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TARGETED KILLINGS BY DRONES: A DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK

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INTRODUCTION

In the last couple of decades, the threat from transnational terrorist organizations has prompted many States to reevaluate how international and domestic laws can effectively operate to counter these threats. Although terrorists have conducted violent acts for centuries, it has only been since the early 1990s that terrorist groups such as Al Qaeda ("Al Qaeda") have been effective in extending their span of operations globally and continuously. With the global reach of such groups, they have successfully threatened the fundamental security of States with a magnitude of violence never envisioned by the drafters of the legal instruments that guide State behavior in this area. Today, States struggle to reevaluate how these laws are applicable to this new category of enemy. This article examines the relevant domestic and international legal framework for countering the modern threats from terrorism, focusing on the U.S. drone program as one tactical tool to counter terrorists.

As armed drones fly through the skies, seeking out their targets, they are tasked to kill those enemies that are actively engaged in warfare against the United States. The drones are tasked to target and kill the enemy. Their function is generally described as "targeted killings." Despite the frequency of the use of the term "targeted killings," such term is not defined in U.S. or international law. This article adopts the definition provided by the United Nations Human Rights Council ("UNHRC"); accordingly, a targeted killing is "the intentional, premeditated and deliberate use of lethal force by States or their agents under the color of law, or by an organized armed group in armed conflict,

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against a specific individual who is not in the physical custody of the perpetrator."[1] Targeted killings are distinguishable from assassinations or extrajudicial killings, terms often used interchangeably. While targeted killings can be legal depending on the circumstances of each case, extrajudicial killings and assassinations are never legal. The legality of a specific targeted killing depends on the context in which it is conducted, whether in self-defense, during armed conflict, or outside of armed conflict.

Since the attacks of September 11, 2001, the United States has been engaged in a declared armed conflict with members of Al Qaeda, a terrorist organization. The genesis of the conflict dates back to the early 1990s. In 1991, Al Qaeda targeted American soldiers in Somalia. In 1993, the organization tried to take down the World Trade Center by detonating a bomb in a basement garage. In 1998, it carried out coordinated attacks on two U.S. embassies in East Africa. And in 2000, Al Qaeda attempted to sink the U.S.S. *Cole*, a U.S. Navy destroyer ship, ripping a hole into the ship's hull, resulting in the deaths of 17 U.S. servicemen. These are some of the successful attacks by Al Qaeda that predated the 9/11 attacks, not including those attacks that were thwarted or failed. Post-9/11, Al Qaeda and its affiliates continue to seek to bring violence to Americans. Fortunately, many attempts have been prevented largely due to the U.S. counterterrorism strategy. U.S. counterterrorism strategy seeks to deprive terrorists of any safe haven from which to operate; in the process, the United States has killed thousands of operatives, captured or killed two thirds of their leadership, and destroyed bases in Afghanistan.[2] Still, Al

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[1] Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings*, ¶ 24, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 5 (2009) ("the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.").

[2] Paul R. Pillar, *Counterterrorism After Al Qaeda*, 27 WASH. Q. 101, 101–02 (2004), *available at* http://www.twq.com/04summer/docs/04summer_pillar.pdf.

Qaeda continues to plan and carry out new terrorist attacks, extending its reach in places like London, Madrid, and Bali.

The reality is that since the early 1990s, the United States has been in conflict with a violent group. Al Qaeda and its affiliates continue to infiltrate the United States, attack the United States, kill Americans, and seek to overthrow the nation with a level of sophistication and magnitude that previously only States could command. Until 9/11, however, the United States chose to address these threats as criminal acts by a gang of bandits (with a few rare exceptions that will be discussed below), seeking to subpoena, capture, arrest, try and convict them. The theory was that the criminal justice system could function as a weapon of deterrence against terrorists, preventing further attacks. After 9/11, however, recognizing the real limitations of the criminal system as a counterterrorism tool, the United States acted swiftly, using lethal force to stop and prevent the on-going terrorist attacks that had threatened the United States for a decade.

The legal justification to use force, including targeted killings, against Al Qaeda, the Taliban and associated forces has been stated by the U.S. government as twofold: self-defense and the laws of armed conflict.[3] The targets are those terrorists who have already conducted armed attacks against the United States or are in the process of planning such attacks. These targets pose a threat to the national security of the United States. They are either members of Al Qaeda, the group that conducted the 9/11 attacks, the Taliban, the group that assisted Al Qaeda, groups that have partnered with Al Qaeda since 9/11 to pursue the same objectives of attacking the United States, or individuals who are directly supporting these terrorists in conducting attacks. The critical element of analysis is that each individual targeted to be killed by a drone poses a real, current or anticipated threat, as assessed by the U.S. military or intelligence professionals.

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[3] Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Speech before 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.

While the use of armed drones to kill terrorists may be a new technology only deployed by the United States after 9/11, as a recent report by the United Kingdom's Ministry of Defence stated, "Most of the legal issues surrounding the use of existing and planned systems are well understood and are simply a variation of those associated with manned systems."[4] In terms of both the U.S. domestic legal framework as well as the international legal framework, the use of lethal force in self-defense against threats (past, present and anticipated) has been well established in codified legal rules (the U.S. Constitution, statutes, treaties) and in customary law based on policies and practices of the majority of States. Certainly, all States maintain the domestic legal authority to act in self-defense when faced by threats that challenge the national security of the State. International law has affirmatively supported that authority, allowing States to use force to defend against those greatest kinds of threats. Furthermore, since at least the signing of the Geneva Conventions, and previously through custom, the authority to engage in self-defense and armed conflict is not unlimited. Rather, international law has established rules for those acting in self-defense and those engaged in armed hostilities. This article examines how these rules apply to the U.S. drone program.

I. U.S. TARGETED KILLINGS: ARTICULATING THE "UNWILLING AND UNABLE" TEST

Less than a week after the terrorist attacks against the United States on 9/11, President Bush signed a secret order authorizing the Central Intelligence Agency ("CIA") to use armed drones to kill members of Al Qaeda as well as members of the

[4] U.K. Ministry of Defence, Joint Doctrine Note 2/11, The UK Approach to Unmanned Aircraft Systems 502 (Mar. 30, 2011), *available at* http://www.mod.uk/NR/rdpnlyres/F9335CB2-73FC-4761-A428-DB7DF4BEC02C/0/20110505JDN_211_UAS_v2U.pdf (citing Tony Gillespie & Robin West, *Requirements of Autonomous Unmanned Air Systems Set by Legal Issues*, DEF. SCI. & TECH. LAB., Dec. 14, 2010, http://www.dodccrp.org/html4/journal_v4n2.html).

Taliban and other associated forces in the territory of other States.[5] On November 4, 2002, an unmanned Predator drone, controlled by the CIA, fired a Hellfire missile at a car in the desert outside the Yemeni capital of Sana'a. The target, Abu Ali al-Harithi, Al Qaeda's senior leader in Yemen and one of the planners of the attack on the U.S.S. *Cole* in 2000.[6] The collateral damage included an American citizen, Kamal Derwish, who was reported to be the leader of an Al Qaeda cell operating in Lackawanna, New York. Although the drones had been used before to target and kill enemy combatants, the strike against al-Harithi was the first one conducted outside of Afghanistan, the well-recognized zone of hostilities after 9/11. The United Nations Commission on Human Rights ("UNCHR") called the killing of al-Harithi "a clear case of extrajudicial killing," terms the United States would hear repeated numerous times over the next decade.[7] The al-Harithi strike was also the first confirmed killing of an American citizen by a drone strike, although it does not appear that the American was the target but, rather, was "collateral" damage or, in intelligence parlance, "incidental."

Since 2002, drone strikes have been used frequently outside of Afghanistan. There have been a number of high-profile killings of Al Qaeda and Taliban leaders outside of Afghanistan, including the May 2005 killing of Haitham al-Yemeni and August 2009 killing of Baitullah Mehsud, both in Pakistan.[8] The legality of the drone strikes outside of Afghanistan has been questioned by some

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[5] *See* BOB WOODWARD, BUSH AT WAR 101 (2002); *see also* Jane Mayer, *The Predator War*, NEW YORKER, Oct. 26, 2009.

[6] David Johnston & David E. Sanger, *Threats and Responses: Hunt for Suspects; Fatal Strike In Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16, *available at* http://www.nytimes.com/2002/11/06/world/threats-responses-hunt-for-suspects-fatal-strike-yemen-was-based-rules-set-bush.html.

[7] Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Comm'n on Human Rights, ¶¶ 37–39, U.N. Doc. E/CN.4/003/3 (Jan. 13, 2003) (by Asma Jahangir), *available at* http://www2.ohchr.org/english/issues/executions/annual.htm.

[8] Douglas Jehl, *Remotely Controlled Craft Part of U.S.-Pakistan Drive Against Al Qaeda, Ex-Officials Say*, N.Y. TIMES, May 16, 2005, at A12, *available at* http://www.nytimes.com/2005/05/16/politics/16qaeda.html.

who argue that any killings outside the zone of armed conflict, Afghanistan, would constitute illegal killings in violation of the victims' human rights.[9] Since 9/11, drone strikes have been carried out in Afghanistan, Syria, Yemen, Pakistan, and Somalia by both the CIA and the U.S. military, sometimes separately and at other times as joint operations. The recent terrorist attack against the U.S. Consulate in Benghazi, Libya, on September 11, 2012, which killed U.S. Ambassador J. Christopher Stevens and three other Americans, has raised the issue of whether the CIA will begin using armed drones in North Africa targeting the Al Qaeda affiliate group known as Al Qaeda in the Islamic Maghreb.[10] The group has been linked to the attack and has declared its intention to attack U.S. targets. North Africa may be the next region where the drone program could be employed.

Since the incidental killing of Derwish in 2002, the United States has confirmed that armed drones killed an American citizen, Anwar al-Awlaki, an American Muslim cleric who helped plan a number of terrorist plots, including the December 2009 attempt to blow up a jetliner headed to Detroit. Al-Awlaki had served as a recruiter for Al Qaeda and had links to Major Nidal Hasan, who attacked fellow soldiers at Fort Hood, Texas in 2009. In September 2011, the CIA targeted and killed al-Awlaki while he was traveling in Yemen. This was the first time since killing Hairithi in Yemen in 2002 that the CIA conducted a drone targeted killing inside Yemen. The case of Awlaki and other similar cases since 9/11 highlight that Al Qaeda remains a lethal enemy of the United States, especially given its ability to find sanctuary in other territories. As specific Al Qaeda members have been successfully eliminated, the group has come to rely on affiliate organizations dispersed across several continents (Al Qaeda in the Arabian Peninsula, al-Shabab in Somalia, Lashkar-e-Taiba in Pakistan, the

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[9] Mary Ellen O'Connell, Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2–4 (Legal Studies Research Paper No. 09-43, Notre Dame Law Sch., July 2010).

[10] Greg Miller, *CIA Seeks to Expand Drone Fleet, Officials Say*," WASH. POST, Oct. 18, 2012, http://www.washingtonpost.com/world/national-security/cia-seeks-to-expand-drone-fleet-officials-say/2012/10/18/01149a8c-1949-11e2-bd10-5ff056538b7c_story.html.

Haqqani network in Pakistan, Al Qaeda in the Islamic Maghreb). These affiliates are now the extension of Al Qaeda operating under the same goals and mission. They provide financial, technical, and logistical support functions to those local franchises of Al Qaeda in different countries. On September 30, 2011, President Obama publicity identified al-Awlaki as "the leader of external operations for Al Qaeda in the Arabian Peninsula." He had played a significant role in an attack conducted by Umar Farouk Abdulmutallab, the Nigerian Muslim who attempted to blow up a Northwest Airlines flight bound for Detroit on Christmas Day 2009.[11] Al-Awlaki's work for Al Qaeda started with just encouraging terrorist activities against the United States but he then transitioned to "acting for or on behalf of Al Qaeda in the Arabian Peninsula . . . and providing financial, material or technical support for . . . acts of terrorism."[12] He had become a belligerent and, according to U.S. officials, a legitimate target. Also killed in the drone strike was Samir Khan, publisher of the Inspire, and an American citizen who was not on the target list but was traveling with al-Awlaki.

The targeting of al-Awlaki, an American citizen, caused a significant level of concern among U.S. government officials about the legality of the president authorizing the killing of an American citizen in secret and without the benefit of a trial. In response to concerns raised, the Justice Department's Office of Legal Counsel was asked to draft a special memorandum justifying the killing and providing a legal rationale for targeting an American.[13] According to the *New York Times*, the memo asserted that the targeted killing of al-Awlaki would not violate the U.S. Constitution, Executive Order 12333 and its ban on assassinations, any U.S. criminal

[11] Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 8, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-01469) (quoting Michael Leiter, Director of the National Counterterrorism Center, before the Senate Homeland Security and Governmental Affairs Committee on Sept. 22, 2010).

[12] Designation of Anwar Al-Aulaqi [as a Specially Designated Global Terrorist] pursuant to Exec. Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233, 43234 (July 23, 2010).

[13] Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at 1.

statute on murder, or international law.[14] According to the article, the administration had determined that since al-Awlaki's capture was not feasible and Yemeni authorities were unable or unwilling to prevent his participation in activities that posed a threat to the United States, the killing of al-Awlaki was necessary and lawful.[15]

On March 5, 2012, in a speech at Northwestern University School of Law, Attorney General Eric Holder reiterated the "unwilling or unable" test as he described that targeted killings in other countries would be legal if the host State "is unable or unwilling to deal effectively with a threat to the United States."[16] In addressing the issue of targeting U.S. citizens, Holder outlined the circumstances under which lethal force would be lawful, to include the criteria that the individual was 1) a senior operational leader of a group the United States was engaged in armed conflict with, and 2) actively engaged in planning to kill Americans. Notably, also included in this list of factors was the requirement that the U.S. citizen posed "an imminent threat of violent attack against the United States," an element not traditionally required for legitimate targets under the laws of armed conflict.[17]

This was not the first time that the United States has articulated the "unwilling or unable" test to justify actions in another State's territory without the State's consent. The United States has articulated the same test in uses of force in addition to

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[14] *Id.*

[15] *Id.*

[16] Attorney General Eric Holder, Speech at Northwestern University School of Law (Mar. 5, 2012), *available at* http://www.lawfareblog.com/2012/03/2012/text-of-the-attorney-generals-national-security-speech/#more-6236.

[17] *Id.* It is interesting to note that under *jus in bello* principles in international law, there is no requirement to make individual determinations about targets that involve an imminent threat. Furthermore, under *jus ad bellum*, according to the *Caroline* precedent (addressed below), the imminent criteria is only necessary when acting in self-defense when the host State is actually willing to cooperate in deterring the threat but the threatened State determines that it must act swiftly without the host State's assistance in preventing a threat from materializing. It is not clear why the U.S. administration has added an additional element of "imminence" for targeting U.S. citizens.

the use of drones. In 2008, as President Obama was campaigning for the presidential election, in addressing how he would address the terrorist threat emerging from Pakistan, he stated, "[I]f we have actionable intelligence against bin Laden or other key Al Qaeda officials . . . and Pakistan is unwilling or unable to strike against them, we should."[18] In May 2010, with President Obama in the Oval Office, the United States did just that. By President Obama's order, U.S. Navy Seals entered Pakistan, with the government's consent, and killed Osama bin Laden. The implication from the U.S. action was that the United States had determined that Pakistan was either unable or unwilling to deal with Osama bin Laden (stop him from planning further attacks on the United States). Therefore, the United States would address the threat even if that meant violating Pakistan's sovereignty.

President Obama referenced an "unwilling or unable" standard in using force within Pakistan for the operation against Osama bin Laden. Other States agree that a standard like the "unwilling or unable" test is the appropriate standard to assess the legality of the use of force under the circumstances.[19] Many commentators have debated whether the U.S. operation in this case was lawful under international law. Unfortunately, international law currently gives States like the United States that are suffering from ongoing attacks from non-state actors little direction about what factors are relevant under the law when making these decisions.

A year after killing Osama Bin Laden, the Obama administration, for the first time, acknowledged the U.S. covert program using drones to kill terrorists. In a speech at the Woodrow Wilson Center, John Brennan, the President's

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[18] Andy Merten, *Presidential Candidates Debate Pakistan*, MSNBC, Feb. 28, 2008.

[19] U.N. Security Council, 36th Sess., 2292nd mtg. at 5, U.N. Doc. S/PV.2292 (July 17, 1981) (Israel invoking the "unwilling or unable" standard in justifying its use of force in Lebanon against Hezbollah); U.N. Doc. S/1996/479 (July 2, 1996) (in a letter from its Ministry of Foreign Affairs, Turkey invokes the "unwilling or unable" test to defend its use of force in Iraq against the Kurdish Workers' Party).

counterterrorism advisor at the White House, provided the first official disclosure of the secret program, discussing the legal standard for the targeted killings.[20] Brennan stated the president has general constitutional authority as commander in chief to act against "any imminent threat of attack" and a specific congressional mandate to strike any member of Al Qaeda under the 2001 Authorization for Use of Military Force. But with Al Qaeda members, Brennan goes on, "when considering lethal force we ask whether the individual poses a significant threat to U.S. interests." Except when the Al Qaeda member is a U.S. citizen; then the standard narrows to "whether the individual poses an imminent threat of violent attack." It seems that Brennan drew a distinction between a lower threshold for designating a foreign member of Al Qaeda a lawful target, a determination by the U.S. government that the individual is a "significant threat" and a higher threshold for American citizens who are members of Al Qaeda to become a target, a determination that the American poses an imminent threat of violent attack.

Brennan also discussed the issue of international legal authority. Invoking the same "unable or unwilling" language that President Obama had previously used, Brennan argued that based on the self-defense principle of international law, the drone attacks into another State's sovereignty territory are legal, "at least when the country involved consents or is unable or unwilling to take action against the threat."[21] In addition to Pakistan not providing its consent to the United States to kill Osama bin Laden within Pakistan, there is evidence that Pakistan has also objected to the U.S. use of drones to conduct targeted killings within Pakistan.

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[20] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Woodrow Wilson International Center for Scholars: Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), *available at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-U.S.-counterterrorism-strategy.

[21] *Id. See also* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School's Program on Law and Security: Strengthening Our Security By Adhering To Our Values And Laws (Sept. 16, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

Reading between the lines of the administration's statements, its legal argument for lawful strikes within Pakistan, even without consent, is based on the idea that if a State is unable or unwilling to stop its territory from being used by individuals cause harm to the United States, then the United States will act to eliminate the threat based upon its right of self-defense. In other words, while the United States will not hold the government of Pakistan responsible necessarily (i.e., the United States is not attacking elements of the Pakistan government but only the terrorist target), it will invoke its right of self-defense to prevent or stop the threat, even if it means violating the sovereignty of Pakistan.

Understanding the basis of such tests under international law is important to assessing the legality and legitimacy of State actions. This article will review the international law related to the use of force, looking to relevant factors such as treaty law, decisions of international courts and the opinions of legal scholars in discussing the legality of the use of force. First, however, the next section will examine the use of drones under U.S. domestic law.

II. U.S. DOMESTIC LEGAL FRAMEWORK

Some critics of the U.S. drone program have argued that the Bush and Obama administrations use of armed drones to kill specific individuals violates domestic law. They have challenged the authorities of specific agencies conducting the targeted killings as well as the overall presidential authorities to kill individuals without affording them trials. The legal authorities of U.S. military and intelligence agencies to use drones to target and kill terrorists starts with the presidential executive and commander-in-chief powers, delineated in the U.S. Constitution and applicable federal statutes, and delegated to the Secretary of Defense under his authorities pursuant to Title 10 of the U.S. Code and the Director of National Intelligence ("DNI") and Director of the Central Intelligence Agency ("DCIA") pursuant to their authorities as outlined in Title 50 of the U.S. Code.

The U.S. President's authority to direct military and intelligence activities against foreign threats resides in his

constitutional executive and commander-in-chief powers.[22] As the Supreme Court noted in the *Curtiss-Wright* case, the president is vested with significant executive power and is the "sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."[23] The dispute in the *Curtiss-Wright* case was whether President Roosevelt had independent authority to restrict private companies in shipping arms overseas because the president deemed such sales to be threatening to U.S. national security. In finding that the president was acting under his constitutionally provided powers of commander-in-chief in that case, the Court ruled that the president did not need congressional permission to restrict such shipments, as he was carrying out his responsibility to defend the nation from foreign threats.[24]

Similarly, the Court has found that the president's commander-in-chief constitutional authorities authorize him "to employ secret agents to enter rebel lines and obtain information respecting the strengths, resources, and movements of the enemy."[25] As recognized by those that drafted the U.S. Constitution, the president has the authority to "manage the business of intelligence in such a manner as prudence may dictate."[26] While some disagree as to how such powers are to be shared between Congress and the Executive Branch, no one disputes the president's authority to use both military and intelligence measures to repel attacks against the nation.[27] Certainly, if the country is at risk of attack, actual or anticipated, the president, through those authorities vested to him in the U.S. Constitution has the authority to act in defense of the nation in accordance with the relevant domestic and international laws.

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[22] U.S. CONSTITUTION, art. II.

[23] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[24] *Id.*

[25] Totten v. United States, 92 U.S. 105, 106 (1876).

[26] THE FEDERALIST NO. 64 (John Jay).

[27] JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH, 3-5 (1993); LOUIS FISHER, PRESIDENTIAL WAR POWERS 3–12 (1995); MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 80–84 (1990); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 74–77 (1990).

As commander-in-chief, the president can exercise his authority through any agency or department that he believes will be most effective in defending the nation, as long as such action is also in accordance with statutory enactments by Congress. Title 10 and Title 50 of the U.S. Code are the relevant U.S. statutes outlining the president's authority to use the military and/or intelligence agencies to employ force against threats. Under Title 10, the secretary of defense is the president's "principal assistant . . . in all matters relating to the U.S. Department of Defense ("DoD")."[28] This statute provides to the secretary of defense the "authority, direction and control" over the DoD, to include all agencies and commands within the department.[29] Title 50 of the U.S. Code incorporates the National Security Act of 1947 which established the National Security Council ("NSC"), the CIA, as well as other agencies, and codified the process for national security decision-making and congressional oversight of intelligence activities.[30] In addition to creating specific national security agencies, Title 50 establishes, defines and delineates the authorities within the intelligence community.[31] As contrasted with the DoD's war-fighting authorities under Title 10, CIA's covert action authorities are derived from Title 50, to be discussed later in this article.

Title 10 and Title 50 statutes are mutually-reinforcing authorities in that nothing within the statutes prohibits the DoD elements from carrying out activities under Title 50 authorities (i.e., the operation to kill Osama Bin Laden) and nothing within the statutes prohibits intelligence elements from operating under Title 50 authorities. During the May 2011 U.S. operation against Bin Laden in Pakistan, for example, U.S. military assets, Navy Seals, executed the operation, but they did so under the authority of the then-DCIA Leon Panetta. Director Panetta was operating under

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[28] 10 U.S.C. § 113(b) (2006).
[29] *Id.*
[30] 50 U.S.C. § 1-2420 (2006).
[31] 50 U.S.C. § 403-5 (2006). The National Geo-Spatial Agency ("NGA") and the National Reconnaissance Office ("NRO") are also intelligence agencies that are part of DoD.

his authorities as delegated by the president and pursuant to the National Security Act of 1947 to conduct covert action. Notably, operational responsibility for conducting covert action remains with the CIA and not the DNI. In accordance with the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), legislation that reorganized the intelligence community in the aftermath of 9/11, the DCIA reports to the DNI, but the DNI does not have operational control over the CIA.[32] The vague language within the statute has caused some tension between the DNI and the DCIA related to operational matters and the line between their authorities. There had been disagreements over the respective roles of the DNI and DCIA related to covert action that were ultimately resolved by the National Security Council. The resolution was that the CIA would remain in charge of covert action and the right to select chiefs of stations and the DNI was given a role in assessing and evaluating covert action when requested by the president or the NSC.

Much of the debate and concern over the conflating of the two statutory authorities within Title 10 and Title 50 has to do with congressional oversight and reporting requirements. Some have argued that by calling some activities "preparation of the environment," under its Title 10 authorities, DoD avoids reporting those activities to the congressional oversight committees that would otherwise be informed of such activities if conducted by CIA under its Title 50 authorities.[33] There are, however, important implications related to oversight, especially when the government is engaged in authorizing the killing of American citizens. It is important to ensure that appropriate transparency exists related to the president's actions in the name of national defense.

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[32] Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. 108-458, 118 Stat. 3638, enacted Dec. 17, 2004.

[33] Jeffrey H. Smith, *Keynote Address: Symposium: State Intelligence Gathering and International Law*, 28 MICH. J. INT'L L. 543, 546–47 (2007) (former CIA General Counsel Jeff Smith describes the different notification requirements for DoD and CIA for activities that would appear to be the same types of activities but conducted by a different organization of the U.S. government).

Oversight over DoD activities is conducted by both the Senate and House Armed Services Committees, which exercise jurisdiction over all aspects of DoD and matters relating to "the common defense."[34] As for congressional oversight of intelligence activities, the National Security Act of 1947 originally did not include any congressional oversight provisions and any oversight at the time that was conducted was done in an informal and minimal fashion. This approach to intelligence oversight changed radically after the Church and Pike Committees conducted their investigations in the early 1970s over allegations of domestic spying and assassinations plots by the Federal Bureau of Investigations ("FBI"), the NSA and the CIA. Ultimately, in 1980, Congress passed the Intelligence Oversight Act, as part of the Intelligence Authorization statute for 1981, requiring the then-DCIA to keep the congressional intelligence committees "fully and currently informed of all intelligence activities."[35] Today, the intelligence committees exercise broad oversight of the intelligence community.

In the context of the drone programs, whether the military or the intelligence agencies are conducting the strikes, administration officials have publicly stated that they are keeping Congress informed of the counterterrorism operations. In his speech at Northwestern School of Law in March of 2012, Attorney General Holder, in addressing the issue of the United States targeting a U.S. citizen, Holder noted that the U.S. Constitution does not require the president to get permission from a court before targeting a U.S. citizen who is engaged in a conflict against the United States but also noted,

> [I]n keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities,

[34] S. Comm. On Rules & Admin., 111th Cong., Standing Rules of the Senate R. XXV, 1(c)(1) (2009); Rules of the House of Representatives, 111th Cong., Rule X, 1(c).

[35] Intelligence Authorization Act for 1981, 94 Stat. 1981, Pub. L. 96-450 (1980).

> including the legal framework, and would of course follow the same practice where lethal force is used against United States citizens.

A. Covert Action

Covert action is defined in the National Security Act of 1947 as "[a]n activity or activities of the United States Government to influence political, economic or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."[36] In 1974, Congress passed the Hughes-Ryan Amendment to the Foreign Assistance Act, mandating that the president make specific findings regarding covert actions, providing Congress with notification of the covert actions that the president authorized.[37] The president must sign an order approving the operation, based on the president's finding that covert action is "necessary to support identifiable foreign policy objectives of the United States, and is important to the national security of the United States" and specifying the U.S. departments, agencies, or entities and any third parties not elements or agents of the U.S. government who are authorized "to fund or otherwise participate in any significant way in the covert action."[38] The Church Committee's final report concluded that a presidential finding for each covert operation stating the operations were "important to the national security of the United States" was sufficient to ensure constraint in the use of covert actions. The report stated, "covert action must be seen as an exceptional act, to be undertaken only when the national security requires it and when over means will not suffice."[39]

In 1980, as part of the Intelligence Oversight Act, Congress imposed procedural requirements on the intelligence community

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[36] Pub. L. No. 80-253, 61 Stat. 495.

[37] The Hughes-Ryan Amendment, Pub. L. No. 93-559, Sec. 32, 88 Stat. 1795, 1804 (1974) (codified at 22 U.S.C. § 2244 (Supp. 1975)).

[38] Intelligence Authorization Act for Fiscal Year 1991, Pub. L. No. 192-88, 105 Stat. 441 (codified as amended at 50 U.S.C. § 413–414, 413b(e) (2000)).

[39] Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-755, at 159–60 (1976).

for reporting activities to Congress.[40] This statute required the president to keep the intelligence communities "fully and currently informed" of "significant anticipated intelligence activit[ies]," allowing the president to limit notification under "extraordinary circumstances."[41] With the congressional statutes that were passed during the 1980s and 1990s, Congress ended the practice of plausible denial for the president in conducting intelligence activities, at least as related to Congress. The reporting requirements continue today and ensure that Congress has a role in reviewing all targeted killings whether they are described as covert actions or significant intelligence activities. In sum, the legal authority to conduct covert action resides in the Executive Branch, with congressional oversight and formal presidential approval of all covert programs.

Shortly after 9/11, President Bush signed a covert action authorizing the use of lethal force against Osama Bin Laden and others responsible for the attacks.[42] In intelligence parlance, this document is called a "lethal finding." In 2010, a limited number of congressional leaders were informed about the Bin Laden mission prior to its execution. Previously, presidents had signed similar findings targeting specific individuals. It was reported that President Reagan signed a secret presidential finding authorizing the use of lethal force to kill Gaddafi prior to the United States bombing of his headquarters in Libya in 1984.[43] By the end of 1998, President Clinton had expanded his previous authorization to the CIA, allowing CIA tribal partners in Afghanistan to kill Bin Laden.[44]

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[40] Intelligence Oversight Act of 1980, Pub. L. No. 96-450, section 407(b), 94 Stat. 1981 (Oct. 14, 1980) (codified as amended at 50 U.S.C. § 413 (2000)).

[41] *Id.* at § 501(a).

[42] WOODWARD, *supra* note 5.

[43] Bob Woodward & Walter Pincus, *1984 Order Gave CIA Latitude: Reagan's Secret Move to Counter Terrorists Called License to Kill*, WASH. POST, Oct. 5, 1988, at A1.

[44] Nat'l Comm'n on Terrorist Attacks Upon the U.S., The 9/11 Commission Report 47–70 (2004) [hereinafter 9/11 Commission Report], http://www.9-11commission.gov/report/911Report.

The Obama administration has not officially confirmed that the CIA is conducting drone strikes against terrorists under covert action authorities. However, in February 2011, John A. Rizzo, former CIA Acting General Counsel, who served as the most senior lawyer at the CIA and retired in 2009, discussed the CIA covert action drone program in an interview with *Newsweek*. He explained how he personally "concurred" on authorizations for drone strikes against specific targets, signing "about one cable each month."[45] Rizzo is currently under investigation by the Department of Justice for the unauthorized disclosure of CIA's secret drone program based on the details he discussed in the interview.[46] More recently, on April 10, 2012, while not confirming the CIA's role in the drone program, Stephen W. Preston, General Counsel of the CIA, spoke at Harvard Law School, discussing CIA and the Rule of Law.[47] In his speech, Preston noted that CIA activities must comport with "covert action procedures of the National Security Act of 1947, such that Congress is properly notified by means of a Presidential Finding." He further mentioned that depending on the specific activities, "international law principles may be applicable" including the right of self-defense and rules related to armed conflict. The CIA drone program as described would be categorized as a covert operation and would therefore have presidential authorization under U.S. domestic legal requirements. The president, however, would not necessarily be knowledgeable about the identity of any specific individual on the CIA's target list. Furthermore, certain members of Congress would be notified about the program. What is less clear is the level of detail that is provided to the members of

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[45] Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 13, 2011, *available at* http://www.thedailybeast.com/newsweek/2011/02/13/inside-the-killing-machine.print.html.

[46] Eli Lake, *Former CIA General Counsel is in the Crosshairs in Leak Probe*, NEWSWEEK, Nov. 10, 2011, *available at* http://www.thedailybeast.com/articles/2011/11/10/former-cia-general-counsel-is-in-the-crosshairs-in-leak-probe.print.html.

[47] Stephen W. Preston, General Counsel, Central Intelligence Agency, Address at Harvard Law School: CIA and the Rule of Law (Apr. 10, 2012), *available at* http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912.

Congress and whether the Congress would be legally entitled to obtaining such details (i.e., do they get access to CIA's target list).

B. E.O. 12333: Assassinations v. Targeted Killings

In 1975, Congress established the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee") to investigate allegations that the CIA had exceeded its charter. The committee found that the CIA, at the direction of the White House, had been involved in several assassination plots in the 1960s and 1970s, the most famous one against Fidel Castro.[48] There were other plots targeting Patrice Lumumba of the Congo, Rafael Trujillo of the Dominican Republic, General Rene Schneider of Chile, and Ngo Dinh Diem of South Vietnam.[49] In its final report, the Church Committee stated, "We condemn assassination and reject it as an instrument of American policy."[50] Since 1976, the United States has formally banned the use of assassinations, either directly by the United States or by third parties.

In 1976, not wanting a legislative enactment that would impinge upon the president's constitutional authorities as commander-in-chief to carry out intelligence activities, Gerald R. Ford issued Executive Order 11905 prohibiting assassinations as well as setting forth a number of other rules and procedures for the intelligence community to follow.[51] Every president since President Ford has signed the executive order maintaining the assassination ban provision. The current version, Executive Order 12333, first signed by President Reagan in 1981 and most recently updated in 2008, bans assassinations. It provides that "[n]o person

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[48] Alleged Assassination Plots Involving Foreign Leaders, S. Rep. No. 94-465 [hereinafter Church Committee Report].

[49] *Id.* at 4–5.

[50] U.S. Senate, Alleged Assassination Plots Involving Foreign Leaders, An Interim Report of the Select Committee on Study of Governmental Operations with respect to Intelligence Activities, S. Rept. 94-465, 94th Cong., 1st Sess. 184 (Nov. 20, 1975).

[51] Exec. Order 11905, Sec. 5(g), 1, 41 Fed. Reg. 7703, 7733 (President Gerald Ford, Feb. 19, 1976).

employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."[52] Executive Order 12333 and its predecessor orders do not define the term "assassination."[53] However, given the context in which the order was originally promulgated the ban has been understood to apply to circumstances of killings of heads of state during a time of peace.[54]

Tragically, prior to 9/11, not all U.S. officials agreed with this interpretation of the executive order, cautioning that any operation to target and kill Bin Laden (versus capture and try him before a court) would potentially violate the executive order ban on assassination.[55] Throughout the 1990s, concerns about the legal and political implications of targeting Bin Laden outside a self-defense scenario prevented the CIA from taking action to eliminate an enemy of the United States who would continue to wage an effective war against the State. Certainly, President Ford and his successors did not envision that by signing the executive order they agreed that the United States was prohibited from acting in self-defense against a foreign enemy who had already attacked the country. The executive order exists to prevent the killing of foreign political leaders like Fidel Castro, not terrorist leaders. The intent of the drafters was that the order applied during times of peace when the United States was not engaged in hostilities that had been authorized by Congress or in accordance with the international legal right of self-defense.[56]

C. Congressional Action Related to U.S. Drones Program

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[52] Exec. Order 12333, 46 Fed. Reg. 59954 (Dec. 4, 1981).

[53] Exec. Order 11905 was superseded by Exec. Order 12036, 43 Fed. Reg. 3674 (President Jimmy Carter, Jan. 26, 1978).

[54] W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, *in* DEP'T OF THE ARMY PAMPHLET 27-50-204, ARMY LAW. (Dec. 1989).

[55] 9/11 Commission Report, *supra* note 48, at 113.

[56] Jonathan M. Fredman, *Covert Action, Loss of Life, and the Prohibition on Assassination*, 1 STUDIES IN INTELLIGENCE 16 (1997); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 717–26 (2003).

Under U.S. domestic law, the use of drones targeted against those terrorists that conducted the 9/11 attacks and those that harbor or support those individuals has authorization in the form of the 2001 Authorization for the Use of Military Force ("AUMF") which continues to be effective, controlling legal authority.[57] The preamble of the AUMF invokes the right of self-defense and authorized the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any further acts of international terrorism against the United States by such nations, organizations, or persons.[58]

The AUMF authorized the U.S. President to use force against all those involved in the attacks on 9/11, whether they were the leaders of Al Qaeda or mere foot soldiers, foreign officials or private individuals. Under the president's constitutional authorities, he has the authority to determine which agency of the United States Government would be the most appropriate in using force to stop those that conducted 9/11. It is up to the president to determine whether the DoD or the CIA is best equipped to carry the mission out. In fact, both DoD and CIA have been critical to the drone program and stopping the terrorists from being able to carry out further attacks.

The limiting authority of the AUMF, however, derives from the nexus between the September 11, 2001 attacks against the U.S. and the involvement of the target for lethal killings with those attacks against the United States. If the nexus exists, then the AUMF would authorize the action against the target. For those terrorists like al-Awlaki who are members of Al Qaeda in the

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[57] Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

[58] *Id.* at § 2(a).

Arabian Pennisula ("AQAP"), the Haqqani Network in Pakistan or the Pakistan Taliban who have been killed by the drones, but who were not directly involved with the attacks of 9/11, the AUMF does not cover them explicitly. However, under a co-belligerency theory, members of other terrorists groups like AQAP that have made a common cause with Al Qaeda and have become "a part of Al Qaeda— or at a minimum an organized, associated force or co-belligerent of Al Qaeda—in the non-international armed conflict between the United States and Al Qaeda."[59] In February 2012, Jeh Johnson, DoD General Counsel, in a speech at Yale Law School, discussed the AUMF. He noted that although the AUMF does not contain geographic limitations, the Obama Administration does not consider the current hostilities against the terrorists that threaten the United States to be a "global" war without limits. He also noted that, in his opinion, the decisions related to who is targeted in these hostilities is a core function of the Executive Branch and is unreviewable by the courts.[60] Arguably, even without specific congressional approval such as the AUMF, the U.S. President would have the legal authority to use drones against specific targets since these strikes do not involve participation in "hostilities" as understood by the War Powers Resolution.[61]

III. INTERNATIONAL LEGAL FRAMEWORK

Increasingly, the practice of international affairs is less State-centered, while international law remains very much so. Most international law pronouncements remain almost exclusively directed to States as well as its implementation mechanisms. While international law has long recognized the role of States in inter-

[59] Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 33, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

[60] Jeh Charles Johnson, General Counsel, Department of Defense, Dean's Lecture at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), *available at* http://www.lawfareblog.com/jeh-johnson-speech-at-yale-law-school/.

[61] *Libya and War Powers: Hearing Before the Senate Committee on Foreign Relations*, 112th Cong. 11 (2011) (testimony of Harold Hongji Koh, Legal Adviser , U.S. Department of State), *available at* http://www.fas.org/irp/congress/2011_hr/libya.pdf.

state force and the laws related to the use of force between States, it has been slow to develop in the area of force by non-state actors. For decades prior to 9/11, States faced the rising threat from non-state terrorist actors. The U.S. was one of a number of States that had been the target of terrorists, suffering attacks against its embassies, civilians, military personnel and its territory. As the United Nations ("UN") recognized in its high-level panel report in 2004, the "norms governing the use of force by non-state actors have not kept pace with those pertaining to States." [62] As the report pleaded, the "United Nations must achieve the same degree of normative strength concerning non-state use of force as it has concerning State use of force."[63]

In a world where non-state actors, terrorists, can hide within the sovereign territory of a State and launch attacks against other States, States currently lack effective international legal guidance from the UN as to what should inform their decisions to use force under the circumstances. There are, however, established principles based in international law that can and should guide the international community as all States seek to minimize the use of force while providing security for all from terrorists. To deprive States of the legal authority to act to stop and prevent terrorists from acting would undermine the law of the Charter and the international order established in the wake of world war. The UN Charter was not drafted to leave states vulnerable to attack without any recourse to defense.

Some have argued that the United States should be using law enforcement methods to deal with Al Qaeda members in other territories. What these critics miss, however, is that the threat from Al Qaeda is not the same as law enforcement threats. In the past the U.S. position was to generally treat acts of violence by terrorists like other criminals and use law enforcements measure against the individuals. For example, following the attacks by Al

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[62] U.N. Report of the High-level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility" (2004), *available at* www.un.org/secureworld/report2.pdf.

[63] *Id.*

Qaeda on the World Trade Center in 1993, U.S. embassies in East Africa in 1998, and the U.S.S. *Cole* in 2000, the United States used criminal law and law enforcement measures to investigate, extradite, and prosecute the persons responsible for the attacks. The United States also, however, used military force and intelligence measures to counter the terrorist threat during the same time, maintaining the right of the United States to defend itself against attacks from terrorists. For example, after Libyan agents bombed a Berlin disco where American service personnel frequented, the United States bombed the residence of the Libyan leader, Gaddafi, in addition to other military and intelligence targets. The United States argued that the attacks by Libyan agents led to a right to use force in self-defense under Article 51 of the UN Charter.[64]

In 1998, after the attacks against the U.S. embassies in Kenya and Tanzania, in addition sending the FBI to East Africa to investigate the attack, the United States bombed Al Qaeda training camps in Afghanistan and a nerve gas manufacturing facility with ties to Osama Bin Laden in Sudan. These instances, however, can be distinguished from the current conflict that the United States is engaged in against terrorists. The terrorists in these cases were localized and their level of violence was contained. Therefore, a military response to such actions was limited to a specific a discrete use of force in self-defense to eliminate the assets in the locations that they were using to carry out attacks against the United States. The violence at issue, then, was not articulated as reaching the level of an armed conflict with these groups. However, today, the terrorists continue to pose a threat with the ability to create great violence against the United States as they move across various national boarders.

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[64] Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933 (1987); Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and National Defense*, 126 MIL. L. REV. 89, 104, 120 (1989) (discussing Gaddafi as a legitimate target, noting that because he was responsible for "Libya's policy of training, assisting and utilizing terrorists in attacks on U.S. citizens . . . he had no legal immunity from being attacked when present at a proper military target").

For criminals such as drug lords, human traffickers, arms dealers, money launderers, the United States uses criminal law enforcement measures and the international criminal legal regime, working with other States, to stop such criminals. Al Qaeda, as the UN recognized, poses a threat that is significantly different in scope and scale from criminals. The attacks that Al Qaeda deploy are of such large scale and continuity that they are distinguishable from sporadic murders by criminals or low-level armed incursions or border incidents. The stated goal of Al Qaeda is to commit massive casualties specifically among a State's civilian population. Success for Al Qaeda does not come from low-level attacks but from high profile attacks with large death counts and great visibility. While Al Qaeda and other terrorists groups do commit crimes to facilitate their terrorist activities (e.g., money laundering, drug trafficking, arms dealing), the reason the United States uses military force in self-defense against such groups is not because of their criminal activity but for their actions that threaten the very viability of States—high-level attacks of mass murder. The legally-appropriate response in self-defense against the threats from Al Qaeda is the use of force narrowly targeting the members of Al Qaeda who pose the threat. As long as Al Qaeda has the intent and capabilities to carry out attacks similar in nature to the 9/11 attacks, the threats persists and the right of self-defense remains.

A. The Use of Inter-state Force in Self-defense: Jus ad Bellum

Targeted killings conducted in the territory of other States raise sovereignty issues. Under Article 2(4) of the UN Charter, States are forbidden from using force in the territory of another State. When a State conducts a targeted killing in the territory of another State with which it is not in armed conflict the questions of whether the first State violates the sovereignty of the second State is raised. The answer is based on the law applicable to the use of inter-state force. In other words, in conducting the targeted killing, did the State have the legal authority under the UN Charter to violate the article 2(4) prohibition on the use of force within another State? The legality of the targeted killing will depend on the rules related to international humanitarian law.

Under international law, a targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if (1) the second State consents, (2) the UN Security Council authorizes the targeted killing under Chapter VII, Article 42 of the UN Charter, or (3) if the first State has the right under international law to use force in self-defense under Article 51 of the UN Charter. Article 51 states that a State can use force in another State's territory, without violating that State's sovereignty, if the first State has suffered an armed attack. The UN Security Council has supported two circumstances under which the first State has such authority under Article 51: (1) where the second State is responsible for an armed attack against the first State,[65] or (2) if the second State is unwilling or unable to stop armed attacks against the first State launched from its territory.[66]

The "unwilling or unable" test is less developed under international law and will likely need more development before it is fully accepted by States. Some have argued that the right to intervene in such cases where the State is unable or unwilling to stop the threat stems from the obligation of neutrality during wars between States.[67] As the *Caroline* incident illustrated, even though Canada and the United States were not at war, the British argued that they were justified in using force in self-defense within the United States because the United States had been unable to uphold its responsibilities of a neutral State in preventing Americans from interfering in Canadian matters (i.e., Americans joining the rebels fighting against the Canadians and using an American ship to supply the rebels).[68] This issue will be examined more closely below. However, during a time of peace, where an incursion or threat does not amount to an "armed attack" the right may be an

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[65] S.C. Res. 678, U.N. Doc. S/RES/678 (Apr. 8, 1991).

[66] S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); Alston, *supra* note 1, at 12.

[67] Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT'L L. 483, 497–98 (2012); Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209 (2003).

[68] Sofaer, *id.* at 218–19.

extension of the concept of the norm of State responsibility to prevent harm from emanating from its territory and harming another State.

As long as the force used is both necessary and proportionate, States can use lethal force in self-defense within the territory of another State in response to an armed attack.[69] According to the principle of necessity, the State acting in self-defense must only use force when it has deemed that no other non-lethal means exist to resolve the threat. Proportionality under *jus ad bellum* requires that any response to an armed attack be calibrated to stop the original attack or prevent future attacks. Although no strict force-to-force ratio is required, in determining how the response is proportionate to the original attack the following factors should be considered: the scale of the response, the targets chosen, type and degree of force employed, and the results to be achieved. In responding to non-state actors who have committed an attack in another territory, a responding State would be limited to acts in self-defense targeted against the terrorist targets as contrasted to the infrastructure, facilities, and leadership of the territorial State, unless there was proof of the State's complicity in the terrorists attacks.[70]

1. Consent

It is clear under international law that if a State invites or consents to another State's using force within its territory, there is no violation of the State's sovereignty or Article 2(4) of the UN Charter. This is a well-established exception to the Article 2(4) prohibition. As far as drone strikes in Pakistan and Yemen are concerned, based upon public reports, it is likely that those States did provide consent to the United States to conduct targeted killings within their territories. However, international law still places limits upon what can be done against specific individuals within a State's territory since the host State itself is limited under

[69] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 194 (June 27).

[70] Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L. J. 533, 540 (2002).

international humanitarian law or human rights law as to what it can do vis-a-vis individuals within its territory. Under a law enforcement framework, controlled by human rights law, a State cannot target to kill individuals in its own territory unless there is no other way to avert a great danger. If, however, the host State is unable to detain and arrest the individual, preventing the person from posing a threat against the other State by planning and taking part in terrorist attacks, the host State may legally consent to the other State using force within its territory to stop the threat.

2. Right of Self-defense Against Non-state Actors

In the absence of consent by the host State, the first State can legally use force within the host State against specific terrorists based on the principle of self-defense.[71] As noted previously, according to the UN Charter and the International Court of Justice ("ICJ"), international law permits the use of lethal force in self-defense in response to an "armed attack" as long as that force is necessary and proportionate. There has been disagreement, however, as to whether the right of self-defense applies to the use of force against non-state actors and, related, whether the principle of self-defense alone can justify targeted killings.

The United States' use of force in Afghanistan after 9/11 was based on the international legal principle of self-defense. The principle of state responsibility also played a role in the U.S. response against Al Qaeda, the perpetrators of the attacks, in the sovereign State of Afghanistan, where the Taliban was tied to the acts of Al Qaeda and had been at least unable, if not unwilling, to stop Al Qaeda from operating within its territory against the United States. This right of self-defense stems from the customary legal "inherent" right of all States to act in self-defense in the face of significant threats. The resort to legal force by the United States after 9/11 targeting Al Qaeda was based on the right of self-defense under Article 51 of the UN Charter. Article 51 permits the use of lethal force on the territory of another State if that State is

[71] Abraham D. Sofaer, *Terrorism, The Law, and the National Defense*, 126 MIL. L. REV. 89, 103 (1989).

responsible for an armed attack. It has been a matter of debate whether Article 51 permits States to use force against non-state actors who committed "armed attacks" against the State.

The ICJ in the *Wall* opinion and the *Nicaragua* case lends support to the argument that States cannot invoke Article 51 against armed attacks by non-state actors that are not imputable to the State. The ICJ has ruled that force used in self-defense may only be carried out on the territory of a State responsible for a significant armed attack if that State ordered the attack or controls the group that carried it out.[72] The United States has argued that Article 51 was not intended to replace the pre-existing customary international right to act in self-defense, including against non-state actors. In fact, State practice supports this argument. The *Caroline* incident of 1837 reflects the customary international right to act in self-defense that existed prior to the UN Charter and, most experts argue, continues to exist post-UN Charter.

3. The *Caroline* Incident Revisited

It was the *Caroline* case that changed the concept of self-defense from what had been previously considered to be a political excuse to what has since been accepted as a legal doctrine under international law. In 1837, Canada was deeply immersed in a rebellion. The U.S. government did not support the rebels and had maintained that it had been trying to take steps to maintain order along the border with Canada and restrain American cooperation with the rebels. The efforts by the U.S. government, however, failed to stop hundreds of Americans from joining the rebels. The specific facts of the *Caroline* case are particularly relevant to today's current conflict between the United States and terrorists and the legal justifications offered by the United States.

On December 13, 1837, an armed group, composed mainly of Americans citizens, invaded Canadian territory and took

[72] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 194 (June 27).

possession of Navy Island, a British "possession."[73] An American named Van Rausselear, led the group. From December 13 to 29, 1837, the group maintained control of Navy Island, committing "acts of Warlike aggression on the Canadian shore, and also on British Boats passing the Island."[74] On December 29, 1837, the *Caroline*, an American private ship, traveled from Buffalo, New York, to Navy Island, transporting men and "stores of war." On December 29, 1837, a British force destroyed the *Caroline*, seeking to stop the supply of men and supplies to the rebels and preventing the Americans their access to the mainland of Canada. At midnight of that evening, the British moved into U.S. territory as it attacked the ship, killing two Americans, destroying the ship, and arresting two individuals (one an American citizen). Prior to the attack against the *Caroline*, the U.S. officials were aware that Americans were actively participating in the rebellion against the Canadians. The United States, however, had not arrested any Americans nor had the United States agreed to extradite anyone to Canada to be tried for their actions.

On January 5, 1838, Secretary of State Forsyth wrote a letter of protest to Mr. Fox, the British Minister at Washington. Mr. Fox replied. He described the nature of the *Caroline* as "piratical" and invoked the "necessity of self-defense and self-preservation" as justification for the destruction of the *Caroline*. Notably, the British maintained in the letter that because the United States had failed to enforce its own laws preventing the Americans from joining the rebels and attacking Canada, the British were justified in destroying the *Caroline*. The ship had acted as a belligerent, forfeiting any privileges of neutral territory. As to the British claim that the United States failed to enforce its laws, there were facts supporting the claim. In a letter to the president from the Mayor of Buffalo, the mayor wrote, "The civil authorities have no adequate force to control these men, and unless the General Government should interfere, there is no way to

[73] Report of the Law Offices of the Crown, Feb. 21, 1838, Public Record Office in London, Vols. F.O. 83, 2207-2209.

[74] *Id.*

prevent serous disturbances."[75] The U.S. government did not send any armed reinforcements to the border.

The United States and the British agreed that there was a right to intervene into the territory of another State to stop and prevent non-state actors from doing harm within the other territory when necessary under the circumstances. The difference between them, however, was over the claim by the British that the United States was either unable or unwilling to stop the rebels within its territory from attacking Canada. In their correspondence, the ministers from Britain seemed to indicate that they thought that this fact alone was sufficient to justify the destruction of the *Caroline*. The United States insisted that it was adequately fulfilling its obligation to prevent the rebels from attacking Canada from U.S. territory. The facts revealed that the United States had inadequately addressed the issue, as attacks into Canada from U.S. territory continued throughout 1838.

It was not until 1841 when the then-Secretary of State Daniel Webster wrote his famous letter to the British Minister Fox containing the famous words justifying the destruction of *Caroline* on "self-defence and self-preservation." Webster called on the British Government to show a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." Webster went on to state that even if necessity required the British to enter U.S. territory, they still needed to show how their actions were not "unreasonable or excessive." Lord Ashburton, in his reply to Webster, fitting the facts into the framework that Webster had developed, argued that because the insurgent forces were organized in U.S. territory without effective steps taken by the U.S. authorities to prevent them, it became necessary to acquire the *Caroline*. Accordingly, if the State had been willing and able to take steps to stop the threat, the State acting in self-defense would have to show the necessity of acting quickly under the circumstances. But if a State was not taking any steps to stop the threat, the State acting in self-defense was

[75] H. Exec. Doc. No. 74, 25th Cong., 2d Sess. (1837–1838).

justified in using force in the other State's territory as long as the actions in self-defense were proportionate to the threat.

According to the British, who believed that the United States had been unwilling or unable to stop the attacks from U.S. territory, the United States had failed to maintain a neutral and peaceful status.[76] In the view of the British, the British action within U.S. territory was necessary because the United States was not able or willing to stop the attacks. Therefore, there were not any other measures that could have been taken in order to stop the *Caroline* from providing the supplies to the rebels because the United States has already proved unable stop these activities on the border.

The U.S. position, on the other hand, articulated by Webster's formulation for determining the legality of self-defense, was based on his assumption that the attack was unnecessary because the United States was both willing able to satisfy its obligations to prevent and punish attacks from within its borders. Based on Webster's assumption that the United States would be able to stop the attacks, the British would have authority to use force within U.S. territory against the rebels if the need to act was "instant, overwhelming, leaving no choice of means and no moment for deliberation." In effect, Webster was arguing that the British should have relied on the U.S. government to take action against the rebels within U.S. territory. On the assumption that the United States would and could stop the attacks from the rebels, the threat posed by the *Caroline* was not so imminent that it required the British to violate U.S. territory.

The *Caroline* incident, in full context and with a closer look at the facts, makes clear that Webster's rule was meant to apply to situations in which the State on whose territory the self-defense action is contemplated is not responsible for the threat involved and is both able and willing to act appropriately to

[76] Webster, "Lord Palmerston to Andrew Stevenson," Sept. 18, 1941 (enclosure in Andrew Stevenson to Webster, Aug. 27, 1841) in K.E. SHEWMAKER (ed.), THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, VOL. I, 1841–1843 (1983), 133–34.

prevent the threat from being realized. In other words, the threat must be "instant, overwhelming, leaving no choice of means and no moment of deliberation" before using force when the State is able or willing to act to prevent the threat. Therefore, if the State ably and willingly can take action against the threat, the State contemplating using force would need to meet the higher threshold of immediacy before taking such action under the circumstances. The *Caroline* incident provides support for the argument that a State can act in self-defense within the territory of another State against non-State actors under certain circumstances. If the host State is unable or unwilling to prevent the attacks from the non-state actors then the first State acting in self-defense can use force without having to meet the high threshold of a State of imminence.

Further support for the argument that States can use force in self-defense against non-State actors is based on UN Security Council ("UNSC") resolutions 1368 and 1373, issued after 9/11 and NATO's invocation of its Article 5 collective self-defense provision in the wake of those attacks. In the weeks after 9/11, in Resolution 1368, the UN Security Council recognized the 9/11 attacks as a major attack against a State and authorized the use of lethal force against those responsible for the attacks. In the resolution, however, the Security Council did not specify or limit the particular location or State in which the United States could legally use force in self-defense. Based on the Security Council action and Article 51 authority, the United States had the legal authority to use lethal force in the territory of another State against the non-state actors who carried out the attacks on 9/11.

Even before the UNSC authorized this action, the United States arguably had this "inherent" right under Article 51. But certainly once the UNSC authorized a military response, there was no doubt in the international community of the legal right of the United States to use military force to stop the non-state actors who conducted the attacks against the United States. Certainly, not every wrongful act against a State will rise to the level of an armed attack. But as long as the high threshold for an armed attack as set forth by the *Nicaragua* case, "the most grave uses of forces," is met, then States have that right to use self-defense. Particularly with terrorist groups such as Al Qaeda, with their global reach and

support systems, these non-state actors may continue, without engaging the responsibility of a host State, to conduct the kind of armed attack that gives rise to the right to use force. As the *Caroline* criteria pointed out, if a State is unwilling or unable to stop terrorists from within its territory from carrying out armed attacks against another States, the victim State has the legal authority to use force within the host State against the terrorists, but not the government. As long as terrorists groups continue to actively plan and carry out attacks, the United States and other States maintain the legal right to use lethal force in self-defense against those groups, wherever they be. Furthermore, the right of self-defense is a continuing self-defense right as distinguished from an anticipatory self-defense right.[77]

4. The Threshold for Armed Attack by Non-state Actors

The ICJ has established a high threshold for the kinds of attacks that would justify the use of force in self-defense in another State's territory. According to the ICJ, sporadic, low-intensity attacks do not rise to the level of armed attack that would permit the right to use such force in self-defense. Some commentators have argued that in assessing the legality of the self-defense force in light of the gravity of the attack, the force used must be judged in light of each armed attack, looked at individually, rather than considering the aggregation of the successive armed attacks. However, the U.S. use of the targeted killings is based on an assessment of the ongoing and continuous threat from these actors who are part of groups that are actively planning to carry out devastating attacks against the United States and U.S. interests abroad.

Some have argued that the right of self-defense from an armed attack does not last indefinitely, allowing a State to continue endlessly to use force, but the right must stop at some point after the armed attack. However, what if the State suffered from continuous, ongoing attacks, separated by some time but that are

[77] Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 649 (1992).

still being planned by the adversary? One can argue that after 9/11, the United States had the legal authority to use force in self-defense after the armed attack against its territory. And as argued above, one can argue that that right extended to using force in another State's territory if that State was unable or unwilling to stop that attacks from its territory. Even if a *jus ad bellum* analysis offers a justification for a targeted killing, it does not dispose of the further question of whether the killing of the particular individual is lawful. This question is answered by addressing the requirements of international humanitarian law ("IHL") during armed conflict.

Whether recourse to the use of force is legal is a question that arises at the start of a conflict. To assess the legality of that initial use of force, one turns to the UN Charter in analyzing whether the use of force violated Article 2(4), whether the use of force falls below the threshold of Article 2(4), and whether the use of force triggered the Article 51 threshold for an "armed attack." This body of law is referred to as *jus ad bellum*. Even if a State has the right to respond using lethal force in self-defense under Article 51, however, there are limits to what a State can do in self-defense. The general principle of necessity requires that a State show that the use of military force is a last resort and can accomplish a defensive purpose. In territories where the terrorists are planning their attacks, where the host State cannot effectively stop them, military force may be the last resort.

The principle of necessity requires that states use military force as a last resort and in doing so can accomplish their defensive purpose. Prior to the 9/11 attacks, the United States, in cooperation with dozens of states, tried to stop and prevent terrorist attacks from Al Qaeda through law enforcement measures. At the time, that was probably the most appropriate measure to take. (Although one can dispute whether after the embassy bombings in 1998 or the attack against the U.S.S. *Cole* these measures should have been subject to more doubt in their effectiveness to deal with the terrorist threat from Al Qaeda). For decades, the United States had worked with the criminal courts and partner law enforcement agencies domestically and across the globe to obtain arrest warrants for terrorists to seek trying them for their crimes. The

hope was that such measures would take the most dangerous terrorists off the street and prevent the terrorists from conducting significant attacks.

After 9/11, the international community supported the U.S. use of military force against Al Qaeda in recognition of the fact that military force was necessary to deter the terrorist threat and that the law enforcement approach that had been used prior to 9/11 in the face of attacks since the early 1990s from Al Qaeda were not effective. Certainly, in authorizing such use of force, the UNSC believes that such use of force could accomplish the defensive purpose of preventing Al Qaeda from attacking again. At least that was the goal. The use of drones to kill members of Al Qaeda, taking them off the streets and rendering them unable to plan or carry out another attack, would satisfy the necessity requirement. Just as bombing Afghanistan fulfilled the requirement, so too does eliminating those members of Al Qaeda that would facilitate further attacks meet the necessity requirement under international law. CIA Director Leon Panetta has stated that drones are "the only game in town in terms of confronting and trying to disrupt the Al Qaeda leadership."[78] According to Panetta, the person who authorizes the targeted killing of Al Qaeda members, this advanced technology may be the only means to stop Al Qaeda and prevent further attacks.

Some have criticized the use of drones, arguing that it is not an effective counterterrorism tool because at times innocent by-standers are killed.[79] While the likelihood of innocent people being killed in warfare is always a possibility, the fact that there are incidental deaths of civilians not posing a threat during a drone

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[78] Noah Shachtman, *CIA Chief: Drones "Only Game in Town" for Stopping Al Qaeda*, WIRED, May 19, 2009, http://www.wired.com/dangerroom/2009/05/cia-chief-drones-only-game-in-twon-for-stopping-al-qaeda/.

[79] *See* Noah Shachtman, *Call Off Drone War, Influential U.S. Adviser Says*, WIRED, Feb. 10, 2009, http://www.wired.com/dangerroom/2009/02/kilcullen-says (referring to David Kilcullen, a former Australian colonel and an adviser to U.S. counterinsurgency officials).

strike does not make the use of strikes illegal. As always with the use of force, the State must abide by the requirement that the use of force must be proportionate to the threat, causing as little death or damage to bystanders as possible to achieve the military objective. The decision to use any military weapon as a lawful use of force in self-defense must be weighed against the requirement to minimize the death of innocent civilians. This decision is one that must be made by military and civilian leadership.

Others have argued that using drones does not stop terrorism. However, if prior to 9/11, the United States had been able to eliminate any number of the hijackers through targeted killings, the 9/11 plot would have at a minimum delayed Al Qaeda's plans for that day giving the U.S. government more time to uncover the plot. Eliminating hijackers or some of the Al Qaeda leaders could have lead to Bin Laden deciding to give up the planned attack in total. Eliminating Al Qaeda leaderships is arguably just as effective as eliminating some of the foot soldiers that carry out the details of a terrorism plan.

Under the proportionality requirement, lethal force may be used only to the extent necessary to achieve the military objective. Without the ability to arrest and remove terrorists from positions where they can plan more attacks, killing the leaders and other individuals critical to the terrorist operations would be appropriate. Some argue that the necessity and proportionality requirement rules of *jus ad bellum* provide an adequate legal framework for the use of force against the threat in any armed conflict with an adversary.[80] Others, however, point out that if a State is presently in hostilities with an adversary, as the U.S. government has indicated it is with respect to Al Qaeda and other terrorist groups that are attacking or seek to attack the United States, then the laws of war are applicable during the existence of the hostilities.[81] Furthermore, if the United States is not in a state of hostilities with these actors, then the laws applicable to law enforcement

[80] 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 (2010).

[81] Alston, *supra* note 1, at 14–15.

measures, human rights law, would be applicable in determining what individuals can legally be targeted.[82] According to the International Committee of the Red Cross ("ICRC"), "international lawfulness of a particular operation involving the use of force may not always depend exclusively on IHL but, depending on the circumstances, may potentially be influenced by other applicable legal frameworks, such as human rights law and the *jus ad bellum*."[83]

B. Self-defense and International Humanitarian Law: Jus in Bello

Once there is justification for using force under *jus ad bellum*, the law related to armed conflict, *jus in bello*, will dictate what rules the parties must abide by in waging their hostilities. It is important to distinguish these two areas of international law. Under *jus ad bellum*, the reason for the use of force is important in assessing the legality of the actions. In contrast, under international law, when determining whether an armed conflict exists, triggering international humanitarian law, the purpose of the armed forces in engaging in acts of violence is irrelevant to the determination of whether an armed conflict exists. Under international law there are four categories of armed hostilities that can exist: (1) hostilities of a international armed conflict, (2) hostilities of a non-international armed conflict that meets the threshold of Common Article 3 to the Geneva Conventions, (3) hostilities of a non-international armed conflict meeting the threshold of Common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions, or (4) hostilities that are isolated and sporadic which are not considered to reach the level of "armed conflict."[84]

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[82] *Id.*

[83] Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 829, 897 (2010).

[84] Alston, *supra* notes 1, at 16.

An international armed conflict exists between two States involving armed forces.[85] When the Geneva Conventions were drafted, it was common for States to declare wars against each other. At that point, the rules related to armed conflict would be triggered irrespective of the level of hostilities because it was clear that States were involved with armed forces in conflict. Following the definition of an international armed conflict in Article 2(1) of the Geneva Conventions, an international armed conflict cannot exist between a State and a non-state armed group. Therefore, the U.S. conflict with Al Qaeda and affiliated terrorists groups would not constitute an international armed conflict.

The fourth category of hostilities, those that do not rise to the level of armed conflict, can be ruled out in the context of the current U.S. conflict with Al Qaeda and others. As will be discussed, the level of violence produced by Al Qaeda and other terrorist groups working with Al Qaeda surpasses any isolated and sporadic incidents of violence. Al Qaeda and those groups that have joined Al Qaeda in continuing its mission of killing Americans are not isolated but, rather, are part of an ongoing effort to destroy America. As for categories 2 and 3, the United States is not party to Additional Protocol II to the Geneva Conventions and, therefore, category 2 is the relevant category of hostilities for analysis to determine whether the current conflict meets the threshold of a non-international armed conflict, thereby informing the parties what specific rules are applicable for the duration of hostilities. The challenges lies in the fact that Common Article 3 does not define "armed conflict," "organization of an armed group," nor does it provide any indication of the degree of intensity required for a situation to qualify as "armed conflict not of an international character."

In March 2012, in a speech at the American Society of International Law, Harold Koh, State Department Legal Advisor, discussed the legal justification for the Obama Administration's drone program. In his speech, Koh acknowledged that self-defense is one legal basis for drone strikes but also mentioned that

[85] Geneva Conventions I, II, III, IV, & Common Art. 2(1).

international humanitarian law is an additional basis, stating that the United States is "in an armed conflict with Al Qaeda, as well as the Taliban and associated forces."[86] Koh went on to describe how drone attacks would not take place in States that had effective law enforcement efforts against terrorists but only in those States that lacked such efforts or capabilities. Based upon what Koh indicated, therefore, it is relevant to examine how the U.S. drone program is or is not complying with the rules related to international humanitarian law ("IHL"). The most central question related to the drone program under IHL is whether under the program the killing of individuals is arbitrary, which is prohibited under the rules. Even the former Special Rapporteur on Extrajudicial Killing, Summary on Arbitrary Executions noted that targeted killings may be lawful in the context of IHL: "[A]though in most circumstances targeted killings violate the right to life, in the exceptional circumstances of armed conflict, they may be legal." [87] This conclusion illustrates the importance of answering the question of the applicability of IHL and the existence of an armed conflict.

During an armed conflict, the law regulating the conduct of military operations during war applies. This law is often referred to as the "law of war," the "law of armed conflict," or *jus in bello*. Under the Geneva Conventions, the definition of "armed conflict" is abstract; therefore, whether or not a situation can be described as an "armed conflict," meeting the criteria of Common Article 3, is to be decided on a case-by-case basis based on the facts of the situation. These laws are distinguishable from those related to the recourse to the use of force, *jus ad bellum*, as discussed above. The rules would appear to be quite straight forward given the specific area of conflict. However, there is much debate about the scope and nature of the actual armed conflict that the United States is currently engaged in with terrorists.

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[86] Harold Koh, Legal Advisor, Department of State, Keynote Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010).

[87] Alston, *supra* note 1, at 12.

The nature of the specific conflict is important since there is a difference in the rules that apply in an international armed conflict as distinguished from a non-international armed conflict, particularly as it relates to targeting civilians. Historically, States have dealt with non-state actors as internal conflicts (matters to be dealt with under domestic law), human rights law issues, and law enforcement matters. Therefore, the international law for non-international armed conflicts is far less developed than the law applicable to conflicts between States that crosses international boundaries. However, no matter the nature of the conflict, the intent of the drafters of the Geneva Conventions was that there would always be protections for the victims when any type of conflict is occurring. The ICJ has posited that the substantive provisions of Common Article 3 reflect fundamental considerations of humanity that are binding regardless of the character of an armed conflict. Accordingly, Common Article 3 applies whether it is an international or non-international armed conflict. Therefore, even if the conflict spills over into another State's territory and becomes transnational, as is the conflict between the United States and Al Qaeda and its affiliates, Common Article 3 is applicable.

1. Non-International Armed Conflict

The United States has stated that it is in a non-international, armed conflict with Al Qaeda. In other words, the U.S. drone program operates under the laws of war against targets that are engaged in hostilities against the United States. Therefore, the targeted killings are not considered "extrajudicial killings"[88] or "assassinations" because peacetime rules prohibiting such killings are not applicable. The use of such force to kill terrorists by drones is implemented in sovereign territories of other States only if those States are unable or unwilling to stop the threat posed by

[88] Under U.S. law, "extrajudicial killing" is defined under the Torture Victims Protection Act as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." 28 U.S.C. § 1350.

the individuals. In circumstances where the sovereignty of other States is concerned with targeted killings, international law regarding the resort to force, *jus ad bellum*, as discussed above, can serve to resolve the issues.

Common Article 3 provides that in "armed conflicts not of an international character," each party to the conflict shall observe certain minimum standards. In other words, there are certain prohibitions that must be honored by the parties to the conflict: prohibitions on murder, torture, other ill-treatment, hostage-taking, and unfair trial. As such, Common Article 3 provides rules on the protection of persons in enemy hands, but it does not include specific rules on the conduct of hostilities.

Although the Geneva Conventions do not define the terms "non-international armed conflict," under treaty, customary international law, and international court decisions, there are specific criteria one can point to in determining the existence of a non-international armed conflict between a State and non-state armed groups. The determination is premised on two factors: the scale or intensity of the violence and the degree of organization of the parties.[89] As noted by Idi Gaparayi, the Associate Legal Officer at the International Criminal Tribunal for the former Yugoslavia ("ICTY"), "[d]etermining what counts as 'protracted' armed violence and as a 'well-organized' armed group requires a case-specific analysis of the facts."[90] This is a determination that must be made on a case-by-case basis given the facts at the time.

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[89] Judgment of Trial Chamber (Prosecutor v. Boskoski), I.C.T.J. IT-04-82-T at 173–86 (July 10, 2008). Under the Geneva Conventions and the Additional Protocols these criteria include: (1) a level of organization of the non-state group such that the State is able to identify the members of the group; (2) engagement of the non-state group in collective, armed action against the State; (3) admission of the conflict to the UN Security Council; (4) the violence caused by the non-state group goes beyond "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence"; (4) the violence is "protracted armed violence" or if an isolated incident, one with a high degree of intensity; and (5) the confines of the battlefield can be a transnational conflict that crosses State borders.

[90] *See* ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 123 (2010).

Each party is under a good faith obligation to assess whether the facts are such that, objectively, one can conclude that the conflict is of a non-international character.

In 1995, in the *Tadic* case, the Appeal Chamber for the ICTY provided a definition of non-international armed conflict: "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[91] In addressing the issue of whether the court had jurisdiction to try Tadic, a Bosian Serb, for crimes against humanity, grave breaches of the Geneva Conventions and violations of the customs of war under Articles 2, 3 and 5 of the ICTY Statute, the court needed to determine whether an armed conflict existed at the time between the parties.

The court in the *Tadic* judgment determined that there was an armed conflict of a non-international characteristic. Although the definition is broader in scope than what was considered by the drafters of the Geneva Conventions, today it serves as an authoritative threshold for armed conflict associated with Common Article 3 of the Geneva Conventions. This definition has been applied by the International Criminal Tribunal for Rwanda ("ICTR") and adopted in the Rome Statute of the International Criminal Court ("ICC"), illustrating the definition's widespread international legal authority. In recognizing that the elements of a

[91] Although the definition was dictum in the case, it can still be considered persuasive especially given its consistent application by the ICTY, the ICTR, the ICJ, the ICC, and the Special Court for Sierra Leone. *See* Trial Chamber Judgment (Prosecutor v. Delalic, Mucic, Delic and Landzo), 1998 I.C.T.Y. No. IT-96-21-T, 183 (Nov. 16); Trial Chamber Judgment (Prosecutor v. Kordic and Cerkez), 2001 I.C.T.Y. No. IT-95-14/2-T, 24 (Feb. 26); Third Chamber Decision on Motion for Judgment of Acquittal (Prosecutor v. Slobodan Milosevic), 2004 I.C.T.Y. No. IT-02-54-T, 16 (June 16); Trial Chamber Judgment (Prosecutor v. Rutaganda), 1999 I.C.T.R. No. ICTR-96-3, 92 (Dec. 6); Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 23 (Dec. 19) (separate opinion of Judge Simma); Decision on the Confirmation of Charges (Prosecutor v. Lubanga), 2007 I.C.C. No. ICC-01/04-01/06, 233 (Dec. 6); Decision on Appeal Against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, Appeals Chamber Decision of the Special Court for Sierra Leone (Prosecutor v. Fofana), ¶ 32 May 16, 2005 (separate opinion of Justice Robertson).

non-international armed conflict existed, it triggered the application of international humanitarian law. The application of the court's criteria to the current U.S. conflict against non-state actor groups of terrorists is particularly relevant in assessing the nature of the conflict and applicable international humanitarian laws. The next section follows the example of how the definition has been applied by the ICTY, developing a framework for the analysis of facts on a case-by-case basis that can be applied to the current U.S. conflict.

2. Determining the Applicability of International Humanitarian Law

In rendering a judgment on the merits, the Trial Chamber in *Tadic* explained that the purpose of the definition was to distinguish "an armed conflict from banditry, unorganized and short-lived insurrections, or terrorists activities, which are not subject to international humanitarian law."[92] In other words, for hostilities to amount to a non-international armed conflict, where Common Article 3 to the Geneva Conventions would be applicable, the level of hostilities would need to reach a certain level. For those hostilities where the level of violence was low, such as with criminal activities, human rights law would be applicable and not humanitarian law. In the Trial Chamber of the *Delalic* case, the ICTY supported this interpretation of a non-international armed conflict and used the definition to distinguish between "cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence."[93] Importantly, the *Kordic and Cerkez* Appeals Chamber reiterated the significance of the two characteristics of the conflict and further explained what the court meant when it identified terrorist activities. The court stated, "[T]he requirement of protracted fighting is significant in excluding mere cases of civil unrest or single acts of terrorism."[94]

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[92] Trial Chamber Judgment (Prosecutor v. Tadic), 1997 I.C.T.Y. No. IT-94-1-AR72, 561 (May 7).

[93] Delalic et al., *supra* note 97, at 184.

[94] Appeals Chamber Judgment (Kordic and Cerkez), *supra* note 97, at ¶ 341.

A. Organization of Parties

According to the ICRC, "armed groups opposing a government must have a minimum degree of organization and discipline."[95] While the *Tadic* decision did not define what constitutes an "organized armed group," subsequent case law provided some guidance on the meaning of the terms. In the *Milosevic* trial, the court looked to the following elements in determining sufficient level of organization of the armed groups: official joint command structure, headquarters, designated zones of operation, and ability to procure, transport, and distribute arms.[96] Later in the *Limaj* trial, the court adopted the *Tadic* test and, following the *Milosevic* case, found that the Kosovo Liberation Army ("KLA") was sufficiently organized due to the following factors: the role of the General Staff as the main governing body of the KLA carrying out such functions as appointing zone commanders, supplying weapons, issuing political statements, distributing regulations to members of the group, authorization to carry out specific hostile acts, and the assignment of tasks to individuals within the organization.[97]

Like the KLA, Al Qaeda has shown the ability to formulate and declare a change in operational tactics as well as dictating conditions for refraining from further hostile action. This reflects how Al Qaeda continues to coordinate military planning and activities and to determine a unified military strategy. The ability to do these things does not depend on having a hierarchical command structure. As many have noted, Al Qaeda, post 9/11, has morphed into a more networked organizational structure. However, to meet the *Tadic* test, the command structure is not as relevant to this analysis as is the ability of the group to exhibit

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[95] I.C.R.C., Armed Conflicts Linked to the Disintegration of State Structures: Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law, Geneva, Jan. 19–23, 1998.

[96] Trial Chamber Decision (Prosecutor v. Slobodan Milosevic), *supra* note 97, at ¶ 23.

[97] Judgment (Limaj et al.), 2007 I.C.T.Y. No. IT-03-66, ¶ 46–101 (Sept. 27).

specific characteristics related to organizational stability, in whichever form that may be, that allow for operational effectiveness.

A certain level of effectiveness is indicative of a level of organization of the armed groups. Al Qaeda and its affiliated groups have been successful in identifying the enemy to attack and laying out a plan to achieve that objective. The leadership has been able to provide direction to its members as well as issuing public statements about its objectives. Even when Bin Laden was in hiding, he used taped videos and couriers to deliver messages to his members and the general public. As the court indentified in the *Limaj* case, the KLA had the ability to recruit, train, and equip new members; this was evidence of the group's level of organization.[98] Even after the United States bombed Al Qaeda's training camps in Afghanistan in 1998, Al Qaeda and its new members have been able to gain access to training in Pakistan. After 9/11, plots thwarted through the arrest of suspects often revealed evidence that individuals had been to Pakistan to receive training from Al Qaeda. An additional indicator of Al Qaeda's level of organization is that individual members of Al Qaeda that have been arrested or detained are in possession of weapons.

Al Qaeda is an organized, armed group capable of being a party to a conflict. While Al Qaeda may be changing organizationally due to a process of decentralization, this does not diminish its ability to recruit, train, provide operational direction, affiliate funding of operations, and carry out armed attacks. The United States is not targeting these groups solely because they are trafficking in drugs or humans, money laundering, counterfeiting, or arms trading. These terrorist groups are not criminal gangs or drug cartels, although they may use criminal activities to finance their terrorist attacks. It is significant that the United States is not using drone strikes to target criminals. For those international criminals, the law enforcement framework under international law would be appropriate. In fact, the United States applies the law enforcement framework under those circumstances. However, for

[98] *Id.* at ¶ 171.

terrorists who are identifiable as a group and commit acts of violence with such intensity as 9/11, the United States appropriately employs the non-international armed conflict framework and the international humanitarian rules that are applicable.

B. Intensity of Hostilities

Similar to the organizational requirement, the threshold of "protracted armed violence" requires the interpretation of facts in the context of the U.S.-Al Qaeda conflict. It is clear that the requisite level of intensity of hostilities for the existence of armed conflict must be above that of internal disturbances and tensions. On the other hand, it is also clear that the level of hostilities need not reach the magnitude of "sustained and concerted military operations." In determining the requisite level of intensity for hostilities to qualify as an armed conflict, the interpretation of the word "protracted" is central. In the *Limaj* case, the court used a similar approach to the *Milosevic* case and relied on a number of factors in assessing the intensity of the violence: seriousness of armed clashes, mobilization of troops, kind of weaponry, destruction of property, and the existence of casualties.[99]

While "protracted" implies a time frame, it "does not carry the same meaning as 'sustained'."[100] Therefore, "there is no requirement that military operations be carried out in a sustained or continuous manner."[101] The assessment of "protracted" hostilities is one that begins with the initiation of hostilities and continues to the end of the hostilities. The Rome State of the ICC accepts the definition of non-international armed conflict and maintains that international humanitarian law applies even in situations of protracted armed violence where hostilities are not necessarily characterized as continuous, giving support to the argument that hostilities do not need to be "sustained and concerted" military

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[99] *Id.* at ¶ 134–66.

[100] Sonja Boelaert-Suominen, *Commentary: The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to all Armed Conflicts*, LEIDEN J. INT'L L., Sept. 2000, at 634.

[101] *Id.*

operations as Additional Protocol II dictates. Just because there may be interruptions in fighting between parties does not mean that international humanitarian law ceases in being applicable. In the case of Al Qaeda, as described before, the group has been engaged in hostilities against the United States since the early 1990s. And while attacks have often been thwarted prior to and after 9/11, the group continues to maintain its mission to kill Americans and destroy the country.

The more difficult case here is in assessing the criteria of protracted violence as it related to several non-state parties involved in the conflict against the United States. Central to the analysis is whether the hostilities originating from the several different non-state parties can be aggregated in considering whether hostilities are protracted. This will depend on the relationship between the non-state parties. Since 9/11 the United States successfully killed a number of Al Qaeda leaders and foot soldiers, arguably making it more difficult for the group to carry out its objectives. What many terrorism experts have described is that Al Qaeda has partnered with other terrorist groups that can assist them in operating in different territories, sustaining their training, arming, and recruiting. Although the groups may have different names and, for some, different goals, they join together in one common purpose: to fight and attack the United States. These groups at times maintain their own command structure and merge together in a joint command style. The attacks against the United States from Al Qaeda, the Taliban in Pakistan, AQAP, and others have not been disconnected, isolated, or sporadic acts of violence. Furthermore, the acts of violence by these other groups are tied to the conflict at issue with the United States. The attacks are not about any other issue other than destroying the United States. They have been ongoing and connected through the common agenda and direction of the groups. As noted above, the attacks do not have to be of a continuous nature.

C. Standards Under International Humanitarian Law

(i) Level of Force to be Used

According to the ICRC, the IHL requirement related to the legitimate use of force is that the kind and amount of force used in a military operation be limited to that which is "actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."[102] In circumstances where the State has control over the territory where a military operation is taking place, it may be feasible for the State to use less-than-lethal means to stop the civilian from causing violence to the State. For example, the State could detain and arrest the individual. This, however, is not a requirement under the law. Under circumstances where a State determines that it could capture the individual instead of killing him, the State ought to use less lethal force in stopping the threat. In countries like Pakistan, Yemen, and Somalia where the United States does not have a presence and the host State may not be able or willing to arrest the individual terrorists, IHL would permit the use of lethal force against the target as long as that person was a lawful target.

(ii) Who are Lawful Targets and Where

Common Article 3 does not provide any guidance on the rules related to the conduct of hostilities. According to the ICRC, there are rules that would apply to non-international armed conflict related to the conduct of hostilities; they are rules that U.S. has accepted. For example, parties to the conflict must distinguish between civilians and combatants. Attacks cannot be directed at civilians but only combatants. Civilian objects are protected from attack. Further, the principle of proportionality would apply.

Members of organized armed forces or groups are legitimate targets. These individuals are those whose continuous function is to conduct hostilities on behalf of a party to the armed conflict. Civilians are not legitimate targets. They are individuals who do not directly participate in hostilities or who does so on a merely spontaneous, sporadic, or unorganized basis. Once a

[102] International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, June 2009 (prepared by Nils Melzer) [hereinafter ICRC Guidance] at 77.

civilian directly participated in hostilities, he then becomes a combatant and a legitimate target. In non-international armed conflicts, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, are entitled to protections from direct attack until they forgo those protections by participating directly in the conflict.

In non-international armed conflicts, individual members of organized armed groups are people who have a continuous function to directly participate in the hostilities. Therefore, the key terms for determining if members of Al Qaeda and other terrorist groups can be directly targeted is whether they have a continuous combat function. The fact that an individual has a continuous combat function, however, does not provide any combat privileges to the individual. This fact merely makes him a legitimate target. Importantly, however, for those individuals who are civilians and may have transitioned into combatants by directly participating in hostilities, but do so only on a spontaneous, sporadic or unorganized basis, or take on only non-combat functions, according to the ICRC, they are protected from direct attack.

In a non-international armed conflict, under humanitarian legal rules, States are permitted to attack those civilians who "directly participate in hostilities." The basis of this premise is that civilians lose their immunity from attack when they behave like combatants. Yet, the law does not provide a definition for direct participation in hostilities. Generally, the more similar a civilian's actions are to those of a traditional fighter, the easier it becomes to argue that the civilian is participating in hostilities. For example, civilians who shoot at the State forces or cause injury or death to State forces are generally treated as legitimate targets.

According to the ICRC Interpretive Guidance, the determination of what is considered direct participation in hostilities depends on whether the conduct at issue "constitute[s] an integral part of armed confrontations occurring between belligerents."[103] The ICRC sets forth a three-part test for

[103] Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance*

determining when an individual can be considered to be directly participating in hostilities. This includes the consideration of the threshold of harm posed by his or her actions, the causal link between his or her actions and the potential harm to the opponent, and the nexus to the hostilities. In addition to those involved in the physical attacks themselves, the ICRC also includes individuals who conduct preparatory activities of a specific act of direct participation in hostilities as well as any concluding activities related to the specific act, to include the return from the location of the actual act. The central point is that all of these acts have a proximate casual to the specific act that reached the threshold of harm.

Significantly, according to the ICRC's guidance on civilian status, civilians who do participate directly in hostilities (in other words, civilians who become combatants) and who have a "continuous combat function" can be targeted at all times and in all places, even when they are not directly participating in hostilities. The ICRC's position on this is in line with the *Tadic* Appeals Chamber, which held that "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities."[104] This could include individuals who organize, equip, provide intelligence for, or otherwise direct the hostile activities of subordinates and collaborators on a continuous basis (i.e., acts qualifying under the threshold of harm, direct causation, and belligerent nexus criteria). These are the factors that are to be considered when individuals are placed on the target list. However, civilians who become combatants because they directly participate in hostilities, but who do not have a "continuous combat function," can only be targeted for the duration of each specific act that amounts to participating in direct hostilities.

Although the United States has not publicly discussed the factors that are considered for putting someone on a drone target

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on the Notion of Direct Participation in Hostilities, 42 N.Y.U. J. INT'L L. & POL'Y 829, 859 (2010).

[104] Trial Chamber Judgment (Prosecutor v. Tadic), 1997 I.C.T.Y. No. IT-94-1-AR72, ¶ 67 (May 7).

list, U.S. officials have discussed the identity of a number of the targets that have been killed. Individuals who have been targeted and killed by drones have been described as members who had operational roles within Al Qaeda. Membership and affiliation with such a group, directly supporting initiatives that seek to kill Americans and destroy the very way of life for Americans, has forced the United States and other States to change the methods used in defense of the State. It is likely that the use of such methods will not be reversed; therefore, understanding how domestic and international laws work to incorporate and impose restrictions upon them is critically important for States using drones as well as the rest of the international community.