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Self-defense Targeting: Blurring the Line between the *Jus ad Bellum* and the *Jus in Bello*

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I. Introduction

Conflict classification has been and will continue to be one of the most complex issues arising from the intersection of national security policy and international law. From the inception of what the United States dubbed the "Global War on Terror," experts have been debating the meaning of the term "armed conflict," both international and non-international. The proliferation of remotely piloted warfare has only exacerbated the uncertainty associated with the meaning of these terms. In response, the concept of self-defense targeting emerged as an ostensible alternative to determining if and when a national use of armed force qualified as an armed conflict. In essence, this theory averts the need to engage in *jus in bello*[1] classification of counterterror military operations by relying on the overarching *jus ad bellum*[2] legal justification for these operations. Self-defense targeting, or what Professor Kenneth Anderson has called "naked self-defense,"[3] is offered as the U.S. legal framework for employing combat power to destroy or disrupt the capabilities

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of transnational terrorist operatives.[4] This essay will question the validity of substituting *jus ad bellum* principles for those of the *jus in bello*, and why this substitution is a false solution to this extremely complex conflict classification dilemma.

The attack on Osama Bin Laden's (OBL) compound in Pakistan[5] has exposed in stark relief the importance of defining the legal framework applicable to the use of military force as a counterterrorism tool. The initial focus of the public debate generated by the attack was the legitimacy of the U.S. invocation of the inherent right of self-defense to launch a non-consensual operation within the sovereign territory of Pakistan.[6] However, that focus soon shifted to another critical legal question: even assuming the exercise of national self-defense was legitimate, what law regulated the tactical execution of the operation?[7] By virtue of his role as the leader of al Qaeda, was OBL a lawful military objective within the meaning of the law of armed conflict (LOAC),[8] and thereby subject to attack with deadly force as a measure of first resort? Or was he merely an international criminal, subject to a much more limited law enforcement use of force authority? The duality of the *jus belli* issues implicated by the attack generated a two-pronged legal critique: First, did the mission violate the international legal prohibition against use of force (*jus ad bellum*)? Second, did the mission trigger the law of armed conflict, or was the amount of force employed during the mission resulting in OBL's death excessive to that which was necessary to apprehend him? The self-defense targeting theory failed to sufficiently address this duality.

The first prong of this dualistic legal debate touches on an issue that appears well-settled in U.S. practice: the use of military force to attack individuals who are determined to be al Qaeda or Taliban belligerent operatives. The second prong—how such attacks are legally regulated at the tactical execution level—remains a subject of uncertainty. Both Presidents Bush and Obama (with the support of Congress) consistently invoked the inherent right of national self-defense pursuant to Article 51 of the Charter of the United Nations as the legal basis for attacking al Qaeda operatives.[9] However, the Obama administration seems to have superimposed an odd veneer on this authority: the concept of self-defense targeting.[10] Invoking the inherent right of self-defense, this theory suggests that both the resort to armed force *and* the execution of specific operations are regulated by the *jus ad bellum.* In essence, because attacking terrorist targets falls within the scope of international self-defense legal authority, *jus ad bellum* self-defense principles regulate the execution of combat operations used to achieve this self-defense objective, obviating the need to assess whether and what *jus in bello* principles apply to these operations. Thus, so long as the targets fall within the *ad bellum* principles of necessity and proportionality, attacking them is legally permissible.

II. Background

There is nothing unusual about the assertion that the principles of necessity and proportionality regulate combat operations directed against transnational terrorist operatives.[11] What is unusual is the assertion that *jus ad bellum* variants of these principles regulate operational execution.[12] Necessity and proportionality have always been core principles of both branches of the *jus belli*—principles that apply to both the authority to employ military force and the regulation of actual employment. However, in the *jus ad bellum* context, they have never before been viewed as principles to regulate operational and tactical execution.[13] Instead, in that context they frame the legality of national or multinational resort to military force in self-defense. Once the decision is made to employ force pursuant to this authority, the *jus in bello* variant of these principles (necessity of the mission and proportionality of collateral damage) operate to regulate the application of combat power during mission execution (in other words, they provide the foundation for the regulation of the application of combat power in the context of the self-defense-justified mission).

This self-defense targeting paradigm—Professor Kenneth Anderson's "naked self-defense"[14]—is certainly responsive to concerns over the legality of extending counterterror combat operations beyond the geographic limits of Afghanistan (and to an increasingly lesser degree Iraq). However, it does not and cannot become a substitute for defining the rules that regulate the actual execution of such missions. This *ad bellum* targeting theory may in some ways be responsive to the uncertainty related to the legal characterization of the struggle against transnational terrorism, or perhaps more precisely the question of whether an armed conflict can exist within the meaning of international law when States employ armed force to find, fix and destroy terrorist operations in diverse geographic locations.[15] A subcomponent of this question regarding the existence of an armed conflict is, even assuming the answer is yes, does such a conflict follow the enemy wherever on the globe he may be and does it provide for a "springing" of the LOAC authority for brief periods of time wherever he is located?

Since the United States initiated its military response to the terrorist attacks of September 11, 2001, the uncertainty related to the legal nature of this response has been a central theme in policy and academic discourse. Although the answers to these questions seem increasingly settled in U.S. practice (at least in the practical if not legal sense), questions over the legality of killing OBL—or the availability of viable alternatives—have again highlighted the significance of this uncertainty. While the United States seems to have abandoned the assertion that it is in a "war" against terror that spans the entire globe, its continued attack of what can only be

understood as targets of opportunity in places like Yemen, Somalia and Pakistan have kept this uncertainty at the forefront of contemporary debate on counter-terror operations.[16]

Various interpretations of what triggers the *jus in bello* emerged following the U.S. military response to the terror attacks of September 11. In general terms, these theories ranged across a spectrum from a strict adherence to the theretofore widely accepted international/internal armed conflict paradigm, to the other extreme, proffered by me and others, that military operations conducted against international terrorist organizations like al Qaeda should be characterized as transnational armed conflicts: non-international armed conflicts of international scope.[17] Within that range were included concepts such as militarized law enforcement and extraterritorial law enforcement (military operations within the framework of human rights principles). All of these approaches shared a common theme: they sought to define the rules of tactical execution applicable to this military response within a framework of established legal norms.[18]

This essay will argue that the concept of self-defense targeting does not and cannot provide a substitute for resolving the debate about *in bello* applicability to transnational counterterror military operations. The reasons for this are multifaceted. First, the *jus ad bellum* has never been understood as a source of operational or tactical regulation nor a substitute for the law providing that regulation.[19] Indeed, one of the central tenets of the *jus belli* has always been the invalidity of reliance on the *jus ad bellum* to define *jus in bello* obligations. Instead, the de facto nature of tactical execution is the principal factor for assessing applicability of the *jus in bello*. Second, because the *jus ad bellum* has never been conceived as a tactical regulatory framework, using it as a substitute for the *jus in bello* injects unacceptable confusion into the planning and execution of combat operations. Finally, while the principles of necessity and proportionality are central to both branches of the *jus belli*, the meaning of these principles is not identical in each branch but, in fact, disparate. As a result, the scope of lawful authority to employ force during mission execution will be subtly but unquestionably degraded if *ad bellum* principles are utilized as a substitute for *in bello* regulation.

A. Transnational Armed Conflict: Genesis and Controversy

Transnational armed conflict as a legal term of art was nonexistent prior to September 11, 2001. Other writings provide extensive explanation of the term's origins and the concept it proposed.[20] In essence, it was a concept intended to bridge the chasm between the two traditionally acknowledged—and ostensibly only—situations triggering the *jus in bello*: international or inter-State armed conflicts and non-international or internal armed conflicts.[21] Adopted in the 1949 revisions to

the Geneva Conventions, the concept of armed conflict, and these two categories of armed conflict, manifested an effort to ensure a genuine de facto law-triggering standard.[22] While this did not eliminate all uncertainty as to when the law applies, preventing humanitarian law avoidance through reliance on technical legal concepts such as war was unquestionably the primary motive behind the adoption of the armed conflict law trigger.

This was a profound development in conflict regulation. For the first time in history, a treaty-based legal test dictated applicability of LOAC regulation.[23] Although originally linked only to application of the Geneva Conventions, these triggers rapidly became the standard for applicability of the entire corpus of the LOAC.[24] An entire generation of military and international lawyers learned that armed conflict triggers LOAC application.[25] However, they also learned that there were only two types of armed conflict: international and internal.[26]

This dichotomy was under-inclusive from its inception. The international/internal armed conflict dichotomy was clearly responsive to the law avoidance that occurred during World War II and the law inapplicability during the Spanish Civil War.[27] However, it failed to account for the possibility of extraterritorial armed conflicts between States and non-State belligerents.[28] Although not a common situation in the history of modern warfare, hostilities in such a context were not unknown.[29] Nor did the armed-conflict-law trigger account for the emergence of other external military operations involving minimal hostilities, such as United Nations peacekeeping missions.[30] Understanding the necessity of providing a regulatory framework for such operations, commanders and legal advisors thrust into these zones of uncertainty resorted to policy-based application of *jus in bello* principles, a methodology that proved generally effective in the decade preceding 9/11.[31] However, this approach to filling the regulatory void created by the international/internal dichotomy also averted attention from the underlying issue of regulatory under-inclusiveness.[32]

This under-inclusiveness was fully exposed when the United States initiated its military response to al Qaeda following the terror attacks of September 11.[33] As the United States began to preventively detain captives in that struggle, the implicit invocation of LOAC authority became clear.[34] Use of the designation "unlawful combatant" confirmed this invocation—these terrorist operatives were detained not as criminals awaiting adjudication, but as enemy operatives to prevent their return to hostilities.[35] However, pursuant to the advice provided by his Attorney General, President Bush concluded that LOAC protections were inapplicable to these detainees.[36] The basis for this conclusion was clear: the armed conflict with al Qaeda did not fit within the international/internal armed conflict law-triggering equation.[37] Because al Qaeda was not a State, the conflict could not qualify as

international; because al Qaeda operated outside the territory of the United States, the conflict could not qualify as internal.[38]

This determination was problematic on numerous levels, but for military lawyers trained to ensure compliance with LOAC principles during all military operations no matter how they might be legally classified,[39] it was particularly troubling. As I have written previously, the concept of transnational armed conflict evolved to respond to this newly exploited gap in legal protections for individuals subjected to LOAC-based authority.[40] The objectives of the concept were simple: adopt a characterization for the non-international armed conflict with al Qaeda consistent with the non-State but nonetheless international character of the organization; require application of fundamental LOAC principles; and deny al Qaeda any credibility windfall from suggesting the conflict was international within the meaning of the law. In short, it was simply a term to denote a non-international armed conflict (within the meaning of Common Article 3 of the four 1949 Geneva Conventions) of international scope, what others have called an "internationalized non-international armed conflict."[41]

Reaction to the transnational armed conflict concept has ranged the spectrum from rejection[42] to endorsement;[43] however, it is important to note that the underlying objective is also reflected in other conceptions of the legal framework for the military component of counterterror operations. As noted, these include "internationalized" non-international armed conflict and militarized extraterritorial law enforcement.[44] For the United States, this debate was essentially resolved by the Supreme Court's 2006 decision in *Hamdan v. Rumsfeld*.[45] A majority of the Court concluded the term "non-international armed conflict" in Common Article 3 is not restricted to internal armed conflicts, but covers any armed conflict that does not qualify as international within the meaning of Common Article 2.[46] This "contradistinction" interpretation effectively achieved the transnational armed conflict objective: a majority of the Court closed the gap identified (some might say exploited) by the Department of Justice analysis and relied on by President Bush.[47] By concluding that any armed conflict that fails to qualify as "international" within the meaning of the Geneva Conventions is non-international (irrespective of geographic scope) and therefore triggers the baseline humanitarian protections of Common Article 3, the Court created a simple equation: if the government treats the struggle against al Qaeda as an armed conflict, it must be either international or non-international within the meaning of the Geneva Conventions.[48] Thus, it closed the gap in humanitarian law applicability and ensured that future invocations of armed conflict authority must trigger minimum humanitarian obligations.[49]

The *Hamdan* opinion has not, however, eliminated the uncertainty and controversy over the legal characterization of military operations directed against al Qaeda.[50] Experts continue to struggle with this question, and new theories continue to emerge.[51] It remains indisputable, however, that characterizing the contention between al Qaeda and the United States as an armed conflict defies indicators traditionally applied to identify the existence of non-international armed conflicts.[52] Those most notably lacking include a sustained nature of combat operations directed against al Qaeda targets outside the Afghanistan zone of combat[53] (even loosely defined), and the lack of continuous and concerted hostilities by al Qaeda against the United States.[54] This lack of "intensity" and "duration" was in fact central to the conclusion by a working group of the International Law Commission that counterterror operations cannot be properly characterized as armed conflicts, even of the non-international type.[55] Following President Obama's election, expectations were high that the new administration might abandon the armed conflict theory altogether and revert to the international law enforcement approach to dealing with the transnational terrorist threat.[56] Not only were these expectations unfounded; the new administration opened an entirely new front in the legal characterization debate.[57]

B. Self-defense Targeting: A Third Rail?

It did not take long for the Obama administration to demonstrate that it was not about to abandon an armed conflict–based approach to dealing with the al Qaeda threat.[58] To this date, the United States continues to employ combat power against al Qaeda operatives in locations both proximate to and far removed from ongoing hostilities in Afghanistan.[59] These operations involve the employment of deadly force as a measure of first resort, an unavoidable indicator that the United States continues to rely on an armed conflict–based legal framework.[60] The discomfort with such an expansive concept of armed conflict is certainly understandable. What is equally understandable is the pragmatic reality that the nature of these operations makes them inconsistent with peacetime law enforcement legal principles.[61] Nonetheless, the apparent aversion to recognizing some type of "springing" armed conflict paradigm has produced not only opposition, but also a proposal for an alternative legal framework that avoids the need to address the conflict classification dilemma: self-defense targeting.[62]

This alternative methodology is most notably attributed to Professor Kenneth Anderson.[63] In a series of essays, Anderson began to proffer the argument that the *jus ad bellum* provides sufficient—and ostensibly exclusive—legal authority for the regulation of attacks directed against terrorist operatives.[64] This theory has also been embraced by Professor Jordan Paust.[65] Although Paust has consistently

rejected characterizing the response to transnational terrorism as an armed conflict[66] (based primarily on a classical interpretation of Common Articles 2 and 3 of the Geneva Conventions),[67] his position has evolved to acknowledge the legitimate use of military force in self-defense against external non-State threats.[68] That response would not qualify as an armed conflict, because it could not fit within the traditionally understood scope of the Geneva Convention law-triggering framework. Instead, the *jus ad bellum* right of self-defense would be the exclusive source of legal authority related to the response.

Professor Anderson characterizes this theory as "naked self-defense."[69] According to Anderson, this term characterizes the legal basis for drone strikes articulated by State Department Legal Advisor Harold Koh: exercise of *jus ad bellum* self-defense does not *ipso facto* trigger the *jus in bello*. As will be explained more fully below, in the same essay Anderson signals a significant revision of this theory—a retreat motivated by his reflection on the inability to effectively define the geographic scope of a transnational non-international armed conflict. What is significant here, however, is that the theory itself presents a complex question: is it possible to employ military force pursuant to a claim of *jus ad bellum* national self-defense without triggering the *jus in bello*? And if the answer is yes, what international legal principles regulate the application of combat power during the execution of such operations?

In this essay, I argue that *jus ad bellum* targeting—or naked self-defense—is a flawed substitute for embracing the alternate (albeit controversial) conclusion that employing combat power in self-defense against transnational non-State operatives must be characterized as armed conflict. In support of this argument, the essay will expose what I believe is the implicit acknowledgment by proponents of self-defense targeting that these operations do indeed trigger the LOAC. I will do this by exploring the nature of two fundamental *jus belli* principles invoked by these proponents: necessity and proportionality.[70] Contrasting the effect of these principles within the self-defense targeting framework with their effect within a *jus in bello* framework will illustrate that self-defense targeting reflects an implicit acknowledgment of *jus in bello* applicability during operational mission execution.

III. The Traditional Distinction between the Jus ad Bellum *and the* Jus in Bello

At the core of the self-defense targeting theory is the assumption that the *jus ad bellum* provides sufficient authority to both *justify* and *regulate* the application of combat power.[71] This assumption ignores an axiom of *jus belli* development: the compartmentalization of the *jus ad bellum* and the *jus in bello*.[72] As Colonel G.I.A.D. Draper noted in 1971, "equal application of the Law governing the

conduct of armed conflicts to those illegally resorting to armed forces and those lawfully resorting thereto is accepted as axiomatic in modern International Law."[73] This compartmentalization is the historic response to the practice of defining *jus in bello* obligations by reference to the *jus ad bellum* legality of conflict.[74] As the *jus in bello* evolved to focus on the humanitarian protection of victims of war, to include the armed forces themselves,[75] the practice of denying LOAC applicability based on assertions of conflict illegality became indefensible.[76] Instead, the de facto nature of hostilities would dictate *jus in bello* applicability, and the *jus ad bellum* legal basis for hostilities would be irrelevant to this determination.[77]

This compartmentalization lies at the core of the Geneva Convention law-triggering equation.[78] Adoption of the term "armed conflict" as the primary triggering consideration for *jus in bello* applicability was a deliberate response to the more formalistic *jus in bello* applicability that predated the 1949 revision of the Geneva Conventions.[79] Prior to these revisions, *in bello* applicability often turned on the existence of a state of war in the international legal sense, which in turn led to assertions of inapplicability as the result of assertions of unlawful aggression.[80] Determined to prevent the denial of humanitarian regulation to situations necessitating such regulation—any de facto armed conflict—the 1949 Conventions sought to neutralize the impact of *ad bellum* legality in law applicability analysis.[81]

This effort rapidly became the norm of international law.[82] Armed conflict analysis simply did not include conflict legality considerations.[83] National military manuals, international jurisprudence and expert commentary all reflect this development.[84] This division is today a fundamental LOAC tenet—and is beyond dispute.[85] In fact, for many years the United States has gone even farther, extending application of LOAC principles beyond situations of armed conflict altogether so as to regulate any military operation.[86] This is just another manifestation of the fact that States, or perhaps more importantly the armed forces that do their bidding, view the cause or purported justification for such operations as irrelevant when deciding what rules apply to regulate operational and tactical execution.

This aspect of *ad bellum/in bello* compartmentalization is not called into question by the self-defense targeting concept.[87] Nothing in the assertion that combat operations directed against transnational non-State belligerent groups qualifies as armed conflict suggests the inapplicability of LOAC regulatory norms on the basis of the relative illegitimacy of al Qaeda's efforts to inflict harm on the United States and other victim States (although as noted earlier, this was implicit in the original Bush administration approach to the war on terror).[88] Instead, the self-defense targeting concept reflects an odd inversion of the concern that motivated the armed conflict law trigger. The concept does not assert the illegitimacy of the terrorist cause to deny LOAC principles to operations directed against them.[89] Instead, it

relies on the legality of the U.S. cause to dispense with the need for applying LOAC principles to regulate these operations.[90] This might not be explicit, but it is clear that an exclusive focus on *ad bellum* principles indicates that these principles subsume *in bello* conflict regulation norms.[91]

There are two fundamental flaws with this conflation. First, by contradicting the traditional compartmentalization between the two branches of the *jus belli*,[92] it creates a dangerous precedent. Although there is no express resurrection of the just war concept of LOAC applicability, by focusing exclusively on *jus ad bellum* legality and principles, the concept suggests the inapplicability of *jus in bello* regulation as the result of the legality of the U.S. cause. To be clear, I believe U.S. counterterror operations are legally justified actions in self-defense. However, this should not be even implicitly relied on to deny *jus in bello* applicability to operations directed against terrorist opponents, precisely because it may be viewed as suggesting the invalidity of the opponent's cause deprives them of the protections of that law, or that the operations are somehow exempted from LOAC regulation. Second, even discounting this detrimental precedential effect, the conflation of *ad bellum* and *in bello* principles to regulate the execution of operations is extremely troubling.[93] This is because the meaning of these principles is distinct within each branch of the *jus belli*.[94]

Furthermore, because the scope of authority derived from *jus ad bellum* principles purportedly invoked to regulate operational execution is more restrictive than that derived from their *jus in bello* counterparts,[95] this conflation produces a potential windfall for terrorist operatives. Thus, the *ad bellum/in bello* conflation is ironically self-contradictory. In one sense, it suggests the inapplicability of *jus in bello* protections to the illegitimate terrorist enemy because of the legitimacy of the U.S. cause.[96] In another sense, the more restrictive nature of the *jus ad bellum* principles it substitutes for the *jus in bello* variants to regulate operational execution provides the enemy with increased protection from attack.[97] Neither of these consequences is beneficial, nor necessary. Instead, compliance with the traditional *jus ad bellum/jus in bello* compartmentalization methodology averts these consequences and offers a more rational approach to counterterrorism conflict regulation.[98]

IV. Necessity and Proportionality: The Risk of Authority Dilution

The most problematic aspect of the self-defense targeting concept is that it produces a not so subtle substitution of *jus ad bellum* necessity and proportionality for the *jus in bello* variants of these principles.[99] While these principles are fundamental in both branches of the *jus belli*,[100] they are not identical in effect. The *ad bellum*

variants are intended to limit State resort to force to a measure of last resort;[101] the *in bello* variants are intended to strike an appropriate balance between the authority to efficiently bring about the submission of an enemy and the humanitarian interest of limiting the inevitable suffering associated with armed conflict.[102]

It is a foundational principle of international law that the *jus ad bellum* restricts resort to force by States to situations of absolute necessity—and necessity justifies only proportional force to return the *status quo ante*.[103] In this sense, national self-defense is strikingly analogous to individual self-defense as a criminal law justification.[104] In both contexts, necessity requires a determination of an imminent threat of unlawful attack, a situation affording no alternative other than self-help measures.[105] Furthermore, even when the justification of self-help is triggered by an imminent threat, both bodies of law strictly limit the amount of force that may be employed to respond to the threat.[106] States, like individuals, may use only that amount of force absolutely necessary to meet the threat and restore the *status quo ante* of security.[107] Using more force than is necessary to subdue the threat is considered excessive, and therefore outside the realm of the legally justified response.[108]

There is no question that these variants of necessity and proportionality are critical to the stability of international relations.[109] The UN Charter reflects an obvious judgment that States are obligated to endeavor to resolve all disputes peacefully, and that resort to force must be conceived as an exceptional measure.[110] A very limited conception of necessity requiring an actual and imminent threat of unlawful aggression serves this purpose by prioritizing alternate dispute resolution modalities over uses of force—the core purpose of the Charter.[111] Even after a justifiable resort to force, the requirement to provide notice to the Security Council[112] reflects this purpose by enhancing the probability of Security Council action to restore international peace and security and thereby nullify the necessity for continued use of force by the State.[113] The *jus ad bellum* proportionality rule also serves this purpose by reducing the risk of uncontrollable escalation.[114] By limiting the justified response to only that amount of force absolutely necessary to reduce the threat, proportionality operates to mitigate the risk of a justified self-defense response morphing into an unjustified use of military force to achieve objectives unrelated to self-defense.[115] As a result, conflagration is limited, thereby enhancing the efficacy of alternate dispute resolution modalities.

These principles make perfect sense when assessing the justification for a national resort to military force outside the umbrella of a Security Council authorization. However, as operational execution parameters, they impose a peacetime self-defense model onto wartime employment of combat power. This is because the *jus in bello* variants of necessity and proportionality have never been understood to

function analogously with their peacetime variants.[116] Instead, these principles have unique meaning in the context of armed conflict.[117] As a result, they are simply not interchangeable with the *ad bellum* variants. As a result, the self-defense targeting concept ostensibly regulates the execution of combat operations with norms inconsistent with those historically and logically suited for that purpose.

Jus in bello necessity means something fundamentally different than self-defense necessity.[118] In the context of armed conflict, necessity justifies a much broader exercise of authority—the authority to employ *all* measures not otherwise prohibited by international law to bring about the prompt submission of the enemy.[119] Unlike self-defense necessity, there is no "measure of last resort" aspect to *jus in bello* necessity.[120] Accordingly, armed conflict triggers authority to employ force in a manner that would rarely (if ever) be tolerated in peacetime, even when acting in self-defense.[121]

The most obvious (and relevant for purposes of this essay) illustration of the difference between *ad bellum* and *in bello* necessity is the authority to employ deadly force against an opponent. Like peacetime self-defense, *jus ad bellum* self-defense justifies a State's use of deadly military force only as a measure of last resort.[122] In contrast, *jus in bello* necessity authorizes the use of deadly combat power against an enemy as a measure of first resort. This necessity justification is implemented through the rule of military objective, which establishes who and what qualify as a lawful object of attack.[123] However, once that status is determined, it is the principle of military necessity[124] that justifies employment of deadly combat power against such "targets" as a measure of first resort.[125]

It is clear that this authority in no way requires manifestation of actual threat to the attacking force.[126] Instead, the status of military objective alone results in a presumption of threat that justifies the use of deadly force.[127] This presumption itself indicates the unique function of *in bello* necessity. This central premise of the *jus in bello* was reflected as early as Rousseau's 1762 *Contract social*, in which he noted that "[w]ar is not a relation between man and man, but a relation between State and State in which individuals are enemies only incidentally, not as men, or citizens, but as soldiers."[128]

Because armed conflict involves a contest between armed belligerent *groups*, and not merely *individual actors*, the use of force authority triggered by military necessity is focused on collective rather than individual effect.[129] In other words, unlike a peacetime exercise of necessity (which focuses on neutralizing an individual threat), wartime[130] necessity focuses on bringing about the submission of the enemy in the corporate and not individual sense.[131] This collective vice individual focus of justifiable violence applies at every level of military operations. At the strategic level, nations seek to break the will of an opponent by demonstrating to

enemy leadership the futility of resistance; at the operational level, commanders seek to impose their will on forces arrayed against them by the synchronized employment of all combat capabilities.[132] The ideal outcome of such employment is the establishment of full-spectrum dominance, allowing the friendly commander to impose his will on the enemy at the time and place of his choosing.[133] This routinely necessitates use of overwhelming combat power at the decisive point in the battle—use that is often far more robust than may be required to overcome resistance at that specific point.[134] At the tactical level, forces may use mass and shock to paralyze enemy forces, disrupt their ability to maneuver and adjust to the fluidity of the battle, and demoralize individual unit members.[135] All of these effects contribute to "the prompt submission of the enemy."[136]

Employing overwhelming combat power at the decisive place and time of battle (known as the principle of mass in the lexicon of military doctrine)[137] would arguably be inconsistent with *jus ad bellum* necessity.[138] Instead, a commander would be restricted from employing any amount of force beyond what was *actually* necessary to subdue the *individual* object of attack.[139] Thus, the assertion that the *jus ad bellum* suffices to justify necessary measures to subdue an opponent misses the point. The question is not whether the resort to force by the State is necessary—a question that certainly must be answered through the lens of *jus ad bellum* necessity.[140] The question is whether the amount of force then employed by the armed forces of the State to subdue the enemy is justified, a question that must be answered through the lens of a very different conception of necessity.[141]

Even more problematic than the extension of *jus ad bellum* necessity as an operational regulatory norm is the extension of *jus ad bellum* proportionality. Like necessity, proportionality is a core principle of both the *jus ad bellum* and the *jus in bello*.[142] And like necessity, the principle has a significantly different meaning in each branch of the *jus belli*.[143] Conflating these disparate principles into a singular regulatory norm substantially degrades the scope of lawful targeting authority and confuses those charged with executing combat operations.

In the *jus ad bellum*, proportionality really means proportionality. This might seem like an odd statement, but it is critical when comparing the two *jus belli* variants of the principle. Proportionality normally means no more than is absolutely necessary to achieve a valid purpose.[144] It is a concept that is normally linked to a justification of necessity.[145] Similarly, under U.S. criminal law, actions in self-defense are invalid if executed with more force than is necessary to reduce the threat. Use of excessive force in that context, because not strictly necessary, is unjustified.[146] The *jus ad bellum* reflects an analogous conception of proportionality.[147] First, the amount of force a State is permitted to employ in self-defense is strictly limited to that amount necessary to reduce the imminent threat.[148] Second, the source of

aggression is the beneficiary of the proportionality constraint.[149] In other words, as in the criminal law context, a State (like an individual) responding to unlawful aggression may be authorized to employ force in self-defense, but is prohibited from responding to the source of aggression with any amount of force in excess of that necessary to reduce that immediate threat.

In contrast, proportionality in the *jus in bello* context *does not* really mean proportionality. Again, this may seem like an odd proposition. Nonetheless, even a cursory review of the *jus in bello* proportionality principle validates this conclusion. First, unlike traditional proportionality, the *jus in bello* variant in no way protects the object of deliberate violence (the lawful target). Instead, the beneficiaries of the protection are the knowing but non-deliberate victims of a deliberate attack—civilians and civilian property in proximity to the lawful target.[150] Protecting these potential victims from what is referred to in colloquial terms as collateral damage and incidental injury reflects a fundamentally different purpose for this proportionality constraint. Unlike in the self-defense context, *jus in bello* proportionality is not directly linked to the necessity of subduing an imminent threat. Instead, the objective of the principle is to protect innocent people and property in the vicinity of a lawful object of attack from the consequences of employing combat power against lawful targets. As for the lawful target itself, the suggestion that an attack might be disproportionate is a legal oxymoron; the status alone justifies that amount of force determined necessary to bring about enemy submission, which justifies use of deadly force as a measure of first resort.[151] The only limitation on that use of force is the prohibition against the use of methods (tactics) or means (weapons) calculated or of a nature to cause superfluous injury or unnecessary suffering. However, this rule is not synonymous with the protections provided by the principle of proportionality, and rarely is considered a limitation on the employment of authorized weapon systems against enemy personnel, facilities or equipment.

Second, beneficiaries of *jus in bello* proportionality (potential victims of collateral damage and incidental injury) are not protected from disproportionate effects, but from excessive effects.[152] An attack is unlawful within the meaning of *jus in bello* proportionality only when the knowing but non-deliberate harm will be *excessive* in relation to the anticipated military advantage. While the principle, like its *ad bellum* counterpart, does trigger a balance of interests, the fulcrum upon which that balance is made is fundamentally different. Excessive is not, nor ever has been, analogous to disproportionate.[153] To begin with, the meaning of the word is far more elusive than that of traditional proportionality. Proportionality connotes something slightly more than necessary to produce an outcome. While this is not a precise concept, it lends itself to objective evaluation. Indeed, juries sitting in

judgment of defendants claiming the justification of self-defense routinely critique the amount of force employed by the defendant, asking whether it was more than necessary to respond to the threat.

Excessive, in contrast, connotes a significant imbalance. While the precise meaning of excessive collateral damage or incidental injury remains nearly as elusive today as it was when the concept was incorporated into Additional Protocol I,[154] one thing is clear: it is not analogous to disproportionate harm as the term is used in relation to traditional proportionality analysis. Instead, it means something more analogous to harm so overwhelming that it actually nullifies the legitimacy of attacking an otherwise lawful target. Thus, the *jus in bello* proportionality principle does not obligate commanders to strictly limit the amount of force employed against a lawful target to the absolute minimum necessary to eliminate a threat. Instead, it obligates the commander to cancel an attack only when the anticipated harm to civilians and/or civilian property is so beyond the realm of reason that inflicting that harm, even incidentally, reflects a total disregard for the innocent victims of hostilities.[155] In this sense, it is almost as if the law imputes an illicit state of mind to a commander because of the disregard of the risk of overwhelming harm to the civilian population.[156]

This *jus in bello* variant of proportionality is further distinguished from its *ad bellum* counterpart because of the nature of operational and tactical targeting. In a traditional self-defense context, the employment of force (individually or nationally) is justified for the sole purpose of eliminating the imminent threat. In armed conflict, the potential effect to be achieved by employing combat power against a lawful target often varies depending on mission requirements. Accordingly, elimination of an individual threat is not the unitary objective of force employment. Instead, commanders leverage their combat power to achieve defined effects against the range of enemy targets in the battlespace, effects that collectively facilitate enemy submission.[157] Destruction is obviously one of these effects. However, doctrinal effects also include disruption, degradation, interdiction, suppression and harassment.[158] Each of these effects requires a different type and amount of force to achieve; and each effect therefore implicates a very different proportionality analysis.

This variable nature of justifiable effects in armed conflict—known in operational terms as "effects-based operations"[159]—is a critical factor in applying the *jus in bello* proportionality principle, and finds no analogue in self-defense targeting. Nations employ force to reduce the threat, and only that amount of force required to do so is justified. Accordingly, if disruption alone is sufficient to restore the non-threat environment, the *jus ad bellum* obligates the State to employ force limited in intensity to achieve this effect. However, no analogous minimum necessary force

obligation exists pursuant to the *jus in bello* proportionality principle. Instead, each employment of force is operationally connected to the broader overall objective of compelling enemy submission. Thus, disruption and bypass of enemy forces may be a selected course of action at one point in the battle, while total destruction may be selected for a similar enemy force at another point in the battle. Obviously, these different selected effects will drive the amount of force employment required, which will in turn influence the risk of collateral damage and incidental injury. Furthermore, under the *ad bellum* construct, proportionality is traditionally assessed at the strategic (macro) level.[160]

The importance of this aspect of *jus in bello* proportionality is reflected in the requirement that the consequences of force employment be assessed against the overall operational objective, and not the individual tactical objective. A number of States included this macro conception of proportionality in understandings when they ratified Additional Protocol I.[161] The motivation to enter such reservations seems obvious: attribution of the value of employing combat power in armed conflict for purposes of balancing the anticipated effects of that employment against collateral damage and incidental injury must be framed by the broader concept of how it contributes to the legitimate operational objective of compelling enemy submission, not through a micro assessment of whether it is sufficient to achieve any given and isolated tactical objective. This aspect of *jus in bello* proportionality once again reflects the most fundamental difference between the two variants of the principle: the beneficiary of the protection is not the object of attack.

Collectively, all of these considerations indicate that extending *jus ad bellum* proportionality to *jus in bello* decision making produces at worst a significant distortion of legitimate operational authority, and at best confusion as to the scope of targeting authority. Are forces executing *jus ad bellum* self-defense missions obligated to employ minimum force to subdue the object of attack? Is the object of attack protected by the principle? Must proportionality be assessed based on an exclusive consideration of reducing the threat presented by the immediate object of attack, or may the broader impact on enemy forces be considered? These questions are nullified by maintaining the traditional division between *jus ad bellum* authority and *jus in bello* regulation. Pursuant to this division, the nation acts in response to an actual or imminent threat and the armed forces executing operations pursuant to that *justification* employ force in order to bring about the prompt submission of the enemy entity posing the threat. In so doing, they balance the risk of collateral damage and incidental injury to civilians and civilian property in the vicinity of enemy objects of attack. But nothing obligates them to employ the minimum amount of force to achieve each individual tactical objective.

V. If It Ain't Broke Don't Fix It: Jus in Bello *Principles and Tactical Clarity*

As noted earlier in this essay, some commentators continue to assert the inapplicability of *jus in bello* principles to the struggle against transnational terrorism on the basis that this struggle cannot qualify as armed conflict, or that if it does it is geographically restricted to zones of traditional combat operations.[162] Some of these commentators also reject the legitimacy of invoking *jus ad bellum* self-defense to attack terrorists. This rejection at least renders their position logically consistent. The same cannot be said for advocates of self-defense targeting: those who assert the legitimacy of invoking the right of national self-defense to respond to the threat of transnational terrorism, but insist such operations cannot normally qualify as armed conflicts triggering the *jus in bello*.[163] If, as they assert, responding to terrorism with military force is justified pursuant to the *jus ad bellum*, then the use of combat capability to execute such missions is, in the view of this author and others, sufficient to qualify as armed conflict. Why is there such aversion to acknowledging *jus in bello* applicability to military operations executed to achieve these legitimate self-defense objectives? The most obvious answer appears to be the conclusion that these operations, while justified as actions in self-defense, fail to satisfy the internationally accepted elements to qualify as armed conflicts.[164]

This self-defense-without-armed-conflict approach reflects a visceral discomfort with the suggestion that States may properly invoke *jus in bello* authority whenever they choose to employ combat power abroad. Transnational armed conflict opponents argue that since the inception of the "Global War on Terror," unless combat operations fit within the traditional Geneva Convention international/internal armed conflict equation, they cannot be characterized as armed conflicts.[165] Others (including the author) have responded to this argument at length in previous articles.[166] However, what is perplexing is that this argument loses all merit when connected with the self-defense targeting theory. That theory presupposes the use of combat power to defend the nation against an imminent and ongoing threat posed by transnational terrorist operatives.

If this is the basis for refusing to acknowledge the applicability of *jus in bello* regulation, it is the ultimate manifestation of willful blindness. Essentially, self-defense targeting proponents implicitly acknowledge operations conducted under this authority involve armed hostilities against transnational non-State threats. However, they then avoid assessing the nature of these hostilities, and how they implicate *jus in bello* applicability, by substituting *ad bellum* principles to provide a regulatory framework for operational execution.[167]

Professor Kenneth Anderson's latest essay on this subject is particularly insightful on the validity of the self-defense targeting concept.[168] An (or perhaps the)

original proponent of self-defense targeting,[169] Anderson candidly acknowledges his reversal on this issue, and that what he calls "naked self-defense" is insufficient to provide comprehensive regulation to transnational counterterror operations.[170] This is an important step in the right direction, for it will better focus debate on the underlying and critical question of whether a nation's resort to force in self-defense against an external non-State opponent can qualify as something other than armed conflict. My response to this question has been consistent: when a State employs combat power in a manner that indicates it has implicitly invoked LOAC principles (by employing deadly force as a measure of first resort), it is engaged in an armed conflict. As a result, it is bound to comply with core LOAC principles.[171] This does not mean that any use of armed forces qualifies as armed conflict. Such a view would certainly be overbroad, and I have argued against this approach consistently in the past. However, when armed forces employed to achieve a national security objective conduct operations pursuant to LOAC-based targeting authority—status-based targeting—that combination of armed forces and engagement authority indicates they are utilizing the "tools" of war, and must respect, at a minimum, the core principles of the "rules" of war.[172]

Irrespective of the relative support for or opposition to this interpretation of LOAC applicability, it remains a critical question that has been obscured by the self-defense targeting alternative. If, as proponents like Professor Paust argue, an exercise of national self-defense against transnational non-State threats is not armed conflict, focus must be redirected to determine the alternative controlling legal framework for regulating the execution of such operations. Can national self-defense be executed with an employment of military (or paramilitary) force falling below the threshold of armed conflict? For example, are there situations where a State when asserting the right of national self-defense is obligated by the *jus ad bellum* proportionality requirement to rely on police powers instead of combat power?

This seems a particularly critical question in an era of transnational non-State threats. Terrorism is obviously first on that list (at least for the United States), but organized criminal syndicates operating across national boundaries, piracy and non-State-generated cyber threats all share similarities with transnational terrorism. All of these threats challenge the national security of multiple States; all of these threats emanate from entities that are rarely organized in traditional military character; all of these threats may compel reliance on military force in response. Yet in the view of many, the lack of organization, territorial control and concerted military-type operations by these threats exclude responses (even with military force) from the category of armed conflict.[173]

Invoking the *jus ad bellum* as a justification to respond to such threats is insufficient to resolve this important question. Instead, resolving this question requires a

careful assessment of the nature of the threat, the nature of the requisite response and the very real consequences of subjecting operational execution to either a law enforcement or armed conflict legal framework. Some experts (the author included) continue to believe that LOAC principles provide an effective and operationally logical framework to regulate any combat operation. But as noted above, this view is based on the conclusion that the key trigger for application of these principles is a use of force that reflects reliance on the principle of military objective. In those situations, there is arguably no value—and indeed substantial risk—in attempting to substitute *jus ad bellum* principles to regulate operational execution. However, there are plausible arguments that the nature of some self-defense missions might justify a more restrictive operational framework based on a hybrid of LOAC and law enforcement principles.[174] What seems clear, however, is that even if true, these principles would be applied as the result of the nature of the threat/response continuum, not as an extension of *jus ad bellum* principles to regulate operational execution.

VI. One Step Forward, One Step Back: Are We Missing Something?

The statement by Legal Advisor Koh following the Bin Laden raid addressing U.S. legal authority for the mission and for killing Bin Laden is perhaps as clear an articulation of a legal basis for a military action ever provided by the Department of State.[175] Indeed, the fact that Koh articulated an official U.S. interpretation of both the *jus ad bellum* and *jus in bello* makes his use of a website titled *Opinio Juris*[176] especially significant (as such a statement by a government official in Koh's position is clear evidence of *opinio juris*). Unlike his earlier statement at a meeting of the American Society of International Law,[177] Koh did not restrict his invocation of law to the *jus ad bellum*. Instead, he asserted the U.S. position that the mission was justified pursuant to the inherent right of self-defense, but also that Bin Laden's killing was lawful pursuant to the *jus in bello*. Koh properly noted that as a mission executed in the context of the armed conflict with al Qaeda, the LOAC imposed no obligation on U.S. forces to employ minimum necessary force. Instead, Bin Laden's status as an enemy belligerent justified the use of deadly force as a measure of first resort, and Bin Laden bore the burden of manifesting his surrender in order to terminate that authority. Hence, U.S. forces were in no way obligated to attempt to capture Bin Laden before resorting to deadly force.[178]

A recent statement made by John Brennan, Deputy National Security Advisor for Homeland Security and Counterterrorism, further clarifies the current administration's justification for using deadly force as a first resort against al Qaeda operatives:

> The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that . . . we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. . . .
>
> This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define "imminence."
>
> We are finding increasing recognition in the international community that a more flexible understanding of "imminence" may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. . . . Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an "imminent" attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.[179]

These two articulations of the Obama administration's interpretation of international law reflect an important evolution of the U.S. legal framework for military operations directed against transnational terrorist operatives. They leave virtually no doubt that the United States has embraced the concept of transnational armed conflict, that the nation is engaged in an armed conflict against al Qaeda, that this armed conflict is non-international within the meaning of the *jus in bello* and that it transcends national borders. There is also no doubt that the United States invoked the *jus in bello* as the framework to regulate execution of the Bin Laden mission. Koh's clear emphasis on the *in bello* variants of the principles of distinction and proportionality cannot be read as meaning anything else.

Koh, however, included one qualifier that suggests possible uncertainty. Rejecting the criticism that attacks such as that on Bin Laden are unlawful extrajudicial killings, Koh noted that "a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force."[180] What is perplexing is the "or" in the statement. Koh preserved a division between armed conflict *and* other actions in legitimate self-defense. It is significant that he asserts the right to kill as a measure of first resort in either context (which seems to rebut any inference that he is suggesting some actions in self-defense must be exercised pursuant to a law enforcement legal

framework). Why was that "or" necessary? What was Koh suggesting if he was not suggesting a law enforcement limitation to some actions in self-defense?

One possible answer is that Advisor Koh is simply preserving the authority of the United States to act in limited self-defense against an imminent terrorist threat that is not considered associated with al Qaeda or the Taliban. In such situations, the attack would accordingly be unrelated to the existing armed conflict the United States asserts is ongoing with these enemies. If this was the meaning of his use of the "or," it produces little confusion: imminent terrorist threats to the United States may justify military action as an exercise of *jus ad bellum* self-defense, and use of force for such a purpose triggers LOAC applicability. However, distinguishing armed conflict *from* self-defense with an "or" could also be interpreted as an endorsement of self-defense targeting, suggesting that uses of military force are regulated by the *jus in bello* or *jus ad bellum* principles. This is an unnecessary dichotomy, and hopefully one that Advisor Koh did not intend. There is no viable reason to attempt to establish such a distinction; as discussed in this essay, the suggestion that *ad bellum* principles are interchangeable with their *in bello* variants is flawed and operationally confusing.[181]

VII. Conclusion

Transnational non-State threats are not going away any time soon. Indeed, it is likely that identifying a rational and credible legal basis for national response to such threats will continue to vex policymakers and legal advisors in the coming years. These threats will almost certainly lead States to continue to invoke the inherent right of national and/or collective self-defense to justify extraterritorial responses. This legal basis is not, however, an adequate substitute for defining the legal framework to regulate the operational exercise of this self-defense authority. Nonetheless, the advent of the self-defense targeting theory purports to be just that.

The *jus ad bellum* was never conceived as a legal framework to regulate the execution of military operations. Instead, it is analogous to the law that permits individuals to act in self-defense when faced with an imminent threat of death or grievous bodily harm. Like the domestic self-defense concept, *jus ad bellum* self-defense reflects a necessity foundation based on minimizing situations where States resort to force and limiting the risk of conflagration resulting from such resort. Self-defense, as a form of self-help, is intended to be a measure of last resort, and the *jus ad bellum* principles of necessity and proportionality reflect that foundation. In contrast, the *jus in bello* variants of these two principles are based on a fundamentally different foundation: facilitating the prompt submission of operational opponents in the collective—not individual—sense. Accordingly, the scope

of permissible violence justified by the *jus in bello* is fundamentally different from that tolerated through the exercise of peacetime self-defense.

Attempting to substitute *jus ad bellum* principles for their *jus in bello* variants is not only confusing; it fundamentally degrades target engagement authority. As discussed in this essay, this degradation is the result of imposing peacetime concepts on wartime operations. It may be conceivable that some actions in self-defense—especially in response to non-State threats—may permit only a law enforcement–type response. For example, if members of Mexican drug cartels began engaging in violence on the U.S. side of the border requiring, in the judgment of the President, some action to neutralize this threat, armed forces might be used to augment law enforcement officers during a mission to capture cartel members for subsequent trial. In such a situation, the use of armed force might be subject to law enforcement–type use of force authority. However, even if such situations are conceptually lodged within the scope of national self-defense authority, this cannot justify the wholesale abandonment of *jus in bello* principles. Instead, the nature of the threat and the authority invoked by the State to respond to that threat must dictate the existence of armed conflict. When States utilize armed forces and grant them the authority to engage opponents pursuant to the LOAC rule of military objective—an invocation revealed by the employment of deadly force as a measure of first resort—it indicates the existence of an armed conflict. It is the *jus in bello*, and not the *jus ad bellum*, that must regulate such operations.

Notes

1. Eyal Benvenisti, *Rethinking the Divide Between* Jus ad Bellum *and* Jus in Bello *in Warfare Against Nonstate Actors*, 34 YALE JOURNAL OF INTERNATIONAL LAW 541 (2009) (defining *jus in bello* as "the law governing the conduct of hostilities").

2. *Id.* (defining *jus ad bellum* as "the law governing resort to force").

3. Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a "Legal Geography of War"* 7 (WCL Research Paper No. 2011-16, 2011), *available at* http://ssrn.com/abstract=1824783.

4. *Id.*

5. Nicholas Schmidle, *Getting Bin Laden: What Happened That Night in Abbottabad*, THE NEW YORKER, Aug. 8, 2011, at 34, *available at* http://www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle (detailing the raid into Pakistan executed without the permission or knowledge of the Pakistani government by American forces to kill Osama Bin Laden).

6. *U.S. Attorney General: Bin Laden Raid "Lawful,"* AGENCE FRANCE-PRESSE (May 4, 2011), *available at* http://www.google.com/hostednews/afp/article/ALeqM5gYsheAr3sLXs6ERJ-d6pkkoULHKg?docId=CNG.e73a3d4ada4c822cbcaee9345abb3385.d1 (quoting White House spokesman Jay Carney: there was "no question" the raid was legal and that it was "an act of national self-defense").

7. *The Killing of bin Laden: Was It Legal?*, CNN WORLD (May 4, 2011), http://articles.cnn.com/2011-05-04/world/bin.laden.legal_1_al-qaeda-leader-bin-cia-director-leon-panetta?_s=PM:WORLD (again quoting White House spokesman Jay Carney, "[the raid] was conducted in a manner fully consistent with the laws of war").

8. *U.S. Attorney General: Bin Laden Raid "Lawful,"* *supra* note 6 (discussing the shoot-first-or-capture orders to the SEALs who killed Osama Bin Laden).

9. *See* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security, Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an. *See also* Attorney General Eric Holder, Remarks at Northwestern University School of Law (Mar. 5, 2012), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html; Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 101, 108 (2010).

10. Vogel, *supra* note 9, at 114.

11. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE JOURNAL OF INTERNATIONAL LAW 47, 67 (2009) (asserting the use of force must be necessary and proportional with respect to both the *jus ad bellum* and the *jus in bello*).

12. Geoffrey S. Corn & Eric T. Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL LAW REVIEW 46, 78 (2009); Sloane, *supra* note 11, at 69–78.

13. *See generally* Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict*, 21 EMORY INTERNATIONAL LAW REVIEW 601 (2007).

14. *See* Anderson, *supra* note 3.

15. *Id.* at 4.

16. Christine Gray, *President Obama's 2010 United States National Security Strategy and International Law on the Use of Force*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 35, 43 (2011). *See* Headquarters, Department of the Army, FM 3-60, The Targeting Process ¶ 1-14 (2010).

17. *See generally* Geoffrey S. Corn & Eric T. Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMPLE LAW REVIEW 787 (2008); Rebecca Ingber, *Untangling Belligerency From Neutrality in the Conflict with Al-Qaeda*, 47 TEXAS INTERNATIONAL LAW JOURNAL 75, 80–81 (2011).

18. Corn & Jensen, *supra* note 17.

19. *See* William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE JOURNAL OF INTERNATIONAL LAW 295, 303–6 (2004). The International Court of Justice considered a case between Iran and the United States, commonly known as *Oil Platforms*, named for Iranian platforms attacked by the United States in retaliation for Iranian strikes on Kuwaiti vessels under U.S. control. *Id.* 296–98. *See also* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6). The Court dismissed the case, but not before spending a substantial amount of time discussing self-defense in the realm of international law. *See generally* Taft, *supra*, at 296–98.

20. *See generally* Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 295 (2007) (a detailed discussion of the term "transnational armed conflict"); Robert J. Delahunty & John C. Yoo, *What Is the Role of International Human Rights Law in the War on Terror?*, 59 DEPAUL LAW REVIEW 803 (2010).

21. Corn, *supra* note 20, at 300–10; Delahunty & Yoo, *supra* note 20, at 825–34.

22. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

23. *See* Fionnuala Ní Aoláin, *Hamdan and Common Article 3: Did the Supreme Court Get It Right?*, 91 MINNESOTA LAW REVIEW 1523, 1525–34 (2007); Corn, *supra* note 20, at 300–301 (discussing the traditional two LOAC triggers used before the concept of transnational conflict emerged).

24. *See* International and Operational Law Department, The Judge Advocate General's Legal Center and School, Department of the Army, Law of War Workshop Deskbook 25–34 (Bill J. Brian et al. eds., 2004); *see also* UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 3.1 (2004).

25. *See* COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 19–23 (Jean S. Pictet ed., 1952). A similar commentary was published for each of the four Geneva Conventions. Because Articles 2 and 3 are identical—or common—to each Convention, however, the commentary for these articles is also identical in each of the four commentaries.

26. *See* Ní Aoláin, *supra* note 23; Corn, *supra* note 20, at 300.

27. Corn, *supra* note 20, at 307.

28. *Id.* at 309.

29. *Id.* at 305 (noting that the conflict between Israel and Hezbollah and the United States' removal of General Noriega did not fall into either category).

30. *Id.* at 300 (explaining that the only two triggers of war as set out by the Geneva Convention–based law-triggering paradigm are international armed conflict between two sovereign nations and non-international armed conflict taking place within the borders of a State that is a party to the conflict).

31. *See* U.S. Department of Defense, Directive 5100.77, DoD Law of War Program (1998) [hereinafter 1998 DoD Law of War Program]. *See also* Corn, *supra* note 20, at 314 ("Fortunately, the policy-based application of the principles of the law to the entire range of combat operations has mitigated this uncertainty and provided a consistent regulatory framework at the operational and tactical level of command."); David E. Graham, *Counterinsurgency, the War on Terror, and the Laws of War: A Response*, 95 VIRGINIA LAW REVIEW IN BRIEF 79, 85–86 (2009) (citing American policy-based approach to law of war applicability and its impact on counterinsurgency operations).

32. *See* Corn, *supra* note 20, at 314.

33. *See* Memorandum from Assistant Attorney General Jay S. Bybee to Counsel to the President Alberto R. Gonzales and General Counsel of the Department of Defense William J. Haynes II, Application of Treaties and Laws to al Qaeda and Taliban Detainees 1 (Jan. 22, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf [hereinafter Bybee Application of Treaties and Laws Memorandum] (asserting treaties that form the laws of armed conflict do not apply to the conditions of detention and the procedures for trial of captured al Qaeda or Taliban members); *see also* Memorandum from Assistant Attorney General Jay S. Bybee to Counsel to the President Alberto R. Gonzales, Status of Taliban Forces under Article 4 of the Third Geneva Convention 1 (Feb. 7, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020207.pdf (asserting captured members of

the Taliban do not meet the requirements under the Geneva Convention Relative to the Treatment of Prisoners of War under Article 4(A)(1), (2) or (3) and thus can be held indefinitely without convening a tribunal); Memorandum from President George W. Bush to Vice President Dick Cheney, Regarding Humane Treatment of al Qaeda and Taliban Detainees 2 (Feb. 7, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf (adopting the recommendations of Bybee to not apply Article 3 of Geneva Convention III to detained al Qaeda or Taliban members).

34. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIFORNIA LAW REVIEW 693, 701 (2009) (discussing the law of war allowance of preventive detention, and the *Hamdi* decision that allowed even U.S. citizens to be preventively detained in some circumstances).

35. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2009).

36. Hamdan v. Rumsfeld, 548 U.S. 557, 628–30 (2006) (discussing the government's position that Hamdan was not entitled to the full protections of the Geneva Conventions because the conflict did not clearly fit into Article 2 or 3 of the Conventions).

37. *Id.*

38. *Id.*

39. *See generally* Michael F. Lohr & Steve Gallotta, *Legal Support in War: The Role of Military Lawyers*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 465 (2003) (discussing the role of the military lawyer in conflicts ranging from declared State-on-State war to the war on terror). *See also* 1998 DoD Law of War Program, *supra* note 31. The exact policy mandate required that the heads of the DoD components "[e]nsure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." *Id.*, ¶ 5.3.1. *See also* U.S. Department of Defense, Directive 2311.01E, DoD Law of War Program ¶ 4.1 (2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf [hereinafter Directive 2311.01E] ("Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.").

40. *See generally* Corn, *supra* note 20; Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 339, 342 (2010).

41. *See* Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon,* 33 AMERICAN UNIVERSITY LAW REVIEW 145, 147 (1983) (utilizing the term "internationalized non-international armed conflict" to denote an armed conflict between State and non-State forces that transcends national boundaries).

42. Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO LAW REVIEW 2461, 2512 (2008) (asserting many scholars believe these types of conflicts should be classified as law enforcement operations and conducted accordingly).

43. *See generally* Benvenisti, *supra* note 40 (entire essay discussing "tension between the two conflicting visions on the regulation of transnational armed conflict").

44. *See* Corn & Jensen, *supra* note 12, at 66 (discussing Professor Yoram Dinstein's classification of counterterrorism activities as extraterritorial law enforcement).

45. 548 U.S. 557 (2006).

46. *Id.* at 629–32.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See, e.g.,* Corn & Jensen, *supra* note 12; Michael Greenberger, *You Ain't Seen Nothin' Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches*, 66 MARYLAND LAW REVIEW 805, 833–34 (2007).

51. Corn & Jensen, *supra* note 12.

52. Michael W. Lewis, *International Myopia: Hamdan's Shortcut to "Victory,"* 42 UNIVERSITY OF RICHMOND LAW REVIEW 687, 706 (2008) ("[T]he *Hamdan* court defined armed 'conflict not of an international character,' determined the requirements of a regularly constituted court, and decided what judicial guarantees are recognized as indispensable by civilized people in just over five pages . . . without significantly reviewing the drafting history of Common Article 3 and the Additional Protocols, or investigating any state practice outside this country."). *See* Bybee Application of Treaties and Laws Memorandum, *supra* note 33, at 10 (asserting the conflict with al Qaeda does not fit into either of the two traditional categories of armed conflict as established by Articles 2 and 3 of the Geneva Conventions).

53. *See* Vogel, *supra* note 9, at 132 (mentioning that although a majority of the United States' combat operations against al Qaeda are in Afghanistan, it does use drone strikes against al Qaeda operatives in Yemen and Somalia). *See also* Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER FORUM OF WORLD AFFAIRS 55, 62 (2003) (mentioning one such attack in Yemen in 2004). *See* International Law Association, Use of Force Committee, Final Report on the Meaning of Armed Conflict in International Law 29–32 (2010), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022 [hereinafter Final Report on the Meaning of Armed Conflict] (discussing the criteria of intensity and territorial scope aspects of classifying hostilities as armed conflict).

54. Final Report on the Meaning of Armed Conflict, *supra* note 53.

55. *Id.* at 30.

56. Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa'eda, the Taliban, and Associated Forces—the First Year*, 30 PACE LAW REVIEW 340, 353–54 (2010) (mentioning President Obama's campaign desire to dismantle key elements of President Bush's policies on combating terrorism and his actions shortly after entering office attempting to do so).

57. *See* Anderson, *supra* note 3, at 1 (mentioning the Obama administration's expanded use of drone strikes in countries outside of Afghanistan).

58. Tess Bridgeman, *The Law of Neutrality and the Conflict with Al Qaeda*, 85 NEW YORK UNIVERSITY LAW REVIEW 1186, 1191 (2010) (discussing the Obama administration's immediate stance that those taken prisoner in Afghanistan would be detained pursuant to the law of armed conflict). *See also* Robert M. Chesney, *Who May Be Held? Military Detention through the Habeas Lens*, 52 BOSTON COLLEGE LAW REVIEW 769, 830–31 (2011) (discussing the Obama administration's decision early in March 2009 to continue to assert its authority "to detain without charge pursuant to a substantive detention standard not much different from the Combatant Status Review Tribunal (CSRT) standard of the Bush administration").

59. Vogel, *supra* note 9, at 109 (mentioning the United States' use of drone strikes in Pakistan, Somalia and Yemen).

60. Jeff Bovarnick, *A Review of: The War on Terror and the Laws of War: A Military Perspective*, 44 NEW ENGLAND LAW REVIEW 885, 892 (2010) (book review) (citing the use of deadly force as the most basic right under the laws of armed conflict). *See also* Schmidle, *supra* note 5 (noting the "killing as a first resort" mentality was present, because nobody on the mission to kill Osama Bin Laden wanted detainees).

61. Bovarnick, *supra* note 60, at 892 (again noting that the use of deadly force as a first resort in military operations is inconsistent with law enforcement norms).

62. *See generally* Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 JOURNAL OF TRANSNATIONAL LAW AND POLICY 237 (2010) (the entire article discussing this new alterative legal framework).

63. *See* Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law, in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346 (Benjamin Wittes ed., 2009). Kenneth Anderson is a professor of law at the Washington College of Law at American University. Professor Anderson is also a visiting fellow at the Hoover Institution on War, Revolution and Peace, Stanford University.

64. *See* Anderson, *supra* note 3, at 15. *See also* Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 331, 354 (2009) ("Although in theory a single adjudicator could hear both the resort to force and conduct questions [*jus ad bellum* and *jus in bello*], and simply maintain perfect independence, in reality the same tribunal—even with separate panels—would tend to conflicts of interest, path dependence between the two *supposedly* independent areas.") (emphasis added).

65. *See* Paust, *supra* note 62, at 262 (justifying the ability of the United States to capture Osama Bin Laden or other members of al Qaeda in Afghanistan or other countries simply because the hostilities with al Qaeda were commenced under a notion of self-defense). *See also* Jordan Paust, *Permissible Self-Defense Targeting and the Death of Bin Laden*, 39 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 569 (2011). Professor Paust is the Mike and Teresa Baker Law Center Professor of International Law at the Law Center of the University of Houston.

66. Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE JOURNAL OF INTERNATIONAL LAW 325, 326 (2003) ("the United States simply cannot be at war with bin Laden and al Qaeda").

67. *See id. generally*.

68. *See* Paust, *supra* note 62, at 279 ("As this article affirms, self-defense can be permissible against non-state actor armed attacks, and measures of self-defense can occur in the territory of another state without special consent of the other state or imputation of the armed attacks to that state as long as the measures of self-defense are directed against the non-state actors.").

69. *See* Anderson, *supra* note 3, at 7 (labeling the use of force under self-defense that would not be part of an armed conflict "naked self-defense").

70. *See* Paust, *supra* note 62, at 270 (stating reasonable necessity and proportionality are integrated into the law of armed conflict under the Geneva Conventions). *See also* Paust, *supra* note 65, at 572–73 (stating the need to conduct self-defense targeting within the principles of distinction, reasonable necessity and proportionality to protect the general human right to life).

71. *See generally* Paust, *supra* note 65, at 577–78 (discussing generally and specifically how the justification for self-defense targeting of non-State actors determines which targets are allowed to be attacked and where, as long as such decisions are based on necessity and proportionality).

72. *See* Benvenisti, *supra* note 1, at 541 (stating the traditional clear distinction between the *jus ad bellum* and the *jus in bello*).

73. G.I.A.D. Draper, *Ethical and Juridical Status of Constraints in War*, 55 MILITARY LAW REVIEW 169, 174 (1972) (the paper was first presented by Colonel Draper at the Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, on September 10, 1971).

74. *See* Sloane, *supra* note 11, at 48 (discussing the Special Court for Sierra Leone's Appeals Chamber's clearly separating *jus ad bellum* and *jus in bello* by refusing to justify a defendant's actions based on the legitimacy of his right to fight).

75. *Id.* at 65 (discussing the UN Charter's application of *jus in bello* to all belligerents, regardless of their *jus ad bellum* status).

76. *Id.* ("Articles 1 and 2 of the Geneva Conventions of 1949 affirmed that the *jus in bello* codified in those treaties applied in 'all circumstances' and to 'all cases of declared war or of any other armed conflict.'").

77. *Id.*

78. *See* GC I, GC II, GC III, GC IV, all *supra* note 22. *See also* Sloane, *supra* note 11, at 65.

79. *See* COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 22 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY III].

80. *Id.* at 28–35. *See also* Geoffrey S. Corn, *"Snipers in the Minaret—What Is the Rule?" The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAWYER, July 2005, at 36 (endnote 27 discusses this topic at great length, citing to the *Commentary, supra*).

81. *See* COMMENTARY III, *supra* note 79, at 22.

82. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628–33 (2006) (finding the classification or description of the conflict between the United States and al Qaeda did not impact the rights detainees were entitled to under the Geneva Conventions). *See also* Sloane, *supra* note 11, at 75 (recognizing Common Article 3 of the Geneva Conventions' application in all cases of armed conflict as "custom," with no mention of *jus ad bellum*) and at 48 (discussing the Special Court for Sierra Leone's Appeals Chamber's clearly separating *jus ad bellum* and *jus in bello* by refusing to justify a defendant's actions because of the legitimacy of his right to fight); Directive 2311.01E, *supra* note 39 (ordering all U.S. armed forces to comply with principles of the law of war during all military operations).

83. *See, e.g.*, Directive 2311.01E, *supra* note 39.

84. *See* Antoine Bouvier, *Assessing the Relationship between* Jus in Bello *and* Jus ad Bellum*: An "Orthodox" View*, 100 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 109, 110 (2006) ("The idea that both branches [*jus ad bellum* and *jus in bello*] operate autonomously is firmly rooted in (1) the legal literature, (2) State practice, (3) the jurisprudence of national and international courts and (4) several treaties."). *See also* COMMENTARY III, *supra* note 79.

85. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts pmbl., June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] ("Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.").

86. *See* Directive 2311.01E, *supra* note 39 (ordering all U.S. armed forces to comply with principles of the law of war (*jus in bello*) during all military operations); *see also* 1998 DoD Law of War Program, *supra* note 31 (the predecessor to DoD Directive 2311.01E, which mandated that heads of Defense components "[e]nsure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations").

Whether this policy directive reflects an emerging principle of customary international law that requires compliance with core LOAC principles during all military operations as a "default" setting is a question beyond the scope of this essay. However, in prior articles this author has asserted that the policy does, at a minimum, suggest that a strict interpretation of the situations that trigger application of these core principles is inconsistent with the underlying objective of the Geneva Conventions to ensure that no military operation falls outside the scope of humanitarian regulation. *See* Corn, *supra* note 20.

87. *See generally* Paust, *supra* note 62 (relying simply on the right of self-defense, not on the illegality of the attack by al Qaeda, to defend the United States' use of drone attacks against non-State actors).

88. *See generally id.* (discussing self-defense targeting in great detail throughout the article).

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* Sloane, *supra* note 11, at 104 (recognizing the traditional separation—that *ad bellum* judgments should not have an impact on *in bello* obligations). *See also* MICHAEL WALZER, JUST AND UNJUST WARS 21 (4th ed. 2006) (referring to *ad bellum* and *in bello* principles as "logically independent").

93. *See* Sloane, *supra* note 11, at 50 (discussing the troubling results of conflating *ad bellum* and *in bello* principles, citing examples such as the 1999 NATO conduct in Serbia and the Bush administration's authorization of torture against detainees).

94. *See* Benvenisti, *supra* note 1, at 541–42 (mentioning the current scholarly distinction between *ad bellum* and *in bello* principles).

95. *Id.* at 546 (discussing the greater impact that *ad bellum* principles have over *in bello* principles in military operations).

96. *See* Sloane, *supra* note 11, at 49–50 (discussing actions in Sierra Leone's civil war, NATO's actions against Serbia and the United States' post-9/11 torture of detainees and the inappropriate attempts of each relevant party to justify its *in bello* conduct with the legitimacy of its *ad bellum* cause).

97. *See* Benvenisti, *supra* note 1, at 546 ("the percolation of *ad bellum* considerations into the *jus in bello* proportionality analysis can prove a rather sophisticated and effective constraint on the stronger regular army").

98. *See* Sloane, *supra* note 11, at 103 (discussing the benefits of having separated *ad bellum* and *in bello* principles: *ad bellum* principles to prohibit the use of force except in self-defense situations and *in bello* principles to include necessity, proportionality and discrimination in conducting armed conflict).

99. *See* Paust, *supra* note 62, at 250 (justifying the United States' use of non-State actor targeting by drones across international borders as a tool in the war against al Qaeda based on the necessity of self-defense).

100. *See* Alexander Orakhelashvili, *Overlap and Convergence: The Interaction between* Jus ad Bellum *and* Jus in Bello, 12 JOURNAL OF CONFLICT & SECURITY LAW 157, 164 (2007) (citing the existence of the concept of necessity in both the *jus ad bellum* and *jus in bello*). *See also* Sloane, *supra* note 11, at 52–53 (discussing both *ad bellum* and *in bello* proportionality) and at 67 ("any use of force must be necessary and proportional relative to both the *jus ad bellum* and the *jus in bello*").

101. *See* Michael Novak, *Just Peace and the Asymmetric Threat: National Self-Defense in Uncharted Waters*, 27 HARVARD JOURNAL OF LAW & PUBLIC POLICY 817, 827 (2004) (including the use of war as a last resort in considerations for *jus ad bellum*).

102. *See id.* (including proportionality and discrimination between combatants and noncombatants as considerations for the *jus in bello*).

103. *See id.* (*ad bellum* principles restrict the use of force to only proportionate means when necessary). *See also* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 194 (June 27); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 142 (July 8); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 43

(Nov. 6); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 147 (Dec. 19).

104. DAVID RODIN, WAR AND SELF-DEFENSE 110–11 (2002) (stating it is "universally acknowledged that the right of national-defense is bounded by the same intrinsic limitations as the right of personal self-defense").

105. *See* Shana Wallace, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 UNIVERSITY OF CHICAGO LAW REVIEW 1749, 1766–77 (2004) (comparing the necessity and proportionality requirements of personal and national self-defense).

106. *Id.*

107. *Id.*

108. *Id.*

109. Thomas Yoxall, *Iraq and Article 51: A Correct Use of Limited Authority*, 25 INTERNATIONAL LAWYER 967, 986 (1991) (discussing the UN Charter requirements of necessity and proportionality in the use of force in self-defense).

110. U.N. Charter art. 1.

111. *Id.*

112. *Id.*, art. 51.

113. Scott S. Evans, *International Kidnapping in a Violent World: Where the United States Ought to Draw the Line*, 137 MILITARY LAW REVIEW 187, 240 (1992) (detailing purposes for the Article 51 notification requirement, including creating awareness of the aggression).

114. Brian L. Bengs, *Legal Constraints upon the Use of a Tactical Nuclear Weapon Against the Natanz Nuclear Facility in Iran*, 40 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 323, 370 (2008) (*ad bellum* proportionality "is intended to prevent a state from overreacting to a situation and escalating the level of conflict").

115. *Id.* This is not to suggest the absence of uncertainty related to the scope of action permitted pursuant to the *jus ad bellum* principle of proportionality. Indeed, this remains an area of significant international legal debate. However, what seems relatively clear is that whatever the permissible scope of action, the objective is strictly limited to reduction of the imminent threat that triggers the right of national or collective self-defense. As Professor David Kretzmer notes in the abstract for his forthcoming analysis of *jus ad bellum* proportionality:

> While force used by a state in self-defence must meet the demands of proportionality there is confusion over the meaning of the term in this, ius ad bellum, context. One source of confusion lies in the existence of two competing tests of proportionality, the "tit for tat" and the "means-end" tests. Since the legality of unilateral use of force by a state depends on the legitimacy of its aim—self-defence against an armed attack—the "means-end" test would seem more appropriate. However, there is no agreement over the legitimate ends of force employed to achieve this aim. Is the defending state limited to halting and repelling the attack that has occurred, or may it protect itself against future attacks by the same enemy? May a state that has been attacked use force in order to deter the attacker from mounting further attacks? The "means-end" test of proportionality rests primarily on the necessity of the means used to achieve legitimate ends. *Disagreements over proportionality are in this context usually really disagreements over those ends.* While the appropriate test in this context is generally the "means-end" test, in some cases, such as use of force in response to a limited armed attack, the "tit for tat" test of proportionality might be more appropriate.

See David Kretzmer, *The Inherent Right of Self-Defence and Proportionality in* Ius ad Bellum, EUROPEAN JOURNAL OF INTERNATIONAL LAW (forthcoming 2012) (emphasis added), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014282; *see also* Taft, *supra* note 19

(criticizing the overly restrictive interpretation of *jus ad bellum* proportionality adopted by the International Court of Justice in the *Oil Platforms* decision).

116. *See* Sloane, *supra* note 11, at 67 ("The *in bello* concepts of necessity and proportionality have *ad bellum* analogues—with quite distinct meanings.").

117. *Id.* at 74 (stating conflating the proportionality of *jus ad bellum* and *jus in bello* would allow a nation's self-serving *ad bellum* reason for engaging in conflict to impact its *in bello* conduct during the hostilities with the ultimate outcome being negative for the soldiers in the field).

118. Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL 754 (1998) (stating necessity in reference to self-defense pertains to when force may be resorted to, contrasted to necessity in the *jus in bello* context, which determines how force may be used).

119. *See* Department of the Army, FM 27-10, The Law of Land Warfare ¶ 3(a) (1956); David Kaye, *Khashiyev & Akayeva v. Russia; Isayeva, Yusupova & Basayeva v. Russia; Isayeva v. Russia*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 873, 880 (2005) (*jus in bello* necessity's function is to ensure that force is used to obtain a military objective). *See also* Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 177, 181 (2007) (*in bello* necessity forces a party to strike a balance between obtaining military victory and observing the needs of humanity) and 183 (*in bello* necessity allows the pursuit of military objectives, which includes disabling as many enemy combatants as possible, so long as it is done in a manner that minimizes suffering and damage); Department of the Air Force, AFP 110-31, International Law—The Conduct of Armed Conflict and Air Operations 1-5–1-6 (1976) [hereinafter AFP 110-31] ("Military necessity is the principle which justifies measures of regulated force not forbidden by international law which are indispensable for securing the prompt submission of the enemy, with the least possible expenditures of economic and human resources."); William A. Wilcox Jr., *Environmental Protection in Combat*, 17 SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL 299, 302 (1993) ("The concept of military necessity provides that a combatant is justified in applying any force necessary to secure the complete submission of the enemy as soon as possible—as long as the means are not prohibited by provisions of the laws of war.").

120. *See* Christian Henderson, *The 2010 United States National Security Strategy and the Obama Doctrine of "Necessary Force,"* 15 JOURNAL OF CONFLICT & SECURITY LAW 403, 423 (2010) (identifying that the condition in necessity as it applies to self-defense is that the use of force be used only as a measure of last resort). *See also* Kaye, *supra* note 119, at 880 ("Necessity in the *jus in bello* does not require force to be a last resort.").

121. *See generally* Laurie R. Blank & Benjamin R. Farley, *Characterizing US Operations in Pakistan: Is the United States Engaged in Armed Conflict?*, 34 FORDHAM INTERNATIONAL LAW JOURNAL 151, 187 (2011) (distinguishing between armed conflict, which grants the authority to use force as a first resort, and law enforcement, which only allows force in self-defense).

122. *See* Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 429, 447 (2010) ("*jus ad bellum* is fundamentally about promoting peaceful resolution of conflicts and balancing restraints on aggression with legitimate self-defense").

123. *See* AP I, *supra* note 85, art. 52(2) ("Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

124. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1389 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS] ("Military necessity means the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war.").

125. As long as the use of force as a first resort comports with military necessity, it is valid in armed conflict. *See* Blank & Farley, *supra* note 121, at 187 (citing the ability to use force as a first resort as the primary distinction between armed conflict and law enforcement).

126. *See* Sean Watts, *Reciprocity and the Law of War*, 50 HARVARD INTERNATIONAL LAW JOURNAL 365, 423 (2009) (discussing the authority to use force against persons and property as an authority under the law of war, outside the scope of self-defense).

127. *See* Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 39, 114 (2010) (noting that a property's "status as a military objective justifies attacks being directed against it").

128. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 11 (G.D.H. Cole trans., J. M. Dent & Sons Ltd. 1913) (1762).

129. *See* 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 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 831, 904–5 (2010) ("the principle of military necessity as defined in national military manuals is addressed to governments and senior military commanders and does not intend to restrict the individual soldier's use of force against the enemy").

130. This term is used colloquially to indicate situations of armed conflict that trigger the *jus in bello*.

131. *See* Melzer, *supra* note 129, at 904–5.

132. *See* Headquarters, Department of the Army, FM 100-5, Operations 6-15 (1993) [hereinafter FM 100-5] ("Commanders set favorable terms for battle by synchronizing ground, air, sea, space, and special operations capabilities to strike the enemy simultaneously throughout his tactical and operational depths.").

133. *Id.* at 2-6 ("Army forces in combat seek to impose their will on the enemy.").

134. *See generally id.* at 8-4 (the term "overwhelming combat power" and nearly identical terms are used twenty-two times over the course of the manual).

135. *Id.* ("The attack must be violent and rapid to shock the enemy and to prevent his recovery as forces destroy his defense.").

136. AFP 110-31, *supra* note 119, at 1-5–1-6 (The U.S. Air Force defines military necessity as the "principle which justifies measures of regulated force not forbidden by international law which are indispensable for securing the prompt submission of the enemy, with the least possible expenditures of economic and human resources.").

137. FM 100-5, *supra* note 132, at 2-4 ("Mass the effects of overwhelming combat power at the decisive place and time. Synchronizing all the elements of combat power where they will have decisive effect on an enemy force in a short period of time is to achieve mass.").

138. *See* Sloane, *supra* note 11, at 84 (stating *ad bellum* necessity allows for only the use of force necessary to rebut a current and immediate threat).

139. *Id.*

140. Michael N. Schmitt, *The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches*, 37 AIR FORCE LAW REVIEW 105, 116 (1994) ("*Jus ad bellum* necessity queries whether force was necessary at all.").

141. Jill M. Sheldon, *Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?*, 20 FORDHAM INTERNATIONAL LAW JOURNAL 181, 239 (1996) (discussing how the amount of force that should be used in a conflict is determined by balancing military necessity and humanitarian concerns and by considering if the goal of harming the enemy can be achieved by causing less suffering).

142. *See* Sloane, *supra* note 11, at 52–53 (discussing both *ad bellum* and *in bello* proportionality) and at 67 ("Any use of force must be necessary and proportional relative to both the jus ad bellum and the jus in bello.").

143. *Id.* at 73 (discussing proportionality's "distinct *ad bellum* and *in bello* components").

144. *Just War Theory*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, http://www.iep.utm.edu/justwar/#H2 (last visited Oct. 10, 2011); *see also* Taft, *supra* note 19, at 305 ("[P]roper assessment of . . . proportionality . . . require[s] looking not only at the immediately preceding armed attack, but also at whether it was part of an ongoing series of attacks, what steps were already taken to deter future attacks, and what force could reasonably be judged to be needed to successfully deter future attacks.").

145. Taft, *supra* note 19, at 303 ("[I]t is generally understood that the defending State's actions must be both 'necessary' and 'proportional.'"). *See also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 150 (3d ed. 2008) ("It is not clear how far the two concepts can operate separately. If a use of force is not necessary, it cannot be proportionate and, if it is not proportionate, it is difficult to see how it can be necessary.").

146. WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., 2 SUBSTANTIVE CRIMINAL LAW § 10.4 (2d ed. 1986) (self-defense justifies only the use of force that is reasonably related to the harm the actor is seeking to avoid).

147. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 217 (1988).

148. *Id.*

149. *Id.*

150. *See* AP I, *supra* note 85, art. 51. *See also* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 119–25 (2004).

151. *See* AP I, *supra* note 85, art. 52(2). *See also* Blank & Farley, *supra* note 121. Some contemporary scholarship asserts that an implicit proportionality restriction applies to attacks against enemy belligerents as an aspect of the general principle of humanity—an interpretation of the *jus in bello* attenuated from operational logic and one I have addressed previously. *See* Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 30 (2010).

152. AP I, *supra* note 85, art. 51.

153. *Definition of Excessive*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/excessive (last visited Oct. 10, 2011) ("exceeding what is usual, proper, necessary, or normal"); *Definition of Disproportionate*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/disproportionate (last visited Oct. 10, 2011) ("being out of proportion"). *See also* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 124, ¶ 1979.

154. *See* W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 171–76 (1990) (discussing the use of "excessive" in AP I).

155. AP I, *supra* note 85, art. 57. *See also* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 124, ¶¶ 2204–15 (commentary on Additional Protocol I, Article 57(2)(a)(iii)).

156. Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEXAS INTERNATIONAL LAW JOURNAL 337, 365 (2012) ("When a commander launches such an attack with awareness that the unintended harm to

civilians will be excessive in relation to the benefit of creating the risk (achieving the military objective), the law essentially imputes to the commander the intent to engage in an indiscriminate attack.").

157. Corn, *supra* note 151, at 37; *see also* Jerrett W. Dunlap Jr., *The Economic Efficiency of the Army's Maneuver Damage Claims Program*, 190/191 MILITARY LAW REVIEW 1, 37 (2006/2007) (discussing training events and the ways in which commanders prepare to accomplish their mission when deployed).

158. Corn & Corn, *supra* note 156, at 362 ("it is clear that the law recognizes that the desired effect of an attack need not be total destruction[;] . . . [f]or example, a doctrinal mission employing indirect fire assets serves the purpose of not only target destruction, but also disruption, harassment, and degradation").

159. Chairman, Joint Chiefs of Staff, JP 3-60, Joint Targeting I-8 (2007), *available at* http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(07).pdf.

160. While the *Oil Platforms* decision, *supra* note 19, by the International Court of Justice (ICJ) calls this "macro" assessment perspective into question, it is this aspect of the decision that has triggered the most criticism. *See* Taft, *supra* note 19, at 302–3. The ICJ's application of international law moves away from widespread, accepted understanding of self-defense targeting. *Id.* Generally, so long as the actions of one State affect another State, self-defense is warranted. *Id.* Whether the inciting State acted indiscriminately is irrelevant. *Id. See also* Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 52, 57 (2005) (addressing the "questionable logic" applied by the ICJ in *Oil Platforms* regarding self-defense).

161. Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain and the United Kingdom all included an understanding in their ratification to AP I that the "military advantage" referenced in Articles 51 and 57 is to be considered as a whole and not examined on an individual attack basis. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, INTERNATIONAL COMMITTEE OF THE RED CROSS, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (then follow date of Reservation hyperlink for each country) (last visited Oct. 10, 2011).

162. *See* Mary Ellen O'Connell, *Defining Armed Conflict*, 13 JOURNAL OF CONFLICT & SECURITY LAW 393, 393–95 (2008) (asserting that the United States' armed conflict against terror is limited to Iraq and Afghanistan). *See also* David E. Graham, *The Dual U.S. Standard for the Treatment and Interrogation of Detainees: Unlawful and Unworkable*, 48 WASHBURN LAW JOURNAL 325, 331 (2009) (asserting terrorism and armed conflict are two separate things, governed by their own sets of laws); Rona, *supra* note 53, at 64–65 (stating American targeting of terrorists in Yemen in 2002 was not part of an armed conflict between the United States and terrorism).

163. *See* Paust, *supra* note 62, at 251–52 (supporting the United States' use of force in self-defense outside its own territory even outside the existence of a "relevant international or non-international armed conflict").

164. *See generally* Final Report on the Meaning of Armed Conflict, *supra* note 53, at 10–18 (adopting a definition of armed conflict that requires satisfaction of both organization and intensity of hostilities elements).

165. Rona, *supra* note 53, at 60–65 (analyzing the traits of armed conflict and finding they don't always apply to the war on terror); Mary Ellen O'Connell, *The Legal Case Against the War on Terror*, 36 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 349, 352–57 (2004)

(arguing against a global war on terror because it does not meet traditional Geneva ideas of armed conflict).

166. *See generally* Corn, *supra* note 20; Delahunty & Yoo, *supra* note 20; *see also* Blank & Farley, *supra* note 121. *See generally* Balendra, *supra* note 42 (the entire article discussing what constitutes an armed conflict).

167. *See* Paust, *supra* note 62, at 258–60 (stating the United States does not need to be at war with, or involved in an armed conflict with, al Qaeda to use force in self-defense, that use of force outside the scope of an armed conflict would not be governed by *ad bellum* principles).

168. *See generally* Anderson, *supra* note 3.

169. *See generally* Anderson, *supra* note 63.

170. *See* Anderson, *supra* note 3, at 8 ("The invocation of naked self-defense does not lower the standards-of-care conduct in the use of force below what the uniformed military would be required to do in a formal state of armed conflict. Rather, it merely locates them in customary law rather than in the technical law of armed conflict.")

171. Corn & Jensen, *supra* note 12, at 56–57, 75–76; Eric T. Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 CHICAGO JOURNAL OF INTERNATIONAL LAW 685, 692–701 (2012).

172. *See generally* Corn & Jensen, *supra* note 17. In this article, the authors address the complex question of distinguishing constabulary uses of military force (for example, deployment of armed forces in the context of a peacekeeping mission) from uses of armed force that trigger LOAC principles. It is suggested that the nature of the use of force authority granted to the forces to execute the mission is a key indicator of the line between armed conflict and other uses of military force falling below that threshold. In so doing, the authors categorically reject the suggestion that any use of armed force abroad triggers LOAC applicability. Instead, analysis of the nature of the mission and the scope of authority employed will drive this determination. The authors recognize this is not a talisman; however, they believe that this approach provides a more operationally realistic method of assessing when compliance with humanitarian constraints is legally obligatory than the elements approach.

173. *See generally* Final Report on the Meaning of Armed Conflict, *supra* note 53.

174. *See, e.g.*, Public Committee against Torture in Israel v. Government of Israel, HCJ 769/02, Judgment (Dec. 13, 2006), 46 INTERNATIONAL LEGAL MATERIALS 373 (2007), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf. In this case, which concerned the legality of targeted killings, the Israel High Court of Justice ultimately decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, but it also cannot be determined in advance that every targeted killing is lawful under customary international law. Each circumstance must be examined on a case-by-case basis.

175. Harold Hongju Koh, *The Lawfulness of the U.S. Operations Against Osama bin Laden*, OPINIO JURIS (May 19, 2011), http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/ ("[B]in Laden continued to pose an imminent threat to the United States that engaged our right to use force, a threat that materials seized during the raid have only further documented. Under these circumstances, there is no question that he presented a lawful target for the use of lethal force.").

176. *Id.*

177. Harold Hongju Koh, Legal Adviser, U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

178. Koh, *supra* note 175 ("The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.").

179. Brennan, *supra* note 9.

180. Koh, *supra* note 177.

181. One possible explanation is that Koh may be hinting at a consideration generally overlooked. The fact that the Director of Central Intelligence (and not the Commander of U.S. Special Operations Command) directed the Bin Laden mission is one of the most interesting aspects of the publicly disclosed information about the mission. Concerning the prior widespread reference to a Central Intelligence Agency (CIA) drone operations program, see, e.g., David S. Cloud, *CIA Drones Have a Widened Focus across Pakistan: Since 2008, the Agency Has Been Allowed to Kill Unnamed Suspects*, PITTSBURGH POST-GAZETTE, May 9, 2010, at A6. *See also* Associated Press, *Suspected US Drone Strike Kills 20 in Pakistani Tribal Area, Say Intel Officials*, WATERLOO CHRONICLE, Jan. 17, 2010, at 1; Ken Dilanian, *CIA Drones Joining Fight Inside Yemen*, CHICAGO TRIBUNE, June 15, 2011, at 18. This revelation was not particularly remarkable. However, like the drone program itself, it does raise serious questions related to the legality of employing civilian intelligence personnel to execute missions under the rubric of *jus ad bellum* self-defense. *See* Mary O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 325, 327–38 (2003) (discussing the legality of CIA operatives using drones to kill suspected al Qaeda operatives in Yemen); Dave Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 WILLIAM AND MARY LAW REVIEW 957, 958 (2009) (stating under certain conditions the military—but not the CIA—can legally kill or detain suspected terrorists under the law of war); Gary Solis, *America's Own Unlawful Combatants*, WASHINGTON POST, Mar. 12, 2010, at A17 (citing the illegality of the CIA's use of drones to kill members of al Qaeda). Perhaps that "or" is a reference to some type of legal division that exists between self-defense operations executed by the armed forces and those executed by the CIA. Is Koh's statement part of an effort to shield the use of CIA operatives from the "lawful belligerent" requirement of the *jus in bello*, and to suggest that CIA operations, while justified pursuant to the *jus ad bellum*, are technically not part of the armed conflict with al Qaeda?

If this is the genesis of Koh's "or," it should be explicitly acknowledged and he should articulate the legal theory for the use of deadly force outside the context of armed conflict. The relative merits of such a theory are well beyond the scope of this essay. However, it is interesting to consider how the U.S. view of war crimes liability for unprivileged belligerents may be influencing this apparent attempt to preserve some *jus ad bellum* targeting carved out from *jus in bello* applicability. It is well known that one of the most contentious offenses in the Military Commission Act of 2006 (as amended) is murder in violation of the law of war. *See* 10 U.S.C. § 950(t)(15) (2009) ("Murder in violation of the law of war. Any person subject to this chapter who intentionally kills one or more persons, including privileged belligerents, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.").