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## Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law

### Keywords

Drones, Human Rights Law, Humanitarian Law, Self-Defense, International Law: History, Military, War and Peace

# CLARIFYING THE LAW RELATING TO UNMANNED DRONES AND THE USE OF FORCE: THE RELATIONSHIPS BETWEEN HUMAN RIGHTS, SELF-DEFENSE, ARMED CONFLICT, AND INTERNATIONAL HUMANITARIAN LAW

Molly McNab and Megan Matthews\*

## I. INTRODUCTION

By now it is common knowledge that the United States employs weaponized unmanned drones in its conflict with al Qaeda. Predator drones, equipped with Hellfire Missiles, were first deployed shortly after the September 11, 2001 terrorist attacks to target al Qaeda leaders in Afghanistan.<sup>1</sup> The first reported drone strike outside Afghanistan occurred in 2002 in Yemen.<sup>2</sup> The basic facts of the United States' conflict with al Qaeda are relatively well known. However, the law that governs the conflict is murky at best, and there is little consensus among the legal experts on many relevant legal issues. This article is designed to lay out the basic framework of the law and highlight the major areas of contention, providing the foundation for understanding the intricacies and nuances discussed by the eminent publicists writing in this edition of the *Denver Journal of International Law & Policy*.

To explain the laws governing the use of force, applied in a modern context, this article first briefly describes in Section II the historical context in which the law surrounding the use of force developed. Then, Section III explains the basic legal paradigms that apply to an analysis concerning the legality of drones as weapons of war, including human rights, self-defense, the law of armed conflict, and international humanitarian law (IHL). A brief examination of terrorism and the background history relating to difficulties in defining terrorism follows in Section IV. Section V examines the different approaches to the *jus ad bellum* analysis, which is the first step in determining legality of the use of force. Finally,

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\* Both authors graduated from the University of Denver, Sturm College of Law in May 2011 with J.D.s and Certificates in International Law. Additionally, both authors were members of the Jessup International Moot Court Team. They would like to thank Professor David Akerson for his dedication to research on the use of force law and for his invaluable assistance during the research and writing process. The authors would also like to thank Anjali Nanda, John Gaudette, and Megan Moriarty for their immense contributions.

1. Douglas Waller, *How the CIA Fights its New War*, TIME, Nov. 5, 2001, available at <http://www.time.com/time/nation/article/0,8599,183002,00.html>.

2. U.S. Missile Strike Kills al Qaeda Chief, YEMEN TIMES, Nov. 5, 2002, available at [http://articles.cnn.com/2002-11-05/world/yemen.blast\\_1\\_successful-tactical-operation-international-killers-marib?\\_s=PM:WORLD](http://articles.cnn.com/2002-11-05/world/yemen.blast_1_successful-tactical-operation-international-killers-marib?_s=PM:WORLD).

Section VI lays out the *jus in bello* assessment that governs how a State may use force when carrying out a specific campaign.

## II. BACKGROUND

In the mid-1600's, Hugo Grotius, the Dutch scholar widely considered the father of international law,<sup>3</sup> recognized the paramount principle of territorial sovereignty, and that all sovereigns are perpetually either in a state of peace governed by human rights law or a state of war governed by humanitarian law.<sup>4</sup> These revelations were considered to be new concepts of international law designed to reflect new legal realities.<sup>5</sup> Such a paradigm shift is now termed a "Grotian Moment."<sup>6</sup> Some scholars argue that September 11<sup>th</sup> created a Grotian Moment regarding the use of force to combat terrorism,<sup>7</sup> while others argue the traditional bipartite legal paradigm of humanitarian law and human rights law ensconced by Grotius' original Grotian Moment prevails<sup>8</sup> and the fundamental principle of territorial sovereignty<sup>9</sup> remains inviolable.<sup>10</sup>

3. Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DEN. J. INT'L L. & POL'Y 209, 211 (2011).

4. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* (A.C. Campbell trans., London, 1814) (1625); L. Ali Khan, *The Extinction of Nation States*, 7 AM. U. J. INT'L L. & POL'Y 197, 197 (1992).

5. John W. Head, *Throwing Eggs at Windows: Legal and Institutional Globalization in the 21st-Century Economy*, 50 KAN. L. REV. 731, 771 (2002).

6. Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L.J. 439, 443-44 (2010).

7. E.g., Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 370 (2005) (arguing that a "constitutional moment" occurred in the aftermath of September 11th, which is the same concept embodied by the term "Grotian Moment"); Benjamin Langille, *It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145 (2003); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002).

8. See, e.g., 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 79, 80, 85, U.N. GAOR, 60th Sess., 8th plen. mtg., U.N. Doc. A/RES/60/1 (Sept. 16, 2005), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (reaffirming that the traditional restrictions on the use of force prescribed by the U.N. Charter remains the legal framework under which States must operate in combating terrorism) [hereinafter 2005 World Summit Outcome]; The Secretary-General, *Note by the Secretary-General, Follow-up to the Outcome of the Millennium Summit*, ¶¶ 189-92, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf> (rejecting a new writing or re-interpretation of Article 51 of the U.N. Charter which lays out the requirements for self-defense) [hereinafter *Note by Secretary-General, Millennium Summit*]; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 745 (7th ed. 2008); Pierre-Marie Dupuy, *State Sponsors of Terrorism: Issues of International Responsibility, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM* 3, 13 (Andrea Bianchi ed., 2004); Andreas Fischer-Lescano, *Redefining Sovereignty Via International Constitutional Moments?: The Case of Afghanistan, in REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR* 335, 362-63 (Michael Bothe, Mary Ellen O'Connell & Natalino Ronzitti eds., 2005) (arguing that Anne-Marie Slaughter and William Burke-White's contention that September 11<sup>th</sup> constituted a "constitutional moment" and, accordingly, a valid legal norm, is unsupportable and instead, "constitutional moments" merely reflect norm projections).

9. U.N. Charter art. 2, para. 4; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131,

Regardless of whether September 11<sup>th</sup> constituted a Grotian Moment, the challenge the international community faces today is applying law, which developed over the course of the last four centuries, to new situations and technologies that were previously unimaginable. While international law continuously evolves, arguing that September 11<sup>th</sup> caused total destruction to the foundational principles governing the use of force is unsupported. Rather, use of force law may have evolved in some manners, but it did so within the confines of well-established basic principles.

Since Grotius, significant evolution of the foundational concept of war and peace has occurred. Two of the most momentous developments emerged from the rubble of World War II. First, the United Nations (U.N.) was formed, and now, virtually all States are party to the U.N. Charter.<sup>11</sup> Accordingly, Article 2(4) of the U.N. Charter, which codifies a general prohibition on the use of force, is binding upon nearly every State.<sup>12</sup> This prohibition can only be overcome in very narrow exceptions, one of which is a State's inherent right to self-defense, laid out in Article 51 of the U.N. Charter.<sup>13</sup>

The second post-World War II development was the introduction, and subsequent adoption, of the Fourth Geneva Convention, which provides for the protection of civilians during armed conflicts.<sup>14</sup> The Additional Protocols of 1977 to the Geneva Conventions supplemented these essential civilian protections. Additional Protocol I provides greater security for civilians,<sup>15</sup> and Additional Protocol II further elucidates the requirements for States engaging in conflicts against non-State actors, such as al Qaeda or other terrorist organizations.<sup>16</sup>

Following the Geneva Conventions and the Additional Protocols, there have been significant changes in both the parties to war and the methods of warfare. The World Wars involved great sovereign powers marching on a foreign sovereign territory, but now the "enemy" often involves non-State actors possessing no

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U.N. GAOR, 20th Sess., 1408th plen. mtg., U.N. Doc. A/RES/20/2131 (Dec. 21, 1965); Declaration on Principles in International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), pmbl., U.N. GAOR 25th Sess., Supp. No. 18, Annex (Oct. 24, 1970) [Declaration on Friendly Relations].

10. See, e.g., Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 997 (2001); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO WASH. L. REV. 1201, 1225 (2007).

11. U.N., *Member States*, <http://www.un.org/en/members/> (last visited April 9, 2011).

12. U.N. Charter art. 2, para. 4.

13. U.N. Charter art. 51. The other exceptions to the prohibition on the use of force are discussed briefly in Section III.

14. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

15. 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].

16. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

territory, no formal military, and no official constituency. Similarly, military technology has developed greatly. In traditional warfare, tanks, planes, and well-organized battalions marched across enemy territory. Today, the means and methods of warfare are imbalanced between the parties. Non-State actors employ rudimentary technology that allows a single combatant to carry out an entire attack with a road-side improvised explosive device or suicide vest.<sup>17</sup> Meanwhile, developed nations use state-of-the-art unmanned drones with laser guided missiles to target military objectives located thousands of miles away from the drone operator.<sup>18</sup> Due to these evolutions, international law has been stretched, adapted, and sometimes contorted to fit a mode of combat unimaginable to the drafters of the U.N. Charter and the Geneva Conventions in the aftermath of World War II.

### III. THE BASIC LEGAL PARADIGMS

The general prohibition on the use of force is codified in U.N. Charter Article 2(4), and is also well established customary international law.<sup>19</sup> Customary international law is universally binding and formed by widespread and consistent state practice coupled with *opinio juris*,<sup>20</sup> a State's belief that it has a legal obligation.<sup>21</sup> The prohibition on the use of force is so engrained in customary international law and viewed by the international community as an inherent obligation of all States that it is considered a *jus cogens* norm, or peremptory norm from which no derogation is permitted.<sup>22</sup>

There are several limited exceptions to this prohibition. The first is a State's inherent right to use force in self-defense, either individually or collectively.<sup>23</sup> The second exception is for use of force upon Security Council authorization for the purposes of maintaining international peace and security.<sup>24</sup> Such Security Council

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17. Alissa J. Rubin, *In Kandahar, Another Suicide Bomber Kills 2*, N.Y. TIMES, Feb. 7, 2011, available at [http://www.nytimes.com/2011/02/08/world/asia/08afghanistan.html?ref=improvisedexplosive devices](http://www.nytimes.com/2011/02/08/world/asia/08afghanistan.html?ref=improvisedexplosive%20devices); Thom Shanker, *Makeshift Bombs Spread Beyond Afghanistan, Iraq*, N.Y. TIMES, Oct. 18, 2009, available at <http://www.nytimes.com/2009/10/29/world/29military.html?ref=improvisedexplosivedevices>.

18. See Aaron Drake, *Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law – An Overview*, 39 DEN. J. INT'L L. & POL'Y 629, 630-32, 636-38 (2011). In discussing the unmanned vehicles employed by the U.S., Israel, and other States and their legal implications, this article will refer exclusively to the terms drone or unmanned drone. A variety of other terms are utilized to describe these vehicles, including: remotely piloted aircraft (RPA), "'armed drone', unmanned (or uninhabited) aerial vehicle (UAV), unmanned (or uninhabited) aircraft system (UAS)" and a handful of other technical names. Ian Henderson, *International Law Concerning the Status and Marking of Remotely Piloted Aircraft*, 39 DENV. J. INT'L L. & POL'Y 615, 615 (2011).

19. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 267 (1963); ANTONIO CASSESE, INTERNATIONAL LAW 64-65 (2d. ed. 2005).

20. North Sea Continental Shelf (F.R.G./De., F.R.G./Neth.), 1969 I.C.J. 3, ¶ 71 (Feb. 20).

21. *Id.* ¶ 77.

22. BROWNLIE, *supra* note 8, at 510-12.

23. U.N. Charter art. 51; Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 26).

24. U.N. Charter arts. 42, 51.

authorization was recently given in order to protect civilian populations in Libya.<sup>25</sup> Finally, regional enforcement actions are permitted under Article 53 of the U.N. Charter, but the legality of such action is also predicated upon Security Council authorization.<sup>26</sup>

The law governing the use of force is split into two parts: *jus ad bellum* dictates the conditions under which a State may resort to the use of force,<sup>27</sup> and *jus in bello* controls the means and methods of force a State may legally employ.<sup>28</sup> The former determines the right to use of force and the latter regulates how that right is executed.

Within the *jus ad bellum* analysis, there are three possible legal paradigms in which a State may be acting. First, during times of peace, States are governed by human rights law and may only use law enforcement methods to ensure security.<sup>29</sup> Second, a State acting within the self-defense paradigm, under which a State confronted with violence or threatened with imminent violence, may, under U.N. Charter Article 51 and customary international law,<sup>30</sup> use force in self-defense so long as it is necessary and proportionate.<sup>31</sup> Finally, a State may use force within the context of an armed conflict, under the parameters of international humanitarian law.<sup>32</sup> If the State is not operating within the self-defense or armed conflict paradigms, it *must* be operating in the human rights paradigm. Simply put, if a State does not meet the legal criteria of self-defense or armed conflict, but uses force without Security Council authorization, it is doing so unlawfully. Thus, it becomes imperative for a State utilizing military force to justify and legitimize its actions as either a lawful right to self-defense or engagement in an armed conflict.

Once a State finds itself in one of the two categories that permits the use of force, it must comply with *jus in bello* principles that govern how that force is used.<sup>33</sup> The primary source for *jus in bello* principles are the Geneva Conventions and the Additional Protocols, but virtually every principle codified in the Conventions are universally accepted as customary international law as well.<sup>34</sup>

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25. *Libya: Ban Welcomes Security Council Authorization of Measures to Protect Civilians*, U.N. NEWS CENTRE (Mar. 18, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37809&Cr=libya&Cr1>.

26. U.N. Charter art. 53.

27. MYRES MCDUGAL & FLORENTINO FELICIANO, *THE INTERNATIONAL LAW OF WAR*, 132-33 (1994).

28. Marco Sassòli, *Ius ad Bellum and Ius in Bello-The Separation Between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 242 (2007).

29. *See infra*, Section V(A).

30. *See infra*, Section V(B).

31. *See infra*, Section V(B)(iv).

32. *See infra*, Section V(C).

33. *See infra* Section VI.

34. ICRC, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, INTRODUCTION* (2001), available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_in\\_in](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_in_in) [hereinafter ICRC CUSTOMARY IHL].

## IV. THE RELEVANCE OF DEFINING TERRORISM

Combating terrorism is one of the primary purposes for the employment of armed drones by States such as Russia, Israel, and the United States.<sup>35</sup> The use of military action to respond to terrorism is controversial. To fully understand the debate, it is necessary to understand the essential elements of terrorism in order to properly place it as a cog within the legal clockwork relating to the use of force and drones. An *ad hoc* approach by States in addressing terrorism has developed due to the failure of the international community to either adopt a unified definition of terrorism or to create a binding instrument relating to the prevention or punishment of terrorism in all contexts.

Terrorism is not a new phenomenon and States began making concerted efforts to create a legal framework for addressing terrorism well before the creation of the United Nations.<sup>36</sup> States notably began to address the topic of terrorism in a unified effort beginning with the League of Nations and the 1937 Convention for the Prevention and Punishment of Terrorism.<sup>37</sup> States involved in the drafting were unable to reach consensus on the definition of terrorism and the instrument was abandoned.<sup>38</sup>

Since then, States have struggled to agree upon a comprehensive definition of terrorism.<sup>39</sup> After the 1972 Munich Olympics, where the terrorist group, Black September, massacred eleven Israeli athletes, the United Nations stepped into the international efforts to find a unified definition.<sup>40</sup> That same year, the United States proposed a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism.<sup>41</sup> This draft focused on defining terrorism as violence by non-State actors against a State, without any exception for legitimate

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35. See P.W. SINGER, WIRED FOR WAR: THE ROBOTICS EVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY 263-78 (2009); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, *Study on Targeted Killings*, U.N. Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 ¶¶ 14, 18-24 (May 28, 2010) (by Philip Alston) [hereinafter Alston Report]; Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan 2004-2009* (Notre Dame Law School, Legal Series Research Paper No. 09-43, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1501144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144); HUMAN RIGHTS WATCH, PRECISELY WRONG: GAZA CIVILIANS KILLED BY ISRAELI DRONE-LAUNCHED MISSILES 3 (2009), available at <http://www.hrw.org/en/reports/2009/06/30/precisely-wrong-0>.

36. U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Terrorism and Human Rights*, ¶¶ 6-7, U.N. Doc. E/CN.4/Sub.2/1999/27 (June 7, 1999) (by Kalliopi K. Koufa, Special Rapporteur) [hereinafter Koufa, *Terrorism and Human Rights*].

37. *Id.* ¶ 6; HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 18-19 (2005).

38. Koufa, *Terrorism and Human Rights*, *supra* note 36, ¶¶ 6; DUFFY, *supra* note 37, at 18-19.

39. Koufa, *Terrorism and Human Rights*, *supra* note 36, ¶¶ 7; TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 84-85 (2006); DUFFY, *supra* note 37, at 18-19.

40. BECKER, *supra* note 39, at 89; BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 198 (2008); *11 Israelis, 4 Arabs, German Die in Munich Olympics Terrorism*, PITT. POST-GAZETTE, Sept. 6, 1972, at i.

41. SAUL, *supra* note 40, at 198.

struggles of self-determination.<sup>42</sup> Because this proposed instrument arrived during an era of political upheaval in developing States attempting to cast off the chains of colonialism, the draft was not adopted and vehement disputes ensued between developed and developing States concerning an accurate definition of terrorism.<sup>43</sup> In place of a united approach, States attacked the task of addressing terrorism in a “sectoral” method<sup>44</sup> by drafting and adopting conventions to combat terrorism for very specific situations, such as an airplane hijacking or extortion.<sup>45</sup>

After the tragic events of September 11<sup>th</sup>, the United Nations reignited its efforts in creating an inclusive and acceptable definition of terrorism, as well as adopting an instrument to condemn and punish acts of terrorism.<sup>46</sup> A string of Security Council Resolutions were issued which simultaneously condemned acts of terrorism, urged States to aid in international efforts to combat terrorism, and reminded States that aiding terrorists constituted a breach of their international obligations.<sup>47</sup> In an effort to steer clear of the controversy over terrorism’s definition, the Security Council failed to issue a definition within these resolutions.<sup>48</sup> Unfortunately, to date, the feasibility of “a global terrorism convention [and] its precise content or scope . . . remain shrouded in uncertainty.”<sup>49</sup>

Ultimately, a fairly universal definition of terrorism has evolved from the elements littered in multiple conventions. Jurists and scholars generally agree that terrorism is defined, at the least, by three essential elements: 1) an act of violence that causes death or serious bodily harm to civilians or non-combatants (or threatens such violence, such as the taking of hostages); 2) for the purpose of causing terror or intimidation; and 3) to compel a government or organization to do

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42. BECKER, *supra* note 39, at 90.

43. BECKER, *supra* note 39, at 90-91; SAUL, *supra* note 40, at 199.

44. BECKER, *supra* note 39, at 92.

45. *E.g.*, Convention on Offenses and Certain Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *entered into force* Jan. 26, 1973, 24 U.S.T. 564, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, *entered into force* Feb. 20, 1977, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, OAS T.S., No. 37; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention for the Suppression of Unlawful Acts Against the Safety of Marine Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197.

46. DUFFY, *supra* note 37, at 20-21; BECKER, *supra* note 39, at 100-01.

47. S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

48. BECKER, *supra* note 39, at 101.

49. DUFFY, *supra* note 37, at 23.

or abstain from doing an act.<sup>50</sup> This basic definition, however, does not definitively specify whether terrorism is considered an organized crime (putting it within the human rights paradigm) or if the law of self-defense or armed conflict can also govern, and thereby fails to provide sufficient guidance for States attempting to combat terrorists.

Because no comprehensive treaty law exists and no customary *lex specialis* has developed relating to terrorism, States are left to address terrorism within the binding corpus of existing treaty and customary international law. The debate continues to rage over whether terrorism falls under the purview of human rights law or under the self-defense and armed conflict paradigms.

## V. ANALYZING JUS AD BELLUM

This section will walk through each of the *jus ad bellum* paradigms. There is significant disagreement in the international community as to which paradigm governs the U.S.'s use of force against al Qaeda in the Middle East and Africa. The human rights, self-defense, and armed conflict paradigms have all been asserted, and legitimate arguments exist for each applying at certain times and places in the conflict.

### A. Human Rights Law

Under Grotius' original bipartite legal structure, any act by a sovereign State that is not within the context of an armed conflict or is legally responding to an armed attack in self-defense,<sup>51</sup> automatically falls under the framework of human rights law. A requisite level of violence is required for a State to respond to any type of attack or threat against its citizens or sovereignty.<sup>52</sup> If a State has not suffered from an armed attack, thereby activating a right of self-defense, or the violence does not rise to a protracted intensity sufficient to constitute an armed conflict, then a State's response to an attack or perceived threat is governed by human rights law.<sup>53</sup>

Additionally, even where a State is legally employing military force, human rights law governs where gaps exist in IHL.<sup>54</sup> Some argue that IHL is in fact a subset of human rights law functioning as a *lex specialis* during armed conflicts, thus accounting for the broad application of human rights law where gaps in IHL

50. See, e.g., *Note by Secretary-General, Millennium Summit, supra* note 8, at ¶ 164; *Measures to Eliminate International Terrorism: Report of the Policy Working Group on the United Nations and Terrorism*, U.N. GA/SCOR, 57th Sess., Annex, ¶ 13, U.N. Doc. A/57/273-S/2002/875 (2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/512/97/IMG/N0251297.pdf?OpenElement>; Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 361 (2009).

51. The definitions and legal applications of both self-defense and armed conflict will be addressed in Sections V(B) and V(C) respectively.

52. Alston Report, *supra* note 35, ¶¶ 31-32.

53. *Id.* ¶¶ 31-33.

54. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); Dinah Pokempner, *Terrorism and Human Rights: The Legal Framework*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 19, 19 (Michael N. Schmitt & Gian Luca Beruto, eds. 2002).

exist.<sup>55</sup> Michael Newton, Professor of Vanderbilt University Law School, however, disagrees with this contention, arguing that “[i]t is an oxymoron to argue that humanitarian law is a mere subset of human rights law [because] IHL has a much richer, longer, and diverse history.”<sup>56</sup>

### 1. The Law Enforcement Model

A State acting within the corpus of human rights law must operate under the “law enforcement model.”<sup>57</sup> The law enforcement model permits non-military tactics, such as arrests, extradition, detention, and trial.<sup>58</sup> This term refers to the type of force that can be used, not who may employ the force. All government officials authorized to execute police powers, “including a State’s military and security forces,” may utilize such methods under the law enforcement model.<sup>59</sup> Organized crime and armed violence failing to rise to the level of an armed conflict remains in the purview of domestic law enforcement.<sup>60</sup>

As discussed above, because no comprehensive definition of terrorism exists, it is contentious as to whether terrorism is merely organized crime exclusively governed by human rights or whether terrorism may rise to a sufficient level of violence to warrant self-defense or armed conflict governed by IHL. Scholars, such as Professor Mary Ellen O’Connell of the University of Notre Dame Law School, argue that isolated acts of terrorism do not rise to the level of an armed conflict.<sup>61</sup> She specifically contends that terrorism, generally, “is a crime” and because “[t]errorist acts are usually sporadic,” they do not rise to the requisite level of violence to constitute an armed attack or an armed conflict.<sup>62</sup> Accordingly, O’Connell argues that States do not have a right to act in self-defense or to use military force against terrorists, and instead, must use law enforcement measures to combat terrorism.<sup>63</sup>

55. Pokempner, *supra* note 54, at 19; see Alston Report, *supra* note 35, ¶ 29.

56. Michael Newton, *Flying into the Future: Drone Warfare and the Changing Face of Humanitarian Law*, 39 DENVER J. INT’L L. & POL’Y 601, 602 (2011).

57. Alston Report, *supra* note 35, ¶ 31.

58. See Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-T, Judgment, ¶ 175 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008); *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcommittee on National Security and Foreign Affairs*, 111th Cong. 2 (2010) (written statement of Mary Ellen O’Connell), available at [http://www.fas.org/irp/congress/2010\\_hr/042810oconnell.pdf](http://www.fas.org/irp/congress/2010_hr/042810oconnell.pdf) [hereinafter O’Connell Congress Statement]

59. Alston Report, *supra* note 35, ¶ 31 (citing Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, Annex, art. 1, U.N. Doc A/RES/34/169 (Dec. 17, 1979)).

60. NILS MELZER, INT’L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 24 (2009); O’Connell Congress Statement, *supra* note 58, at 2.

61. See, e.g., Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SECURITY & POL’Y 344, 355 (2010); Mary Ellen O’Connell, *Remarks: The Resort to Drones under International Law*, 39 DENV. J. INT’L L. & POL’Y 585, 597 (2011) [hereinafter O’Connell, *Remarks*].

62. O’Connell, *Remarks*, *supra* note 61, at 593.

63. *Id.*

O'Connell's argument is grounded in State practice and evidence of *opinio juris* demonstrated by States treating terrorism as a crime. A sufficient body of State practice exists evidencing that States regularly employ law enforcement tactics against terrorists.<sup>64</sup> For example, when combating terrorist attacks perpetrated by the Irish Republican Army (IRA), the United Kingdom (U.K.) used its police force to conduct surveillance and execute arrests. Even when a suit was brought against the U.K. questioning the lethal force used against suspected IRA terrorists carrying out a plot to bomb British interests, the court applied the arbitrariness standard under human rights.<sup>65</sup> Additionally, the U.K. employed law enforcement measures to locate and target the perpetrators (later discovered to be members of al Qaeda) of the London subway and bus bombings in 2005.<sup>66</sup> Similarly, the Spanish successfully captured and tried the individuals responsible for the Madrid train bombing of March 2004.<sup>67</sup> The Security Council has likewise used its Article 42 powers<sup>68</sup> on several occasions requiring States to respond to terrorism with law enforcement measures, such as calling upon States to extradite terrorists,<sup>69</sup> freeze the bank accounts of suspected terrorists,<sup>70</sup> and even to domestically prosecute terrorists.<sup>71</sup>

Further, a wealth of evidence establishes States' *opinio juris* that terrorism is a crime and does not fall under the scope of IHL. The U.K. and France expressly stated in their reservations to the Additional Protocols of the 1949 Geneva Conventions<sup>72</sup> their understanding that "the term 'armed conflict' denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."<sup>73</sup> Similarly, the

64. See, e.g., William K. Lietzau, *Combating Terrorism: Law Enforcement or War?*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 75, 77 (Michael N. Schmitt & Gian Luca Beruto, eds. 2002); LOIS M. DAVIS, ET AL., *LONG-TERM EFFECTS OF LAW ENFORCEMENTS POST-9/11 FOCUS ON COUNTERTERRORISM AND HOMELAND SECURITY* xv (2010).

65. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 140 (1995).

66. Alan Cowell, *Subway and Bus Blasts in London Kill at Least 37*, N.Y. TIMES, July 8, 2005, available at <http://www.nytimes.com/2005/07/08/international/europe/08bombings.html>; Paul Reynolds, *Bomber Video 'Points to al Qaeda'*, BBC NEWS, Sept. 2, 2005, [http://news.bbc.co.uk/2/hi/uk\\_news/4208250.stm](http://news.bbc.co.uk/2/hi/uk_news/4208250.stm); *London Police Investigation Timeline*, CBC NEWS ONLINE, Aug. 11, 2005, [http://www.cbc.ca/news/background/london\\_bombing/investigation\\_timeline.html](http://www.cbc.ca/news/background/london_bombing/investigation_timeline.html) (detailing the law enforcement measures carried out by British police to catch the perpetrators of the bombing by investigating, arresting, and detaining individuals).

67. Paul White, *Madrid Train Bombings Probe Finds No al Qaeda Link*, USA TODAY, Mar. 9, 2006, available at [http://www.usatoday.com/news/world/2006-03-09-madrid\\_x.htm](http://www.usatoday.com/news/world/2006-03-09-madrid_x.htm).

68. U.N. Charter art. 42.

69. See, e.g., S.C. Res. 1044, ¶ 4(a), U.N. Doc. S/RES/1044 (Jan. 31, 1996).

70. See, e.g., S.C. Res. 1373, *supra* note 47, ¶ 1(c); S.C. Res. 1735, ¶ 1(a), U.N. Doc. S/RES/1735 (Dec. 22, 2006).

71. See, e.g., S.C. Res. 1373, *supra* note 47, ¶ 2(e).

72. Additional Protocol I, *supra* note 15; Additional Protocol II, *supra* note 16.

73. Reservation of France (Apr. 11, 2001) 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, available at <http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument>; Reservation of United Kingdom (July 2, 2002),

International Criminal Tribunal for the Former Yugoslavia has recognized that “terrorist activities . . . are not subject to international humanitarian law.”<sup>74</sup>

## 2. Requirements for the Use of Force Under Human Rights Law

The use of force under human rights law is laid out primarily in Article 6 of the International Covenant on Civil and Political Rights (ICCPR), prescribing an “arbitrary” standard.<sup>75</sup> Under Article 6, “[e]very human being has the inherent right to life . . . [and] [n]o one shall be arbitrarily deprived of his life.”<sup>76</sup> Within the human rights context, the use of lethal force is permissible only as a last resort. Only killing that is “strictly and directly necessary to save life”<sup>77</sup> is permitted;<sup>78</sup> killing that is arbitrary<sup>79</sup> or not necessary to save a life is an illegal killing.<sup>80</sup>

Law enforcement officials may take life where their lives or the lives of others are imminently threatened,<sup>81</sup> but killing may not be the sole objective.<sup>82</sup> Where law enforcement methods alone are reasonably certain to end a threat of violence, including terrorism, use of additional force is impermissible.<sup>83</sup> In sum, a State may not act in self-defense or use military force against threats or acts of violence if law enforcement measures, on their own, will, with a reasonable degree of certainty, bring the perpetrators to justice.<sup>84</sup> However, as O’Connell recognizes, a State is permitted to derogate from the prohibition against lethal force only in situations constituting an emergency.<sup>85</sup>

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, *available at* <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>.

74. Prosecutor v. Dusko Tadić, Case No. IT-94-I-T, Appeal, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-T, Judgment, ¶ 175 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008).

75. International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

76. *Id.*

77. Alston Report, *supra* note 35, ¶¶ 32-33.

78. Human Rights Committee, General Comment No. 6 (art. 6), ¶ 3, U.N. Doc. HRI/GEN/1/Rev.1 (1994); *Report on Terrorism and Human Rights*, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. ¶¶ 86-87 (2002).

79. ICCPR, *supra* note 75, art. 6(1).

80. See Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev.1 (1990); Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 Yale J. Int’l L. 609, 644 (1992).

81. Alston Report, *supra* note 35, ¶ 32.

82. Alston Report, *supra* note 35, ¶ 9.

83. Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus as Bellum: A Normative Framework*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES, ESSAYS IN HONOUR OF YORAM DINSTEIN 157, 171 (2007).

84. *Id.*

85. O’Connell, *Remarks*, *supra* note 61, at 597.. However, what constitutes an emergency situation great enough to trigger the exception is highly controversial.

### 3. Targeted Killings

One of the primary concerns within the international community regarding the use of drones is that States utilize drones for their extraordinarily precise targeting capabilities to kill terrorists, which many argue constitute extrajudicial or “targeted killing.”<sup>86</sup> As the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Philip Alston, explains, a “targeted killing is the intentional, premeditated and deliberate use of lethal force . . . against a specific individual who is not in the physical custody of the perpetrator.”<sup>87</sup> The main criterion of a targeted killing is that “lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator.”<sup>88</sup>

States may legally employ targeted killing tactics within the context of a valid act of self-defense or armed conflict, as long as the killing conforms to the *jus in bello* requirements of necessity, proportionality, and distinction, which will be further examined in Section VI. Targeted killings occurring during peacetime, however, are illegal.<sup>89</sup> As discussed above, States acting in peacetime (outside of the self-defense and armed conflict paradigms) and within the human rights framework must limit acts of lethal force to situations where lives are imminently threatened. Additionally, because killing may not be the sole objective, a targeted killing is, by definition, illegal under the human rights paradigm.

In limited circumstances, a State’s law enforcement personnel might justifiably employ targeted killing tactics where an imminent threat exists to the civilian population, but only if the overall goal of the mission is not to kill.<sup>90</sup> Interestingly, O’Connell posits that because drones use military force, they “are therefore lawful only in armed conflict hostilities,”<sup>91</sup> without acknowledging limited exceptions for imminent threats. Her argument might be in response to the way in which States are using drones. Currently, States are often employing drones for targeted killings, but where no imminent threat exists.

By way of example, one of the first known U.S. drone attacks using a Hellfire missile occurred on November 3, 2002, which struck a car in Yemen, killing alleged al Qaeda leader Ali Qaed Senyan al-Harithi and five other men.<sup>92</sup> In

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86. Many scholars also refer to this practice as “extrajudicial killing”, “summary execution”, “assassination”, or other similar terms. This article will refer exclusively, however, to the term “targeted killing” without prejudice to these other terms of art.

87. Alston Report, *supra* note 35, ¶ 1.

88. Alston Report, *supra* note 35, ¶ 9 (citing NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 4-5 (2008)).

89. See O’Connell Remarks, *supra* note 61, at 599; Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 614 (1992).

90. Alston Report, *supra* note 35, ¶¶ 1, 9.

91. O’Connell Remarks, *supra* note 61, at 589.

92. Alston Report, *supra* note 35, ¶ 19 (citing Jane Mayer, *The Predator War: What are the Risks of the C.I.A.’s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer)).

response to this incident, then Special Rapporteur on Extrajudicial, Summary, and Arbitrary Killings, Asma Jahangir, reported that the incident constituted “a clear case of extrajudicial killing.”<sup>93</sup> Another such occurrence perpetrated by the U.S. Central Intelligence Agency was the targeting of wanted terrorist Baitullah Mehsud, the leader of the Taliban in Pakistan.<sup>94</sup> Mehsud was in a civilian home with his family and not engaging in any violent activity at the time of the attack. This attack will be discussed in greater detail in Section VI regarding the principles of IHL. However, under O’Connell’s argument that terrorism must be combated with law enforcement measures, this attack would be an illegal targeted killing.

In contrast to O’Connell and Alston, Professor Jordan Paust of the University of Houston Law Center contends that the targeted killing policies of the United States, Israel, and other States do not violate the arbitrary killing standard of human rights.<sup>95</sup> Instead, he reasons that a State’s extraterritorial targeted killings of individuals does not violate the “general human right to freedom from arbitrary deprivation of life” because it “will only be applicable with respect to those persons who are within the jurisdiction, actual power, or effective control of the state or other entity using a drone.”<sup>96</sup>

Both the ICCPR and ICESCR are limited in scope territorially, binding only upon State parties, requiring them to extend human rights protections to their citizens or persons within that State’s sovereign territory. However, because the requirement that a State not arbitrarily deprive individuals of the right to life is an *erga omnes* duty<sup>97</sup> (an obligation owed to all States by all States)<sup>98</sup> and most likely a *jus cogens* norm,<sup>99</sup> States are obligated to ensure individuals the right to life regardless of a State’s jurisdiction, actual power, or effective control of an individual. Therefore, any targeted killing of an individual committed by a State outside of the context of lawful self-defense or an armed conflict, and when no individual is imminently threatened, including those carried out by weaponized drones, implicate human rights violations.

### *B. The Law Governing the Right of Self-Defense*

A State may use force in self-defense in response to an armed attack.<sup>100</sup> This is an inherent right of all States, codified in Article 51 of the U.N. Charter, which

93. U.N. Comm’n on Human Rights, Sub-Comm’n on Civ. and Pol. Rights, Including the Questions of Disappearances and Summary Executions, *Extrajudicial, Summary, or Arbitrary Executions, Report of the Special Rapporteur, Asma Jahangir*, ¶ 19, UN Doc. E/CN.4/2003/3 (Jan. 13, 2003).

94. Mayer, *supra* note 92.

95. Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of bin Laden*, 39 DENV. J. INT’L L. & POL’Y 569, 569-70 (2011) (arguing that the U.S. drone attacks in Pakistan are permissible acts of self-defense, not requiring consent from Pakistan).

96. *Id.* at 573-74.

97. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens*, THE RIGHT TO LIFE IN INTERNATIONAL LAW 120, 147 (B.G. Ramcharan ed. 1985).

98. *Barcelona Traction Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

99. Gormley, *supra* note 99, at 147.

100. U.N. Charter art. 51.

states that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” A parallel right exists under customary international law.<sup>101</sup> The customary right to self-defense “exist[s] alongside treaty law” and is not superseded by the U.N. Charter.<sup>102</sup> The co-existence of the right to self-defense under both treaty and customary law is rooted in the very nature of sovereignty; the State, as the supreme authority under international law, must be empowered to respond to threats against its territorial sovereignty or nationals. Newton argues that it is “modern consensus that the sovereign right of self-defense did not originate in Article 51 of the United Nations Charter and is not restricted to responses enumerated therein.”<sup>103</sup>

The right to self-defense includes both individual and collective self-defense.<sup>104</sup> A State may simultaneously possess both an individual and a collective right to self-defense, and the State may act under both or either. For example, State A and State B both suffer an armed attack from the same actor and State A requests State B’s assistance in self-defense. State B may use force in individual self-defense for the original attack, as well as use force in collective self-defense because of the request from State A. It was this precise scenario the United States attempted to claim it was operating under in its submission to the International Court of Justice (I.C.J.) in the *Nicaragua* case.<sup>105</sup> The U.S. defended its financial and logistical support of military and paramilitary actions in and against Nicaragua by contending it was acting under both a right to individual self-defense as well as collective self-defense on behalf of several Central American countries.<sup>106</sup> The Court found, however, that because the U.S. had not received a request from the States it was claiming to be acting on behalf of, it could not invoke collective self-defense.<sup>107</sup>

Three basic issues arise when a State invokes a right to self-defense, and each is contested to some degree in international legal scholarship: 1) whether the State has suffered an *armed attack*; 2) whether the armed attack must be *attributable* to another State; and 3) *where* the State may use force in responding to the armed attack. These three issues essentially define the parameters for a State’s right to self-defense. Once these threshold issues are settled, the State must comply with

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101. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 26).

102. *Id.*

103. Newton, *supra* note 56, at 604.

104. U.N. Charter art. 51; *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. at ¶ 176.

105. Counter Memorial of United States, *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. Pleadings, ¶ 202 (Aug. 17, 1984).

106. *Id.* at ¶¶ 202, 254.

107. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. at ¶ 165.

two restrictions, requiring that any use of force in self-defense be both *necessary* and *proportionate*.<sup>108</sup>

### 1. Armed Attack

Most, but not all, scholars agree that the right of self-defense is limited to situations where a State has suffered an *armed attack*.<sup>109</sup> The more controversial issue relates to what constitutes an armed attack, as the term itself provides little guidance.

A minority of scholars argue that a State may respond in self-defense to any threat, even those that do not rise to the level of an armed attack.<sup>110</sup> The reasoning is that a State should not be required to withhold a response of self-defense until the threat escalates into an armed attack.<sup>111</sup> Requiring so would create a gap in the law where a State could not respond to serious threats against its nationals or territory, which would render the right to self-defense meaningless.<sup>112</sup> It is also argued that the language of U.N. Charter Article 51, which preserves the inherent right to self-defense that preexisted the U.N., does not require an armed attack.<sup>113</sup> Article 51 articulates that a State has “the inherent right of . . . self-defence if an armed attack occurs,”<sup>114</sup> and the lack of conditional language could indicate that the framers did not intend to limit the right to self-defense to “if and only if” an armed attack occurs.<sup>115</sup>

The majority of scholars agree, however, that a State must suffer an armed attack as a prerequisite to invoking the right to use force in self-defense.<sup>116</sup> The I.C.J. has loosely defined armed attack in several cases, including *Nicaragua*<sup>117</sup> and *Oil Platforms*.<sup>118</sup> Armed attack, as a concept, exists less as a cohesive

108. CASSESE, *supra* note 19, at 355.

109. ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 154-55 (1993); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 182-85 (4th ed. 2005); Albrecht Randelzhofer, *Article 51*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 803 (Bruno Simma ed., 2002); Michael Bothe, *Terrorism and the Legality of Pre-Emptive Force*, 14 *EUR. J. INT'L L.* 227, 229 (2003).

110. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961); STEPHEN M. SCHWEBEL, *Aggression, Intervention and Self-Defense in Modern International Law*, in *JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF JUDGE STEPHEN M. SCHWEBEL* 530, 580 (1994); Oscar Schachter, *The Right of States to Use Armed Force*, 82 *MICH. L. REV.* 1620, 1634 (1984).

111. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 26) (dissenting opinion of Judge Schwebel ¶ 173).

112. SCHWEBEL, *supra* note 110, at 580.

113. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. (dissenting opinion of Judge Schwebel ¶ 173); BROWNLIE, *supra* note 8, at 732.

114. U.N. Charter art. 51.

115. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. (dissenting opinion of Judge Schwebel ¶ 173).

116. *See supra* note 109.

117. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 191, 195 (June 26).

118. *Oil Platforms* (Iran v. U.S.) 2003 I.C.J. 161, ¶¶ 64, 72 (Nov. 6).

definition and more as an interplay of multiple sub-definitions. According to the I.C.J., only the "most grave forms of the use of force" constitute an armed attack.<sup>119</sup> An armed attack must reach a certain significant scale of violence,<sup>120</sup> above "mere frontier incidents."<sup>121</sup> As O'Connell points out, sporadic rocket fire or small groups of persons crossing the border would not rise to the level of an armed attack.<sup>122</sup>

Some argue, however, that smaller scale attacks constitute armed attacks triggering a State's right to self-defense, "[u]nless the scale and effects are *trifling*, below the *de minimis* threshold."<sup>123</sup> In fact, the I.C.J. determined that even a solitary attack on a ship rises to the level of an armed attack.<sup>124</sup> In line with this thinking, I.C.J. Judge Jennings argued that it would be dangerous to unnecessarily restrict the right to self-defense, as it would limit the State's ability to legally respond to a threat to its sovereignty.<sup>125</sup>

Another area of contention regarding an armed attack is whether a string of small-scale attacks can be evaluated as a whole in order to rise to the level of an armed attack. This primarily becomes an issue when discussing acts of terrorism that generally employ "needle prick tactics" to achieve results that could not be achieved by a single concentrated attack.<sup>126</sup> As O'Connell argues, the sporadic nature of terrorist attacks is precisely the reason why States should be required to respond with law enforcement methods rather than military force.<sup>127</sup> O'Connell and others maintain that strings of terrorist attacks must be evaluated on a case-by-case basis and cannot accumulate to produce an armed attack.<sup>128</sup> However, others contend that the accumulation of attacks is justified when violence is carried out as a coordinated campaign.<sup>129</sup>

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119. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. at ¶ 191.

120. *Id.* ¶ 195.

121. *Id.*

122. O'Connell *Remarks*, *supra* note 61, at 591.

123. DINSTEIN, *supra* note 109, at 195.

124. *Oil Platforms* (Iran v. U.S.) 2003 I.C.J. at ¶ 72.

125. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. (dissenting opinion of Judge Jennings, pp. 543-44).

126. Yehuda Blum, *State Response to Acts of Terrorism*, 19 GER. Y.B. INT'L L. 223, 233 (1976).

127. O'Connell *Remarks*, *supra* note 61, at 593.

128. See Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 898 (2002).

129. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) 2005 I.C.J. 168, ¶ 146 (Dec. 19); *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. at ¶ 231; see Schmitt, *supra* note 83, at 169-70 (referencing the I.C.J.'s reasoning in *Nicaragua* that mere frontier incidents do not rise to the level of an armed attack but then adopting Yoram Dinstein's dismissal of the *Nicaragua* holding by arguing that mere frontier incidents and small scale attacks will constitute an armed attack when they rise above the *de minimis* threshold).

## 2. Attribution of Armed Attacks: State or Non-State

The second issue relates to attribution of the armed attack. It remains unsettled as to whether a State suffering an armed attack must be able to attribute that attack to another State in order to legally use force in self-defense, or whether a State may respond to an armed attack carried out by a non-State actor, including terrorists groups like al Qaeda. Some scholars like O'Connell maintain that attribution to a State is absolutely required, and without it, a State must operate within the law enforcement/human rights paradigm.<sup>130</sup> This argument is supported by I.C.J. cases such as *Nicaragua*,<sup>131</sup> *Oil Platforms*,<sup>132</sup> and *The Wall Advisory Opinion*,<sup>133</sup> which consider attribution of an armed attack to a State actor as a necessary requirement for self-defense. These holdings draw from the U.N. General Assembly's Definition of Aggression, which includes acts of aggression as "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State." Put differently, an armed attack may be carried out by non-State actors acting on behalf of a State.

Several tests exist to determine State responsibility in this context, including "effective control" as set forth in *Nicaragua*,<sup>134</sup> "overall control" derived from the *Tadic* decision by the International Criminal Tribunal for the Former Yugoslavia,<sup>135</sup> and applicable provisions from the Draft Articles on State Responsibility.<sup>136</sup> Regardless of the test applied, the attribution requirement predicates a lawful act of self-defense upon the occurrence of an armed attack attributable (under one of the aforementioned tests) to a foreign State. Violent acts carried out unilaterally by a non-State actor would not trigger the right of self-defense.

Other scholars maintain that attribution is not required and that a State has a right to use force in self-defense against a non-State actor, regardless of the involvement of another State.<sup>137</sup> Article 51 of the U.N. Charter articulates a State's

130. See O'Connell *Remarks*, *supra* note 61, at 590-91.

131. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. at ¶ 195.

132. *Oil Platforms* (Iran v. U.S.) 2003 I.C.J. 161, ¶ 72 (Nov. 6).

133. *The Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9).

134. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. at ¶ 115.

135. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal, ¶¶ 120-21 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

136. *Responsibility of States for Internationally Wrongful Acts* arts. 2, 8, G.A. Res. 56/83, U.N. GAOR 56th Sess., Annex, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

137. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda) 2005 I.C.J. 168 (Dec. 19) (separate opinion of Judge Kooijmans ¶ 28); *The Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. (separate opinion of Judge Higgins ¶ 33); *The Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. (declaration of Judge Buergenthal ¶ 6); CASSESE, *supra* note 19, at 355; DINSTEIN, *supra* note 109, at 206, 216; Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 *YALE J. INT'L*

inherent right to self-defense “if an armed attack occurs against a Member of the United Nations,”<sup>138</sup> without mentioning attribution to another State. In response to the increased threat from non-State transnational terrorist organizations, I.C.J. Judge Kooijmans stated in his separate opinion in the *Armed Activities* case that “it would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require.”<sup>139</sup>

In contrast to O’Connell’s argument for attribution based on I.C.J. jurisprudence, this stance relies heavily on State practice. During the *Caroline Incident* of 1837, Canada faced an armed insurrection mounted from U.S. soil led by non-State actors. The United Kingdom, Canada’s sovereign at that time, responded to the armed insurrection by sinking the insurgent’s supply ship, the *Caroline*, while it was in U.S. waters.<sup>140</sup> Both States recognized that self-defense was appropriate when an armed attack emanated from a non-State actor acting alone, and neither State attempted to attribute the insurgent’s actions to the U.S.<sup>141</sup> More recently, the U.S. based its use of force in Afghanistan against al Qaeda for the 1998 embassy bombings on the right to self-defense under Article 51.<sup>142</sup> Additionally, after the attacks of September 11<sup>th</sup>, Security Council Resolutions 1368 and 1373 recognized “the inherent right of . . . self-defence as recognized by the Charter” in response to “any act of international terrorism,” regardless of attribution to a State.<sup>143</sup>

### 3. Location of the Use of Force in Self-Defense

Arguably the most controversial issue regarding self-defense is the location where a State may lawfully use force in exercising its right to self-defense. As O’Connell points out, while there are concerns about the attacks carried out in Afghanistan against al Qaeda, the real concern is whether the attacks carried out against al Qaeda in third States, such as Yemen and Somalia, are lawful.<sup>144</sup> O’Connell asserts that without attribution to the State where the targeting is occurring, the use of force is unlawful.<sup>145</sup> Conversely, Paust and others contend that a State’s right to territorial integrity is not absolute and that under certain

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L. 559, 563-64 (1999).

138. U.N. Charter art. 51.

139. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda) 2005 I.C.J. (separate opinion of Judge Kooijmans ¶ 30).

140. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 83-84 (1938).

141. *Id.*

142. Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, ASIL TASK FORCE ON TERRORISM, 10 (Aug. 2002), available at <http://www.asil.org/taskforce/oconnell.pdf>.

143. S.C. Res. 1368, *supra* note 47; S.C. Res. 1373, *supra* note 47; *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda) 2005 I.C.J. (separate opinion of Judge Simma ¶ 11); *The Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) (separate opinion of Judge Kooijmans ¶ 35); Schmitt, *supra* note 83, at 161; Jordan J. Paust, *Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 238-39 (2010).

144. O’Connell *Remarks*, *supra* note 61, at 592.

145. *See id.* at 590-91, 594.

circumstances a State may exercise its right to self-defense in the territory of a State not responsible for an attack.<sup>146</sup>

The argument against the legality of targeting terrorists in States outside of the traditional notion of a battlefield relies on the foundational principle of territorial integrity of all States, codified in U.N. Charter Article 2(4). Under Article 2(4), all States have the right to be free from other States using force in their territory. In determining where a State may target terrorists, this fundamental concept of territorial integrity couples with the previously mentioned attribution requirement. Together, these two notions form the asserted rule that under the law of self-defense a State's territorial integrity prevails unless the armed attack, which instigated the right to self-defense, is attributable to a foreign State.<sup>147</sup> Only then may the victim State use force in self-defense in the sovereign territory of the foreign State. Should the non-State actor be located in the territory of a State that was not responsible for the armed attack, the victim State must rely solely on law enforcement methods governed by human rights.

In contrast, scholars such as Paust assert that territorial integrity is only one of many values enshrined in the U.N. Charter, and the right to self-defense may supersede territorial integrity, provided it is carried out within the confines of the law of self-defense.<sup>148</sup> Paust's argument is premised upon the notion that a State may target individuals directly participating in the armed attack, regardless of the location of those individuals. For example, the U.S. is permitted to target members of al Qaeda operating from Yemen, despite the fact that an armed attack is not attributable to the State of Yemen. However, the U.S. must limit its targeting to the combatants alone, and not the State of Yemen. This is a fine, but important distinction.

Proponents of this point of view rationalize infringing another State's territory based on that State's failure to meet its obligation to deny safe haven to non-State actors, including terrorists.<sup>149</sup> A State is considered to be providing safe haven when it knows or should know that non-State actors are carrying out attacks against other States from any portion of its territory.<sup>150</sup> All States have an affirmative obligation to deny safe haven to terrorists,<sup>151</sup> and a State that is unable or unwilling to meet this obligation cannot expect to preserve its territorial integrity against lawful measures of self-defense.<sup>152</sup> The porous, mountainous

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146. Paust, *supra* note 98, at 572-73.

147. *The Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J., at ¶ 139.

148. U.N. Charter art. 51; *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 55 (Apr. 9); Schmitt, *supra* note 83, at 179.

149. DINSTEIN, *supra* note 109, at 244.

150. *Id.*

151. S.C. Res. 1378, *supra* note 47; S.C. Res. 1373, *supra* note 47; Declaration on Friendly Relations, *supra* note 9.

152. DINSTEIN, *supra* note 109, at 247; see Ved P. Nanda, *Terrorism, International Law and International Organizations*, in *LAW IN THE WAR ON INTERNATIONAL TERRORISM* 1, 10 (Ved P. Nanda ed. 2005); Alston Report, *supra* note 35, ¶ 35; Wedgwood, *supra* note 137, at 565.

border between Afghanistan and Pakistan is often considered a safe haven, as Pakistan is not able to consistently prevent that portion of its territory from being used as a terrorist stronghold.<sup>153</sup> U.S. Department of State Legal Advisor Harold Koh used this reasoning to justify the U.S.'s ability to kill suspected terrorists in Pakistan's and other States' territory based on their lack of "willingness and ability . . . to suppress the threat the target poses."<sup>154</sup>

The general affirmative obligation that every State not knowingly allow "its territory to be used for acts contrary to the rights of other States" was first articulated by the I.C.J. in the *Corfu Channel* case.<sup>155</sup> This concept was confirmed in the context of transnational terrorism in Security Council Resolution 1373, passed shortly after September 11, 2001.<sup>156</sup> Security Council Resolution 1373 confirms that a State's failure to prevent its territory from being used as a safe haven triggers the right to self-defense against the non-State actors located within the host State's territory.<sup>157</sup> The exercise of self-defense in this context is an exception to the host State's right to territorial integrity, waived because of its failure to comply with international obligations.<sup>158</sup>

Simply put, if a State does not exercise due diligence in preventing terrorist attacks on other States, the victim State may take action in self-defense and has no obligation to wait until the host State comes into compliance with its international obligations. As Lord Ashburn queried in response to the *Caroline Incident*, "[h]ow long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect?"<sup>159</sup> When the argument is framed in such a manner, it becomes evident that a State should not have to defer to another State's territorial sovereignty or await consent to use force in self-defense in that State's territory where that State does not control its territory or has no legitimate means of controlling its territory, such as Somalia or other failed or failing States.

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153. See, e.g., U.S. Dep't of State, Office of the Coordinator for Counter Terrorism, Country Reports on Terrorism, *Chapter 3 – Terrorist Safe Havens* (2006), available at <http://www.state.gov/s/ct/rls/crt/2005/64333.htm>.

154. Harold Koh, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> [hereinafter Koh Speech].

155. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9); accord U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3, ¶ 67 (May 24); *S.S. Lotus*, 1927 P.C.I.J. (Ser. A) No. 10, at 4 (Sept. 7).

156. S.C. Res 1373, *supra* note 47.

157. See, e.g., DINSTEIN, *supra* note 109, at 247; Schmitt, *supra* note 83, at 176-77.

158. *Corfu Channel*, 1949 I.C.J. at 55.

159. Jennings, *supra* note 140, at 82 (quoting letter from Lord Ashburton to Mr. Webster, July 28, 1842).

#### 4. Conditions on a State's Exercise of the Right to Self-Defense – Necessity, Proportionality, and Imminence

International law restricts the use of force in self-defense to that which is *necessary* to quell an *imminent* attack, and *proportionate* to this purpose.<sup>160</sup> The terms *necessity* and *proportionality* are also used in other contexts, including in the *jus in bello* analysis.<sup>161</sup> The terms have different meanings and legal standards depending on which area of the law they are being applied. Thus, it is imperative to understand which type of necessity and proportionality are being referred to. Certain scholars, including O'Connell, contend that these words derive from a fundamental common definition,<sup>162</sup> while others, such as Newton, argue they are highly distinguishable.<sup>163</sup> Regardless of the academic debate on the fundamental similarities of the terms, the basic legal definitions of both sets of terms and their application are different. Thus, this article completely distinguishes *necessity* and *proportionality* under the law of self-defense from their use within the *jus in bello* framework.

The principle of *necessity* in the context of self-defense requires that force only be used when there is no other alternative course of action to deter the attacks against the State.<sup>164</sup> If the State cannot rely on diplomatic<sup>165</sup> or law enforcement measures<sup>166</sup> to stop the attacks, it may respond with necessary force. This restriction on self-defense essentially requires that a State use force only when no other viable option exists to deter the attacks.<sup>167</sup>

*Proportionality* limits a State's response "to those actions necessary to defeat the armed attack"<sup>168</sup> but does not require "symmetry between the mode of the initial attack and the mode of the response."<sup>169</sup> One method of gauging proportionality is to use an objective standard,<sup>170</sup> comparing the quantum of force and counter-force used, as well as the casualties and damages sustained.<sup>171</sup>

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160. *Oil Platforms (Iran v. U.S.)* 2003 I.C.J. 161, ¶ 43 (Nov. 6); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, ¶ 41 (July 8); *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 176 (June 26).

161. *See infra* Section VI.

162. O'Connell *Remarks*, *supra* note 61, at 591.

163. Newton, *supra* note 56, at 610.

164. DINSTEIN, *supra* note 109, at 221; Alston Report, *supra* note 35, ¶ 43.

165. *Oil Platforms*, 2003 I.C.J., at ¶ 43; DINSTEIN, *supra* note 109, at 237.

166. Schmitt, *supra* note 83, at 171.

167. *Id.*; DINSTEIN, *supra* note 109, at 221.

168. Michael N. Schmitt, *Deconstructing October 7<sup>th</sup>: A Case Study in the Lawfulness of Counterterrorist Military Operations*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 39, 42 (Michael N. Schmitt & Gian Luca Beruto eds., 2002); *see also* *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226 (July 8) (dissenting opinion of Judge Higgins ¶ 5); Alston Report, *supra* note 35, ¶ 43.

169. Alston Report, *supra* note 35, ¶ 43; *accord* Schmitt, *supra* note 83, at 172.

170. Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War*, 88 INT'L. R. RED CROSS 779, 787-88 (2006).

171. DINSTEIN, *supra* note 109, at 237.

A State may use force in self-defense against an *imminent* threat where the necessity of self-defense “is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>172</sup> The debate in this area revolves around the meaning of imminent. Do the missiles have to be in the sky and on their way? Or does the finger have to be on the trigger? Or is concrete planning of an attack sufficient? It is clear that the missile in the air scenario satisfies the imminence requirement. After that, one finds little agreement and a variety of terms to describe the different levels of imminence.

Three terms are often employed when describing the varying degrees of imminence: preventive, anticipatory, and preemptive. Preventive describes a use of force to combat an intangible and theoretical prospective threat in order to prevent that threat from coming to fruition.<sup>173</sup> Under the Bush administration, preventive self-defense was misnamed as “preemptive,” most likely in an effort to justify U.S. military action after September 11<sup>th</sup> to quell potential future al Qaeda attacks.<sup>174</sup> Preventive self-defense is almost universally regarded as an illegal use of force and not a valid exercise of the right to self-defense.<sup>175</sup>

Preemptory and anticipatory are used sometimes interchangeably and there are multiple definitions for each. In general, these terms encompass acts of self-defense in response to attacks that are on the brink of being launched or where one attack has already occurred and the State learns more attacks are planned.<sup>176</sup> Anticipatory self-defense allows a State to respond when a group harbors the intent and means to carry out attacks, there is no effective alternative for preventing them, and the State must act immediately or risk missing the opportunity to thwart the attacks.<sup>177</sup> Yoram Dinstein also employs the term “interceptory” to define a category of preemptive self-defense in response to acts which are already launched, arguing that anticipatory self-defense is unlawful while interceptory self-defense is permitted,<sup>178</sup> but in essence, the distinction between interceptory and anticipatory is academic.

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172. *Caroline Incident, Letters from Webster to Fox*, 29 BRIT. & FOREIGN ST. PAPERS 1129, 1137-38 (1840-41).

173. O’Connell, *supra* note 142, at 2, n.10.

174. *See id.* (citing Mike Allen & Karen DeYoung, *Bush: U.S. Will Strike First at Enemies; In West Point Speech, President Lays Out Broader U.S. Policy*, WASH. POST, June 2, 2002, at A01); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599, 599 (explaining that, “Although the administration has characterized its new approach as “preemptive,” it is more accurate to describe it as “preventive” self-defense. Rather than trying to preempt specific, imminent threats, the goal is to prevent more generalized threats from materializing.”).

175. *See, e.g., Note by Secretary-General, Millennium Summit, supra* note 8, ¶¶ 189-91 (explaining that unilateral acts of preventive self-defense, as opposed to collective preventive actions with Security Council authorization, contravene the U.N. Charter).

176. Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defence*, 57 AM. J. INT’L L. 597, 601 (1963); Schachter, *supra* note 110, at 1634.

177. Schmitt, *supra* note 83, at 174.

178. DINSTEIN, *supra* note 109, at 168, 182-85.

Scholars in favor of a preemptory or anticipatory right to self-defense maintain that any other interpretation would render the right to self-defense meaningless<sup>179</sup> by requiring States to “assume the posture of ‘sitting ducks’” in the face of an imminent threat.<sup>180</sup> This is often asserted in the context of self-defense against terrorists because their attacks are designed to be undetectable until they are launched.<sup>181</sup> Between attacks, terrorists continue to plan future attacks, creating a threat which is “underway, not simply potential.”<sup>182</sup> Under this theory, the principle of imminence is satisfied when there is a group with the avowed purpose of carrying out attacks and the group possesses the means to carry out the attack.<sup>183</sup> Such a situation creates a continuous attack and a State may use self-defense to ward off the imminent and ongoing terrorist attacks.<sup>184</sup>

On the other side of the issue, scholars argue that such a broad interpretation of imminence is dangerous, allowing for the overly aggressive use of force when not absolutely necessary, and thus violating the previously described principle of necessity. Proponents of a narrow interpretation of imminence usually rely upon the *Caroline* Incident and contend that any act of self-defense must be in response to a threat that “is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>185</sup> Any preemptive right of self-defense is limited to interceptive prevention, requiring that an attack be already mounted<sup>186</sup> and corroborated by “substantiated evidence.”<sup>187</sup>

### C. Armed Conflict

The last way in which a State may combat terrorism is while acting within the context of an armed conflict. If the use of force rises to the level of an armed conflict, international humanitarian law applies,<sup>188</sup> but human rights law continues to govern any legal gaps.<sup>189</sup> As is discussed within the *jus in bello* portion of this article, IHL provides a State greater legal latitude when using lethal force. The human rights standard prescribes that killing is only permitted to prevent an imminent threat to law enforcement officials or to the public. Under IHL,

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179. Schmitt, *supra* note 83, at 174.

180. McDougal, *supra* note 176, at 601.

181. *Id.* at 173.

182. Wedgwood, *supra* note 137, at 564-65.

183. Schmitt, *supra* note 83, at 174.

184. Wedgwood, *supra* note 137, at 564-65.

185. *Caroline Incident, Letters from Webster to Fox*, *supra* note 172.

186. DINSTEIN, *supra* note 109, at 187; Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 821 (1970); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 531 (2006).

187. Franck, *supra* note 186, at 821.

188. Fourth Geneva Convention, *supra* note 14, art. 2; Ved P. Nanda, *Introductory Essay: International Law Implications of the United States' "War on Terror"*, 37 DENV. J. INT'L L. & POL'Y 513, 514 (2009).

189. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); Pokempner, *supra* note 54, at 19.

however, a State is permitted to kill designated “combatants” and to incur civilian casualties so long as they comply with the *jus in bello* principles.

The advantage of using lethal force under more lenient legal standards is likely the reason behind the U.S. and Israel’s arguments that each is involved in an armed conflict against known terrorist organizations.<sup>190</sup> Alston recognizes the inherent danger of allowing States to “unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the framework of human rights . . .”<sup>191</sup> He voices concerns that in so doing, States “are not only effectively declaring war against a particular group, but eviscerating key and necessary distinctions between international law frameworks that restricts States’ ability to kill arbitrarily.”<sup>192</sup> In essence, Alston contends that States abusing the distinctions between human rights, self-defense, and armed conflict could lead to potential catastrophic results on the existing legal frameworks which limit States’ right to use force.<sup>193</sup>

The law of armed conflict is codified in the Geneva Conventions and the Additional Protocols, whose terms have evolved into binding customary obligations.<sup>194</sup> An armed conflict must be either international or non-international.<sup>195</sup> An international armed conflict is present where two or more States engage their armed forces with the others’, regardless of the intensity or duration of the clashes.<sup>196</sup> Historically, an armed conflict between two States was termed a “war,” however, this traditional nomenclature is nearly obsolete given that States regularly use military force against their enemies without formally declaring war.<sup>197</sup>

Non-international armed conflicts are those not involving two States, but rather a State responding to violence by non-State actors.<sup>198</sup> Common Article 3 of the Geneva Conventions and Additional Protocol II governs these conflicts.<sup>199</sup> The rather vague treaty law has recently received much attention given the increasing number of non-international armed conflicts. While international armed conflicts

190. HCJ 769/02 *The Pub. Comm. Against Torture in Israel v. The Gov’t of Israel* 57(6) IsrSC 285, P 21 [2006] (Isr.); Koh speech, *supra* note 154.

191. Alston Report, *supra* note 35, ¶ 48.

192. *Id.*

193. *Id.*

194. ICRC CUSTOMARY IHL, *supra* note 35.

195. Fourth Geneva Convention, *supra* note 14, arts. 2-3.

196. Fourth Geneva Convention, *supra* note 14, art. 2(1); *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Judgment, ¶ 561 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (1952); ; U.K. MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT 28-29 (2005).

197. Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-first Century War and Its Possible Implications for the Law of Armed Conflict*, 19 Mich. J. Int’l L. 1051, 1055 (1998) (arguing that, “The old paradigms of war and warfare are being broken as we enter the next millennium.”).

198. *Tadić*, Case No. IT-94-1-T at ¶ 562.

199. Fourth Geneva Convention, *supra* note 14, common art. 3; Additional Protocol II, *supra* note 16; Alston Report, *supra* note 35, ¶ 50.

conventionally provided robust protections for civilians compared to the minimal protections in non-international armed conflicts, customary international law has solidified the higher standards of an international conflict codified in Additional Protocol I for all armed conflicts, regardless of whether they are international or non-international.<sup>200</sup>

The International Committee of the Red Cross, responsible for drafting the Geneva Conventions and the Additional Protocols, intended Common Article 3 governing non-international armed conflicts to be read broadly and have the widest possible application.<sup>201</sup> The development of criteria for establishing the existence of a non-international armed conflict has occurred at a customary level, rather than conventional, primarily at the United Nations' *ad hoc* criminal tribunals. In determining whether a non-international armed conflict exists, the primary focus of the analysis must be on the actions of the non-State actor, rather than State actor.<sup>202</sup> A non-international armed conflict exists where: 1) sufficiently organized armed groups carry out armed violence; 2) in an intense; and 3) protracted manner against a State.<sup>203</sup> A non-State actor only needs a minimal degree of organization<sup>204</sup> sufficient to facilitate collective, armed, anti-government actions.<sup>205</sup> A State's use of its military against the non-State actor can be *indicia* of sufficient organization.<sup>206</sup>

The second two elements of a non-international armed conflict, intensity and duration, are met when the violence rises above those "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."<sup>207</sup> Intensity is measured by, *inter alia*, the seriousness of the attacks, expanse and duration of clashes, Security Council involvement in the issue,<sup>208</sup> the employment of military weapons and tactics,<sup>209</sup> and

200. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8); *Tadić*, Case No. IT-94-1-T at ¶ 562.

201. JEAN PICTET, INT'L COMM. FOR THE RED CROSS, COMMENTARY, IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (1958).

202. See *Tadić*, Case No. IT-94-1-T at ¶¶ 566-67 (analyzing the existence of an non-international armed conflict based primarily on the Bosnian Serbs' actions and whether they were sufficiently organized armed group).

203. *Id.* ¶¶ 561-62.

204. *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment, ¶ 248 (Jan. 27, 2000) ("The expression "armed conflicts" introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State").

205. Alston Report, *supra* note 35, ¶ 52.

206. LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICTS 38-39 (2002).

207. Additional Protocol II, *supra* note 16.

208. *Prosecutor v. Boskoski & Tarculovski*, Case No. IT-04-82-T, Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

209. See *id.*; *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Judgment, ¶ 565 (Int'l Crim. Trib. for

the number of civilians affected.<sup>210</sup> Additionally, the duration of the conflict must involve “protracted armed violence.”<sup>211</sup> As discussed within the human rights section of this article,<sup>212</sup> and affirmed by Additional Protocol II, isolated acts of violence do not arise to the level of an armed conflict.<sup>213</sup>

Armed attacks by non-State actors, activating the right of self-defense, may also rise to a requisite level of violence to constitute an armed conflict.<sup>214</sup> Thus, a State might permissibly respond in self-defense to an armed attack, while simultaneously acting within an armed conflict. The relevance of the distinction between *armed attacks* and *armed conflict* is that in responding to an armed attack, a State must ensure that each and every response is necessary and proportionate to the *armed attack*,<sup>215</sup> whereas a State acting within in *armed conflict* must only ensure that each use of force is necessary and proportionate to the *overall military advantage*.<sup>216</sup> Therefore, a State, arguably, is less confined by the law when using force during an armed conflict.

The leniency created by the legal regime of armed conflict as compared to self-defense has prompted the United States to assert both self-defense and an armed conflict in its official position, and the associated legal justifications, relating to its uses of force in Afghanistan, Pakistan, and Yemen. Specifically, Koh defended U.S. drone strikes in Afghanistan, Pakistan, and Yemen as acts within “a war of self-defense against an enemy that attacked us on September 11, 2001 . . . .”<sup>217</sup> Yet at the same time, Koh claims the U.S. is engaged in an “armed conflict with al-Qaeda, the Taliban and associated forces . . . .”<sup>218</sup>

Koh made no remarks as to whether “al-Qaeda, the Taliban and associated forces” comprises a single sufficiently organized armed group or multiple armed groups carrying out this violence. Further, there is controversy in the legal community over whether the violence carried out by these groups individually or in concert meets the requisite level of intensity or duration to constitute a non-international armed conflict. O’Connell maintains that these justifications are “mutually contradictory”<sup>219</sup> because the U.S. must be either responding to ongoing<sup>220</sup> *armed attacks* implicating the right to self-defense or engaged in violence that rises to the requisite level constituting an *armed conflict*.

the Former Yugoslavia May 7, 1997).

210. *Boskoski & Tarculovski*, Case No. IT-04-82-T at ¶¶ 182-83.

211. *Tadić*, Case No. IT-94-I-T at ¶ 561.

212. *See supra* Section V(A).

213. Additional Protocol II, *supra* note 16, art. 1(2); *Tadić*, Case No. IT-94-I-T at ¶ 562.

214. An armed attack or series of armed attacks that activate a right to self-defense will also constitute an armed conflict if the non-state actors are sufficiently organized and the violence meets the intensity and protraction requirements of Geneva Convention IV and Additional Protocol II.

215. *See supra* Section V(B)(iv).

216. *See infra* Section VI.

217. Koh speech, *supra* note 154.

218. *Id.*

219. O’Connell *Remarks*, *supra* note 61, at 592.

220. The attacks must be ongoing, as the right to self-defense in response to the original armed

Yet the idea that these two paradigms are mutually exclusive is not universally accepted. Instead, a State may be acting in self-defense against a State, which is simultaneously an armed conflict, or alternatively, the State may respond in self-defense to violence by a non-State actor and the violence rises to a sufficient intensity and duration that it evolves into an armed conflict. Accordingly, it is possible that a State may have initially used force in self-defense, but later is using force against that same enemy in the context of an armed conflict.

#### VI. *JUS IN BELLO*: LIMITING THE MEANS AND METHODS OF WARFARE

The *jus in bello* principles of international humanitarian law limit the means and the methods of uses of force a State may implement in order to carry out an armed conflict or an act of self-defense.<sup>221</sup> Once a State begins to engage in the use of force, it has an obligation to do so in a manner consistent with IHL, which is also referred to by U.S. military as the law of armed conflict (LOAC). Three primary principles of IHL work in tandem to restrict the way in which a State may carry out a specific attack: *necessity*, *proportionality*, and *distinction*. As discussed above, while there is an overlap of terms, these principles are wholly distinct from the *jus ad bellum* analysis of necessity, proportionality, and imminence required when acting in self-defense.<sup>222</sup>

Humanitarian law requires a State use military force that is *necessary* to achieve the goal of the military operation,<sup>223</sup> only causes incidental loss of life or civilian casualties that is *proportionate* to the military objective,<sup>224</sup> and *distinguishes* between legitimate military targets and civilians.<sup>225</sup> These fundamental rules are codified within the Geneva Conventions and the Additional Protocols, but also “constitute intransgressible principles of international customary law.”<sup>226</sup> Humanitarian law does not require perfection in the execution of a military attack,<sup>227</sup> nor does it prohibit all civilian casualties.<sup>228</sup> However, these three interrelated and indivisible principles assessed collectively are intended to provide sufficient protection for civilians.

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attack of September 11<sup>th</sup> is no longer consistent with the self-defense element of imminence.

221. CASSESE, *supra* note 19, at 995; Mary Ellen O’Connell, *Lawful and Unlawful Wars*, in *LAW IN THE WAR ON INTERNATIONAL TERRORISM* 79, 86 (2005); MALCOLM SHAW, *INTERNATIONAL LAW* 1031 (5th ed. 2003); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 721 (2008); Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 Y.B. INT’L HUMANITARIAN LAW 79, 81 (2004).

222. Sassòli, *supra* note 28, at 241.

223. Additional Protocol I, *supra* note 15, art. x.

224. *Id.* art. 57(1)(iii).

225. *Id.* art. 57(1)(i).

226. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8).

227. Additional Protocol I, *supra* note 15, art. 51.

228. Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamic*, 7 Y.B. OF INT’L HUMANITARIAN L. 35, 50 (2004).

In order to illustrate the challenges of the *jus in bello* analysis, this article will analyze these principles using the facts of a specific drone attack carried out by the U.S. in Pakistan in August of 2009 against Baitullah Mehsud. As the primary Taliban leader operating from Pakistan, Mehsud was responsible for leading vast numbers of loyal fighters in years of attacks against the U.S. and its allies, including suicide bombings and cross-border attacks on U.S. and allied troops.<sup>229</sup> He was also allegedly behind the December 2007 assassination of former Prime Minister Benazir Bhutto of Pakistan.<sup>230</sup>

After several failed attempts to eliminate Mehsud, the U.S. military finally located him at his father-in-law's house.<sup>231</sup> At the time of the attack, Mehsud was on the roof of the house with his wife, receiving medication via drip infusion for a kidney ailment caused by diabetes.<sup>232</sup> The drone strike, carried out by a U.S. Predator Drone equipped with Hellfire missiles<sup>233</sup> killed Mehsud and eleven other civilians, including his wife and doctor.<sup>234</sup> This section will articulate the *jus in bello* analysis and the applicable IHL principles as applied to this particular drone strike against Mehsud.

#### A. Necessity

Military necessity permits a State to employ a degree and type of force that is required to achieve a concrete military objective at the earliest possible moment with the minimum expenditure of life and resources.<sup>235</sup> The destruction of civilian life and property is permitted, so long as it is necessary to the military objective;<sup>236</sup> any unnecessary use of force results in wanton killing and destruction.<sup>237</sup>

In context of the attack against Mehsud, the principle of necessity requires that the use of a Hellfire missile was necessary to achieve the military objective of taking out a top Taliban leader. The necessity of taking out a terrorist military commander is debatable. Some argue that these kinds of military objectives strategically disrupt the terrorist organization and hamper the further planning of terrorist attacks.<sup>238</sup> Others, such as O'Connell, contend that executing high-level

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229. *Obituary: Baitullah Mehsud*, BBC NEWS, Aug. 25, 2009, available at [http://news.bbc.co.uk/2/hi/south\\_asia/7163626.stm](http://news.bbc.co.uk/2/hi/south_asia/7163626.stm); Pir Zubair Shah, Sabrina Tavernise & Mark Mazzetti, *Taliban Leader in Pakistan is Reportedly Killed*, N.Y. TIMES, Aug. 7, 2009, available at <http://www.nytimes.com/2009/08/08/world/asia/08pstan.html>.

230. *Obituary: Baitullah Mehsud*, *supra* note 229.

231. Shah, Tavernise & Mazzetti, *supra* note 229.

232. *Id.*

233. Mayer, *supra* note 92.

234. Shah, Tavernise & Mazzetti, *supra* note 229.

235. Additional Protocol I, *supra* note 15, art. 57(2); MICHAEL BOTHE, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 323 (1982); MELZER, *supra* note 60, at 17; O'Connell, *supra* note 221, at 85; PICTET, *supra* note 201, ¶ 2018; U.K. MINISTRY OF DEFENCE, *supra* note 196, § 2.2.

236. *U.S. v. List*, Case No.47, Nuremberg Tribunal (1948); U.K. MINISTRY OF DEFENCE, *supra* note 196, § 2.4.

237. U.K. MINISTRY OF DEFENCE, *supra* note 196, at 21-22.

238. Leon Panetta, Director, U.S. Central Intelligence Agency, Speech to the Pacific Council on International Policy (May, 18 2009), available at <https://www.cia.gov/news-information/speeches->

terrorists is counterproductive, as it only incites animosity and does not weaken the terrorist cell, as the leaders are easily and quickly replaced.<sup>239</sup>

Additionally, the necessity analysis considers that Mehsud had proven to be a difficult target, and moreover, that the roof top identification of him provided a rare clear line of site. This demonstrates that because Mehsud was an elusive military target, the time, place, and circumstances under which the drone attack was executed fulfilled the requirement of necessity.

Further, the necessity analysis includes the timing and the resources needed to complete the military objective.<sup>240</sup> Although the U.S. could have launched a full-scale ground invasion in order to kill Mehsud, it would have required an unnecessary expenditure of American lives and resources.

### B. Proportionality

The principle of proportionality acts as a check on the broader principle of necessity. The *expected* collateral damage must not be *excessive* in relation to the anticipated military advantage.<sup>241</sup> The first step in a proportionality analysis is a prospective assessment that considers the anticipated collateral damage<sup>242</sup> rather than a post-execution evaluation of how the military operation actually unfolded.<sup>243</sup> While always regrettable, civilian casualties are lawful in this analysis,<sup>244</sup> and “the general immunity that civilians enjoy is not absolute.”<sup>245</sup>

The second step in a proportionality analysis relates to evaluating the targeting State’s expected military gains from the attack. While this assessment must be completed for each and every intended attack,<sup>246</sup> debate arises over the scope of the anticipated military advantage a State may use to justify its attack. Several scholars argue that the specific attack must be weighed against the specific military objective an individual attack will achieve.<sup>247</sup> Others maintain that the anticipated advantage can be assessed as a whole, which allows consideration of the overarching military objective for the entire military campaign.<sup>248</sup> For example, the U.S. could justify its killing of the eleven civilians surrounding Mehsud as collateral damage weighed against either the specific military objective of eliminating Mehsud or the overall goal of eliminating the Taliban. The former analysis arguably creates a greater restriction on States, as only the military advantage of a specific target can be used to justify the collateral damage to civilian life and objects. The latter evaluation permits additional leeway for States

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testimony/directors-remarks-at-pacific-council.html.

239. O’Connell Congress Statement, *supra* note 58, at 6.

240. See U.K. MINISTRY OF DEFENCE, *supra* note 196, at § 2.2.

241. Additional Protocol I, *supra* note 15, arts. 51(5)(b), 57(2)(iii), 57(2)(b).

242. *Id.* art. 51(5)(b).

243. Holland, *supra* note 228, at 50.

244. Schmitt, *supra* note 83, at 184.

245. Holland, *supra* note 228, at 50.

246. *Id.*; Neuman, *supra* note 221, at 96-98; Alston Report, *supra* note 35, ¶ 89.

247. DUFFY, *supra* note 37, at 231-35; Neuman, *supra* note 221, at 96-98.

248. Neuman, *supra* note 221, at 98-99.

to justify collateral damage by allowing them to compare the collateral damage of the specific attack to the military benefit in the context of the entire campaign.

The final step in assessing proportionality is to weigh the prospectively determined collateral damage against the military advantage, to ensure the expected loss of life and destruction of property will not be *excessive* to the gain. The term *excessive* is vague and little State practice exists to readily determine the exact meaning and scope of this term. Proportionality is evaluated on a case-by-case basis, requiring that a State must weigh the value of the target, the location of the attack, the timing of the attack, the number of anticipated civilian casualties, and the amount of damage anticipated to civilian objects, such as buildings, bridges, hospitals and utilities, for each and every attack it executes.

When applying the proportionality analysis to the Mehsud attack, the issue is whether the anticipated collateral damages, including the people in the house, other civilians around the house, and the house itself, is excessive given the value of eliminating Mehsud, as a leader of the Taliban and a high value military target. The U.S. could potentially justify a greater number of civilian casualties for the attack on Mehsud, as compared to a lower level combatant with a less prominent role than Mehsud. As a prospective analysis, the U.S. must consider its anticipated collateral damage for executing Mehsud, and it is irrelevant to retrospectively evaluate the actual damage or military gain the U.S. achieved in fact. For example, if the U.S. received reliable surveillance intelligence that only five civilians were in Mehsud's house and the surrounding area rather than the eleven actually present, the proportionality analysis would consider whether the killing of those five individuals, and not the eleven present, is excessive to the military advantage of terminating Mehsud.

Foreseeable risks must also be taken into account within the proportionality analysis.<sup>249</sup> Potential errors or mistakes by the targeting State must be considered, but again, only risks assessable prospectively.<sup>250</sup> If a missile is likely to misfire or the blast radius could exceed the intended targeting area, thereby impacting additional civilian lives or property, these foreseeable scenarios must also be weighed against the expected military advantage. Upon executing an attack however, perfection is not required, and unintended civilian casualties will not render an attack disproportionate.<sup>251</sup>

### C. Distinction

The principle of distinction, as the "very heart and soul of the law of war,"<sup>252</sup> requires a State to distinguish between its legitimate military target and civilians.<sup>253</sup> Even if a target is necessary, the State must take all feasible steps to minimize

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249. Neuman, *supra* note 221, at 97.

250. *Id.* at 96-98; DUFFY, *supra* note 37, at 234.

251. DUFFY, *supra* note 37, at 234.

252. Hays Park, *The Protection of Civilians from Air Warfare*, 27 ISR. Y.B. ON HUMAN RIGHTS 65, 72 (1997).

253. Additional Protocol I, *supra* note 15, art. 57(2)(a)(i).

damage to civilian life and objects.<sup>254</sup> Feasibility does not require perfection, but rather that the person launching the attack takes appropriate measures to correctly identify the target and limit civilian casualties as far as possible.<sup>255</sup> Distinction encompasses three separate issues: 1) whether an individual is considered a civilian or combatant and may be legitimately targeted; 2) whether the weapon employed adequately distinguishes between civilian and military targets; and, 3) whether the execution of an attack actually distinguished civilian life and property from that of a military nature.

Turning to the first consideration, distinction demands that States distinguish between members of the armed forces and all others present who are entitled to civilian status.<sup>256</sup> Civilians are generally afforded immunity from military attacks.<sup>257</sup> Civilian immunity is the primary purpose of *jus in bello*<sup>258</sup> and civilians maintain that immunity unless they *directly participate in hostilities*.<sup>259</sup> Civilians who join a terrorist organization and are responsible for planning and executing a chain of terrorist attacks have a *continuous combat function*, and thus are targetable at any time.<sup>260</sup>

The second issue within distinction encompasses the modes of military force, primarily the weapons utilized. Certain weapons inherently violate the principle of distinction because of their inability to distinguish between civilians and combatants. In its advisory opinion, *The Legality of Nuclear Weapons*, the I.C.J. acknowledged that weapons such as mines, incendiaries, and those of a chemical or bacteriological nature inherently violate IHL, as recognized by conventional and customary law.<sup>261</sup>

It may be argued that drones equipped with Hellfire missiles are inherently indiscriminate based purely on the number of civilian casualties incurred from U.S. drone attacks in Afghanistan, Pakistan, and Yemen, as compared to the reported successful terrorist kills.<sup>262</sup> However, most agree that drones are precise weapons systems, and do not inherently violate the principle of distinction. Predator and Reaper drones have 24-hour surveillance capability, referred to as persistent stare capability,<sup>263</sup> and as Aaron Drake, Captain in the U.S. Air Force, Air National Guard, points out, drone operators can gather a substantial amount of information

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254. DUFFY, *supra* note 37, at 231-35.

255. CLAUDE PILLOUD, COMMENTARY TO THE ADDITIONAL PROTOCOLS § 2198 (1987).

256. *Id.* § 1917.

257. Additional Protocol I, *supra* note 15, art. 51(3).

258. Holland, *supra* note 228, at 50.

259. MELZER, *supra* note 60, at 16-17.

260. *Id.* at 75; Alston Report, *supra* note 35, ¶ 66.

261. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 76-77 (July 8).

262. The number of civilian deaths as compared to the number of militants killed in Afghanistan, Pakistan, and Yemen is highly contested. This article will not address these disputed numbers, but at least one source suggests that drones armed with Hellfire missiles kill “10 or so civilians” for every militant killed. Daniel Byman, *Do Targeted Killings Work*, FOREIGN POL’Y, July 14, 2009.

263. SINGER, *supra* note 35, at 222.

about the targeting area, including the number of civilians present, and whether combatants and civilians directly participating in hostilities are present.<sup>264</sup> Additionally, these drones are equipped with a laser designator for its Hellfire missiles, permitting precise targeting.<sup>265</sup>

Moreover, the employment of Hellfire missiles in general, and specifically by the U.S. against Mehsud and other terrorist leaders, may not violate the principle of distinction. The Hellfire missile possesses an extremely precise blast radius, ranging from ten to fifteen feet, and can be programmed for delay detonation.<sup>266</sup> Thus, a Hellfire can precisely target a house and delay the explosion until after fully penetrating the building, minimizing damage to surrounding people or objects. Accordingly, attacks executed with Hellfire missiles launched by Predator drones most likely do not inherently violate the principle of distinction.

Finally, as Drake correctly recognizes, potential misuses of weapons do not render that entire class of weapons illegitimate. As he notes, "Commentary on Article 36 of [Additional Protocol] I confirms this, providing that '[a] State is not required to foresee or analyze all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited.'"<sup>267</sup> Therefore, even if the U.S. were indiscriminately launching Hellfire missiles from drones, their failure to comply with IHL would not automatically delegitimize the use of drones.

The third issue under distinction pertains to the actual execution of an attack. Attacks are unlawful under the principle of distinction if they are directed specifically against civilians or civilian objects or launched indiscriminately without distinction between civilians and military targets.<sup>268</sup> Additionally, once an attack is launched, if a mistake is discovered and an object is found not to be a military objective, then the attack must be immediately aborted.<sup>269</sup> States must employ greater caution when distinguishing between civilians and military targets when the attack is launched from a further distance and a direct view of the object is not available.<sup>270</sup> The requirement of distinction is likely the reason the U.S. and other States utilize ground informants to confirm legitimate military targets for Predator drone attacks.<sup>271</sup> Ground informants often successfully prevent intended

264. Drake, *supra* note 18, at 653.

265. SINGER, *supra* note 35, at 33.

266. *AGM-114 HELLFIRE MODULAR MISSILE SYSTEM (HMMS)*, Military, GlobalSecurity.Org, <http://www.globalsecurity.org/military/systems/munitions/agm-114.htm> (last visited Apr. 18, 2011); see Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 Int'l R. Red Cross 445 (2005).

267. Drake, *supra* note 18, at 653.

268. DUFFY, *supra* note 37, at 228-29; Additional Protocol II, *supra* note 16, arts. 13, 51(2), 51(4).

269. Alston Report, *supra* note 35, ¶ 89.

270. PILLOUD, *supra* note 255, at art. 57, ¶ 2221.

271. The U.S. regularly utilizes ground informants to verify targets for drone attacks in Pakistan, Afghanistan, and Yemen. See, e.g., Siobhan Gorman & Adam Entous, *CIA Plans Yemen Drone Strikes: Covert Program Would Be Major Expansion of U.S. Efforts to Kill Members of al Qaeda*, WALL ST. J., June 14, 2011, available at <http://online.wsj.com/article/SB10001424052702303848104576384051572679110.html>.

attacks from violating distinction, as illustrated by the abortion of a U.S. drone attack on six individuals suspected to be al Qaeda combatants planting roadside bombs, which informants confirmed to actually be five children digging for firewood.<sup>272</sup>

In analyzing the execution of the attack against Mehsud, it appears it most likely complied with distinction. The attack was not purposefully launched at civilians or civilian property without a military objective, because Mehsud had continuous combatant status, making him a legitimate military objective. Moreover, as discussed above, because a drone with 24-hour surveillance capabilities executed the attack, the U.S. likely knew the expected number of civilian losses and conducted a proportionality assessment, thereby not indiscriminately killing those civilians.

## VII. CONCLUSION

As illustrated throughout this article, the law relating to the use of force is complex, contradictory, and highly contentious. Any use of force must fall under one of the three basic legal paradigms: human rights, self-defense, or armed conflict. Due to the lack of a comprehensive definition of terrorism and the failure of the international community to adopt a binding instrument that specifically governs acts of terrorism, States are required to justify their uses of force against terrorists within the three existing bodies of law. Depending upon which legal framework applies, the lethal drone campaigns perpetrated by the U.S. and other States may be legal.

Additionally, it remains extremely controversial as to whether terrorism triggers law enforcement methods governed by human rights or whether it activates the right to use force in self-defense. Further, it is debated whether terroristic activities can rise to the level of a non-international armed conflict, allowing a State to operate under *jus in bello* principles. Thus, the legality of the responses carried out by the U.S. and its allies against terrorists, and particularly the use of weaponized drones, remains controversial. Accordingly, States should attempt to clarify the law under which they are operating when responding to terrorism. To improve accountability and transparency, States should notify the Security Council not only of their use of force, but also as to which paradigm they are operating within. This would prevent States, such as the U.S., from defending its actions under multiple categories without giving any legal justifications for doing so. In the end, under the current *ad hoc* approach to terrorism and the lack of universal consensus as to definitions and parameters concerning the use of force, a State can argue a myriad of reasons to justify any use of force against

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272. Bill Weir, *Our Reporter on Pakistan-Afghanistan Border: Drones and Diplomatic Efforts*, ABC NEWS, Jan. 12, 2010, <http://abcnews.go.com/WN/Afghanistan/abcs-bill-weir-reporting-afghanistan-influence-predator-drones/story?id=9542900>; *The Drone Wars: 21st Century Warfare* (ABC television broadcast Jan. 12, 2010), available at <http://abcnews.go.com/video/playerIndex?id=9545470>.

terrorists, with little fear of ramifications from the international community for illegal uses of force.