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## RESPONSE

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### LEARNING TO LIVE WITH (A LITTLE) UNCERTAINTY: THE OPERATIONAL ASPECTS AND CONSEQUENCES OF THE GEOGRAPHY OF CONFLICT DEBATE

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In response to Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. 1165 (2013).

#### INTRODUCTION

The recent release of the United States Department of Justice White Paper, detailing the legal justifications for the targeted killing of American citizens overseas in the course of U.S. counterterrorism operations against al Qaeda and associated forces,<sup>1</sup> provides an interesting and important backdrop for any discussion of key legal issues that arise in the context of these U.S. operations. The memo poses and answers (or sometimes merely alludes to) a host of questions, including who may be targeted, how they may be targeted, when such strikes are lawful, and, most relevant here, where targeted strikes—and other incidents of wartime authority—may be employed. This last question lies at the heart of Professor Jennifer Daskal’s

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<sup>1</sup> U.S. DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 1-2 (2011), available at [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

recent Article, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*,<sup>2</sup> which proposes a new law of war framework for targeting and detention operations that rests on a distinction between areas of ongoing hostilities and areas more attenuated from such “hot” battlefields. The issue of the geography of “the battlefield”—that is, where an armed conflict can and does take place—has provoked extensive debates over the past few years. Daskal’s Article offers a useful and thoughtful addition to the discourse, highlighting some of the key interests and challenges at the heart of the matter.

Two central concerns, however, arise from the prospective application of Daskal’s suggested legal framework: (1) how the lack of strategic clarity trickles down to affect operational and tactical clarity, and (2) the long-term consequences for the development and implementation of the law of armed conflict (LOAC). This Response highlights these concerns as a counterpoint to the idea of a new set of rules based on shifting geographical combat zones, even in light of the potential procedural benefits such new rules and frameworks might engender. In essence, it is important to recognize that LOAC’s constituents, as it were, include not only the strategic and policy-level decisionmakers and the suspected enemy operatives they seek to combat, but also the individual soldiers tasked with carrying out the mission and, in a broader sense, all those who will implement LOAC in the future or employ its authorities and benefit from its protections. Exploring and accounting for the purposes and functionality of LOAC from all angles is therefore a critical aspect of any discussion of LOAC’s applicability with regard to either geographical application or the formulation of situation-dependent rules or parameters. Indeed, the application of LOAC—where and when it applies, and how it applies to different categories of persons and objects—is fundamental not only to the execution of military operations, but also to the planning of and training for operations, and to the enforcement of accountability for violations of the law. Divorcing considerations of LOAC’s geographical reach or its applications in different geographical areas from these three components thus introduces substantial concerns about feasibility, operational effectiveness and predictability, and risks severing the debate from LOAC’s fundamental purposes and objectives. Lost in the current discourse as well is the fact that “armed conflict” is a legal term of art, one introduced to avoid the political manipulations

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<sup>2</sup> Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. 1165 (2013).

enabled by the earlier use of the word “war,”<sup>3</sup> while “battlefield” is an operational euphemism for the place where armed hostilities are taking place and does not even appear as a defined term in military doctrine.<sup>4</sup> And yet “armed conflict” and “battlefield” have become linked and have even begun to morph into a legal conception of the “battlefield” that is not based in LOAC, which does not provide specific geographic parameters for armed conflict.

Part I of this Response briefly highlights the core principles and purposes of LOAC as an essential backdrop to any discussion of LOAC’s applicability (both the “where” question and the “how” question). Part II then explores the consequences of using a rules-based framework to answer, or perhaps sidestep, the challenging question of where the bounds of conflict with transnational actors may lie, focusing on issues of clarity and predictability and the long-term development of the law. The question of geographical application of LOAC is both highly relevant in the most pragmatic sense—the difference between being in an area of armed conflict or not literally can be life or death—and also not susceptible to specific and concrete definition. This combination of relevance and thorniness has led not only to extensive debates about how to conceptualize the geographic parameters of the battlespace in an armed conflict,<sup>5</sup> but also to alternative paradigms for regulating the use of force through rules-based frameworks,

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<sup>3</sup> See OSCAR M. UHLER ET AL., INT’L COMM. OF THE RED CROSS, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 20 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) (“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’. . . . The expression ‘armed conflict’ makes such arguments less easy.”).

<sup>4</sup> The closest term in the *Department of Defense Dictionary of Military and Associated Terms* is “theater of war,” which is “[d]efined by the President, Secretary of Defense, or the geographic combatant commander as the area of air, land, and water that is, or may become, directly involved in the conduct of major operations and campaigns involving combat.” JOINT CHIEFS OF STAFF, JOINT PUBL’N 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 292 (2013), available at [http://www.dtic.mil/doctrine/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf).

<sup>5</sup> See, e.g., KENNETH ANDERSON, HOOVER INST., TARGETED KILLING AND DRONE WARFARE: HOW WE CAME TO DEBATE WHETHER THERE IS A ‘LEGAL GEOGRAPHY OF WAR’ 10-16 (2011), available at [http://media.hoover.org/sites/default/files/documents/FutureChallenges\\_Anderson.pdf](http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf); Louise Arimatsu, *Territory, Boundaries and the Law of Armed Conflict*, 12 Y.B. INT’L HUMANITARIAN L. 157, 178-82, 187-92 (2009); Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT’L & COMP. L. 1, 14-20 (2010); Geoffrey S. Corn, *Geography of Armed Conflict: Why it Is a Mistake to Fish for the Red Herring*, 89 INT’L L. STUD. 77, 86-92 (2013); Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT’L L.J. 293, 301-08 (2012); Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT’L CRIM. JUST. 65, 68-73 (2013); Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858-59 (2009); WHAT IS WAR?: AN INVESTIGATION IN THE WAKE OF 9/11 (Mary Ellen O’Connell ed., 2012).

hybrid paradigms, or other mechanisms, such as those Daskal proposes. Although these alternative conceptions of the battlefield are highly useful, it is also important to address their feasibility in the operational realm and their potential second- and third-order effects.

## I. LOAC'S PRINCIPLES AND PARAMETERS IN THE BATTLEFIELD DEBATE

LOAC—otherwise known as the law of war or international humanitarian law—governs the conduct of both states and individuals during armed conflict. It seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.<sup>6</sup> LOAC applies during all situations of armed conflict, with the full panoply of the Geneva Conventions and customary law applicable in international armed conflict and a more limited body of conventional and customary law applicable during non-international armed conflict.<sup>7</sup> In all circumstances, therefore, LOAC provides the basic framework for all actions, obligations, and privileges; it is, in essence, the outer parameters for all military conduct.

LOAC has multiple purposes that all stem from or contribute to the regulation of the conduct of hostilities and the protection of persons and objects affected by conflict. The most obvious, perhaps, is the humanitarian purpose, the focus on protecting persons who are caught up in the horrors of war. Equally important, however, is the regulation of the means and methods of warfare for the direct purpose of protecting those who are

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<sup>6</sup> INT'L COMM. OF THE RED CROSS, ADVISORY SERV. ON INT'L HUMANITARIAN LAW, WHAT IS INTERNATIONAL HUMANITARIAN LAW? 1 (2004), available at [http://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf). The law of armed conflict is codified primarily in the four Geneva Conventions of August 12, 1949 and their Additional Protocols. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

<sup>7</sup> INT'L COMM. OF THE RED CROSS, *supra* note 6, at 1.

fighting—soldiers and others—from unnecessary suffering during conflict. Finally, it is crucial to recognize that the law of war does not exist to inhibit military operations or prevent war; rather, the goal of this body of law is to enable effective, moral, and lawful military operations within the parameters of the two aforementioned protective purposes.<sup>8</sup>

The Geneva Conventions, and the laws of war for centuries before that, are based on four key principles: military necessity, humanity, distinction, and proportionality.<sup>9</sup> These key principles of LOAC not only provide the foundation for the law, but can also serve as a useful guidepost for exploring difficult challenges and finding solutions that preserve and protect the law's core values. Military necessity recognizes that the goal of war is the complete submission of the enemy as quickly as possible; it allows any force necessary to achieve that goal as long as not forbidden by the law.<sup>10</sup> The principle of humanity aims to minimize suffering in armed conflict; the infliction of suffering not necessary for legitimate military purposes is therefore forbidden.<sup>11</sup> The principle of distinction requires all parties in a conflict to distinguish between those who are fighting and those who are not and target only the former when launching attacks.<sup>12</sup> Finally, the principle of proportionality seeks to balance military goals with the protection of civilians, prohibiting attacks when the expected civilian casualties will be excessive compared to the anticipated military advantage.<sup>13</sup>

In the context of the geography of armed conflict, military necessity and humanity might help provide guidance in delineating the scope of the battlefield. Military necessity naturally suggests a broad view of the zone of combat in order to offer the most comprehensive opportunity to defeat the enemy. At first glance, the principle of humanity seems to support a broad

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<sup>8</sup> See *id.* at 1-2.

<sup>9</sup> U.K. MINISTRY OF DEFENCE, JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶¶ 2.1-2.6.3 (2004), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf); see also U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE app. A-1 (1956), available at <http://www.afsc.army.mil/gc/files/fm27-10.pdf>.

<sup>10</sup> U.S. DEP'T OF THE ARMY, *supra* note 9, at app. A-1.

<sup>11</sup> See Convention with Respect to the Laws and Customs of War on Land, Preamble, July 29, 1899, 32 Stat. 1803 (the "Martens Clause"); LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 41-43 (2013).

<sup>12</sup> Article 48 of Additional Protocol I sets forth what is known as the "basic rule": "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Additional Protocol I, *supra* note 6, art. 48.

<sup>13</sup> See *id.* arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b).

view of the geographical scope of armed conflict as well. The Commentary to the Fourth Geneva Convention emphasizes that the drafters sought to ensure the “widest possible field of application” for LOAC’s protective goals.<sup>14</sup> In the past, this goal of maximizing protection has been a driving force, facilitating interpretations of complicated questions regarding protected persons or other issues.<sup>15</sup> In the context of conflicts with terrorist groups, however, this goal may not operate as effectively. Simply put, taking a broad view of the time and space dimensions in a conflict with terrorist groups could—with little imagination—lead one to conclude that a large portion of the world falls within the zone of combat, by dint of terrorist groups having a presence in many countries and terrorist attacks taking place in many countries. Although this approach would, in theory, mean that large numbers of persons might benefit from the rights and protections of LOAC, it also means that large swaths of the globe would fall within the “use of force as first resort” authority—against positively identified enemy operatives only—that LOAC grants to belligerents.<sup>16</sup> Thus, the principle of humanity more rationally supports a narrow view of the geographic scope of conflict in this situation, a view that seeks to protect the most people by keeping conflict, and the battlefield, away from their countries altogether.

This result—a broad view of geographical application based on military necessity and a narrow view based on humanity—mirrors in some ways LOAC’s essential and inherent balancing of military necessity and humanity and ultimately leaves lingering uncertainties about how to frame the geographic scope of the battlefield. And yet, as discussed further in Section II.A, this inherent tension between military necessity and humanity,

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<sup>14</sup> OSCAR M. UHLER ET AL., *supra* note 3, at 50.

<sup>15</sup> The International Criminal Tribunal for the Former Yugoslavia’s (ICTY) approach in *Prosecutor v. Tadic* and other cases, which bases protected person status on allegiance rather than nationality, fulfills LOAC’s general need for broad applicability across territory, time, and categories of persons. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, ¶166 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (holding, with an eye to ensuring fidelity to LOAC’s object and purpose, that allegiance, not nationality, should determine protected person status in the complex conflict in the former Yugoslavia).

<sup>16</sup> See Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655, 1656-57, 1681 (2012); Geoffrey S. Corn, Laurie R. Blank, Chris Jenks & Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT’L L. STUD. 536, 550 (2013); Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT’L HUMANITARIAN LEGAL STUD. 52, 74-84 (2010).

between authority and obligation, raises important cautions about attempts to delineate the contours of that balance more specifically. That is, our discomfort with a lack of geographical clarity in a conflict between a state and a transnational terrorist group may well be precisely the source of the elasticity needed to enable this balance between military necessity and humanity to be sustained in pursuit of LOAC's core purposes.

## II. OPERATIONAL CLARITY AND THE DEVELOPMENT OF THE LAW: CASUALTIES OF A HYBRID RULES-BASED FRAMEWORK

As Daskal aptly describes, the primary contours of the debate over the scope of the battlefield are shaped by the territorially prescribed view on one side and the broadly conceived "global battlefield" on the other.<sup>17</sup> From a policy standpoint, the latter poses the risk of spiraling violence and a degradation of sovereignty; the former offers terrorists and other armed groups an unnecessary bonus of safe haven simply by crossing an international border. In an earlier piece, I have argued for a middle ground, based on an understanding of the relevant legal parameters that can offer guidance in analyzing the geographic space of conflict.<sup>18</sup> In this sense, I firmly agree with the motivation behind Daskal's effort to transcend the "impasse" seemingly created by a dichotomous, all-or-nothing view of the geography of conflict. However, attempting to navigate these thorny questions through new binding legal frameworks that copy and borrow from two or more distinct legal regimes poses a separate set of concerns, with the risk of more comprehensive long-term consequences.

This Part highlights two of these concerns, specifically within the context of one overarching question: would a new law of war framework apply only to conflicts with terrorist groups or to all LOAC-triggering situations? To the extent that this new framework would become the dominant framework for all conflict situations, the operational and law-development concerns discussed in this Part loom large. However, if the new framework were to apply only in the event of conflicts like that between the U.S. and al Qaeda—a conflict between a state and a transnational terrorist group—two equally significant questions arise. First, how—and by whom—would the determination be made as to whether a particular conflict situation fits

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<sup>17</sup> See Daskal, *supra* note 2, at 1174-92 (describing and highlighting the flawed reasoning of both the substantively and territorially broad view and the territorially restricted view). I also have discussed these differing views in prior work. See Blank, *supra* note 5, at 20-26 (contrasting the global battlefield view with the spatially limited conception of the battlefield in the context of today's conflicts with terrorist groups).

<sup>18</sup> See Blank, *supra* note 5, at 26-36.

within the regular LOAC framework or the new rules-based framework? The risk of additional layers of complexity, legal challenge, and uncertainty as a result of having to make this additional determination first would be great and poses a significant concern. Second, would there thus be two different standards for training and for enforcement, depending on the framework under which a particular unit was operating? Here the consequences for clarity and predictability are quite simply enormous.

#### A. *Operational Clarity and Predictability*

A central focus of debate for more than a decade has been how to apply LOAC to conflicts with terrorist groups—from how to define the conflict to how to implement the principle of distinction to the content of law of war detention. The very application of LOAC to military operations against terrorist operatives or groups depends, as the essential preliminary consideration, on the existence of an armed conflict.<sup>19</sup> Notwithstanding the complexities of these determinations in the context of efforts to combat transnational terrorist groups, LOAC continues to rely on clear and objective standards to assess when the law applies. Effective implementation of LOAC depends on the clarity of the legal principles, their application during the heat of battle, and their credible application post hoc in investigations and prosecutions. Moreover, commanders and their troops can best adhere to the law and carry out its central tenets when the law and the obligations it imposes are predictable and operationally logical.

The introduction of a new law of war framework for certain types of conflicts—in which the application of relevant rules depends not on established standards but on a new set of considerations drawn from multiple legal regimes—will affect the application of LOAC at all levels: training, implementation, and enforcement. First, a new framework will have implications for training generally, but the implications go well beyond the need to develop new training methods and modules. Rather, the military will have to explore and assess how to train commanders, lawyers, and troops to comply with a legal framework based on a more complex set of considerations than that established by LOAC, including factors drawn from U.S. constitutional law and other international law regimes. At this stage of training and planning, another challenge will be that of drafting

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<sup>19</sup> See Common Articles 2 and 3 of the First, Second, Third, and Fourth Geneva Conventions, *supra* note 6 (setting forth the primary framework for LOAC applicability to situations of both international and non-international armed conflict).



and implementing rules of engagement for operations governed by the legal standards at issue here. Rules of engagement (ROE) distill law, strategy, and policy into tactical instructions for military personnel regarding when and against whom they can use force.<sup>20</sup> LOAC forms the outer boundaries of lawfulness for conduct during armed conflict and thus is the outer framework for the rules of engagement; each military operation then has specifically designed rules of engagement to meet the operation's particular needs. At one level, a new framework based on different legal obligations in different geographical locales does not have significant consequences for the development of ROE because there can be many specific considerations in any conflict situation that drive particularized ROE. Nonetheless, the rapidly changing nature of a conflict with terrorist groups—the nature and geographical location of the threat, and the available responses—will mean that the parameters of this new framework will also be changing—a recipe for extraordinary challenges with regard to developing and training for effective ROE.

Second, implementation in the context of a new law of war framework as proposed, based on distinctions between various zones of security needs and the shifting procedural obligations that result, poses even more significant concerns. Pragmatically, threat and the concomitant need to respond to that threat will always be the primary consideration driving the strategic, operational, and tactical calculus: “Armed conflict is a threat-driven concept, arising when the threat necessitates resort to combat power, and extending to wherever the operational and tactical opportunity to produce a militarily valuable effect on the enemy arises.”<sup>21</sup> Divorcing a geographic

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<sup>20</sup> See INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 73-74 (Brian Bill & Jeremy Marsh eds., 2010), available at [http://www.loc.gov/r/rfd/Military\\_Law/pdf/operational-law-handbook\\_2010.pdf](http://www.loc.gov/r/rfd/Military_Law/pdf/operational-law-handbook_2010.pdf) (defining rules of engagement and describing their purposes); JOINT CHIEFS OF STAFF, *supra* note 4, at 249-50 (defining rules of engagement); Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. REV. 245, 246-47 (1997) (discussing the history and function of rules of engagement). For further discussion of rules of engagement, see Laurie R. Blank, *Rules of Engagement: Law, Strategy, and Leadership*, in ASPECTS OF LEADERSHIP: ETHICS, LAW, AND SPIRITUALITY 221 (Carroll Connelley & Paolo Tripodi eds., 2012), and INT'L INST. OF HUMANITARIAN LAW, RULES OF ENGAGEMENT HANDBOOK 6 (2009), available at <http://www.usnwc.edu/getattachment/7bodof70-bb07-48f2-af0a-7474e92dobbo/San-Remo-ROE-Handbook>, which explains, “In addition to *self-defence*, ROE will therefore generally reflect multiple components, including political guidance from higher authorities, the tactical considerations of the specific mission, and LOAC. Succinct and unambiguous rules are essential.”

<sup>21</sup> Corn, *supra* note 5, at 82. The U.S. military's concept of “effects-based operations” illustrates this directly: the desired strategic, operational, and tactical effects drive the military mission, and these effects are in turn dictated by threat capabilities, dispositions, and vulnerabilities. See, e.g., Robert B. Herndon, John A. Robinson, James L. Creighton, Raphael Torres & Louis J. Bello, *Effects-Based Operations in Afghanistan: The CJTF-180 Method of Orchestrating Effects to*

analysis from this fundamental nature of military operations and decisionmaking can make the law less practical in the immediate sense, and can also, as explained below, hinder the development of the law going forward. During military operations, the law plays an essential protective role not only for those uninvolved in the conflict, but—just as importantly—for those who are fighting.<sup>22</sup> Beyond specific provisions that protect soldiers, sailors, airmen, and Marines (such as the obligation to care for the wounded,<sup>23</sup> the prohibition on weapons that cause superfluous injury,<sup>24</sup> and the protections provided for prisoners of war<sup>25</sup>), the law accomplishes this key purpose by striving for clarity and predictability. At the most basic level, soldiers need to know when and against whom they can use force. Uncertainty regarding that most fundamental aspect of wartime conduct places an extraordinary burden on the soldier and places him or her in grave danger beyond that already inherent in the nature of conflict. It may well be possible that a new law of war framework with binding rules that depend on a security calculus drawn from different geographic zones can offer more guidance for a policymaker or other decisionmaker at the highest strategic level. For the men and women directly facing the enemy, however, it muddies the waters by introducing additional considerations to the tactical and operational decisionmaking process, a process that is measured in seconds, if not less.<sup>26</sup>

More broadly, the balance between military necessity and humanity, highlighted in Part I, is most vital in the direct implementation of LOAC during military operations. Military necessity provides the authority for a

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*Achieve Objectives*, FIELD ARTILLERY, Jan.-Feb. 2004, at 26, available at [http://sill-www.army.mil/firesbulletin/archives/2004/JAN\\_FEB\\_2004/JAN\\_FEB\\_2004\\_FULL\\_EDITION.pdf](http://sill-www.army.mil/firesbulletin/archives/2004/JAN_FEB_2004/JAN_FEB_2004_FULL_EDITION.pdf) (analyzing effects-based operations, “[a] process for obtaining a desired strategic outcome or ‘effect’ on the enemy through the synergistic, multiplicative and cumulative application of the full range of military and nonmilitary capabilities” (citation and internal quotation marks omitted)).

<sup>22</sup> See generally First Geneva Convention, *supra* note 6 (protecting wounded and sick members of the armed forces on land); Second Geneva Convention, *supra* note 6 (protecting wounded, sick, and shipwrecked members of the armed forces at sea); Third Geneva Convention, *supra* note 6 (protecting prisoners of war).

<sup>23</sup> See, e.g., First Geneva Convention, *supra* note 6, art. 12(1) (“Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances.”).

<sup>24</sup> See, e.g., Additional Protocol I, *supra* note 6, art. 35(2) (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”).

<sup>25</sup> See, e.g., Third Geneva Convention, *supra* note 6.

<sup>26</sup> See generally Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SECURITY J. 45, 53-54 (2010) (describing the characteristics of “new warfare”).

party to a conflict to use all force—within the bounds of the law—necessary to achieve the complete submission of the enemy.<sup>27</sup> This authority extends beyond the neutralization or elimination of immediate threats to the broader purpose of defeating the enemy as an entity itself, rather than the individuals who comprise the enemy force. For this reason, the law envisions a robust and broad power to attack and disable the enemy based on the presumption that, by nature of being part of the enemy, all members of the enemy force pose a threat.<sup>28</sup> ROE then provide parameters for and limits on that power in some situations, depending on the strategic, political, and operational needs of the mission at hand.<sup>29</sup> If the law would now be relied upon to provide those parameters—as seems to be the effect of proposed law of war frameworks such as that which Daskal suggests—the law would apply differently in different conflicts and in different geographic areas related to the same conflict. Operationally, this effect has the potential to be a recipe for uncertainty and unpredictability, and divorces legal authority from operational practice and necessity. No less, such a framework raises the question of how the decisions are to be made regarding where different authorities can be used and where different procedural

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<sup>27</sup> See U.S. DEP'T OF THE ARMY, *supra* note 9, at app. A-1.

<sup>28</sup> In an international armed conflict, all members of the military forces of a party to the conflict are legitimate targets of attack at all times; in a non-international armed conflict, all fighters in an organized armed group that is a party to the conflict are similarly targetable at all times. See JIMMY GURULÉ & GEOFFREY S. CORN, *PRINCIPLES OF COUNTER-TERRORISM LAW* 70-76 (2011) (discussing the rules governing targeting of enemy forces in international and non-international armed conflict and noting that (1) “a member of an enemy force . . . is presumed hostile and therefore presumptively subject to attack” in international armed conflict, and (2) “[s]ubjecting members of organized belligerent groups to status based targeting pursuant to the LOAC as opposed to civilians who periodically lose their protection from attack seems both logical and consistent with the practice of states engaged in non-international armed conflicts”); Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, 995 (2008) (stating that members of organized armed groups are targetable based on their status in non-international armed conflict).

<sup>29</sup> For example, the United States has drastically limited the use of air power in Afghanistan in order to reduce civilian casualties as much as possible, a limit that serves the strategic goals of the mission but is not mandated by LOAC, which would likely permit the use of air strikes in many more situations (dependent on adherence to the principles of distinction, proportionality, and precautions, and other obligations inherent in the law of targeting). See, e.g., *Hearing to Consider the Nominations of Admiral James G. Stavridis, USN for Reappointment to the Grade of Admiral and to Be Commander, U.S. European Command and Supreme Allied Commander, Europe; Lieutenant General Douglas M. Fraser, USAF to Be General and Commander, U.S. Southern Command; and Lieutenant General Stanley A. McChrystal, USA to Be General and Commander, International Security Assistance Force and Commander, U.S. Forces, Afghanistan Before the S. Comm. on Armed Servs.*, 111th Cong. 11 (2009) (statement of Lt. Gen. Stanley A. McChrystal) (“Our willingness to operate in ways that minimize casualties or damage, even when doing so makes our task more difficult, is essential to our credibility.”).

obligations must be fulfilled, all the while recognizing that conflict is a fluid and shifting environment, driven by threat perception, operational needs, the conduct of the enemy, and a range of other factors.

Third, the enforcement and accountability stage of conflict introduces similar challenges as a result of the interaction of a new law of war framework with operational needs during conflict. Accountability for legal violations during armed conflict is an essential component of ensuring LOAC compliance, thus maximizing the law's ability to protect civilians and others *hors de combat* and to ensure humane treatment, among other goals. Over the past few decades, the remarkable development of an international criminal jurisprudence—through the work of ad hoc tribunals, hybrid tribunals, and the International Criminal Court, among other mechanisms—has demonstrated the vital role that accountability plays in enforcing the law, in bringing justice to the victims, and, in some cases, in helping to promote reconciliation. The application of the law in the courtroom, however, must be operationally relevant in order to serve as a useful guide for commanders in future military operations. If it is not, the likelihood that the law will be seen as irrelevant or too hard to follow is unfortunately far too great and is a serious concern.<sup>30</sup>

In the specific context of a law of war framework designed to incorporate additional procedural guarantees and legal regimes in addressing targeting and detention issues across a range of geographic spaces in a transnational conflict, these accountability challenges will loom even larger. First, the relevant legal obligations will be based not only on LOAC but on additional legal regimes as well, such as human rights law or domestic constitutional law, for example. Second, the nature of those obligations and the way in which the various legal regimes relate to each other within this new law of war paradigm will change depending on where, geographically, the relevant conduct takes place. And, as noted above, the lines between geographic areas that drive different legal obligations are not fixed during a

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<sup>30</sup> The criticisms of the ICTY trial judgment in the case of *Prosecutor v. Gotovina* highlight these risks with regard to both the development and implementation of LOAC in the future and the institutional consequences for the military. See INT'L HUMANITARIAN LAW CLINIC AT EMORY UNIV. SCH. OF LAW, OPERATIONAL LAW EXPERTS ROUNDTABLE ON THE *GOTOVINA* JUDGMENT: MILITARY OPERATIONS, BATTLEFIELD REALITY AND THE JUDGMENT'S IMPACT ON EFFECTIVE IMPLEMENTATION AND ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW 7, 10-15 (2012) (discussing ways in which the Trial Chamber's judgment in *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011), [http://www.icty.org/x/cases/gotovina/tjug/en/110415\\_judgement\\_vol1.pdf](http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol1.pdf), could have proved detrimental to the military's ability to conduct lawful operations and protect civilians).

conflict with a transnational actor, but rather will shift in accordance with the nature of the threat, the state's response, and other factors. Current cases before the military commissions in the United States already demonstrate the jurisdictional hurdles posed by a conflict whose geographic and temporal parameters are difficult to identify;<sup>31</sup> these challenges will be magnified exponentially if different components of the same conflict trigger different legal obligations as a result of a new framework based on a sliding scale of procedural obligations relative to geographical location and other factors. Furthermore, enforcement of LOAC always helps to guide future decisionmaking by commanders, judge advocates, and others, but the nature of an accountability process in this new law of war framework will unfortunately not foster greater clarity and predictability. Which precedents would apply in which areas, and for how long? Military commanders and other decisionmakers would be left with the unenviable task of sorting through the uncertainty of the legal precedents and judgments or might simply disregard these precedents as not applicable, an equally problematic outcome. As a result, even when a new framework offers the apparent potential for greater procedural protections or other metrics of effectiveness, if it divorces the decisionmaking and, later, the enforcement process from the operational realities of military operations, it is likely to be viewed as irrelevant or, still worse, as doing more harm than good.

#### B. *Consequences for the Continued Development of LOAC*

Uncertainty about the geographic scope of armed conflict leads to a variety of analytical and implementation challenges with regard to LOAC, human rights law, *jus ad bellum*, and other relevant legal regimes. The simple fact that within an armed conflict, a party to the conflict can use lethal force as a first resort, while outside an armed conflict, such deadly force may only be used as a last resort, is the starkest reminder of why such extensive attention has been focused on this question over the past few years. For the purpose of achieving LOAC's central goal of "alleviating, as much as possible the

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<sup>31</sup> For example, in the *Al-Nashiri* case, the government and the defense are engaged in extensive motion practice regarding when the conflict with al Qaeda started, for the purpose of determining the Commission's jurisdiction over certain charged crimes, namely, the bombing of the U.S.S. Cole. See, e.g., Order on Defense Motion to Dismiss Because the Convening Authority Exceeded his Power in Referring this Case to a Military Commission at 6, *United States v. Al-Nashiri* (Mil. Comm'n Guantanamo Bay, Jan. 15, 2013) (denying without prejudice the defense's motion to dismiss).

calamities of war,”<sup>32</sup> greater clarity regarding where an armed conflict is taking place and to where the concomitant authorities and obligations extend certainly would be a significant contribution. The international community—military lawyers, policymakers, international law scholars—should therefore address these issues head-on in a continuing effort to better understand how to apply the law most effectively and efficiently.<sup>33</sup> Daskal’s proposal for a rules-driven new law of war framework is therefore a welcome and important contribution to the discussion and debate. At the same time, however, these efforts must stay true to the needs and goals of LOAC as a pragmatic, operationally focused body of law that is, above all, designed to work in the inherent chaos and uncertainty of armed conflict. As I have argued elsewhere, there are significant risks for the future implementation and development of LOAC as a result of conflating norms from LOAC with norms from human rights law, or of borrowing one from the other without careful delineation, including, in particular, the rules regarding surrender and capture and the different applications and purposes of proportionality in each legal regime.<sup>34</sup> No place is this risk more profound than in relation to the legal authority to employ force against an enemy belligerent.

In the context of a specific legal framework for one particular type of conflict, the same concerns about blurring the lines between legal regimes remain. LOAC does not require an individualized threat assessment in the targeting of combatants, who are presumed hostile by dint of their status. Over time, however, the requirement for an individualized threat assessment in certain geographical zones in a new law of war framework for conflicts with transnational terrorist groups may well begin to bleed into the application of LOAC in more traditional conflicts. In essence, therefore, a carefully designed paradigm for one complex and difficult conflict scenario ultimately impacts LOAC writ large, even absent any perceived need or direct motivation for such change. Interpreting LOAC to require an individualized threat assessment for all targeting decisions—even those against the regular armed forces of the enemy state in an international

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<sup>32</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, *reprinted in* 1 AM. J. INT’L L. SUPP. 95, 95 (1907) (commonly referred to as the St. Petersburg Declaration).

<sup>33</sup> See Blank, *supra* note 16, at 1699-700 (arguing that the “[f]ailure to engage directly with the tough issues that lie at the heart of the distinction between where a state is acting as part of an armed conflict and where it is acting solely in legitimate self-defense against a terrorist or other threat is, ultimately, a wasted opportunity to promote greater development in the law going forward”).

<sup>34</sup> See *id.* at 1697-700.

armed conflict—introduces significant tactical and operational risk for soldiers not mandated or envisioned by the law.<sup>35</sup> The same conflation problem holds true for other non-LOAC obligations that might be imported into LOAC depending on the analysis of where and how a new law of war framework were to apply. It is important to recognize, notwithstanding the focus on the operational effectiveness of LOAC in this Response, that conflation and “borrowing” offer the same challenges for the implementation of human rights law, to the extent that norms from LOAC begin to bleed into the application of human rights norms. Lastly, superimposing an artificially created framework detracts attention from—or even papers over—current challenges within LOAC, such as the identification of enemy operatives, the nature and amount of proof required for determinations of reasonableness or unreasonableness in targeting decisions, and other perennially tricky issues.

### CONCLUSION

The procedural and legal protections proposed in the sort of rules-based, geographically differentiated law of war framework that Daskal proposes could certainly maximize protections for certain groups of people in certain areas during certain specific conflicts. To that end, such enhanced protections would indeed be an important contribution. However, the operational imperatives of conflict—all conflicts, not only the complex current conflict with al Qaeda and associated terrorist groups—suggest that such a framework would likely have more significant detrimental consequences through diminished clarity and predictability in the application of LOAC at all stages and unfortunate modifications in the future development of LOAC. Learning to accept some uncertainty in assessing the geography of conflict therefore helps to protect equally important LOAC goals and may well be a better option than it appears at first blush.

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<sup>35</sup> See, e.g., Corn, Blank, Jenks & Jensen, *supra* note 16 (arguing that LOAC does not mandate a least harmful means rule in targeting enemy operatives and examining the dangers of such a potential rule); Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 115-21, 150-63 (2010) (highlighting the moral discomfort with the existing rule and calling for a policy-based limitation on targeting enemy personnel who do not pose an immediate threat, while noting that such a limitation is not legally mandated).