greatest extent possible. This omnipresent historical motivation for the laws of war resulted in the evolution of a framework that not only cloaked the victims of war in a blanket of protection, but also regulated the ways in which combat operations were planned and executed.¹⁵⁴

The transnational armed conflict trigger proposed in this Article attempts to draw on this historical tradition by emphasizing that the existence of armed conflict, and not a technical legal paradigm, must dictate when this regulatory framework is brought into force as a matter of law. Unfortunately, the pervasive influence of the legal interpretations that the provisions established in the Geneva Conventions should serve as the exclusive triggers for application of those treaties has resulted in a distortion of this pragmatic regulatory application. The emphasis on the nature of armed conflicts led to the absurd result that situations in obvious need of such regulation have been treated as falling outside the umbrella of a body of law that evolved from the historic appreciation by military leaders that combat required *ipso facto* regulation.

The consequences of the internal/international armed conflict law-triggering paradigm that evolved from Common Articles 2 and 3 was clearly understood by many professional militaries as insufficient to respond to the operational and tactical demands of combat operations. As a result, the United States imposed this essential regulatory framework as a matter of national military policy, a move emulated by other armed forces confronting similar challenges. While this policy “band aid” proved sufficient for many years, the rapidly changing nature of armed conflict exemplified by U.S. operations against al Qaeda and the recent Israeli campaign in Lebanon has exposed an undeniable reality: policy is no longer an acceptable response to the regulatory requirements of the contemporary battlefield.

154. See Green, *supra* note 101, at 176.

The time has come to make all things old new again, by endorsing ipso facto application of the foundational principles of the laws of war to all armed conflicts as a matter of law. Recognizing transnational armed conflict as a new or perhaps hybrid category of the legal trigger for application of these principles provides a pragmatic solution to the impediments inherent in the Common Article 2/3 paradigm. Pursuant to this category of armed conflict, any military operation determined to amount to armed conflict will trigger, at a minimum, the principles of necessity, distinction, proportionality, discrimination, and humanity (to include the substantive mandate of Common Article 3 and the prohibition against inflicting unnecessary suffering on enemy personnel). Determining when an armed conflict exists will be based on the nature of the means employed by the state to respond to the threat and the engagement authority granted by the state to its armed forces. When use of combat power is based on the status determinations, and not on self-defense criteria, armed conflict must be acknowledged to ensure that the balance between engagement authority and the dictates of humanity is preserved.

Such a category of conflict acknowledges the need for a regulatory framework more extensive than the limited humane treatment mandate of Common Article 3, thereby ensuring the application of combat power is subject to the historically critical limitations established by the laws of war. This goal, however, is accomplished without suggesting a geographically limited scope of strategic operations. Furthermore, none of the foundational principles triggered by transnational armed conflict operate to vest non-state entities with an undeserved status or legitimacy, a critical concern for national security decision-makers. In so doing, this proposed category of armed conflict restores the critical balance between the necessities of warfare and the limitation of suffering, and does so in a way that assuages the policy concerns of the governments who will confront such enemies in the future. Clinging to the outdated legalistic paradigm that developed after 1949 is no longer adequate to preserve this balance, a balance at the very heart of the regulation of armed conflict and the protection of humanity.

In the final analysis, it is important to recall that maximizing application of humanitarian protection was the driving purpose for the development of the Common Article 2/3 law-triggering standard. Regardless of how complex the question of legally defining war has once again become, for the forces called upon to execute military operations the pragmatic definition involves a much simpler equation: deployment plus authority to engage a designated enemy with lethal combat power equals war. For these forces, the technical legal triggers for application of the combat regulatory framework

created unacceptable gaps that have necessitated policy solutions. Endorsing the transnational armed conflict trigger therefore serves not only the purpose of the Geneva Conventions, but also the fundamental interests of the forces called upon to execute combat operations. For:

[t]he law of armed conflict is not intended to impede the waging of hostilities. Its purpose is to ensure that the violence of hostilities is directed toward the enemy's forces and is not used to cause purposeless, unnecessary human misery and physical destruction. In that sense, the law of armed conflict complements and supports the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise, and security. Together, the law of armed conflict and the principles of warfare underscore the importance of concentrating forces against critical military targets while avoiding the expenditure of personnel and resources against persons, places, and things that are militarily unimportant. However, these principles do not prohibit the application of overwhelming force against enemy combatants, units and material.¹⁵⁵

The United States should immediately amend the Department of Defense Law of War Directive to specifically embrace the concept of transnational armed conflict. This amendment should acknowledge the applicability of the foundational principles of the law of war to any military operation determined by the United States to qualify as armed conflict. Qualification based on the non-state identity of an enemy or the geographic scope of the operations should be rejected. In short, the Directive should transform the current policy-based application to one based on a sense of legal obligation. Furthermore, this triggering category of armed conflict should be reflected in all future doctrine, plans, policies, and procedures.

Whether other nations would follow this course of action is unknown. However, because U.S. armed forces are the most frequently engaged armed forces in the world, such a move by the United States would result in at least a re-evaluation of current legal interpretation by major allies and military partners. One fact seems clear: continuing reliance on the internal/international armed conflict triggering paradigm will do little to assuage the expectations of both professional armed forces and the international community that all combat operations must be subject to the regulation historically linked to warfare. Perhaps a forward thinking approach by the

155. See DEP'T OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, at 5.2 (A.R. Thomas & James C. Duncan eds., 1999, available at <http://www.dsca.osd.mil/diils/library/US%20Navy%20Marine%20Coast%20Guard%20Operational%20Law%20Manual%20for%20Lawyers.pdf>).

United States will be the catalyst that produces emulation similar to that related to the Department of Defense law of war policy. At a minimum, however, such a move will provide a far more effective and credible solution to the challenge of balancing the requirements of transnational warfare with the demands of the profession of arms. For in the final analysis, that profession (like any other profession) relies on a logical framework of rules to guide the application of combat power.

APPENDIX 1: PRINCIPLES OF THE LAWS OF WAR IN THE
OPERATIONAL LAW HANDBOOK

The Operational Law Handbook, a resource updated annually by the International and Operational Law Department of the U.S. Army Judge Advocate General's Legal Center and School, and considered as close to an authoritative statement of the law within the Army (and often times in other Services and government agencies), provides the following definition:

THE LAW OF WAR RESTS ON FOUR BASIC PRINCIPLES:

A. **Principle of Military Necessity.** The principle of *military necessity* is explicitly codified in Article 23, paragraph (g) of the Annex to Hague IV, which forbids a belligerent "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

1. The principle of military necessity authorizes that use of force required to accomplish the mission. Military necessity does not authorize acts otherwise prohibited by the law of war. This principle must be applied in conjunction with other law of war principles discussed in this chapter, as well as other, more specific legal constraints set forth in law of war treaties to which the U.S. is a party.

2. Military necessity not a Criminal Defense. Military necessity is not a defense for acts expressly prohibited by law.

a. Protected Persons. The law of war generally prohibits the intentional targeting of protected persons under any circumstances.

b. Protected Places - The Rendulic Rule. Civilian objects are protected from intentional attack or destruction, so long as they are not being used for military purposes, or there is no military necessity for their destruction or seizure. The law of war permits destruction of civilian objects if military circumstances necessitate such destruction. (FM 27-10, para. 56 and 58), or if the civilian object has become a military objective. The circumstances justifying destruction of civilian objects are those of military necessity, based upon information

reasonably available to the commander at the time of his decision. See IX Nuremberg Military Tribunals, *Trials of War Criminals Before the Nuremberg Military Tribunals*, 1113 (1950). The Tribunal convicted General Lothar Rendulic of other charges but found him “not guilty” of unlawfully destroying civilian property through employment of a “scorched earth” policy. The court found that “the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made.” Current norms for protection (and destruction) of civilian property: Civilian objects are protected from intentional attack or damage unless they have become military objectives or “unless demanded by the necessities of war.” (HR, art. 23g.)

c. There may be situations where because of incomplete intelligence or the failure of the enemy to abide by the law of war, civilian casualties occur. Example: Al Firdus Bunker. During the first Persian Gulf War (1991), U.S. military planners identified this Baghdad bunker as an Iraqi military command and control center. Barbed wire surrounded the complex, it was camouflaged, armed sentries guarded its entrance and exit points, and electronic intelligence identified its activation. Unknown to coalition planners, however, some Iraqi civilians may have used upper levels of the facility as nighttime sleeping quarters. The bunker was bombed, allegedly resulting in 300 civilian casualties. Was there a violation of the law of war? No. Based on information gathered by Coalition planners, the commander made an assessment that the target was a military objective. Although the attack may have resulted in unfortunate civilian deaths, there was no law of war violation because the attackers acted in good faith based upon the information reasonably available at the time the decision to attack was made. See DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-16 (1992).

B. Principle of Unnecessary Suffering. “It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering.” (HR, art. 23e.) This principle applies to the legality of weapons and ammunition. Military personnel may not use arms that are per se calculated to cause unnecessary suffering,

sometimes referred to as superfluous injury (e.g., projectiles filled with glass, hollow point or soft-point small caliber ammunition, lances with barbed heads).

1. The prohibition of *unnecessary suffering* constitutes acknowledgement that *necessary suffering* to combatants is lawful, and may include severe injury or loss of life. There is no agreed definition for unnecessary suffering. A weapon or munition would be deemed to cause unnecessary suffering only if it inevitably or in its normal use has a particular effect, and the injury caused is considered by governments as disproportionate to the military necessity for it, that is, the military advantage to be gained from its use. This balancing test cannot be conducted in isolation. A weapon's or munition's effects must be weighed in light of comparable, lawful weapons or munitions in use on the modern battlefield.

2. A weapon cannot be declared unlawful merely because it *may* cause severe suffering or injury. The appropriate determination is whether a weapon's or munition's employment for its normal or expected use would be prohibited under some or all circumstances. The correct criterion is whether the employment of a weapon for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to its military effectiveness. A State is not required to foresee or anticipate all possible uses or misuses of a weapon, for almost any weapon can be misused in ways that might be prohibited.

....

C. Principle of Discrimination or Distinction. This principle requires that combatants be distinguished from non-combatants, and that military objectives be distinguished from protected property or protected places. Parties to a conflict shall direct their operations only against combatants and military objectives. (AP I, Art. 48)

1. AP I prohibits "indiscriminate attacks." Under Article 51, paragraph 4, these are attacks that:

a. are "not directed against a specific military objective," (e.g., Iraqi SCUD missile attacks on Israeli and Saudi cities during the Persian Gulf War);

b. “employ a method or means of combat the effects of which cannot be directed at a specified military objective,” (e.g., might prohibit area bombing in certain populous areas, such as a bombardment “which treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village...”(AP I, art. 51, para. 5(a))); *or*

c. “employ a method or means of combat the effects of which cannot be limited as required” by the Protocol (e.g., release of dangerous forces (AP I, art. 56) or collateral damage excessive in relation to concrete and direct military advantage (AP I, art. 51, para. 5(b)); *and*

d. “consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction.”

2. *Distinction* is the customary international law obligation of parties to a conflict to engage only in military operations the effects of which distinguish between the civilian population (or individual civilians not taking a direct part in the hostilities), and combatant forces, directing the application of force solely against the latter. Similarly, military force may be directed only against military objects or objectives, and not against civilian objects. Under the principle of distinction, the civilian population as such, as well as individual civilians, may not be made the object of attack. (Article 51, para. 2, AP I).

D. Principle of Proportionality. The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. (FM 27-10, para. 41, change 1.) Proportionality is not a separate legal standard as such, but a way in which a military commander may assess his or her obligations as to the law of war principle of *distinction*, while avoiding actions that are indiscriminate.

1. Incidental Injury and Collateral Damage. Collateral damage consists of unavoidable and unintentional damage to civilian personnel and property incurred while attacking a military objective. Incidental (a/k/a collateral) damage is not a violation of international law. While no law of war treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. As stated above, AP I, Article 51(5)

describes indiscriminate attacks as those causing “incidental loss of civilian life . . . excessive . . . to . . . the military advantage anticipated.”

That being said, the term, “attacks” is not well defined in the sense of the principle of proportionality, or as to the level at which such decisions are to be made. “Military advantage” is not restricted to tactical gains, but is linked to the full context of war strategy. Balancing between collateral damage to civilians objects and collateral civilian casualties may be done on a target-by-target basis, as frequently was done in the first (1991) and second (2003) Persian Gulf Wars, but also may be weighed in overall terms against campaign objectives. It may involve a variety of considerations, including security of the attacking force. See, for example, DOD Final Report to Congress, Conduct of the Persian Gulf War (April 1992), p. 611. Similarly, at the time of its ratification of Additional Protocol I, the United Kingdom declared that “the military advantage anticipated from an attack’ is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.”

OPERATIONAL LAW HANDBOOK, *supra* note 134, at 12-14.
