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PERMISSIBLE SELF-DEFENSE TARGETING AND THE DEATH OF BIN LADEN

JORDAN J. PAUST*

My recent article on *Self-Defense Targetings of Non-State Actors and Permissibility of Use of Drones in Pakistan*,¹ and writings of the vast majority of text-writers,² demonstrates that use of measures of self-defense against armed attacks by non-state actors is permissible under Article 51 of the United Nations Charter and relevant customary international law even though the direct effects of responsive force will most often occur in a foreign country.³ Nothing in Article 51 of the Charter or in general patterns of pre- and post-Charter practice and *opinio juris*⁴ requires special express consent of the state from which the non-state actor armed attacks emanate and on whose territory a self-defense action takes place

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1. Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010).

2. *Id.* at 238-39, 239 n.3.

3. *See, e.g., id.* at 238-49, 279-80; ANTONIO CASSESE, INTERNATIONAL LAW 354-55 (2nd ed. 2005); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 183-85, 204-06, 208 (4th ed. 2005). If responsive force is directed merely against the non-state actors who are perpetrating ongoing armed attacks, the use of force against them in a foreign state in compliance with Article 51 of the U.N. Charter is not a use of force against the foreign state, against its territory, or in violation of its territorial "integrity" within the meaning of Article 2(4) of the Charter. *See e.g., Paust, supra* note 1, at 256, 258-59, 279. Importantly, there are no geographic limits with respect to armed attacks that trigger the inherent right of self-defense. For example, an armed attack by a group that initiates a war between a nation or people and a state, a belligerency, or an insurgency within a single state can justify use of responsive armed force in self-defense. *See also* Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 534 (2002) [hereinafter Paust, *Use of Armed Force*] ("nothing in the language of Article 51 requires that such an armed attack be carried out by another state, nation, or belligerent, as opposed to armed attacks by various other non-state actors . . . "); Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1, 11 n.39 (1978) (where an armed attack occurs within a state by a government against a people undergoing a process of self-determination, such people should have the right of self-defense and the right to seek self-determination assistance in accordance with the principles and purposes of the U.N. Charter). Concerning the role of various non-state actors in the international legal process, *see, Jordan J. Paust, Non-State Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977 (2001).

4. It is well recognized that patterns of practice and expectation need only be generally shared for the existence of a customary international legal norm. *See, e.g., JORDAN J. PAUST, JON M. VAN DYKE, LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 93-95, 100, 105-08 (3d ed. 2009); CASSESE, *supra* note 3, at 162. Additionally, the evolving meaning or content of a treaty is based partly in the ordinary meaning of terms as supplemented by the object and purpose of the treaty and general patterns of practice and *opinio juris* over time. Vienna Convention on the Law of Treaties art. 31(1), (3)(b)-(c), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

against the non-state actor.⁵ Additionally, it would be demonstrably incorrect to claim that a state has no right to defend itself outside its own territory absent (1) express foreign state consent,⁶ (2) attribution or imputation of non-state actor attacks to the foreign state when the foreign state is in control of non-state actor attacks,⁷ or (3) the existence of a relevant international or non-international armed conflict.⁸

I. THE SELF-DEFENSE PARADIGM

From either a moral or policy-serving perspective, a new requirement should not be imposed that there be either express foreign state consent or attribution to the foreign state in contexts where neither exists and when non-state actors engage in continual armed attacks that kill a number of persons, result in serious bodily injury of others, and are designed to spread terror. Such a new requirement would:

most likely encourage violence and functional safe havens for those who initiate violence against other human beings. This would not appear to serve peace and security when such armed attacks are occurring or peace more generally over time when various non-state actors are prepared to engage in transnational acts of terroristic violence without regard to peace, territorial boundaries, the dictates of humanity, or the dignity of their victims.⁹

With respect to the need to serve various policies at stake in the context of continual non-state actor armed attacks, including peace, security, human rights, and effective opposition to international crime, it is important to note that state sovereignty

is not absolute under international law or impervious to its reach, territorial integrity of the state is merely one of the values preferred in the U.N. Charter, and permissible measures of self-defense under Article 51 of the Charter that are reasonably necessary and proportionate against actual armed violence must necessarily override the general

5. See, e.g., Paust, *supra* note 1, at 249-58, 279; Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN 167-68, 176-77 (Michael N. Schmitt & Jelena Pejic eds., 2007).

6. Schmitt *supra* note 5, at 167-168, 176-177.

7. DINSTEIN, *supra* note 3, at 206.

8. Paust, *supra* note 1, at 251-52, 258-61, 279-80.

9. *Id.* at 251 n.37. If a selective response to non-state actor terroristic attacks would not be permitted, there would be a danger of promoting a type of "one-sided warfare" that Professor Richard Falk rightly decries in other contexts where "the perpetrator inflicts unspeakable pain while facing no risk of retaliation and is generally insulated from accountability under law." Richard Falk, *Torture, War, and the Limits of Liberal Legality*, in THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 119, 122 (Marjorie Cohn ed., 2011). Professor Falk provides important criticism of non-defensive "one-sided warfare" engaged in by the United States and seeks "to offer an alternative approach to state violence to that taken by liberal legalists" who "could argue plausibly that one-sided warfare remains lawful so long as military targets are selected in a manner that respects civilian innocence." *Id.* at 123, 129.

impermissibility that attaches to armed intervention.¹⁰

One should also note that the self-defense paradigm is different from both a mere law of war or law enforcement paradigm. Self-defense targetings and captures can occur with respect to the following groups: (1) direct participants in armed attacks (DPAA) whether or not an armed conflict exists that would also allow the targeting and capture of persons who are combatants; (2) civilians who are direct participants in hostilities (DPH); or (3) civilians who are unprivileged fighters engaged in a continuous combat function.¹¹ Whether or not lawful use of force in self-defense is undertaken in time of war or relative peace, selective use of armed force as part of permissible self-defense is not simplistically “law enforcement” or limited by what would only be authorized during law enforcement.

Concerning the war in Afghanistan and the targeting and capture of leaders and other members of al Qaeda and the Taliban in parts of Pakistan, few would disagree with Professor Ved Nanda’s observation that the *de facto* theatre of war or “geographical region of conflict” has expanded to include parts of Pakistan.¹² There is a porous border between Afghanistan and Pakistan that neither country effectively controls. For several years, quite deadly, injurious, and continuous “al Qaeda and Taliban armed attacks [have been] planned, initiated, coordinated, or directed from inside Afghanistan and Pakistan on U.S. military personnel in Afghanistan who are engaged in an international armed conflict.”¹³ The theatre of war has expanded to locations where persons directly participate in hostilities.¹⁴

Professor Nanda has also recognized that self-defense targetings and captures may occur “outside the geographical region of armed conflict” or “outside the area of hostilities,” so long as there is strict compliance with general principles of necessity and proportionality that govern the permissible use of lawful measures of self-defense.¹⁵ Of course, I agree that lawful measures of self-defense can occur

10. Paust, *supra* note 1, at 256-57 & nn.47-48.

11. *See id.* at 260-64, 271-72, 275, 279-80.

12. *See id.* at 254-355 & n.44; Ved P. Nanda, *International Law Implications of the United States’ “War on Terror,”* 37 DENV. J. INT’L L. & POL’Y 513, 533 (2009) (“One could justify the targeted strikes by the US in Pakistan on the ground that the geographical region of conflict stretches from Afghanistan to Pakistan . . . It is recommended that the Obama Administration review its policy authorizing the killing of suspected terrorists outside the geographical region of armed conflict . . . and if killings are sought outside the area of hostilities the ‘proportionality’ element be strictly adhered to, and if terrorists can be apprehended killings should be a last resort.”).

13. Paust, *supra* note 1, at 250-51, 254-55. With respect to breaches of the neutrality of Pakistan, it is obvious that these have occurred at the hands of certain members of al Qaeda and the Taliban who have misused neutral territory for their war-making efforts. Breaches of neutrality by public or private actors are international crimes under customary international law. *Henfield’s Case*, 11 F. Cas. 1099, 1119-20 (C.C.D. Pa. 1793). Such a misuse of neutral territory supplements the permissibility of self-defense targetings of members of al Qaeda and the Taliban inside of Pakistan.

14. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

15. Nanda, *supra* note 12, at 533.

outside of an actual theatre of war against those who are directly participating in an ongoing process of armed attacks against the United States and/or its embassies, military personnel, and other nationals abroad.¹⁶ For this reason, the self-defense paradigm is recognizably different from a war paradigm; the right of self-defense allows the targeting of persons wherever such forms of direct participation occur.¹⁷ Quite clearly, significant armed attacks or attempted armed attacks have emanated from parts of Yemen, thereby permitting self-defense targeting of direct participants in Yemen.¹⁸

II. THE PRINCIPLES OF DISTINCTION, NECESSITY, AND PROPORTIONALITY

When using responsive force in self-defense, either outside the context of an armed conflict or during an armed conflict, international legal principles of distinction among persons, reasonable necessity, and proportionality will condition the permissibility of responsive conduct.¹⁹ From my perspective, armed drones are merely a particular type of weapons system. The same general principles, therefore, that condition the use of armed force in self-defense or conduct during war must be applied to the use of armed drones. If anything, some armed drones appear to have the capability of being “smart” weapons – weapons that can allow more precise forms of targeting²⁰ – and can avoid indiscriminate and unnecessary

16. Paust, *supra* note 1, at 244-49, 252, 255, 258-60, 279-80. The right of self-defense continues at least as long as the process of armed attacks continues. Clearly, armed attacks on our nationals in Afghanistan have continued for a number of years. Importantly, these continual and deadly attacks on our nationals as part of an overall process of armed attacks against the United States and its nationals for many years are different than merely one-time or sporadic small-scale attacks of minor significance. Importantly also, one should focus on the process of attacks (if such exists) as opposed to restricting one's view merely to each individual attack that forms part of the ongoing process of attacks. *See, e.g.* Armed Activities on the Territory of the Congo (D.R.C. v. Uganda), Judgment, ¶146 (Dec. 19, 2005). Thus, one should use a movie camera as opposed to a single snapshot in order to realistically view and assess the process of ongoing attacks and the use of responsive force. Paust, *Use of Armed Force*, *supra* note 3, at 533-35 & n.6, 536 & n.9.

17. Paust, *supra* note 1, at 253-54 n.41; *see* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 565 (1999); DINSTEIN, *supra* note 3, at 247.

18. *Airport Terror Scare, Yemen Linked Yet Again to Threat U.S. Increasingly Concerned over al-Qaida Branch*, Hous. Chron., Oct. 30, 2010, at A19; Peter Baker, *Magazine Preview: Obama's War Over Terror*, N.Y. TIMES, Jan. 17, 2010, at MM 30; Peter Finn & Gregg Miller, *Plane Bombs More Lethal than in Dec. 25 Attempt*, WASH. POST, Nov. 2, 2010, at A3; Eric Lichtblau, *The People We Pay to Look Over Our Shoulders*, N.Y. TIMES, Feb. 22, 2010, at C2; Mark Mazzetti, et al., *Bomb Plot Shows Key Role Played by Intelligence*, N.Y. TIMES, Oct. 31, 2010, at A1; Mark Mazzetti & Robert F. Worth, *U.S. Fearing Yemen Terrorists*, PITT. POST-GAZETTE, Oct. 31, 2010, at A1.

19. *See, e.g.*, Paust, *supra* note 1, at 270-76; INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 615 (1987).

20. *See, e.g.*, Paust, *supra* note 1, at 274; Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 353, n.40 (2010) (noting that computer programs can provide specific estimates of incidental deaths). It should also be noted that drones armed with significant firepower are not so-called battlefield weapons that can only be used in the context of war. Restrictions on use of weapons during self-defense will involve nuanced application of the general principles of distinction, reasonable necessity, and proportionality, as explained below. Laurie R. Blank & Benjamin R. Farley, *Characterizing US Operations in Pakistan: Is the United States*

death, injury, or suffering.²¹ Whether a weaponized drone is “smart” will depend in part on what weapons are placed on the drone and the circumstances surrounding actual use.

In the future, drones as small as a dragonfly could be used for very precise targetings. For these reasons, it is evident that armed drones are not illegal *per se*, such as weapons or tactics using poisonous substances or gases, radiation poisoning, or torturous effects during an armed conflict.²² Yet, if a drone is armed with a poisoning agent, use of that particular drone during an armed conflict would be illegal *per se* in view of the general and absolute ban on use of poisoned weapons and tactics under the laws of war, let alone the fact that poisoning effects are unnecessary and can produce lingering suffering.

Human rights law generally applies at all times and in all social contexts, including war.²³ Yet, with regard to lawful targetings of those who are taking a direct part in ongoing armed attacks or hostilities, the general human right to freedom from arbitrary deprivation of life²⁴ will only be applicable with respect to

Engaged in an Armed Conflict?, 34 FORDHAM INT’L L.J. 151, 152-53 (2011).

21. Concerning the customary prohibition of unnecessary death, injury or suffering, see for example, JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., INTERNATIONAL CRIMINAL LAW 639, 679-680, 697-99 (3d ed. 2007) [hereinafter PAUST, BASSIOUNI, ET AL.]; Int’l Comm. of the Red Cross, *Customary IHL Database, Rule 70, Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering*, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter20_rule70?OpenDocument&highlight=unnecessary.suffering [hereinafter *Customary IHL Database*]; Jordan J. Paust, *Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense “Practices” Inconsistent with Legal Norms?*, 4 DENV. J. INT’L L. & POL’Y 229, 231 (1974). The International Committee of the Red Cross (ICRC) considers this customary principle to be reflected in what it terms the “principle of humanity.” See, e.g., Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L R. RED CROSS 991, 1041-42 (2008) [hereinafter ICRC *Guidance*].

22. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1-3, 16, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1523 (noting examples of prohibitions); International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; VI Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3(1), 5, 27, 32, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; PAUST, BASSIOUNI, ET AL., *supra* note 21, at 679-82 (addressing relevant laws of war and their application to poisonous substances and gases). Use of poisonous substances and gases can also constitute torture or cruel or inhumane treatment of persons if they are in the actual power or effective control of a perpetrator and, therefore, such treatment can constitute a violation of applicable laws of war and human rights laws that prohibit torture or cruel or inhumane treatment of persons. See Jordan J. Paust, *Remarks by Jordan J. Paust*, 72 AM. SOC’Y INT’L L. PROC. 39, 43-45 (1978) (regarding impermissibility of use of the neutron bomb or warhead).

23. U.N. Charter art. 55(c) (regarding the requirement of “universal respect for, and observance of, human rights”); *id.* art. 56 (“All members pledge themselves to take joint and several action . . . for achievement of the purposes set forth in Article 55.”); Paust, *supra* note 1, at 265-66. The International Covenant on Civil and Political Rights applies wherever a party has jurisdiction or “effective control” over a person. ICCPR, *supra* note 22, art. 2(1); PAUST, BASSIOUNI, ET AL., *supra* note 21, at 813, 816.

24. ICCPR, *supra* note 22, art. 6; Paust, *supra* note 1, at 263-64, 269.

those persons who are within the jurisdiction, actual power, or effective control of the state or other entity using a drone.²⁵ Therefore, it is evident that those who are being targeted, for example, by a high flying drone in a foreign country will not be protected under the general human right to life. In any event, if they are lawfully targeted in compliance with the principles of distinction, reasonable necessity, and proportionality their deaths will not be "arbitrary" within the meaning of human rights law.²⁶ Moreover, compliance with the principles of distinction, reasonable necessity, and proportionality provides a higher form of protection than a test based merely on what is or is not arbitrary in a given circumstance.²⁷

With respect to the laws of war, "general principles of [distinction,] reasonable necessity, and proportionality have been integrated into several provisions of Geneva law applicable during an international armed conflict."²⁸ As explained,

Articles 48 and 50-51 of Protocol I to the 1949 Geneva Conventions reflect treaty-based and customary international legal requirements concerning necessity and proportionality. These include (1) the need to distinguish between civilians (who are protected from attack "unless and for such time as they take a direct part in hostilities"²⁹) and lawful military targets (the so-called principle of distinction), (2) the prohibition of attacks directed at protected civilians or civilian objects as such, and (3) the prohibition of indiscriminate attacks.³⁰ A customary prohibition related to the prohibition of "indiscriminate" attacks³¹ is the more general prohibition of unnecessary death, injury, or suffering during war,³² one that is also partly reflected in the duty set forth in Geneva Protocol I to avoid attacks "expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated."³³ Some "incidental" loss of

25. ICCPR, *supra* note 22, art. 2, Paust, *supra* note 1, at 264-265.

26. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, ¶ 25 (July 8).

27. Paust, *supra* note 1, at 263-64, 269, 272, 280.

28. *Id.* at 270.

29. Additional Protocol I, *supra* note 14, art. 51(3). Obligations under Geneva law and customary international law reflected therein apply whether or not an enemy generally violates such law. Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 814-16 (2005). For this reason, reprisals are impermissible. PAUST, BASSIOUNI, ET AL., *supra* note 21, at 655; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 441 (7th ed. 2008).

30. *See* Additional Protocol I, *supra* note 14, arts. 48, 51-53; *see also* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 3-67* (Int'l Comm. of the Red Cross 2005).

31. *See* Additional Protocol I, *supra* note 14, art. 51(4).

32. *See id.* art. 35(2).

33. *Id.* art. 51(5)(b). *See also* HENCKAERTS & DOSWALD-BECK, *supra* note 30, at 46-50 (concerning the principle of proportionality); Paust, *supra* note 1, at 270-71 n.87.

civilian life might be foreseeable but still permissible if the requirements of reasonable necessity and proportionality are met.³⁴

Al Qaeda and Taliban fighters who directly participate in a process of armed attacks over time and who traverse “in and out of Afghanistan from Pakistan and their leaders are directly, continuously, and actively taking part in hostilities in Afghanistan whether or not they constantly take up the gun.”³⁵

The International Committee of the Red Cross (ICRC) has recognized that such non-state fighters can also be recognized as “members” of “organized armed groups . . . [that consist] of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’)” or as “members of an organized armed group with a continuous combat function” and that they are targetable.³⁶ The ICRC adds that “members of organized armed groups . . . cease to be civilians . . . and lose protection against direct attack.”³⁷ The ICRC would distinguish such member-fighters or “fighting forces” “from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis.”³⁸ The latter are targetable when they directly participate in hostilities.

Moreover, direct participation in hostilities by civilians includes their “[m]easures preparatory to the execution of a specific act . . . as well as the deployment to and the return from a location of its execution.”³⁹ As Nils Melzer, a legal expert with the ICRC, has affirmed, general practice is “to directly attack insurgents” or organized armed groups “even when they are not engaged in a particular military operation,” the practice is not internationally condemned, and “members of organized armed groups . . . are not regarded as civilians, but as

34. Paust, *supra* note 1, at 270-71.

35. *Id.* at 271 & n.90. Therefore, they can be classified as DPH within the meaning of Article 51(3) of Additional Protocol I. *Id.* Importantly, the specific singular limitation of protection in Article 51(3) controls the reach of claims to use force that are otherwise based on alleged necessity during war. For example, the DPH standard trumps claims based on alleged strategic necessity to target a civilian population. Nonetheless, general principles of reasonable necessity and proportionality continue to operate as limitations.

36. ICRC *Guidance*, *supra* note 21, at 995. Paust, *supra* note 1, at n.90.

37. *Id.* at 996.

38. *Id.* at 1007.

39. *Id.* at 996; *see also* YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27-29 (2004) (arguing that civilians who directly participate in hostilities should lose their civilian status); NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 56, 310, 314, 317, 319-20, 327-28, 345 (2008) (“[T]hat threshold would almost certainly be reached where a civilian supplies ammunition to an operational firing position, arms an airplane with bombs for a concrete attack, or transports combatants to an operational combat area.”); *HCJ 769/02 Public Committee Against Torture v. Government of Israel*, [2006] *Isr. L. Rpts.* (2) 459, ¶ 39 [2006] (*Isr.*), (“[A] civilian who has joined a terrorist organization . . . and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack.”).

approximately equivalent to State armed forces” for targeting purposes.⁴⁰ Melzer also added that those with “functional ‘combatancy’” are targetable.⁴¹

When applying principles of reasonable necessity and proportionality with respect to use of drones for targeting, one should consider all relevant features of context. Among appropriate considerations are identification of the target (*e.g.*, as a DPAA, combatant, fighter with a continuous combat function, or DPH as opposed to a non-targetable civilian); the importance of the target; whether equally effective alternative methods of targeting or capture exist; the presence, proximity, and number of civilians who are not targetable; whether some civilians are voluntary or coerced human shields; the precision in targeting that can obtain; and foreseeable consequences with respect to civilian death, injury, or suffering.⁴² As Melzer avers, part of a nuanced contextual inquiry should involve consideration of “the actual level of control exercised over the situation by the operating State” and an appropriate consideration of “required intensity or urgency may” actually involve “a generous standard of ‘reasonableness’ in traditional battlefield confrontations.”⁴³ For this reason, and because of other features of context that can be relevant to a nuanced application of the principle of reasonable necessity, no rigid rule should exist that would require ground verification of target selection and engagement when ordinary civilians are known to be nearby. As Melzer added more generally, there should be inquiry into qualitative, quantitative, and temporal necessity and whether methods and means to be used “contribute effectively to the achievement of a concrete and direct military advantage . . . without unreasonably increasing the security risk of the operating forces or the civilian population.”⁴⁴

A 1999 decision regarding the use of air strikes by NATO forces during the armed conflict in Kosovo demonstrates proper use of the principles of distinction, reasonable necessity, and proportionality. At one point, there was a refusal to target a bridge in Belgrade, Yugoslavia that was itself a proper military target because it had been used by Yugoslavian military to transport soldiers and military arms and equipment. NATO refused to target the bridge when it became known that thousands of civilians were on the bridge one evening during a peaceful candlelight procession to protect the bridge.⁴⁵ At that moment, the bridge was not being used for transport of military personnel and equipment and, if targeting was thought to be generally needed, NATO forces could wait even though the civilians appeared to be voluntary shields. I do not believe that U.S. armed drones are

40. MELZER, *supra* note 39, at 317.

41. *Id.* at 327-28.

42. See, *e.g.*, Paust, *supra* note 1, at 275-77; see also Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, 22, 28-38 (William Mitchell Legal Studies Research Paper No. 2010-14, Tex. Tech Law Sch., Research Paper No. 2010-25, 2010), available at <http://ssrn.com/abstract=1625829> (addressing a U.S. military six-step decisional and review process and suggesting relevant criteria and considerations with respect to targetings by CIA personnel).

43. MELZER, *supra* note 39, at 397.

44. *Id.*

45. PAUST, BASSIOUNI, ET AL., *supra* note 21, at 683.

inherently indiscriminate weapons systems and I believe that, if anything, they are generally “smart.” Of course, those who choose lawful targets and those who use drones to engage lawful targets during self-defense operations and/or during armed conflict must pay attention to the prohibition of indiscriminate attacks. Such attacks are necessarily inconsistent with the principles of distinction, reasonable necessity, and proportionality.

Additional guidance with respect to lawful targeting is found in Geneva Protocol I’s exposition of what can constitute “indiscriminate” attacks, which are prohibited under both customary and treaty-based international law. As paragraphs 4 and 5 of Article 51 recognize,

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) Those which are not directed at a specific military objective;
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

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

5. Among others, the following types of attacks are to be considered as indiscriminate:

- (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁴⁶

As can be seen, the description of indiscriminate attacks necessarily encompasses the principles of distinction, reasonable necessity, and proportionality. In the context of war, indiscriminate attacks are war crimes,⁴⁷

46. Additional Protocol I, *supra* note 14, art. 51(4)-(5).

47. The general *mens rea* standard with respect to criminal responsibility of perpetrators of unlawful bombings and artillery or rocket attacks can involve either knowledge or wanton and reckless disregard. *Customary IHL Database*, *supra* note 21, at Practice Relating to Rule 12. Definition of Indiscriminate Attacks, X. The *mens rea* standard with respect to jurisdiction of the International Criminal Court (ICC) is generally a higher standard of knowledge. Rome Statute of the International Criminal Court art. 30, Jul. 17, 1998, 2187 U.N.T.S. 90. For this reason, ICC jurisdiction is noticeably more limited than international law requires. The phrase “may be expected to cause” in Article 51(5)(b) of Additional Protocol I might allow prosecution under a criminal negligence standard. Some might prefer that decision-makers who review the legality of prior targetings adopt a “margin of appreciation,” “deference,” or presumption of validity. See Benvenisti, *supra* note 20, at 358. With

whether engaged in by government forces or a non-state actor like al Qaeda.⁴⁸ Outside the context of war, they would constitute an illegal use of force that can result in some forms of criminal responsibility⁴⁹ and should not be tolerated.

POSTSCRIPT

On May 2, 2011, U.S. Navy SEALs entered Osama bin Laden's walled and secretive compound in northern Pakistan equipped for combat under an authorization from President Barack Obama to kill or capture bin Laden, the leader of al Qaeda.⁵⁰ Members of the SEAL team shot and killed one of bin Laden's couriers and his brother, one of his sons after he had rushed toward some SEALs, and later bin Laden. According to the Obama Administration, bin Laden was unarmed but did not surrender, he was not under actual control of the SEALs when he was killed, and, according to some, there were weapons nearby and/or he had made a furtive move.⁵¹ Drones had been used to gather intelligence prior to and in support of the military operation but were not used to launch a missile into the compound, perhaps in part because it was not certain that bin Laden was in the

respect to criminal sanction processes, there is no need for an extra layer of presumptions because under international law an accused will already be presumed innocent until proven guilty. See ICCPR, *supra* note 22, art. 14(2); Additional Protocol I, *supra* note 14, art. 75(4)(d). Moreover, with respect to criminal or civil sanctions against those who either knew that their conduct would result in indiscriminate death, injury, or suffering or who engaged in conduct with wanton or reckless disregard of such consequences, it would not be policy-serving or preferable to provide such a person with a new "margin of appreciation" or deference.

48. There are two reasons why members of al Qaeda are bound by relevant treaty-based and customary international law. First, a treaty is binding on a party to the treaty and its nationals and nearly all states are a party, for example, to the 1949 Geneva Conventions. See, Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATHOLIC U. L. REV. 759, 766, 782-83 (2007). Second, customary international law is universally applicable and binds all human beings, among other actors. PAUST, BASSIOUNI, ET AL., *supra* note 21, at 6, 650, 655-56.

49. Indiscriminate attacks occurring when there is no relevant armed conflict would most often be prosecutable under domestic criminal law addressing murder, manslaughter, and assault and battery. It is possible that intentional attacks on non-targetable civilians would also be prosecutable as customary crimes against humanity. For a discussion regarding the difference between customary crimes against humanity and those within the limited jurisdiction of the ICC, see for example, Jordan J. Paust, *The International Criminal Court Does Not Have Complete Jurisdiction Over Customary Crimes Against Humanity and War Crimes*, 43 J. MARSHALL L. REV. 681 (2010). Most text-writers agree that al Qaeda's 9/11 attacks on civilians at the World Trade Center were non-state actor crimes against humanity. See, e.g., *id.* at 694 n.37.

50. See, e.g., Steven Lee Myers & Elisabeth Bumiller, *Obama Calls World "Safer" After Pakistan Raid*, N.Y. TIMES, May 2, 2011; Jay Carney, White House Press Secretary, Press Briefing, May 4, 2011 ("The team had the authority to kill Osama bin Laden unless he offered to surrender, in which case the team was required to accept his surrender if the team could do so safely. The operation was conducted in a manner fully consistent with the laws of war," "the team was prepared and had the means to take bin Laden into custody," and "[w]e acted in the nation's self-defense"), available at <http://www.whitehouse.gov/the-press-office/2011/05/04/press-briefing-press-secretary-jay-carney-542011>.

51. See, e.g., Mark Landler & Helene Cooper, *New U.S. Account in Bin Laden Raid: He Was Unarmed*, N.Y. TIMES, May 3, 2011, at A1; Mark Landler & Mark Mazzetti, *The Death of Bin Laden: Obama Says He Won't Release Bin Laden Photos*, N.Y. TIMES, May 4, 2011; Myers & Bumiller, *supra* note 50.

compound.⁵² It was reported that the government of Pakistan did not know of the Navy Seal operation until after it had been successfully completed and it is obvious, therefore, that Pakistan had not consented to U.S. use of armed force on its territory to carry out the Navy Seal mission to kill or capture bin Laden.⁵³

In view of the fact that Pakistan had not consented to the use of armed force on its territory to carry out the operation, issues addressed in this article concerning permissible use of force in self-defense are clearly relevant to whether or not the operation violated international law. Use of a Navy Seal team instead of a drone attack can be relevant regarding compliance with the principle of proportionality, but in this instance⁵⁴ use of the Seal team merely raises an additional issue whether it was lawful under the circumstances for members of the team to kill bin Laden instead of capturing him. Quite obviously, the Navy Seal operation was not simplistically a law enforcement operation. It was a self-defense⁵⁵ and law of war operation, especially since the *de facto* theatre of war had migrated to parts of Pakistan and to the very spot where bin Laden had been planning and directing attacks through use of his trusted couriers, for example, to use or transfer flash drives containing emails and other information to be sent to various members of al Qaeda.⁵⁶

52. See, e.g., Myers & Bumiller, *supra* note 50 (the President's counterterrorism adviser John O. Brennan said that the Seal operation was chosen partly to minimize collateral damage and "to ensure that we knew who it was that was on that compound").

53. See, e.g., Eric Schmitt, Thom Shanker & David E. Sanger, *U.S. was Braced for Fight With Pakistanis in Bin Laden Raid*, N.Y. TIMES, May 9, 2011, at A1 (during planning, "a proposal to bring the Pakistanis in on the mission" was rejected; capture of bin Laden was part of the plan: but "the [kill or capture] mission always was weighted toward killing, given the possibility that bin Laden would be armed or wearing an explosive vest"); Jane Perlez & David Rohde, *Pakistan Pushes Back Against U.S. Criticism on Bin Laden*, N.Y. TIMES, May 3, 2011 (Pakistan clearly had not consented and called the U.S. operation an "unauthorized unilateral action").

54. Since bin Laden was a highest value target who apparently never left the compound, a known courier and DPH was with him, and his wives and sons knowingly lived with him in the compound, it might not have been impermissible to destroy the compound with a drone attack. Under the circumstances, the wives, and possibly the son who was killed, might have been considered to be like voluntary shields whether or not any of the wives directly participated in hostilities. See also Paust, *supra* note 1, at 275-77 (regarding the need for nuanced and contextually-aware application of the principle of proportionality, consideration of the presence of civilians of various types, and consideration of the presence of human shields).

55. See also Jeremy Pelofsky & James Vicini, *Bin Laden Killing Was Act of Self-Defense*, REUTERS, May 4, 2011; David Crane, *Legal Arithmetic: Adding Up the Legality of Operation Geronimo*, JURIST, May 14, 2011, <http://jurist.law.pitt.edu/forum/2011/05/david-crane-legal-arithmetic.php>; Amos N. Guiora, *Targeting Bin Laden: Legal, Geopolitical and Strategic Issues*, JURIST, May 4, 2011 <http://jurist.law.pitt.edu/forum/2011/05/amos-guira-targeting-bin-laden.php> ("Bin Laden's continued threats and his proven ability to successfully conduct attacks unequivocally categorized him as a legitimate target at the time he was killed. The attack . . . adhered to fundamental international law principles, including distinction, military necessity, proportionality and alternatives. As a result, the operation was the manifestation of lawful and legitimate self-defense").

56. See, e.g., *The Death of bin Laden: Painstaking Email System Kept Terrorist Ahead of U.S.*, Hous. Chron., May 13, 2011, at A3; Christopher Dickey, Ron Moreau, Sami Yousafzai, *A Decade on the Lam*, NEWSWEEK, May 5, 2011, at 32.

In context, the killing of bin Laden was permissible under Article 51 of the U.N. Charter, which allows the United States to target the leader of al Qaeda in self-defense in response to ongoing armed attacks on U.S. military personnel and other U.S. nationals in Afghanistan and from across the porous border areas with Pakistan. As noted in this article, under either a self-defense paradigm or a law of war paradigm the United States did not need special Pakistani consent for use of lawful measures of self-defense on Pakistani territory against a direct participant in continual armed attacks on U.S. military personnel and other U.S. nationals in Afghanistan (a DPAA) and the United States did not need special Pakistani consent to try to target or capture a direct participant in hostilities (a DPH) who also exercised some command and control functions within an expanded theatre of war during what had been and still is an international armed conflict in Afghanistan and parts of Pakistan involving the Taliban and its armed affiliates, the armed forces of the United States and a number of other countries, and the armed forces of Afghanistan.⁵⁷

As also noted in this article, and contrary to some viewpoints, it is not correct to claim that the United States would not have the right to defend itself outside its own territory absent (1) express foreign state consent, (2) attribution or imputation of non-state actor attacks to the foreign state when the foreign state is in control of the non-state actor attacks, or (3) the existence of a relevant armed conflict where measures of self-defense occur. In this instance, neither express consent nor attribution pertained, and the United States could have sought to target or capture bin Laden in Pakistan as a permissible measure of self-defense even outside a *de facto* theatre of war. In any event, the *de facto* theatre of war had extended to bin Laden's compound where he was engaged in planning and authorizing operations and other violent conduct by members of al Qaeda in Afghanistan and from the porous border areas of Pakistan.⁵⁸

Some have claimed that the Navy Seal operation would only have been permissible if Pakistan had been "unwilling or unable" to kill or capture bin Laden.⁵⁹ It is far from clear that Pakistan's government was unwilling to carry out

57. It is important to recognize that the conflict is an international armed conflict so that the Navy Seals have combatant status and combatant immunity for lawful acts of war and would not be prosecutable under relevant domestic law for murder. See, e.g., Paust, *supra* note 1, at 277-78, 280.

58. See also U.S. DEP'T OF ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 17, para. 31 (1956) (quoted *infra* note 63)[hereinafter U.S. DEP'T OF ARMY FM 27-10]. With respect to Pakistan's neutrality, bin Laden and al Qaeda, as well as the Taliban, had breached Pakistan's neutrality long ago and their continued misuse of neutral territory supplements the permissibility of self-defense and law of war targetings.

59. See, e.g., Ashley S. Deeks, *Pakistan's Sovereignty and the Killing of Osama Bin Laden*, 15 AM. SOC'Y INT'L L. INSIGHT, May 5, 2011, available at <http://www.asil.org/insights110/505.cfm>; cf. U.K. MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 20 (2004) ("If a neutral state is unable or unwilling to prevent the use of its territory for the purposes of . . . military operations, a belligerent state may become entitled to use force in self-defence against enemy forces operating from the territory of that neutral state."); U.S. DEP'T OF ARMY FM 27-10, *supra* note 56, at 185, para. 520 ("Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by troops of one belligerent entering or passing through its territory, the other belligerent

or participate in a mission that it had not been aware of or more generally that its government would have been unwilling or unable to kill or capture bin Laden despite speculation that a few Pakistani military or intelligence personnel might have known where bin Laden was hiding. More importantly, despite occasional rhetorical use of the “unwilling or unable” phrase in some contexts and its admitted relevance as a feature of context during war when an enemy has breached the neutrality of a state (for example, by using areas within it for planning, authorizing, and carrying out operations,) this supposed “test” is not a legal limitation of either the inherent right of self-defense against ongoing armed attacks or the right under the laws of war to target enemy DPH and leaders of armed groups within an expanded *de facto* theatre of war. Conversely, it is not a criterion the sole existence of which can justify use of armed force in a foreign state without foreign state consent if, for example, (1) the right of self-defense under Article 51 of the U.N. Charter has not been triggered because there has been no “armed attack,”⁶⁰ (2) there has been no authorization to use armed force by the U.N. Security Council,⁶¹ (3) there has been no authorization of regional action by a relevant regional organization,⁶² or (4) there is no exception to the express prohibition of three types of armed force within Article 2, paragraph 4 of the U.N. Charter.⁶³

Importantly, human rights law reflected in the ICCPR (including the right to freedom from arbitrary deprivation of life) did not apply for bin Laden during the Navy Seal operation because, according to what has been disclosed by the Obama Administration, the Seals did not have effective control of bin Laden while he was alive and, as noted in this article, with respect to a person located in foreign territory effective control is the trigger for application of human rights reflected in the ICCPR.⁶⁴ If bin Laden had been within the effective control of the Seal team,

may be justified in attacking the enemy forces on this territory.”); Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT’L L. 244, 246 (2011) (noting different uses of such a phrase in different contexts).

60. U.N. Charter art. 51.

61. *See id.* art. 42.

62. *See, e.g., id.* art. 52 (regarding permissible “regional action”); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 545-47 (2002).

63. Concerning the prohibition of merely three types of armed force under Article 2(4) of the Charter, *see, for example*, Paust, *supra* note 60, at 536-37.

64. *See supra* note 25; *see also* Laurie Blank, *Finding the Paradigm: Investigating Bin Laden’s Demise*, JURIST, May 8, 2011 (human rights law is the wrong paradigm and “[u]nder the law of armed conflict, whether Bin Laden was armed or unarmed is essentially an irrelevant question. As the leader of enemy forces, he was a legitimate military target at all times . . . [and] the law of armed conflict includes no obligation to offer the enemy a chance to surrender,” assuming that the enemy has not done so and does not clearly intend to do so) <http://jurist.law.pitt.edu/forum/2011/05/laurie-blank-finding-the-paradigm.php>. Concerning Professor Blank’s recognition regarding targeting under the laws of war, *see also* Geneva Additional Protocol I, *supra* note 14, art., art. 41(1) (“A person who is recognized or who, in the circumstances should be recognized to be *hors de combat* shall not be made the object of attack.”), (2) (“A person is *hors de combat* if: (a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in

his human right to life would have pertained and would have been violated if his life had been taken arbitrarily – as it would have been, for example, if bin Laden had surrendered and was otherwise in effective control of the team. President Obama's authorization for the mission was to kill or capture as circumstances permit. If the authorization had been merely to kill and if bin Laden had been within the effective control of the Navy Seals when he was killed, the order and killing in pursuance thereof would have been unlawful under human rights law (as an arbitrary deprivation of life), the laws of war (as an unnecessary death), and international law regarding permissible use of force in self-defense (as an unnecessary death). Moreover, under the laws of war, an order to kill when a person obviously intends to surrender and when capture becomes a clear alternative would be tantamount to an order to take no prisoners or what is termed a refusal of quarter, and the order would create war crime responsibility.⁶⁵ However, that was not what President Obama had authorized.⁶⁶

Although there has been no chorus of criticism regarding the constitutionality of President Obama's decision, it is worth noting that precisely because the President is bound under the Constitution to faithfully execute the laws⁶⁷ and international law is among the constitutionally-based laws of the United States,⁶⁸ the President has an enhanced authority to execute relevant competencies of the United States under international law to use armed force in self-defense against armed attacks and to target certain persons during war.⁶⁹ With respect to bin Laden and al Qaeda, Congress has also authorized the President to use "appropriate" force under the 2001 Authorization for Use of Military Force,⁷⁰ and the word "appropriate" has rightly been interpreted by the U.S. Supreme Court to

any of these cases he abstains from any hostile act and does not attempt to escape."); Paust, *supra* note 1, at 275 & n.101, quoting MELZER, *supra* note 39, at 370, 397-98, 413; *infra* note 63.

65. See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, art. 23(c) (it is especially unlawful "[t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion") (d) (it is especially unlawful "[t]o declare that no quarter will be given"), 36 Stat. 2277; T.S. No. 539 (Oct. 18, 1907) [hereinafter HC IV]; Geneva Protocol I, *supra* note 14, art. 40 ("It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis"); U.S. DEP'T OF ARMY FM 27-10, *supra* note 56, at 17, paras. 28 (refusal of quarter), 31 (treacherous killing is prohibited by HC IV, Annex, article 23(b) and "[t]his article is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.' It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere") (emphasis added).

66. See *supra* notes 48, 51 for the news accounts detailing the Seal operatopm.

67. U.S. CONST., art. II, § 3 ("he shall . . . take care that the Laws be faithfully executed").

68. See, e.g., *id.* arts. II, § 3; III, § 2; VI, cl. 2; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7-11, 169-73 (2 ed. 2003); Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 240-45 (2008).

69. See generally Paust, *supra* note 60, at 553-54.

70. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

include permissible measures and limitations under the laws of war within the congressional authorization.⁷¹ Congress has the power to limit warfare in terms of its extent, objectives, operations, persons and things affected, places, and time,⁷² including use of drones or special operation teams in Pakistan, but outside the limitation in the AUMF has chosen not to do so.

71. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004) (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities . . . (prisoners of war ‘can be detained during an armed conflict, but the detaining country must release and repatriate them “without delay after the cessation of active hostilities,” unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences’). Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles . . . Active combat operations against Taliban fighters apparently are ongoing in Afghanistan . . . The United States may detain, for the duration of these hostilities . . .”); *id.*, 542 U.S. at 551 (Souter, J., dissenting in part and concurring in part) (using the law of war and stating: “there is reason to question whether the United States is acting in accordance with the laws of war . . . I conclude accordingly that the Government has failed to support the position that the” AUMF “authorizes the described detention”)); see also Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 400, 403-05 (2007); Paust, *supra* note 60, at 554 & n.109; Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law, pt. III.B.1 (Mar. 25, 2010) (“we are resting our detention authority on a domestic statute – the 2001 . . . [AUMF] – as informed by the principles of the laws of war” and “as a matter of *international law*, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF *as informed by the laws of war*.”) (emphasis in original), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

72. See, e.g., Paust, *supra* note 69, at 382-99, and cases cited.

REMARKS: THE RESORT TO DRONES UNDER INTERNATIONAL LAW

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It is a privilege to be part of the Sutton Colloquium, one of the most important discussions of international law that occurs in the United States. I would like to express sincere thanks to Professors Ved Nanda and David Akerson for inviting me, as well as to their students and staff for organizing the event.

My remarks concern this question: When may a state lawfully resort to drone attacks? The answer lies in the first instance in what we call the *jus ad bellum*, the law governing resort to military force. This is a distinct body of law with important overlaps with *jus in bello*, another body of law also known as international humanitarian law (IHL) or the law of armed conflict (loac), which governs how force is used once an armed conflict is underway.¹ We must begin with the *jus ad bellum*, however, analyzing whether resort to weaponized drones is lawful before turning to the *jus in bello*, to determine whether the way drones are used is lawful.²

Drones are unmanned aerial vehicles that are operated by a pilot who may be thousands of miles away from where the drone is flying.³ The militaries of sovereign states and of non-state actors are quickly acquiring large fleets of drones. Most of these drones are currently used for surveillance only. Increasingly, however, states and non-state actors are acquiring drones equipped with missiles and bombs, the sort of weapons that international law restricts to armed conflict hostilities. The restriction on weaponized drones to use in combat zones means that the distinction between situations of armed conflict and situations that are not armed conflict is critical. What exactly distinguishes these situations is a matter of common sense that is reflected in the definition of armed conflict found in

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1. See MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE, CASES AND MATERIALS* 103-13 (2d ed. 2009) (providing an overview of both the *jus ad bellum* and the *jus in bello*).

2. Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in *SHOOTING TO KILL, THE LAW GOVERNING LETHAL FORCE IN CONTEXT* 13 (Simon Bronitt ed., forthcoming 2011), available at <http://ssrn.com/abstract=1501144> [hereinafter O'Connell, *Pakistan*].

3. See Peter W. Singer, *Robots at War: The New Battlefield*, WILSON Q., Winter 2009, at 30, 33-34 (discussing robotic weapons including drones).

international law. Armed conflict is the exceptional situation, while peace is the normal situation. Thus, whether the United States or any state is lawfully using armed drones depends on whether the initial resort to armed force is lawful or whether the use is within a situation defined by international law as an armed conflict. Outside of armed conflict such use would be unlawful.

Before going into more detail respecting the law on resort to drones, I will first provide a brief history and very brief overview of drone use by the United States from 2001-2010. This history will set the stage for our discussion of the applicable law.

At the time of this writing, the United States has two types of combat drones in its arsenal: the MQ-1 or Predator and the MQ-9 or Reaper.⁴ Predators began as surveillance drones and then were adapted to carry two Hellfire missiles.⁵ The Reaper is similar in design and function to the Predator, but was specially designed as a launch vehicle for weapons. It can carry up to fourteen Hellfire missiles and 500-pound bombs.⁶ The U.S. is rapidly increasing its supply of drones and will soon have more unmanned than manned aerial vehicles in its arsenal.⁷ I understand pilots are not altogether happy with this development.

The United States is not the only country that possesses this technology. Other states and non-state actors have drones, including the United Kingdom, France, Russia, Turkey, India, China, Hezbollah, Israel, and Iran.⁸ An October 2010 report by United Press International (UPI) says that Israel has sold drones to over 42 states.⁹ Iran is also supplying drones to friendly states and non-state actors. In a *New Yorker* magazine article in late 2009, Jane Mayer described the U.S. as having two drone programs: one conducted by the U.S. Air Force and one by the CIA.¹⁰

From my discussions with others, especially with a former commander of drone operation at Nellis Air Force Base in Nevada, it is clear to me that all drone operations are today and probably for some time have been joint operations. None are carried out by the Air Force alone. The commander told me that "a thousand

4. See Spencer Ackerman, *Air Force is Through with Predator Drones*, DANGER ROOM (Dec. 14, 2010), <http://www.wired.com/dangerroom/2010/12/air-force-is-through-with-predator-drones>.

5. *Id.*

6. *MQ-9 Reaper*, OFFICIAL WEBSITE OF THE U.S. AIR FORCE (Aug. 18, 2010), <http://www.af.mil/information/factsheets/factsheet.asp?id=6405>.

7. Singer, *supra* note 3, at 38.

8. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 27, n.51, U.N. Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter Alston Report].

9. *Iran Muscles into the UAV battlefield*, UPI.COM (Oct. 5, 2010, 2:38 PM), http://www.upi.com/Business_News/Security-Industry/2010/10/05/Iran-muscles-into-the-UAV-battlefield/UPI-47421286303914/.

10. Jane Mayer, *The Predator War, What are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, available at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

people see the video feed” from the deployed drones, from the pilots in their trailers in Nevada and New Mexico to intelligence analysts at CENTCOM to personnel in Japan to the President of the United States.

The first known use of a drone to kill a named individual occurred in Afghanistan in November 2001. This was about a month after the United States and the United Kingdom launched the intervention of October 7, 2001, in response to the 9/11 attacks. In the midst of armed conflict hostilities, the U.S. Air Force used a drone to launch a Hellfire missile to kill Mohamed Atef, a reputed al Qaeda leader, in his home near Kabul.¹¹ On November 3, 2002, the U.S. used a drone outside of a combat area to launch Hellfire missiles at a passenger vehicle traveling in a thinly populated region of Yemen. The CIA operated that drone from a base in Djibouti on Africa’s east coast.¹² The United States Air Force at the time had control of drone operations, but did not carry out the strike because of concerns about its legality. The CIA apparently had no such concerns and carried out the strike killing all six persons in the vehicle, including a suspected top operative in al Qaeda and a United States citizen, a young man in his twenties from Buffalo, New York.¹³ According to Dina Temple-Raston of National Public Radio, the CIA quickly arrived at the site, repelled an agent down, and took DNA samples from the bodies to confirm who had been killed.¹⁴

In January 2003, the United Nations Human Rights Commission received a report on the Yemen strike from its special rapporteur on extrajudicial summary or arbitrary killing. She concluded that the strike constituted “a clear case of extrajudicial killing.”¹⁵ Drone attacks by the United States in Pakistan began in 2004.¹⁶ The number of attacks have jumped dramatically to about 30 in 2008 and continued to climb in 2009 to about 50.¹⁷ In 2010, the U.S. attacked in Pakistan about 120 times.¹⁸

11. *Al-Qaida: Dead or Captured*, TODAY NEWS, MSN (June 22, 2005 3:37 PM), <http://today.msnbc.msn.com/id/4686228/42958222>.

12. See Jack Kelly, *U.S. Kills al-Qaeda Suspects in Yemen*, U.S.A. TODAY, Nov. 5, 2002, at A1, available at http://www.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm (providing a detailed account of the attack); Doyle McManus, *A U.S. License to Kill*, L.A. TIMES, Jan. 11, 2003, at A1, available at <http://articles.latimes.com/2003/jan/11/world/fg-predator11>.

13. John J. Lumpkin, *Administration Says That Bush Has, in Effect: A License to Kill*, ST. LOUIS POST-DISPATCH, Dec. 4, 2002, at A12.

14. DINA TEMPLE-RASTON, *THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN THE AGE OF TERROR* 196 (2007).

15. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, U.N. Comm’n on Human Rights, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶¶ 37-39, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (by Asma Jahangir).

16. See David Rohde & Mohammed Khan, *The Reach of War: Militants; Ex-Fighter for Taliban Dies in Strike in Pakistan*, N. Y. TIMES, June 19, 2004, at A6, available at <http://www.nytimes.com/2004/06/19/world/the-reach-of-war-militants-ex-fighter-for-taliban-dies-in-strike-in-pakistan.html>.

17. *Counterterrorism Strategy Initiative, 2010: The Year of the Drone*, New AmErica Foundation., <http://counterterrorism.newamerica.net/drones/2010> (last visited May 11, 2011).

18. *Id.*

The U.S. has also been using drones in Somalia, a place that almost never gets mentioned in discussions of U.S. use of military force.¹⁹ I have been unable to pinpoint when U.S. drone use in Somalia first began, but I have found news accounts that the U.S. was using drones in late 2006, perhaps to assist Ethiopia in the invasion that it carried out to attempt to install a new government in Somalia.²⁰

Despite the fact that we refer to drones as “unmanned,” there are people involved in all of these drone operations. There are people associated with drone use in Afghanistan, Djibouti, Pakistan, Yemen, and places where the drones have been housed such as Uzbekistan.

Many of these persons are CIA personnel or individuals under contract with the CIA. John Radsan, a former assistant general counsel at the CIA, has related to me that all decisions to actually fire a missile or drop a bomb from a drone are made by the CIA at its headquarters in Langley, Virginia.²¹ Jane Mayer’s article also confirms that the CIA is using private military contractors to assist with its drone operations.²² While I certainly do have concerns about the CIA and private military contractors being involved in the use of lethal force, I do not think that is the most important issue confronting the United States as a matter of law today with respect to drone use. The U.S. could easily return all drone operations to the military. The most serious issue with respect to drones is the amount of firepower involved—drones are currently configured as military weapons, meaning resort to drones is lawful in only four circumstances.

First, military force may be used as part of a lawful exercise of individual or collective self-defense under the United Nations (UN) Charter Article 51. Second, the United Nations Security Council may authorize military force. Third, military force may be used by a government in effective control of a state to suppress an organized armed uprising within a state where military force is resorted to by rebel armed forces. Fourth, military force may be used by a state asked to join in suppressing an insurrection within another state.²³

A drone is the aerial equivalent of a ground-based missile launcher or bomber aircraft. The police do not deploy this type of force—police do not get to drop

19. See Steve Bloomfield, *Somalia: The World's Forgotten Catastrophe*, INDEPENDENT (Feb. 9, 2008), <http://www.independent.co.uk/news/world/africa/somalia-the-worlds-forgotten-catastrophe-778225.html>; *A Strike Against Al-Qaeda's Hornet's Nest*, SPIEGEL ONLINE, Sept. 1, 2007, <http://www.spiegel.de/international/0,1518,458597,00.html>; *U.S. Missile Strike Hits Town in Somalia*, CBS NEWS.COM (Mar. 3 2008), <http://www.cbsnews.com/stories/2008/03/03/world/main3898799.shtml>.

20. See Bloomfield, *supra* note 19.

21. Interview with John Radsan, Professor at Law and Dir. of Nat'l Sec. Forum, William Mitchell Coll. of Law, in Univ. of Notre Dame Law Sch. (Oct. 8, 2009); see also, Richard Murphy & A. John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 405, 412-14 (2009).

22. Mayer, *supra* note 10.

23. See Mary Ellen O'Connell, *Preserving the Peace: The Continuing Ban on War Between States*, 38 CAL. W. INT'L L.J. 41, 41-42, 45-46 (2007); Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889-90, 893, 899 (2002).

bombs or use Hellfire missiles against criminal suspects. In law enforcement, lethal force is restricted to situations of absolute necessity.²⁴ Civilian casualties are not tolerated. There is no principle of proportionality that applies to the police when they are exercising lethal force.²⁵ Armed drones are therefore lawful only in armed conflict hostilities. The right to resort to them must be found in the law governing resort to military force, the *jus ad bellum*. The way they are used must be based on IHL and human rights.

Article 2(4) of the UN Charter is the most important rule on resort to force.²⁶ It is a treaty rule that is binding on all sovereign states. Treaty rules are not easily changed by contrary state practice, despite what some commentators argue. Rather, such contrary state practice is a treaty violation according to the law of treaties.²⁷ Contrary state practice might be relevant to the formation of a rule of customary international law.²⁸ In the case of Article 2(4), however, not only are we talking about a treaty rule, the United States argued in its memorials in the *Nicaragua* case in 1984 that it is a rule of *jus cogens*.²⁹ In other words, Article 2(4) is a peremptory rule that cannot be overcome by a contrary treaty rule, let alone a new rule of customary law derived from state practice.

In addition to arguing that 2(4) has been changed by state practice, some scholars try to interpret it as allowing more than it does.³⁰ Article 2(4) is properly interpreted as prohibiting all uses of force above a certain *de minimis* level. Minimal uses of force such as firing a bullet across a boundary or across the bow of a ship may perhaps violate the principle of non-intervention, but such examples are too minor to come within the purview of Article 2(4). With this exception, Article 2(4) generally prohibits all uses of force.

Other UN Charter articles provide two express exceptions to this virtual ban on all uses of force. In Chapter VII, the Security Council has been given authority to act in cases of threats to the peace, breaches of the peace, or acts of aggression

24. See, e.g., Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, 8th Sess., Aug. 27-Sept. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1, ¶¶ 3, 4, 9, available at <http://www2.ohchr.org/english/law/firearms.htm>.

25. Alston Report, *supra* note 8, ¶¶ 30, 31.

26. See Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809, 809, 822 (1970).

27. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

28. See *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶¶ 71, 77 (Feb. 20).

29. Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 1000 (2001); Mary Ellen O'Connell, *Drones Under International Law* 3-4 (Oct. 8, 2010) (unpublished Washington University of Law Whitney R. Harris World Law Institute International Debate Series), available at <http://law.wustl.edu/harris/documents/OConnellFullRemarksNov23.pdf>. *Jus cogens* norms are peremptory norms from which no derogation is permitted. *Id.*

30. See, e.g., Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in *LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM*, 346, 389-90 (Benjamin Wittes ed., 2009) (arguing that if the U.S. wants to legitimize its targeted killing policy under the framework of international law requires that the U.S. maintain its self-defense justification for doing so, thereby sufficiently creating state practice for the lawfulness of such killings).

and it may authorize measures to maintain or restore international peace and security. Article 51 also provides an exception, but note how detailed Article 51 is. So often people seem to skip over it. Every word of the Article is binding and has meaning. It reads:

Nothing in the present Charter shall impair the inherent right of collective or individual self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.³¹

Measures need to be reported to the Security Council.³² The evident restrictions in this article have come under a lot of pressure from a number of people, especially academics in the United States. For some reason, for a number of years, it has been a common practice by international lawyers in the U.S. to try to find loopholes in Article 51.³³ Louis Henkin in his famous debate with Jeanne Kirkpatrick in the 1980s, later published in the book *Right vs. Might*, pointed out that it is not in America's interest to find loopholes to these clear rules of the Charter.³⁴ This point continues to be absolutely right.

In 2005, all states re-confirmed the United Nations Charter as written at the UN World Summit in New York City.³⁵ The International Court of Justice (ICJ), the chief judicial organ of the United Nations, and the only court of general jurisdiction on matters of international law, has restated in numerous cases that the Charter means what it actually says with respect to self-defense.³⁶ The ICJ has made clear that self-defense is a term of art in international law. The reference in Article 51 to self-defense refers to the right of a victim-state to use significant offensive force in the territory of a state legally responsible for a significant armed attack.

In at least five separate decisions spanning a 60-year period, the ICJ has said that the armed attack must be attributable to a state for the exercise of self-defense

31. U.N. Charter art. 51.

32. *Id.*; see, e.g., Cassese, *supra* note 29, at 999 (explaining that although in his view the U.S. may not be required to obtain Security Council authorization for acts of self-defense against terrorism, at the very least the U.S. needs to report its measures of self-defense to the Security Council).

33. See, e.g., Anderson, *supra* note 30, at 21; Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010) (arguing that a state may act in self-defense against another state even where the other state is not responsible for an armed attack if a non-state actor carried out the attack from the other state's territory; consent is also not required, in his view.)

34. See Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT VS. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 69 (Louis Henkin et al. eds., 2d ed. 1989).

35. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 2, 79-80, 85, U.N. GAOR, 60th Sess., 8th plen. mtg., U.N. Doc. A/60/L.1 (Sept. 15, 2005), available at <http://www.unep.org/greenroom/documents/outcome.pdf>.

36. See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 4) [hereinafter *The Wall*]; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 195, 200 (June 26) [hereinafter *Nicaragua*].

on that state's territory to be lawful.³⁷ Even if the ICJ had not said this so frequently, we know from the law on state responsibility that before you can take offensive measures against another state, that state has to be responsible for the first unlawful use of force.³⁸ The ICJ has also ruled that the armed attack giving rise to the right of self-defense must be an attack that involves significant force. It must be more than a mere frontier incident, such as sporadic rocket fire or small groups of persons crossing a border.³⁹

In addition to the Charter, the ICJ has also said in several cases that two general principles of international law impose important conditions on the right to exercise force in self-defense. Those principles are necessity and proportionality.⁴⁰ In distinction to Professor Newton, I understand that proportionality has a core meaning that crosses all areas of law from criminal law sentencing to trade law, to countermeasures to the *jus ad bellum* and the *jus in bello*.⁴¹ This is the core meaning of balance or equivalence between the injury or wrong and the response. In addition to proportionality, the ICJ made clear in the *Nuclear Weapons* case that for any use of force to be lawful in self-defense, it must be necessary to achieve a defensive purpose. If the state can first make that necessity showing, the state must then show that the method of force used will not result in disproportionate loss of human life or destruction of civilian property or the environment. The ICJ said in *Nuclear Weapons*, that we have a specific rule "whereby self-defence

37. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶¶ 146-47 (Dec. 19) (deciding that Uganda could not justify the use of force in Congo given that Congo was not responsible for the attacks in Uganda of non-state actor groups.); *The Wall*, 2004 I.C.J. 136, ¶ 139 (stating that for Israel to be able to invoke Article 51 of the UN Charter as a justification for using military force on the territory of another state, a state must be responsible for an unlawful armed attack.); *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, ¶¶ 51, 61 (Nov. 6) (finding that the U.S. could not justify its acts against Iran as self-defense because it had not discharged its burden of proof to establish Iran's responsibility for attacks against the U.S.); *Nicaragua*, 1986 I.C.J. 14, ¶ 195 (holding that the right to self-defense requires an armed attack by a state or attributable to a state by "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein"); see *Corfu Channel Case* (Alb. v. U.K.), 1949 I.C.J. 4, 35 (Apr. 9) (finding that the United Kingdom had no right to remove mines from the Strait of Corfu where it was not proven that Albania had placed the mines as an armed attack on the UK).

38. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Int'l L. Comm'n, arts. 21-22, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001), available at <http://www.unhcr.org/refworld/pdfid/3ddb8f804.pdf> [hereinafter Draft Articles].

39. See *Nicaragua*, 1986 I.C.J. 14, ¶ 195.

40. *Id.* ¶ 194; *Oil Platforms*, 2003 I.C.J. 161, ¶ 43; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, ¶ 41 (July 8) [hereinafter *Nuclear Weapons*].

41. See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 719-21 (2008) (explaining that proportionality requires constraint with respect to the level of permitted force under both the *jus in bello* and the *jus ad bellum*, and also applies to use of countermeasures).

would warrant only measures which are proportional to the armed attack and necessary to respond to it.”⁴²

The U.S. began its use of force in Afghanistan on October 7, 2001, invoking Article 51.⁴³ The use of force and self-defense in Afghanistan, however, ended in 2002 when the Loya Jirga chose Hamid Karzai to replace the Taliban as the government of Afghanistan.⁴⁴ Today, the U.S. and other international forces are in Afghanistan at the invitation of President Karzai in the attempt to suppress a significant armed insurrection. If you need further evidence that the U.S. does not actually view its actions in Afghanistan today as valid acts of self-defense, I recommend Bob Woodward’s book *Obama’s Wars*.⁴⁵ Woodward recounts in detailed discussion how the U.S. is engaged in suppressing an insurrection in Afghanistan against Karzai. There is little discussion, however, that U.S. involvement in Afghanistan today is a self-defense effort that began in 2001.

Beyond Afghanistan, the U.S. has been invited to join in some military operations in Pakistan, but it is not clear whether those invitations came from the elected leader of Pakistan, President Zardari.⁴⁶ Moreover, following the floods of 2009, Pakistan had suspended its own offensive military operations – troops have plainly been needed to aid in the rescue and rebuilding effort. Similarly, Ethiopia may have asked for U.S. assistance to use drones during its intervention in Somalia, but Ethiopia’s operation is over. Ethiopia withdrew from Somalia, failing to replace the government in Somalia.⁴⁷

Nevertheless, despite the absence of any basis to resort to the use of military force anywhere but Afghanistan at the time of writing, the Obama Administration has persisted in using drones in Pakistan, Somalia and Yemen. How has the U.S. justified these attacks? State Department Legal Advisor Harold Koh gave a speech at the American Society of International Law’s Annual Meeting in March 2010, and indicated two possible justifications, though I find them mutually contradictory. He said first, that the U.S. is currently in a worldwide, armed

42. *Nuclear Weapons*, 1996 I.C.J. 95, ¶ 41.

43. Permanent Rep. of U.S. to the U.N., Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001); Chargé d’affaires a.i. of the Permanent Mission of the U.K. of Gr. Brit. and N. Ir. to the U.N., Letter dated 7 October 2001 from the Chargé d’affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/947 (Oct. 7, 2001).

44. See *President Hamid Karzai*, EMBASSY OF AFG., WASH. D.C., <http://www.embassyofafghanistan.org/president.html> (last visited Apr. 21, 2011).

45. BOB WOODWARD, *OBAMA’S WARS* 5 (2010).

46. See Jackie Northam, *Airstrikes in Pakistan’s Tribal Areas Legally Murky*, NPR (Mar. 17, 2009), <http://www.npr.org/templates/story/story.php?storyId=101953944>.

47. See *Somalia Joy as Ethiopians Withdraw*, BBC NEWS (Jan. 13, 2009), <http://news.bbc.co.uk/2/hi/africa/7825626.stm>; *Ethiopia Completes Withdrawal of Troops from Somalia*, CHINA VIEW (Jan. 26, 2009), http://news.xinhuanet.com/english/2009-01/26/content_10721724.htm.

conflict with al Qaeda, the Taliban, and associated forces.⁴⁸ But then he also said that the United States is responding to threatened attacks by individuals in these organizations, using force to preempt attacks under a theory of self-defense.⁴⁹ So in other words, there is no worldwide, armed conflict but rather preemptive attacks to stop future terrorist plots. If, however, the U.S. is already in an armed conflict, resorted to in self-defense, it does not need to justify each attack as a preemptive attack in self-defense and each attack would be governed by IHL instead of the law of self-defense. Indeed, preemptive force is not a lawful basis for exercising force against a sovereign state, let alone an individual, so this argument is doubly odd. If we leave to one side the credulous arguments that the U.S. is in a worldwide, armed conflict and/or resorting to preemptive attacks, could the U.S. defend drone attacks in Yemen after, for example, the toner cartridge incident?⁵⁰

The British have strongly advocated for decades that terrorist attacks must be treated as criminal acts under international law unless they are part of an armed conflict, separately established from the terrorist attacks.⁵¹ Terrorist attacks generally have the hallmarks of crime; not armed attacks that can give rise to the right of self-defense under Article 51. Terrorist attacks are usually sporadic, and they are rarely the responsibility of the state where the perpetrators are located. However, in some circumstances though rare, terrorist attacks may be carried out so continuously that they rise to the level of armed conflict.

For instance, the Supreme Court of Israel found in 2006 that Israel was engaged in a continuous state of armed conflict with various terrorist organizations due to the “constant, continual, and murderous waves of terroristic attacks,” and they responded in the armed response to these.⁵² The Israeli court described a situation that was more than a crime and would seem to share the important features of the textbook-case of self-defense: the liberation of Kuwait in 1991. After Iraq invaded Kuwait, Kuwait had the right to use force in self-defense.⁵³

48. Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, The Obama Administration and International Law, Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> [hereinafter Koh Speech].

49. *Id.*

50. Eileen Sullivan, ‘Toner’ Terror Fallout, N.Y. POST (Nov. 9, 2010, 1:15 AM), http://www.nypost.com/p/news/national/toner_terror_fallout_lrpzhck38E2yVudpSuDkCO (stating that the “toner cartridge” incident was an attempt by terrorists in Yemen to destroy two cargo planes headed to Chicago with bombs hidden inside of printers, but the plan was thwarted when Saudi Arabian officials obtained information of the attack and provided the United States with the FedEx and UPS tracking numbers of the printers).

51. See, e.g., Reservation of United Kingdom (July 2, 2002), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>; U.K. MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT 31 (2004).

52. HCJ 769/02 The Public Committee Against Torture in Israel v. Israel (2) PD 459, ¶ 16 [2006] (Isr.), available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/d14f3f94989b702fc12572d80043927b!OpenDocument>.

53. See Mary Ellen O’Connell, *Enforcing the Prohibition on the Use of Force: The U.N.’s*

Other states could join Kuwait, in collective self-defense.⁵⁴ Self-defense was authorized by the Security Council in order to expel the invader.⁵⁵ The liberation of Kuwait had two aspects not found in connection with most terrorist attacks. No one doubted who had carried out the armed aggression. It was Iraq. Second, the occupation of Kuwait created a continuing wrong that could be righted.⁵⁶ The international law violation could be effectively corrected through the use of major military counter force.

In the case of terrorist attacks, the first task is always evident. The necessity to act in self-defense means the state that has suffered an attack sees the imminent threat of another attack or is facing continuing attacks to which they must respond quickly.⁵⁷ This is a difficult showing to make in the case of terrorist attacks. Terrorist attacks are usually too brief and do not result in ongoing wrongs, such as the unlawful occupation of territory. It usually takes time to find out who the perpetrators are and where they are. But force used long after a terror attack loses its defensive character becomes an unlawful reprisal. States are forbidden from taking reprisals affirmatively in the General Assembly's Definition of Aggression, which elaborates on Article 2(4).⁵⁸ Even when militant groups remain active along a border, and are regularly carrying out small attacks, such incursions are not considered armed attacks that can give rise to the right of self-defense under Article 51, unless the state where the group is present is responsible for their actions.

In the case of *Congo v. Uganda*,⁵⁹ decided by the ICJ in 2005, Uganda had sent troops into Congo after years of cross-border incursions into Uganda by militant groups based in Congo. Numerous Ugandan citizens were killed as a result of these militant attacks, but Congo did little to control the militants. Nevertheless, the ICJ found that Congo's failure or inability to take action against the militants to protect Ugandans did not give rise to any right by Uganda to exercise major military force on the territory of the Congo.⁶⁰ Thus, although this notion is often heard, there is no actual right to use military force triggered by a state unwilling or unable to control such groups. In the *Congo* case, Uganda was found to have violated Article 2(4) for its attacks on Congolese territory.⁶¹ Uganda

Response to Iraq's Invasion of Kuwait, 15 S. ILL. U. L.J. 453, 479-80 (1991).

54. *See id.*

55. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990), available at <http://daccess-ods.un.org/TMP/1070384.53221321.html>.

56. *See* Draft Articles, *supra* note 38, art. 22.

57. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 121 (Malcolm Evans & Phoebe Okowa eds., 2d ed. 2004).

58. Definition of Aggression, G.A. Res. 3314 (XXIX), art. 3, U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974).

59. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19).

60. *See id.* ¶¶ 109-110, 112, 129, 146, 152.

61. *Id.* ¶¶ 149, 153, 165.

needed to take defensive measures on its own territory or in co-operation with Congolese authorities instead of unilaterally sending troops into Congo.

Within states, resort to military force is limited by international human rights law, which prohibits a government from using excessive force in responding to acts of violence, even if armed groups seeking to take power or secede perpetrate the violence.⁶² Those armed groups must reach a certain level of organization and a certain level of ability to confront the government authority before armed force beyond police measures may be exercised.⁶³

I disagree with Professor Newton that there is no international law governing how internal armed conflicts are waged. There is a very large body of customary international law that has been gathered by the International Committee of the Red Cross in their customary law study.⁶⁴ There is plenty of law regulating the conduct of internal armed conflict. But the rule I am emphasizing today, that armed force may not be used outside armed conflict situations, is a rule from human rights law.

Officials of the Bush and Obama Administrations have made the argument that because the 9/11 attacks were significant and were preceded and succeeded by terrorist attacks, the U.S. may target and kill al Qaeda members and their associates wherever they are found.⁶⁵ Following the 2002 Yemen strike, the National Security Advisor, Condoleezza Rice, said that the U.S. is allowed to use military force because the U.S. is in "a new kind of war."⁶⁶ The U.S. argued that the war existed not where fighting was occurring but where certain individuals were found.⁶⁷ The Deputy General Counsel for International Affairs of the Department of Defense also said that the United States could target al Qaeda and other international terrorists around the world and those who support them without warning.⁶⁸

As weak as it was in other ways, at least the Bush Administration had a logically consistent argument. They said we could kill al Qaeda members if they were in the U.S., Germany, Switzerland, and elsewhere based on a suspect's presence and claimed the combatant's privilege to kill wherever a suspect was

62. See Alston Report, *supra* note 8, ¶¶ 30-32.

63. Prosecutor v. Dusko Tadić, Case No. IT-94-I-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

64. ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2001), available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha.

65. Koh speech, *supra* note 48; O'Connell, *Pakistan*, *supra* note 2, at 16.

66. Fox News Sunday with Tony Snow (Fox News Network television broadcast Nov. 10, 2002), available at <http://www.foxnews.com/story/0,2933,69783,00.html>.

67. See, e.g., Katerina Ossenova, DOJ Official: President May Have Power To Order Terror Suspects Killed in U.S., JURIST (Feb. 5, 2006), <http://jurist.law.pitt.edu/paperchase/2006/02/doj-official-president-may-have-power.php>; Anthony Dworkin, Obama Administration Announces Legal Basis for Drone Attacks, CRIMES OF WAR <http://www.crimesofwar.org/commentary/obama-administration-announces-legal-basis-for-drone-attacks/> (last visited June 2, 2011).

68. Mary Ellen O'Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT'L L. 446, 454 (2003) (citing Anthony Dworkin, *Pentagon Official Examines Legal Aspects of Terror War*, available at http://hsm.intellibridge.com/summary?view_id=117201800 (on file with author)).

found. In contrast, the Obama Administration bases its policy on the conditions in which the suspect is found, not just who the suspect is.⁶⁹ Legal Advisor Koh has said that the Obama Administration no longer uses the term “global war on terror.”⁷⁰ Rather, he says the United States is in an “armed conflict with al-Qaeda as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”⁷¹ They had to take a different position from the Bush Administration because President Obama campaigned against the global war on terror. Thus, the Obama Administration is attempting to differentiate the current legal position from that of the Bush Administration.

However, with all due respect to Harold Koh, his argument is actually weaker than the Bush Administration's. You cannot justify the right to use force based on who an individual is as opposed to whether there has been an armed attack where the person is. Moreover, if the U.S. is already in a worldwide, armed conflict, we have no need to invoke self-defense for each additional attack. Finally, if there is a worldwide, armed conflict, it must be in the U.S. and Germany as much as Yemen and Pakistan. The Legal Advisor has said that decisions to use force would be based on the conditions and capacities of governments.⁷² This point again reveals the weakness of the argument. The combatant's privilege to kill is based on the exigencies of armed conflict hostilities and not on the strength or weakness of a government.

The International Law Association (ILA) undertook a five-year study to help clarify what the definition of armed conflict was in international law in response to the Bush Administration's view that there could be a global armed conflict based on the existence of certain persons.⁷³ I was asked to chair that committee of 18 persons from 15 countries. Judith Gardam, the prominent Australian professor of international humanitarian law and human rights law, was the rapporteur.⁷⁴ Christine Gray from the University of Cambridge was a member of the committee, as was Sir Michael Wood, former legal advisor to the British Foreign and Commonwealth office, Eric Myjer of the University of Utrecht, George Nolte of the Humboldt University, Berlin, and many others.⁷⁵

The ILA report states that international law defines armed conflict as always involving at least two minimum characteristics: 1) the presence of organized armed

69. Koh Speech, *supra* note 48.

70. Renee Dopplick, *ASIL Keynote Highlight: U.S. Legal Adviser Harold Koh Asserts Drone Warfare is Lawful Self-Defense Under International Law*, INSIDE JUSTICE (Mar. 27, 2010), http://www.insidejustice.com/law/index.php/intl/2010/03/26/asil_koh_drone_war_law.

71. Koh Speech, *supra* note 48.

72. *See id.*

73. INT'L LAW ASS'N, HAGUE CONFERENCE (2010) USE OF FORCE COMM., FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 1 (2010), *available at* <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (click on “Conference Report The Hague (2010)” hyperlink).

74. *Id.*

75. *Id.*

groups, 2) engaged in intense inter-group fighting.⁷⁶ The fighting or hostilities of an armed group occurs within limited zones, theater of combat, or combat zones. Ask any member of the U.S. or NATO armed forces where the U.S. is engaged in combat operations today and they will correctly tell you in Afghanistan and Libya. Terrorism, as I discuss above, is generally a crime. Although in some circumstances it may be carried out so continuously as to be the equivalent of the fighting of an armed conflict as the Israeli High Court explained. The isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict because armed conflict requires a certain intensity of fighting.

This is certainly not the situation in the United States today. Even where the U.S. is using drones on the basis of consent from the territorial state, that state may not consent to use military force on its own, against its own people, except when it is engaged in armed conflict hostilities. The legal restriction on the use of military force in such situations is found in human rights law. The major human rights treaties, for example, permit derogation in situations of emergency. Outside emergency, a state may only take human life when absolutely necessary in the defense of persons from unlawful violence – in the case of immediate need to save a human life.

Even on those occasions in Pakistan where hostilities were occurring and the President may have been asked to engage in those armed conflict hostilities, the question remains whether using military force in the situation of Pakistan through the use of drones meets the principles of necessity and proportionality. Necessity in the *jus ad bellum* refers to the decision to resort to force as a last resort and that the use of major force can accomplish the purpose of defense.

One of the leading counter terrorism experts today, David Kilcullen, says that, in fact, the drone attacks have been counterproductive. He said this in his March 2009 Congressional testimony:

I think one of the things we could do immediately to send a strong message is to call off the drone strikes that have mounted in the western part of Pakistan. . . [T]hey've given rise to a feeling of anger that coalesces the population around the extremists and leads to spikes in extremism well outside the parts of the country where we are mounting those attacks.⁷⁷

The views of Kilcullen and other counter terrorism experts raise questions as to whether drone strikes can ever be defended as accomplishing the military objective. Bob Woodward writes that the President is also aware of the long term disability of drone strikes: “Despite the CIA’s love affair with unmanned aerial

76. *Id.* at 2.

77. *Effective Counterinsurgency: The Future of the U.S. Pakistan Military Partnership: Hearing Before the H. Armed Servs. Comm.*, 111th Cong. 21 (2009) (statement of David Kilcullen, Partner, Crumpton Group, LLC, Senior Fellow, EastWest Institute, Member of the Advisory Board, Center for a New American Security), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:52666.pdf.

vehicles, such as Predators, Obama understood with increasing clarity that the United States would not get a lasting durable effect with drone attacks.”⁷⁸ I do not think anybody believes that we will create much more than a temporary disruption of al Qaeda activities.

General Lute, a member of the National Security Council, believes attacking from the air a “high value” target hit list will accomplish little.⁷⁹ This is consistent with what we are hearing from counter terrorism experts. Indeed the Rand Corporation, in a study produced in 2008, provided very definitive evidence that drone attacks or military force against terrorist groups is almost never effective.⁸⁰ The way that terrorist groups come to an end is by bringing them into the political process or through law enforcement efforts.⁸¹ These are not the conclusions of Human Rights Watch; they are the conclusions of the Rand Corporation.

Some commentators have asserted that the U.S., and presumably other forces fighting in Afghanistan, has the right to pursue terrorist suspects in “hot pursuit.”⁸² This assertion was heard frequently in September 2010 after helicopter gunships crossed the border from Afghanistan into Pakistan.⁸³ International lawyers well understand, however, that hot pursuit is a right restricted to maritime policing efforts.⁸⁴ Under the United Nations Convention on the Law of the Sea, the amount of force permissible in hot pursuit is consistent with enforcement measures, not military force.⁸⁵ “Hot pursuit,” as an enforcement measure, is a narrower right under the laws of the sea, confining states to stricter rules than the rules governing the amount of force a state may use against another.⁸⁶

Another highly questionable attempt at justification is something referred to as “unit self-defense.”⁸⁷ As I understand it, it is an argument that, if one naval ship in a unit of ships is attacked by an enemy ship or a plane, then the entire unit to which the victim vessel belonged may strike the entire attacking unit. Outside of

78. WOODWARD, *supra* note 45, at 284.

79. *Id.*

80. See SETH G. JONES & MARTIN C. LIBICKI, HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA 18-19, 30-31 (2008), available at http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf.

81. See *id.* at 18-19.

82. Northam, *supra* note 46.

83. Issam Ahmed, *NATO Helicopter Strike on Pakistan Shows New Strategy of “Hot Pursuit,”* CHRISTIAN SCI. MONITOR (Sept. 30, 2010), <http://www.csmonitor.com/World/Asia-South-Central/2010/0930/NATO-helicopter-strike-on-Pakistan-shows-new-strategy-of-hot-pursuit>; but see NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 72-73 (2010) (arguing the doctrine of hot pursuit does not provide a sound basis for military operations contemplated in Pakistan and Afghanistan).

84. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 245-46 (4th ed. 2005); Christian J. Tams, Symposium, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 371 (2009) (summarizing Christine Gray, INTERNATIONAL LAW AND THE USE OF FORCE 112 (2d ed. 2004)).

85. United Nations Convention on the Law of the Sea art. 111, Dec. 10, 1982, 1833 U.N.T.S. 3.

86. See *id.* (listing the rules of “hot pursuit” for ships at sea); DINSTEIN, *supra* note 84, at 246.

87. Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998) (describing “unit self defense” and the limited assessment of its legal basis).

an armed conflict, there is no legal basis for this asserted right. Even in an armed conflict, the right to attack the enemy is based on the necessity to do so—not on whether a ship or plane belongs to a “unit.” Nor do I see how this argument can lawfully be applied to individual terrorist suspects.

Finally, some arguments are also being made that there is a right of preemptive self-defense to kill a person or group of persons who may be about to engage in future violent action.⁸⁸ As already explained, however, the right of self-defense in international law is based on response to an armed attack occurring, not preempting future attacks. The law of self-defense does not encompass a right to initiate military action against an individual or a small group, especially when the state where such persons are present is not legally responsible for their action.

The strongest conclusion to draw under the *jus ad bellum* is that there is no legal right to resort to drone attacks in Pakistan, Yemen, Somalia, and other places where the U.S. is not involved in armed conflict hostilities. In 2010, that meant Afghanistan only. Drone attacks constitute the use of military force. Resort to them is lawful when a state is a victim of an armed attack and the Security Council has authorized the use of force at the request of a government in effective control who needs assistance in suppressing an organized armed opposition force.

Professor Kenneth Anderson, in a working paper written for a joint project of the Brookings Institute of the Georgetown University Law Center and the Hoover Institute, wrote a statement that I think is absolutely correct and that the United States should carefully heed. He wrote that:

[A] strategic centerpiece of U.S. counter terrorism policy rests upon legal grounds regarded as deeply illegal – extrajudicial killing is one of the most serious violations of international human rights law, after all, as it should be – by large and influential parts of the international community.⁸⁹

Beyond effectiveness against terrorism, the current law on drones should appeal to the West because we are not the only ones who have drones. It is time to start using our legal imagination and to think about these new weapons in the hands of China, Iran, Hezbollah, and others. What are the rules that we should be modeling for all?

In conclusion, commentators are currently debating whether drone technology represents the next revolution in military affairs. Regardless of the correct answer to that question, drones have not created a revolution in legal affairs. The current law governing battlefield launch vehicles is adequate for regulating drones. We do not have a full study of the psychological impact on operators or on our leaders of this new technology—some indicators suggest it is leading to more killing. Our

88. See, e.g., DINSTEIN, *supra* note 84, at 182; W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 530-31 (2006); Franck, *supra* note 26, at 821.

89. Anderson, *supra* note 30, at 16.

leaders may not fully understand that drones are battlefield weapons. The fact that there is not a uniformed member of our armed services in the vehicle may be sending the wrong message that use of drones is somehow not really the use of military force and we can get away with using them away from battlefields. They seem attractive: fast, sleek new technology that we can sneak into countries and get rid of bad guys. Yet, anyone who has seen the destruction caused by drones knows what they are. They are battlefield weapons. They should be regulated under battlefield rules and the United States should be insisting that the entire international community treat them this way. There is no more persuasive argument than pointing out that these are the rules the United States follows.

FLYING INTO THE FUTURE: DRONE WARFARE AND THE CHANGING FACE OF HUMANITARIAN LAW

KEYNOTE ADDRESS TO THE 2010 SUTTON COLLOQUIUM

MICHAEL A. NEWTON*

It is a delight to be here today, particularly in the presence of Professor Ved Nanda. I do hope that you realize how privileged you are to be here under his tutelage, and I salute him as one whose influence has affected both the content of the law and the character of those who have learned from him in this great law school. The discussion regarding the scope and propriety of drone warfare cannot be undertaken in isolation. Drones and the parameters of their appropriate use are very much at the forefront of the modern consciousness, and thus I think it wholly appropriate to carefully consider the best way ahead for both the legal profession and the profession of arms.

Before we consider the specifics of drone warfare, we must remember two predicate points. Firstly, the discipline of international criminal law has never been healthier as the era of accountability is irreversibly underway. While the challenges of administering justice in the midst of profound political and personal passions remain, there is no current shortage of young and inspired advocates who wish to contribute. Furthermore, they do so against the backdrop of a developed discipline. It cannot be forgotten that the discrete discipline that we term international criminal law, and that many of us teach in our law schools, has taken form and root only over the past fifteen years. Thus, any discussion of drone warfare must be cognizant of the backdrop of criminality and prosecutorial prerogatives that did not exist until relatively recently. The long list of leaders and policymakers that have been held accountable bears witness to the authority of the criminal law regime. This pool includes a rogue's gallery of political leaders and powerful personalities. Moreover, individuals at the leadership level will be those that authorize drone warfare in the future. No one is truly above the law in this modern era.¹

Secondly, in my opinion, the debates over drone warfare should not be seen through an isolated lens. Drone warfare takes place against the broader backdrop of many issues. To a certain extent, the interaction of these issues clarifies where

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1. See generally MICHAEL A. NEWTON & MICHAEL P. SCHARF, *ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN* (2008).

we are and where we are heading, but at the same time the interaction creates complexity. For example, the changing face of conflict has spawned a revision of counterinsurgency doctrine that has changed the way we define the very nature of armed conflict.

What does the very scope of the phrase "armed conflict" now mean in light of our modern experience? How does *jus in bello* interface with the established law of peace in a new era of seemingly perpetual conflict? What does it mean to achieve victory in an era of transnational conflict against established non-state terrorist organizations? What are the key operational dynamics and how do civilized nations best remain within the legal regime while still attacking the relevant terrorist organizational centers of gravity? The United States' position on these doctrinal areas has evolved significantly. Moreover, this evolution has not taken place in isolation, as the United States has evolved in conjunction with its allies.

The earlier panel alluded to the complexities introduced by the intersection of differing international law regimes. Two of these colliding regimes are the tectonic plates of international human rights law and international humanitarian law ("IHL"). As drone warfare becomes not only necessary, but a new normality, the clash between these great, huge, moving icebergs of law becomes ever more pointed. From my perspective, it is an oxymoron to argue that humanitarian law is a mere subset of human rights law. No, IHL has a much richer, longer, and diverse history. The Martens clause² and other aspirational phraseology in the corpus of humanitarian law do little to change the relationship between these two international regimes. Additionally, it cannot be forgotten that all of the Geneva principles derived from a strongly stated consensus to improve humanitarian protections.³

The principle of command and control is central to IHL. The idea that a commander's orders operate with the force of law to limit the application of violence arose independently in widely disparate cultures and historical periods.⁴ This suggests that command and control is more than just a legal technicality, but rather is fundamental to the nature of warfare itself. Hence, the body of IHL sprang from the realities of military practice and the demands of military duty. Despite the fact that states in the modern era have obligations arising from human

2. Convention with Respect to the Laws and Customs of War on Land (Hague II) July 29, 1899, 32 Stat. 1803, T.S. no. 403, available at http://avalon.law.yale.edu/19th_century/hague02.asp. See also Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky*, EUR. J. INT'L L. 187 (2000).

3. *The Geneva Conventions of 1949: Origins and Current Significance, Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions, Address by Philip Spoerri, Director of International Law, ICRC, INTERNATIONAL COMMITTEE OF THE RED CROSS* (Dec. 8, 2009), <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm>.

4. Michael A. Newton & Casey Kuhlman, *Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of 'Effective Control'* 4 (Vanderbilt University Law School Public Law and Legal Theory, Working Paper No. 10-17, 2010), available at http://law.case.edu/lectures/files/2010-2011/20110211_Newton-EffectiveControl-SSRN.pdf.

rights awareness, this normative development did not simply eviscerate the preexisting body of law. Human rights law has obviously evolved in a specialized and, in some sense, universalized context. However, international human rights law should not be perceived as the Pac-Man that ate IHL.

The key point to understand in the context of drone warfare is that this clash of the tectonic plates of law is immensely important and directly relevant to the way we view rapidly evolving technology. To be more precise, these international law regimes are wholly determinative of the best practices and professional norms by which we appropriately apply the evolving technology of drones, or remotely piloted vehicles (“RPVs”).

The other notable legal development in the post 9/11 era is of course our changing perceptions regarding the rights and duties attached to non-state actors or, to be more precise, non-state participants in armed conflict. Where should the line be drawn concerning humanitarian human rights protections and humanitarian obligations or conversely humanitarian rights begin? That is the core of the question; and it is derived from both of those bodies of law. As the earlier panelists noted, any attempt to address drone warfare that ignores the changing legal terrain is doomed to be incomplete despite the reality that the questions are inherently complex. Not to state a tautology too bluntly, but inadequate framing of the key issues will result in incomplete answers that ignore the broader doctrinal and legal debates.

The law of state responsibility has also been changing dramatically. Remember, in the context of human rights law, the state itself is primarily responsible for protecting the human rights of those persons within their jurisdiction.⁵ Well, we all know that. By the way, that should be on your Bar exam. Currently, it is not, but it should be for you law students. I am advocating for the day when we will have core international human rights questions on the Bar exam. Human rights are a fundamental, foundational knowledge necessary for good lawyering. Practicing lawyers cannot become successful in the world today without understanding these basic principles. I really believe that, so keep studying your human rights law. But I digress.

Of course, the entire debate regarding drones takes place in the context of a sea change in our understanding of the authoritative actors in an armed conflict. The keen international sense of vulnerability in the aftermath of the al Qaeda attacks in New York and Washington D.C spawned an extremely rare fever of international unity. President Bush declared a state of national emergency,⁶ and the U.N. Security Council swiftly passed Resolution 1368 unanimously.⁷

5. UN Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006, HR/PUB/06/12, available at <http://www.unhcr.org/refworld/docid/46ceaf92.html>.

6. Proclamation No. 7463 Declaration of National Emergency by Reason of Certain Terrorist Attacks, 50 U.S.C. § 1621 (2006).

7. Press Release, Security Council, Security Council Condemns, ‘In Strongest Terms’, Terrorist

Resolution 1368 categorized the attacks as a “threat to international peace and security,”⁸ affirming the “inherent right of individual or collective [self-defense]”⁹ expressed in Article 51 of the U.N. Charter, and specifically directing “all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks.”¹⁰ For the first time in its storied existence, the North Atlantic Treaty Organization (“NATO”) invoked the principle of Article 5 of the Washington Treaty, thereby recognizing that the attacks constituted an “armed attack” consistent with the treaty’s provisions that trigger NATO obligations to assist another member so attacked.¹¹ NATO aircraft helped to fly combat air patrols over U.S. airspace in the immediate wake of the attacks.¹²

Despite the modern consensus that the sovereign right of self-defense did not originate in Article 51 of the United Nations Charter and is not restricted to responses enumerated therein, there remains a great deal of debate over the appropriate principle that ought to apply to non-state actors that conduct conflicts that transcend national borders. Does the responsibility for protecting human rights jump from border to border as the combatant engages in transnational conflicts? States, as a matter of state responsibility, remain responsible for combatant activities conducted from their territories. Conversely, states are, of course, responsible for protecting and defending the human rights of those people and those persons in their territories.

Lastly, an ostensibly obvious point, which cannot be overlooked is that the nature of the conflict is changing. Until 9/11, there was a huge debate on the proper relationship between state actors and non-state actors. Before the al Qaeda attacks many scholars debated whether it was even possible to enter an armed conflict with a non-state actor. As I just noted, that seems so passé after 9/11; so quaint. Today it is widely accepted that the very essence of civilization, central to governmental authority, is the government’s obligation to defend its territory and its citizens from attack, even if that attack comes from non-state actors. General acceptance of the truism that we can indeed be in an armed conflict against non-state actors that is fully subject to *jus in bello* does not, however, answer essential

Attacks on United States; Unanimously Adopting Resolution 1368 (2001), Council Calls on All States to Bring Perpetrators to Justice, U.N. Press Release SC/7143 (Sept. 12, 2001).

8. S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

9. *Id.* pmbl.

10. *Id.* ¶ 3 (“[T]hose responsible for aiding, supporting or [harboring] the perpetrators, organizers and sponsors of these acts will be held accountable . . .”).

11. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; *Invocation of Article 5 Confirmed*, N. ATLANTIC TREATY ORG. [NATO] (Oct. 2, 2001), <http://www.nato.int/docu/update/2001/1001/e1002a.htm>; *What is Article 5?*, NATO, <http://www.nato.int/terrorism/five.htm> (last updated Feb. 18, 2005).

12. NATO, *Anti-terrorism Operations*, ALLIED COMMAND OPERATIONS, <http://www.aco.nato.int/page142123533.aspx> (last visited Apr. 22, 2011); *NATO and the Fight Against Terrorism*, NATO, http://www.nato.int/cps/en/natolive/topics_48801.htm (follow “Historical background” hyperlink) (last updated Mar. 9, 2011, 3:54 PM) (describing Operation Eagle Assist which lasted from October 2001 to May 2002 and was intended to free up U.S. air assets for strikes against Afghanistan, from which the September 11 attacks were planned and launched).

questions that confront practitioners. The real questions are: what is the scope of that conflict? Who are the participants in that conflict? How does IHL bind asymmetric actors? Remember, humanitarian law was designed to apply on a reciprocal basis to people who act in conformity with the language of the Geneva Conventions on behalf of a state; in other words, those who belong to a state party.

Drone strikes that transcend international boundaries and that are conducted against an amorphous transnational organization raise vital legal questions. Some of these are offensive questions, such as targeting issues, while some are defensive questions (at least in the sense of good lawyering on behalf of your client), such as the rights, duties, and obligations of the striking party. As an extension, what are the effects on the application of the law when that non-state actor acts in ways that undermine—and I would argue ignore—the larger body of humanitarian law? Does that obviate the need for IHL? Does another legal regime apply? Does it mean that non-state actors can be targeted without the constraints otherwise imposed by IHL? These are all complex questions that cannot be answered without recourse to the backdrop of larger legal developments.

Before I make the legal observations at the heart of my comments, I want to pause and highlight my deep conviction that words have meaning. This was alluded to in conversations this morning, but I want to emphasize that words do have meaning, particularly when they are charged with legal significance in the context of legal documents because of the implications of language. To be specific, the danger of loose or misused language is heightened in today's globalized society where there really are no secrets. Now we have a common homogenized body of norms, criminal norms that have begun to be implemented in the domestic systems of countries all around the world. Those norms are directly relevant to both the precepts of command responsibility, the precepts of corporate responsibility, and the precise contours of the line between state responsibility and individual responsibility. The paradox is that even as we have made tremendous strides over the last 20 years to eliminate impunity, to create accountability structures with clearly established legal norms that do, in fact, export criminal liability, we have also created a perverse incentive for those same norms to be discussed in a cavalier and cutting manner. If you do not think this is a serious concern, then read the foreign press following any NATO drone strike in Afghanistan, or Pakistan, or Yemen.¹³ Words have meaning and it is important for us to use words precisely if for no other reason than to refrain from giving aid and comfort to our enemies.

A very strong strain of thought argues that drones are really nothing special; certainly nothing that needs an entirely separate legal framework.¹⁴ In other

13. See, e.g., Declan Walsh, *Leading UN Official Criticises CIA's Role in Drone Strikes*, THE GUARDIAN (London), June 3, 2010, available at <http://www.guardian.co.uk/world/2010/jun/03/us-pakistan-drone-strikes?INTCMP=SRCH>.

14. See, e.g., Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 106-08 (2010) (stating that the U.S. government considers itself in an armed conflict in Afghanistan and Iraq, and with the Taliban).

words, the body of developed humanitarian law is sufficient to handle drones as a mere technological innovation. From this perspective, drones are simply another delivery mechanism to be analyzed against the framework of established principles of humanitarian law, such as reciprocity, humanity, necessity, distinction, proportionality. In other words, while drones (RPVs in the current lingo) present a wholly new technological stand-off capability, they merely represent a new incarnation of a method of conflict that must be assessed in light of the preexisting Hague and Geneva principles that are today intertwined in what we conveniently lump together under the rubric of "international humanitarian law." To be more precise, we could correctly speak of the corpus of the "laws and customs of war." These principles nevertheless do not stand alone on the battlefield. They are implemented by the force of will of the commander.

Every drone strike is undertaken at the express command of a commander. "To command" is an active verb. Commanders are critical to a fighting organization, and are keenly aware of the linkages between law and operations, because "their organizations will be most effective—militarily—where they field their organization with the proper control mechanisms."¹⁵ According to the International Committee of the Red Cross (ICRC), "[t]he first duty of a military commander, whatever his rank, is to exercise command."¹⁶ The commander or superior is the decisive actor because inattention to the basic legal duties inherent in a hierarchy of authority undermines the "very essence of the problem of enforcement of treaty rules in the field."¹⁷ Mao Tse-Tung put it simply, "[u]norganized guerrilla warfare cannot contribute to victory."¹⁸ In the modern era, therefore, successful military operations require that commanders at all levels are educated and empowered to make important and accurate decisions, because their actions often have strategic consequences that are intertwined with the legality and legitimacy of the decisions made and actions taken. The modern media has been known to transform appropriate and tactical decision-making into another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices. Legal lacunae can be deliberately magnified and exploited by an adversary to degrade combat effectiveness. Mistakes are often amplified, and law is misused, not to facilitate effective operations that minimize civilian casualties and preserve human dignity, but to create greater military parity between mismatched forces. U.S. counterinsurgency doctrine captures this truism:

15. Michael A. Newton & Casey Kuhlman, *Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of Effective Control*, 40 NETH. Y.B. OF INT'L L. 3, 52 (2009).

16. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 art. 87, ¶ 3549 (Yvez Sandoz et al. eds., 1987), available at <http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/36fc92eb9e83fbbec12563cd00437bfb!OpenDocument> [hereinafter ICRC COMMENTARY ON PROTOCOL I].

17. *Id.* ¶ 3550.

18. MAO TSE-TUNG ON GUERRILLA WARFARE 45 (Samuel B. Griffith trans., 2000).

Senior leaders set the proper direction and climate with thorough training and clear guidance; then they trust their subordinates to do the right thing. Preparation for tactical-level leaders requires more than just mastering Service doctrine; they must also be trained and educated to adapt to their local situations, understand the legal and ethical implications of their actions, and exercise initiative and sound judgment in accordance with their senior commanders' intent.¹⁹

Accordingly, commanders need both a clear understanding of the law regulating drone strikes and the courage to act decisively to limit civilian casualties and comply with the law, while remaining faithful to the overriding imperative of mission accomplishment. Thus, it should not be surprising that there is a long-standing rule of engagement promulgated under the authority of commanders that says you may not send unobserved artillery fire into an urban area. In other words, sending artillery fire into those areas must only be done under the express authority of a commander absent overriding imperatives. Despite the fact that subordinates have legal authority derived under the principle of *jus in bello*, in order for a particular strike aimed at a military target - with indirect artillery fire located in a civilian area - to adhere to distinction and proportionality, it must comply with a more stringent set of constraints imposed by command prerogatives.

When assessing the normative state of practice regarding drone warfare, we therefore need to be very precise in our analysis of the line between pragmatics and legal obligation. What is the distinction between the law as it is and the law as we might want it to evolve? What is the difference between *lex lata* and *lex ferenda*? Where do we want the law to develop, where should it develop? How are states and non-state actors bound by divergent norms? Or is the law to be conceived of as a homogenous mass that must be objectively determined and neutrally applied?

In light of the precursor thoughts I've just outlined, let me quickly develop what I see as four discrete areas where we should look to the future, building on what's happened in the past and focusing on the future developments, which is by coincidence the assigned topic of this panel. As you might have inferred from my earlier reflections on the nature of command, the application of command responsibility [or its extension to the realm of superior responsibility drawn from Article 25 of the Rome Statute] has particular ramifications for the future of drone warfare. The law is exceedingly clear in this regard as commanders must "do everything feasible" to minimize or eliminate collateral damage and "take all feasible precautions" to ensure that the choice of means or methods of attacking any military objective minimizes "incidental loss of civilian life, injury to civilians, [and] damage to civilian objects."²⁰ Thus, the complexities of debate from this morning regarding the scope of direct participation in hostilities and the boundaries

19. DEP'T OF ARMY, FIELD MANUAL 3-24: COUNTERINSURGENCY 157 (2006) [hereinafter COUNTERINSURGENCY MANUAL].

20. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 57, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], *available at* <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>.

of acceptable conduct on the part of non-state actors cannot be obviated. The commander's most solemn duty is to conduct operations with strict adherence to the laws and customs of warfare. This principle is especially applicable in the context of drone warfare because of the pejorative caricature that I have increasingly encountered, that commanders can afford to be cavalier because the lives of THEIR personnel are not endangered through the conduct of drone warfare.

By extension, there is a very real and important debate regarding the standards for assessing feasibility during drone operations. Where is the line among what is advisable, what is feasible, what is appropriate, and what is criminal in this context? That line today is ill-defined except with resort to the broader definitions of distinction and the proportionality in the broader bodies of law that we know today. The precise feasibility criteria are ill-defined at best. Though I fully realize that what I am about to hypothesize is controversial, and indeed anathema to many, it may well be time to consider an additional protocol designed to address the residual questions revolving around drone warfare. The foregoing is intended to make clear that "drone warfare" represents a distinctive synthesis of heterogeneous activities, technologies, strategies, and actors. The distinctive dimensions of drone warfare merit movement towards a holistic international consensus on the appropriate scope, rationale, and legal metrics applicable to this new method for defeating our enemies. Furthermore, if we undertake to negotiate an additional protocol precisely on the issue of unmanned area vehicles, Drone warfare, and micro-Drones, one of the key issues has to be with particular application - what does feasibility mean in this context? We need to define it with our allies so that, in fact, the law is clear and we know what the law is. More to the point, commanders can command.

Another vital issue to be addressed in any future discussions related to drone warfare is the concept of effective warning. Humanitarian law, unlike human rights law, builds in a broad base of appropriate command discretion and appropriate combatant discretion. Thus, the language is often: "where circumstances permit," "when feasible," "when possible," etc., which of course is not reflected in human rights law. Though it derives from wholly different sources and operate with entirely different structures, the latitude that is properly afforded to commanders in the midst of armed conflict is somewhat analogous to the margin of appreciation and deference given to domestic authorities under modern human rights jurisprudence.

Article 57(2)(c) of the 1949 Geneva Convention's Protocol I expressly mandates that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."²¹ This

21. Additional Protocol I, *supra* note 20, art. 57(2)(c). See also INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS, art. 57, ¶ 2190 (Yvez Sanoz et al. eds., 1987), <http://www.icrc.org/ihl.nsf/COM/470-750073?OpenDocument> [hereinafter ICRC COMMENTARY ON PROTOCOL I] (emphasizing that precautions precedent to attacks on civilians will be of "greatest importance in urban areas because such areas are most densely

provision is an express obligation that is really just a *lex specialis* application of the larger obligations to “take constant care” to protect civilian lives and objects²² and to “do everything feasible” to protect civilians both in the choice of targets and in the means selected to attack targets.²³ But, one might well ask, what does effective warning mean? Is the concept of effective warning dependent on the modality of the offensive technology used by the commander? Wouldn’t any abstract principles created to regulate the concept of effective warning carry counterintuitive consequences? During Operation Cast Lead, IDF warnings in the urban areas of Gaza consisted of: 165,000 telephone calls, 300,000 warning notes on December 28, 2008 alone, 2,500,000 leaflets overall, radio broadcasts, and another newly developed tactic involving non-explosive detonations known as “roofknocking.”²⁴

The Goldstone Report sets forth several criteria in determining whether a warning is effective:

[I]t must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon.²⁵

After detailing the content of the leaflet and radio broadcast warnings, the

Report concluded that the warnings did not comply with the obligations of Protocol I because Israeli forces were presumed to have had the capability to issue more effective warnings, civilians in Gaza were uncertain about whether and where to go for safety, and some places of shelter were struck after the warnings were issued.²⁶ Thus, despite giving more extensive warnings to the civilian population than in any other conflict in the long history of war, the efforts of the Israeli attackers were equated with attacks intentionally directed against the civilian population. This approach eviscerates the appropriate margin of appreciation that commanders who respect the law and endeavor to enforce its constraints should be entitled to rely upon—and which the law itself provides. There is simply no legal precedent for taking the position that the civilians actually respond to such warnings, particularly in circumstances such as Gaza where the civilian population is intimidated and often abused by an enemy that seeks to

populated”).

22. Additional Protocol I, *supra* note 20, art. 57(1).

23. Additional Protocol I, *supra* note 20, arts. 57(2)(a)(i)–(ii).

24. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶¶ 498–99, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter *Goldstone Report*] available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf.

25. *Id.* ¶ 528.

26. *Id.* ¶¶ 499–542.

protect itself by deliberately intermingling with the innocent civilian population. The newly minted Goldstone standard for warning the civilian population would displace operational initiative from the commander in the attack to the defender who it must be remembered commits a war crime by intentionally commingling military objectives with protected civilians. This aspect of the report would itself serve to amend the entire fabric of the textual rules that currently regulate offensive uses of force in the midst of armed conflict. Logically, if this standard were applied to drone warfare with intellectual rigidity, there would be no lawful margin for drone strikes. This simply cannot be accepted as an appropriate extension of the law in this area.

The logical corollary to this example derives from the application of the proportionality principle in the context of drone strikes. Article 8(2)(b)(4) of the Rome Statute sets out the modern scope of the proportionality principle.²⁷ Of course, it cannot be forgotten that proportionality in the context of *jus in bello* (or the conduct of armed conflicts) has a very different meaning from that found in the *jus ad bellum* regime or gleaned from the human rights jurisprudence. Though the Rome Statute expressly sets out the consolidated articulation of the modern concept of proportionality, its relevance to drone warfare is more subtle. The crime is committed only through the *intentional* launching of an attack predictably anticipated to result in disproportionate and hence unlawful damage. For example, no responsible commander intentionally targets civilian populations, and the law on this matter is clear and fundamental.²⁸ Nor would a responsible military commander ever launch an attack intentionally against civilians or civilian objects or against a target with reasonably anticipated disproportionate results. In the age of twenty-four hour news cycles, such a commander would foolishly imperil the overarching operational objectives but would also betray the core obligations of the military profession.

So let me pause while we reflect on these truths. If a media outlet or antagonist throws out numbers and press releases to report that a drone strike killed "X" number of people or damaged particular civilian property, the presumption cannot be automatically that those were disproportionate drone strikes. The war crime, the crime that defines the boundaries of professional practice, begins with the word *intentionally*. The key focus is not on the damage inflicted but on the information available at the time of the attack and the precautions taken by the commander. As an aside, I am proud that the Rome Statute language includes damage to the environment within the purview of the crime of intentionally launching an attack that can be anticipated to result in disproportionate damage. This extension of the law is entirely warranted and to me represents a concrete advancement in our legal understanding of the protections afforded by the applicable *jus in bello*.

27. Rome Statute of the International Criminal Court, art. 8, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3, 37 I.L.M. 1002.

28. Additional Protocol I, *supra* note 20, art. 48.

This brings me directly to the third area that should be clarified in customary practice as drone strikes become a more common dimension of state practice. The legal balancing drawn from Article 8(2)(b)(4) of the Rome Statute is predicated on a comparison between the damage to otherwise protected places and people as assessed against the concrete and direct overall military advantage anticipated. The concrete and direct language flows directly from the text of Protocol I. There is, however, a vital distinction in light of modern law and the practice of modern drone strikes. The geographic shackles that might have been imposed by our concept of sovereign conflicts have been definitively removed. The Elements of Crimes for Article 8(2)(b)(4) adopted by international consensus (which included the United States delegation) contain an express footnote to clarify that the assessment of concrete and direct overall military advantage cannot be constrained by geographic or temporal limitations.²⁹

Now, let me be clear of what I am not arguing. The debates over the freedom enjoyed by a sovereign state to direct its drones anywhere around the world to kill anyone that sovereign directs will continue unabated for good reason. Just because the definition of proportionality is a much more open and permissive definition than is often postulated does not remove any residual geographic dimension from the *jus ad bellum* analysis. And then of course, there is that last word “anticipated.” The critical perspective is that of the commander, and the key data lies in the mental calculus drawn from the pressures of command and the conflicting mandates of the mission that must be accomplished in the midst of uncertainties aplenty and unknown collateral consequences. In passing, I should note my own strong (though highly controversial) belief that the United States and our NATO allies should do a much, much better job of being more transparent about these decisions. Where we’re right, I don’t think we should be afraid to go to the world and say “we’re right about that and here’s why.” Our silence and perceived hubris leaves a tabula rasa for a hostile press and cunning adversary to sway the popular perception that the modern conflict is the center of gravity on the road to either victory or defeat. We should not permit the enemy to proclaim and to propagate unchecked negative inferences. We should demonstrate our professionalism and precision at every opportunity. In my opinion, the IDF and other westernized militaries do more than any other participants in conflict to minimize or eliminate accidental deaths and damage to civilian property and to punish it when investigations reveal wrongdoing. The world should rationally have some mechanism available for freely and candidly offering the proof of professionalism.

The final scope of my hypothetical Protocol on drone warfare stems directly from the geographic scope of the proportionality rule that I just raised with you. The classic law of neutrality is closely related to the obligation of states to prevent their territory from being used for combatant purposes. In the context of non-state

29. Rep. of the Preparatory Comm’n for the Int’l Criminal Court, *Finalized Draft Text of the Elements of Crimes*, 24 n.36, U.N. Doc PCNICC/2000/1/Add.2 (Nov. 2, 2000).

actors whose activities transcend boundaries, sometimes all over the world instantaneously from the defense perspective, you would argue that there may be no such thing anymore as a neutral state, because geographic boundaries don't mean as much as they used to, precisely because those decisions about war making are not being made by state actors.

Al Qaeda, Al Shabaab, and other transnational organizations simply don't care about borders. In fact, borders affirmatively help them. They serve to interfere with the application of force. They serve to give them sanctuary. Resolution 1373 emphasizes the fact that in the conduct of hostilities in this armed conflict not of an international character, a neutral state cannot exist. The language of Resolution 1373, the definitive resolution on the subject from September 2001,³⁰ specifically asserts that "all states shall . . . [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice."³¹ The words "facilitate" and "participates in . . . preparation" suggest that, although there may not have been a consensus among the UN Security Council over the exact extent of the definition of "terrorist acts," its members plainly intended to apply individual criminal liability to those complicit in terrorist acts. On this basis, a court in a UN member state could prosecute terrorist facilitators through a broad application of complicity liability that would include such actions as are understood as Material Support for Terrorism under U.S. law. Indeed, regional conventions include the widest possible scope of liability for terrorist acts in prohibiting any state or individual from "aiding, abetting or counseling the commission of [terrorist acts] or participating as an accomplice in [such offenses]."³²

Thus, all states shall refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups, eliminating the supply of weapons to terrorists, and to take necessary steps to prevent the commission of acts—the commission of terrorist acts. Resolution 1373 was a unanimous Chapter VII act that eliminates the ability of any state sponsor of terrorism to hide behind an abstract geographic border.³³ Does it logically follow that the inherent and obligatory right of sovereign self-defense has now superseded the previously binding right of states to control their airspace on a unilateral basis? Furthermore, in light of the "all necessary means" mandate of Resolution 1373, couldn't some states argue in an adjudicatory forum that a transnational drone strike was an *a priori* authorized method for addressing the persistent threat of transnational

30. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

31. *Id.* ¶ 2.

32. SAARC Reg'l Convention on Suppression of Terrorism, U.N. Doc A/51/136, GAOR, 44th Sess., (1989), available at <http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf>.

33. See S.C. Res. 1373, *supra* note 30.

terrorism? All of these issues could be usefully addressed during negotiations over a new Drone Protocol.

Let me close by observing that in one sense, the struggle to define the contours of the legal regime and to correctly communicate those expectations to the broader audience of civilians caught in the conflict is a recurring problem unrelated to the current evolution of warfare. Shaping the expectations and perceptions of the political elites who control the contours of the conflict is perhaps equally vital. The paradox is that as the legal regime applicable to the conduct of hostilities has matured over the last century, the legal dimension of conflict has at times overshadowed the armed struggle between adversaries. As a result, the overall military mission is intertwined with complex political, legal, and strategic imperatives that require disciplined focus on compliance with the applicable legal norms as well as the most transparent demonstration of that commitment to sustain the moral imperatives that lead to victory. In his seminal 1963 monograph describing the counterinsurgency in Algeria, counterinsurgency scholar David Galula observed that if “there was a field in which we were definitely and infinitely more stupid than our opponents, it was propaganda.”³⁴ The events at Abu Ghraib are perhaps the most enduring example of what General Petraeus has described as “non-biodegradable events.”³⁵ The very nature of drone warfare is inextricably linked to the accomplishment of the mission and a larger plethora perception and misperception. Indeed, the United States doctrine for counterinsurgency operations makes a point that is equally applicable to drone warfare in its opening section:

Insurgency and counterinsurgency (COIN) are complex subsets of warfare. Globalization, technological advancement, urbanization, and extremists who conduct suicide attacks for their cause have certainly influenced contemporary conflict; however, warfare in the 21st century retains many of the characteristics it has exhibited since ancient times. Warfare remains a violent clash of interests between organized groups characterized by the use of force. Achieving victory still depends on a group’s ability to mobilize support for its political interests (often religiously or ethnically based) and to generate enough violence to achieve political consequences. Means to achieve these goals are not limited to conventional force employed by nation-states.³⁶

There are many other examples of events during conflict that strengthen the enemy even as they remind military professionals of the visceral linkage between their actions and the achievement of the mission. I fear that drone strikes have

34. DAVID GALULA, *PACIFICATION IN ALGERIA 1956–1958*, at 143 (new ed. 2006) (1963).

35. General David H. Petraeus, *A Conversation with General Petraeus at Vanderbilt University* (Mar. 1, 2010) (video available at <http://sitemason.vanderbilt.edu/myvu/news/2010/03/01/modern-warfare-complex-but-winnable-petraeus-tells-vanderbilt.108544>); See also Uthman Al-Mukhtar, *Local Sunnis Haunted by the Ghosts of Abu Ghraib*, SUNDAY HERALD, Dec. 26, 2010, at 51; Joseph Berger, *U.S. Commander Describes Marja Battle as First Salvo in Campaign*, N.Y. TIMES, Feb. 22, 2010, at A7.

36. COUNTERINSURGENCY MANUAL, *supra* note 19, at 1.

taken on such a symbolism that reasoned dialogue with our adversaries and allies is often precluded. In the context of a globalized and interconnected international legal regime, drone warfare is a reality that cuts across the complexities of competing legal theories to inflict very real damage on both enemies and all too often the innocents among whom they hide. We must confront these issues directly if we expect to resolve the underlying tensions and by extension to permit military professionals to risk their lives and honor with no shadow of second guessing.

I want to thank the organizers of this excellent conference. My task in this keynote address was to highlight the trends and to generate the confusion, which the panel will now dispel. Commenting on the impractical aspects of Additional Protocol I, the eminent Dutch jurist Bert Röling—who served on the bench of the Tokyo International Military Tribunal—observed that treaty provisions ought not “prohibit what will foreseeably occur” because the “laws of war are not intended to alter power relations, and if they do, they will not be observed[.]”³⁷ The disconnects between aspirational legal rules and human experience are borne out in operational experience by states that act decisively to protect the lives and property of their citizens, which feeds an undercurrent of suspicion and politicization that could erode the very foundations of humanitarian law. Unless we move towards clarity in the conduct of drone warfare, we may well find ourselves paralyzed by legal imprecision that erodes our ability to effectively apply available technologies even in the exercise of the fundamental rights of individual or collective self-defense. This imprecision could lead to a cycle of cynicism and second-guessing that could weaken the commitment of some policy makers or military forces to actually follow the law.

37. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 391 (1994) (quoting Bert Röling, *Criminal Responsibility for Violations of the Laws of War*, 12 REVUE BELGE DE DROIT INT'L 8, 25–26 (1976)).

INTERNATIONAL LAW CONCERNING THE STATUS AND MARKING OF REMOTELY PILOTED AIRCRAFT

IAN HENDERSON*

I. INTRODUCTION

In recent times, significant media and legal attention has been paid to the use of remotely piloted aircraft (RPA) in areas such as Pakistan and Yemen.¹ The current terminology being used in the media and other areas debating this issue varies. As well as RPA (the current term being preferred in some military circles), other common terms include “drone”, “armed drone”, unmanned (or uninhabited) aerial vehicle (UAV), unmanned (or uninhabited) aircraft system (UAS); and when some form of armament is also involved, sometimes the word “combat” is after unmanned (or uninhabited), leading to the acronyms UCAS or UCAV. The legal issues discussed have generally concerned the use of force, the status of the operators of the aircraft (e.g., military or civilian intelligence agent), the status of the intended target, or the injury caused to someone and the damage caused to something other than the intended target. Comparatively little attention has been paid to legal issues concerning the aircraft themselves; however, the rise in the use and variety of RPA highlights some interesting legal issues concerning the aircraft themselves. This article looks at the international law concerning the “status” of RPA and the legal requirement, if any, for applying “markings” to RPA.

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1. See generally, *Rise of the Drones: Unmanned Systems and the Future of War: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 5 (2010), available at http://oversight.house.gov/index.php?option=com_content&view=article&id=621:03-23-2010-national-security-qrise-of-the-drones-unmanned-systems-and-the-future-of-warq&catid=17; *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 5 (2010), available at http://oversight.house.gov/index.php?option=com_content&view=article&id=681%3A04-28-2010-qrise-of-the-drones-ii-examining-the-legality-of-unmanned-targetingq&catid=17%3Asubcommittee-on-national-security&Itemid=1; Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html>; Marc A. Thiessen, *In CIA's Drone Mission, Who Will Protect the CIA?*, WASH. POST (June 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/07/AR2010060701986.html?nav=hcmoduletmv>; Jane Mayer, *The Predator War: What are the Risks of the C.I.A.'s Covert Drone Program?*, THE NEW YORKER (Oct. 26, 2009), http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer; Ian Henderson, *Civilian Intelligence Agencies and the Use of Armed Drones*, Y.B. OF INT'L HUMANITARIAN L. (forthcoming 2011).

While this article is concerned only with the aircraft, it is worth recalling that:

Unmanned aircraft systems generally consist of (1) multiple aircraft, which can be expendable or recoverable and can carry lethal or non-lethal payloads; (2) a flight control station; (3) information and retrieval or processing stations; and (4) in some cases, wheeled land vehicles that carry launch and recovery platforms.²

As for the RPA themselves:

Over 1100 makes and models of unmanned aerial systems (UASs) are currently on the market or in development in more than 50 countries... [involving] a diverse collection of fixed wing, rotorcraft, and lighter-than-air flying machines, available in a wide variety of sizes and capabilities.³ The known technologies range from "micro" UAVs that are, in reality, flying robots designed to look and behave like a "bug," fit in the palm of a hand, and carry a high-resolution camera, to 25,000-pound turbojets with wingspans wider than a Boeing 737, operating at or above 60,000 feet at speeds in excess of 530 miles per hour for over 35 hours at a time.⁴ Others designed for scientific research have flown as high as 100,000 feet and have stayed in the air for nearly three days without landing.⁵

II. STATUS AND MARKING OF RPA: STATE AND CIVIL AIRCRAFT

International law divides aircraft into two broad categories: state aircraft and civil aircraft.⁶ The distinction between civil and state aircraft, albeit not always with the same terms, appears to date from the early 20th century.⁷ A reference to state aircraft usually means, as a minimum, aircraft that are "used in military, customs and police services."⁸ It is possible, though, to use the term "state aircraft" to mean all aircraft in the exclusive use or possession of a State and not be limited by the definition in the *Chicago Convention*.⁹ As a result, there are two current views of which aircraft are state aircraft. One view is that despite the vague wording of the *Chicago Convention*, only military, customs and police

2. Rise of the Drones, *supra* note 1, at 4 (written testimony of Michael J. Sullivan, Director, Acquisition and Sourcing Management).

3. Douglas Marshall, *Unmanned Aerial Systems and International Civil Aviation Organization Regulations*, 85 N. DAK. L. REV. 693, 694-95 (citations omitted).

4. *Id.*

5. *Id.*

6. Convention on International Civil Aviation art. 3(a), Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter *Chicago Convention*]; see also *Definition of State Aircraft*, THE EUROPEAN ORGANISATION FOR THE SAFETY OF AIR NAVIGATION (Dec. 22, 2004), http://www.eurocontrol.int/mil/public/standard_page/stateac.html.

7. Jiri Hornik, *Article 3 of the Chicago Convention*, XXVI ANNALS OF AIR AND SPACE LAW 110, 111 (2001).

8. *Chicago Convention*, *supra* note 6, art. 3(b).

9. See Bin Cheng, *State Ships and State Aircraft*, 11 CURRENT LEGAL PROBLEMS 225, 227-28 (1958).

aircraft may be state aircraft.¹⁰ The other view is that other aircraft engaged in purely state activities (e.g. coast guard or search and rescue) may also be state aircraft.¹¹ Regardless of which position is correct, there are two main consequences that flow from being a state aircraft. First, state aircraft are not subject to the *Chicago Convention*, and particularly the detailed air navigation rules. Second, state aircraft enjoy certain immunities and rights.¹² There is no reason not to apply the same legal divisions and consequences to RPA as defined in the *Chicago Convention*.¹³ So, while the *Chicago Convention* is not directly applicable to state aircraft (aside from article 3), there is no reason to treat RPA differently from “normal” state aircraft.

No further requirements are specified in the *Chicago Convention* for an aircraft to have the status of a state aircraft. For example, no particular markings—national or otherwise—are specified. This is particularly noteworthy as article 20 of the *Chicago Convention* states: “Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks.”¹⁴ However, the *Chicago Convention* applies to only civil aircraft and not to state aircraft.¹⁵ Accordingly, the *Chicago Convention* does not require any particular markings, registration, etc., for state aircraft.¹⁶ Interestingly, Article 10 of the 1919 *Paris Convention* stated: “All aircraft engaged in international navigation shall bear their nationality and registration marks....”¹⁷ However, it is difficult to

10. ICAO, SECRETARIAT STUDY ON “CIVIL/STATE AIRCRAFT” ICAO Doc. LC/29 -WP/2-I, Attach. 1, ¶¶ 5.2.1–5.2.6 (1994) [hereinafter ICAO Study]; see also SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 85, 13(l) (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL]; Hornik, *supra* note 7, at 122 n. 48; Lieutenant Colonel Andrew S. Williams, *The Interception of Civil Aircraft over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 113 (2007). But see ICAO Study, Attach. 2, ¶ 13 (calls into doubt part of ¶ 5.2.4).

11. Eur. Comm. for Democracy Through Law, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, ¶ 90, Doc. No. CDL-AD(2006)009 (Mar. 2006) [hereinafter Venice Commission]; see also Michael Milde, “*Rendition Flights*” and *International Air Law*, REDRESS, June 2008, at 8; Hornik, *supra* note 7 at 122–23; I.H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 40, 42 (8th rev. ed. 2006); ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS ¶ 1.4 (2004), available at <http://airpower.airforce.gov.au/Publications/Details/156/AAP1003-Operations-Law-for-RAAF-Commanders-2nd-Edition.aspx>.

12. The extent of those immunities and rights is discussed below.

13. See *Chicago Convention*, *supra* note 6, art. 8; DEP’T OF THE AIR FORCE, INTERNATIONAL LAW THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, AIR FORCE PAMPHLET 110-31, at 2-4 (1976) (no longer in force); Donald Ward, *The Law of Military Aircraft in War and Peace*, at 5 (1970) (unpublished L.L.M. thesis, McGill University) (available at http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=46681&local_base=GEN01-MCG02); Marshall, *supra* note 3, at 697-98.

14. *Chicago Convention*, *supra* note 6, art. 20.

15. *Chicago Convention*, *supra* note 6, art. 3(a).

16. See NICHOLAS M. POULANTZAS, *THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW* 195 n.288 (2nd ed. 2002) (discussing the non-requirement for registration of state aircraft).

17. *Convention Relating to the Regulation of Aerial Navigation*, art. 10, Oct. 13, 1919, 11 L.N.T.S. 173 [hereinafter *Paris Convention*]. It is “generally considered the forerunner to the *Chicago Convention*.” ICAO Study, *supra* note 10, ¶ 2.1.2.

determine whether article 10 applied to state aircraft. This is because article 30 provided that: "All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention."¹⁸ A clear inference from this provision is that the *Paris Convention* did not in general apply to certain types of state aircraft.¹⁹

In a discussion of the criteria for determining whether an aircraft is a military versus a civil aircraft, Milde writes:

This wording ["used" and "services"], in the absence of any other guidance, suggests that the drafters had in mind a functional approach to the determination of the status of the aircraft as civil and military: regardless of the design, technical characteristics, registration, ownership etc.; the status of the aircraft is determined by the function it actually performs at a given time.²⁰

Milde's argument and conclusion applies equally to other types of state aircraft. Williams adopts a similar position, stating that whether an aircraft is a state aircraft depends upon function, and not "design or technical characteristics, call sign, registration, or markings—all of which fall within the competence of its state of nationality."²¹ Whether an aircraft is, for the purposes of the *Chicago Convention*, a state or civil aircraft, it is the "usage of the aircraft in question [that] is the determining criterion, and not, by themselves, other factors such as aircraft registration and markings...."²²

Notwithstanding that there appears to be no strict legal requirement for state aircraft to be marked as such, it often seems assumed that an aircraft will bear some sort of marking.²³ Other statements indicating an assumption of marking include: "state aircraft, including military aircraft, are also marked to indicate their nationality";²⁴ and "state aircraft may include aircraft which, in light of their mission, display appropriate state markings...."²⁵

The importance of the expectations of States cannot be over emphasized. When one starts out with the somewhat ambiguous legal position expressed in article 3 of the *Chicago Convention*,²⁶ and the fact that States may essentially

18. Paris Convention, *supra* note 17, art. 30.

19. Hornik, *supra* note 7, at 112-13 (discussing the application of the Paris Convention and not just Chapter VII thereof to state aircraft).

20. Milde, *supra* note 11, at 9.

21. Williams, *supra* note 10, at 107 (emphasis added); *see also* ICAO Study, *supra* note 10, ¶ 5.3.3 (referring to use and other criteria to help ascertain the status of an aircraft).

22. ICAO Study, *supra* note 10, ¶ 1.3.

23. *Id.* ¶ 5.3.2.

24. DEP'T OF THE AIR FORCE, *supra* note 13, ¶¶ 2-4; UNITED STATES AIR FORCE, JUDGE ADVOCATE GENERAL'S SCH., AIR FORCE OPERATIONS & THE LAW: A GUIDE FOR AIR, SPACE & CYBER FORCES 23-24 at n.52 (Tonya Hagmaier et al. eds., 2nd ed. 2009) [hereinafter U.S. AIR FORCE JAG SCHOOL].

25. DIEDERIKS-VERSCHOOR, *supra* note 11, at 42.

26. Hornik, *supra* note 7, at 130 ("[I]t is almost impossible in accordance with the present wording

choose how to classify one another's aircraft,²⁷ then lack of markings only exacerbates the issue.

Despite the aforementioned legal uncertainty, some general observations can be made. At a minimum, state aircraft include aircraft used in military, customs and police services. Whether an aircraft is being so used is primarily a functional test.²⁸ An aircraft need not bear markings to be a state aircraft, but absence of such markings is likely to prejudice the finding that the aircraft is a state aircraft by other States. RPA can be state aircraft and all of the proceeding points apply to RPA. A unique feature of RPA compared to manned aircraft is that RPA can be quite small in size. However, the relevant international law does not change.²⁹

III. RIGHTS AND LIABILITIES OF STATE AIRCRAFT

While this article is not primarily concerned with the detail of the rights and liabilities of state aircraft, some discussion of the topic is important to illustrate the importance of determining whether an RPA is a civil or state aircraft. State aircraft enjoy certain rights and immunities, including immunity "from the jurisdiction of the courts of a territorial state."³⁰ The applicable law on a state aircraft is the jurisdiction, including criminal jurisdiction, of the "flag" State.³¹ A significant immunity is that state aircraft are not subject to "foreign jurisdiction in respect of search and inspection" without consent.³² Interestingly, the 1919 *Paris Convention* drew a distinction between types of state aircraft, with only military aircraft enjoying "the privileges which are customarily accorded to foreign ships of war";³³ while other types of state aircraft did not enjoy such privileges.³⁴ Writing in 1970, Ward expressed doubt as to whether States would generally accept this principle with respect to military aircraft,³⁵ while a nearly contemporary writer seemed to be

of Article 3 to determine with one hundred percent certainty the legal status of an aircraft, i.e. whether it is a civil or state aircraft.").

27. *Id.* ("Neither the operator of an aircraft nor the state of registry can assure that the aircraft concerned will not be treated in another state as a state aircraft . . . Thus, a situation can easily occur in which an aircraft is deemed in one state to be a civil aircraft and in another state to be a state aircraft. The decision of the latter state, in many cases, might be deemed arbitrary (in many cases of a political nature) rather than stemming from the legal term 'discretion.'").

28. I.H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 34 (Kluwer Law Int'l ed., 7th rev. ed. 2001).

29. Marshall, *supra* note 3, at 699 ("There is no minimum size described, so even a radio-controlled model aircraft would be covered under a literal reading of the definition, and no legal authorities state otherwise. In the ICAO regulatory scheme, no distinction is made between manned and unmanned aircraft.").

30. UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 12.6.1 (Oxford Univ. Press, 2004); MINISTRY PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INT'L LAW APPLICABLE TO AIR AND MISSILE WARFARE 53 (2010).

31. Williams, *supra* note 10, at 99.

32. Venice Commission, *supra* note 11, ¶ 95.

33. Paris Convention, *supra* note 17, art. 32.

34. Paris Convention, *supra* note 17, art. 33.

35. Ward, *supra* note 13, at 24.

of the opposite view.³⁶ The better view today is that military aircraft enjoy sovereign immunity.³⁷ Further, such immunity applies to all types of state aircraft and not just those used in military, police and customs services.³⁸

Separate from the immunity issue is the issue of the rights enjoyed by state aircraft. For example, only certain types of aircraft may legally intercept suspected pirate ships and aircraft on or over the high seas.³⁹ That right is reserved to military aircraft and "aircraft clearly marked and identifiable as being on government service and authorized to that effect."⁴⁰ Similar rules apply to what type of aircraft may exercise a right of visit of a foreign ship on the high seas, and may engage in hot pursuit.⁴¹ While some have stated that this right is limited to military, police or customs aircraft,⁴² that view seems to be based on interpreting article 3(b) of the *Chicago Convention* as an exclusive list of what may be state aircraft for all purposes. The better view is that as long as the aircraft is "on government service and authorized to that effect," then any aircraft may exercise the function and the aircraft need not be a state aircraft per article 3(b) of the *Chicago Convention*.⁴³

Conversely, State aircraft do not enjoy the rights afforded under the *Chicago Convention* to civil aircraft. For example, non-scheduled civil aircraft do not need permission from a contracting state to fly over or to make stops for non-traffic purposes; assistance in distress; the non-use of weapons against civil aircraft in flight; where an accident has occurred, the state of registry has a right to appoint observers to be present at the investigation and to receive a copy of the report and its findings; and none of the aviation security instruments apply to state aircraft.⁴⁴

By way of analogy from the law of the sea and flagless vessels, States may intercept Stateless aircraft over the high seas.⁴⁵ In this respect, an aircraft showing

36. Abu Kasim Thaher, *International Law and the Legal Status of Military Aircraft in Peacetime* 62 (April 1969) (unpublished L.L.M. Thesis, McGill University), available at http://digitool.Library.McGill.CA:80/R/-?func=dbin-jump-full&object_id=47234¤t_base=GEN01.

37. Cheng, *supra* note 9, at 256; J. ASHLEY ROACH & ROBERT W. SMITH, *UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS* 466 (2d ed. 1996); 73 *ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* ¶ 2.2.2 (A.R. Thomas & James C. Duncan eds.) (1999) [hereinafter *LAW OF NAVAL OPERATIONS*]; U.S. AIR FORCE JAG SCHOOL, *supra* note 24, at 23; ROYAL AUSTRAL. AIR FORCE, *supra* note 11, ¶ 2.3; MINISTRY PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 30, at 53.

38. ICAO Study, *supra* note 10, ¶ 5.2.6.

39. United Nations Convention on the Law of the Sea, art. 107, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *Law of the Sea*].

40. *Id.*

41. *Id.*, arts. 110(4), (5) and 111(5).

42. Williams, *supra* note 10, at 113.

43. POULANTZAS, *supra* note 16, at 194.

44. Williams, *supra* note 10, at 106 n.210.

45. *Id.* at 128; see also *Law of the Sea*, *supra* note 39, art. 110(1)(d); ROBIN R. CHURCHILL & ALAN V. LOWE, *THE LAW OF THE SEA* 214 (3d ed. 1999); *LAW OF NAVAL OPERATIONS*, *supra* note 37, ¶ 3.11.2.3.

no national markings is the equivalent of a ship not flying a flag.⁴⁶ So, consistent with the conclusions made above, while technically there is no requirement for an aircraft to bear markings to be a state aircraft under the *Chicago Convention*, the lack of markings will operate to prejudice the finding that the aircraft is a state aircraft by other States.

In summary, consistent with the law that applies to ships, the better view is that a state can only claim the immunities and particularly the rights associated with a state aircraft in international airspace if the aircraft displays its status as a state aircraft via appropriate markings.⁴⁷

IV. INTERNATIONAL ORGANIZATIONS AND OTHER CONSORTIUMS

While state aircraft are automatically associated in people's minds with a single State, that need not necessarily be the case. A reference to a state aircraft can, in the abstract, merely be thought of as the opposite of a civil aircraft, with civil aircraft essentially meaning private aircraft.⁴⁸ For example, early work on air law did not use "state aircraft" but rather "public aircraft."⁴⁹ However, international practice has developed to the point where aircraft are registered in one State and one State only. Pursuant to the *Paris Convention*, an aircraft could not "be validly registered in more than one State."⁵⁰ While not directly applicable to state aircraft, this provision has influenced the development of the law. For instance, in 1923 a proposed article, of application to all types of aircraft, stated that "[n]o aircraft may possess more than one nationality."⁵¹ This theme continues through to the present law, and applies not only to the non-availability of joint-state registration/nationality,⁵² but also requires that registration/nationality be attributable to a State and not an international organization (not even one with legal personality).⁵³

As a matter of law, the foregoing applies strictly only to the registration/nationality issue. So while a state aircraft must have the nationality of an actual State (and only one State), this does not preclude international organizations from performing some functions traditionally associated with a State. For example, "[i]n certain circumstances, such as managing specific aircraft or managing the ICAO 24-bit aircraft addresses allocated to NATO, NATO can be

46. See Williams, *supra* note 10, at 129. Although note that Williams refers to article 20 of the Chicago Convention, which is not applicable to state aircraft.

47. See Venice Commission, *supra* note 11, ¶ 103

48. This was the distinction adopted in the 1919 Paris Convention. See Paris Convention, *supra* note 17, art. 30.

49. Draft Convention, 1910 Paris International Air Navigation Conference art. 40, May 8 – Jun. 28, 1910.

50. Paris Convention, *supra* note 17, art. 8.

51. Hague Rules of Air Warfare art. 10 (1923), reprinted in DOCUMENTS ON THE LAWS OF WAR 139-49 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter HRAW].

52. Williams, *supra* note 10, at 96.

53. See ICAO Study, *supra* note 10, ¶ 4.7.1.

regarded as a State Aircraft operator.”⁵⁴ However, this does not mean that “NATO” can be the “State” for the purpose of an aircraft being a state aircraft. For example, NATO aircraft are registered in Luxembourg and display the national military markings of that State alongside NATO markings.⁵⁵

As a final point, it is worth noting that an aircraft could be truly stateless and be neither a civil nor state aircraft for the purposes of the *Chicago Convention*. In such a circumstance, the aircraft would not have the rights or privileges of either class of aircraft.⁵⁶

V. MILITARY AIRCRAFT AND THE LAW OF ARMED CONFLICT

As discussed above, “military aircraft” are a subset of state aircraft.⁵⁷ In addition, RPA can be military aircraft.⁵⁸ Accordingly, the discussion below applies equally to manned and unmanned aircraft. As discussed above, the requirements for an aircraft to be a military aircraft so as to amount to being a state aircraft are simply that the aircraft be used in military service. This is a functional test and the absence of markings is not ipso facto fatal to a claim of military aircraft status, though the absence of markings is likely to prejudice such a claim. What is sometimes overlooked, though, is that separate law applies during an international armed conflict.⁵⁹

54. European Organisation for the Safety of Air Navigation, *Mode S – Harmonisation of the Transition Arrangements for State Aircraft - Process and Procedures for the Managing of the Mode S Compliance Status and the Exemptions Granted to State Aircraft*, EUROCONTROL (1.1 ed. Aug. 22, 2005), available at <http://www.eurocontrol.int/mil/gallery/content/public/milgallery/documents/Mode%20S%20%20Process%20and%20Procedures%20for%20State%20Aircraft%20V11%20Released%20Issue%20220805%20A4.pdf>.

55. Max S. Johnson, *NATO Military Headquarters*, in *THE HANDBOOK OF THE LAW OF VISITING FORCES* 257, 315 (Dieter Fleck ed., 2001); see also U.S. AIR FORCE JAG SCHOOL, *supra* note 24, at 188. For background on how and why Luxembourg was chosen, see NATO Airborne Early Warning & Control Force E-3A Component, *Frequently Asked Questions*, NATO E-3A COMPONENT, <http://www.e3a.nato.int/eng/html/faq.htm> (last visited May 5, 2011). A similar solution for multinational airlines is discussed in DIEDERIKS-VERSCHOOR, *supra* note 11, at 29. See Ishaq R. Goreish, *The Problem of Registration and Nationality of Aircraft of International Operating Agencies and the I.C.A.O. Council's Resolution of the Problem* (1969) (unpublished L.L.M. thesis, McGill University) (on file with McGill University). For civil aircraft, also see the last sentence of Article 77 of the *Chicago Convention*, “Nothing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions, but such organizations or agencies and such pooled services shall be subject to all the provisions of this Convention, including those relating to the registration of agreements with the Council. The Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies.” *Chicago Convention*, *supra* note 6, art. 77.

56. See Williams, *supra* note 10, at 128-29.

57. *Chicago Convention*, *supra* note 6, art. 3(b); Ward, *supra* note 13, at 6.

58. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 108 (2004); Program on Humanitarian Policy and Conflict Research, *supra* note 30, at 1, 5-6; U.S. AIR FORCE JAG SCHOOL, *supra* note 24, at 23.

59. See UK MINISTRY OF DEFENCE, *supra* note 30, ¶¶ 12.1, 12.10.

There is no treaty law dealing specifically with the marking of military aircraft beyond that concerning the marking of medical aircraft with the distinctive emblem (i.e., the red cross, crescent or crystal).⁶⁰ Therefore, in an international armed conflict the relevant legal principles concerning military aircraft are drawn from customary international law. Whether or not an aircraft is a military aircraft is important because, unlike civil aircraft and other (i.e., non-military) state aircraft, military aircraft may exercise belligerent rights.⁶¹

As early as 1914, the eminent author on air law, Spaight, proposed that, in times of war, military aircraft shall bear “the distinctive sign of its character as a military aircraft of the said Power, irremovable and recognizable at a distance.”⁶² The HRAW provided that military aircraft be required to “bear an external mark indicating its nation; and military character”⁶³ and non-military state aircraft bear “an external mark indicating its nationality and its public non-military character.”⁶⁴ In addition, the external marks should be “so affixed that they cannot be altered during flight. They shall be as large as practicable and shall be visible from above, from below and from each side.”⁶⁵ It is generally recognized that the rules laid down in the HRAW reflect customary international law on these points.⁶⁶ In particular, after a thorough review of the literature, Ward concludes that a military aircraft must bear distinctive marks of both its nationality and military character.⁶⁷ Ward also states that following “[t]his practice appears to be universal.”⁶⁸ Indeed, in the context of the discussion of markings, it is often assumed that military aircraft will be marked.⁶⁹

It would seem that, strictly speaking, “public non-military aircraft employed for customs or police purposes”⁷⁰ should bear these marks at all times, whereas public non-military aircraft “other than those employed for customs or police

60. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 39, Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950).

61. HRAW, *supra* note 51, art. 13.

62. JAMES SPAIGHT, AIRCRAFT IN WAR 114, 72-73 (1914).

63. HRAW, *supra* note 51, art. 3.

64. *Id.* art. 4-5.

65. *Id.* art. 7.

66. See IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 26-27 (2009); Prosecutor v. Stanislav Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 57, n.103 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

67. Ward, *supra* note 13, at 17-18. See also Thaher, *supra* note 36, at 15-17; SAN REMO MANUAL, *supra* note 10, at 13(j); UK MINISTRY OF DEFENCE, *supra* note 30, ¶ 12.10.4; Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 79, 113-14 (Dieter Fleck ed., 2008); ROYAL AUSTRALIAN AIR FORCE, *supra* note 11, ¶ 1.3. For a good review of the history of military aircraft markings, see JAMES M. SPAIGHT, AIR POWER AND WAR RIGHTS 76-99 (3rd ed. 1947).

68. Ward, *supra* note 13, at 12.

69. See DEP'T OF THE AIR FORCE, *supra* note 13, ¶ 2-4(d); LAW OF NAVAL OPERATIONS, *supra* note 37, at 114 n.14. But see *infra* notes 79-80 and accompanying text.

70. HRAW, *supra* note 51, art. 4.

purposes”⁷¹ would need to bear such marks only “in time of war.”⁷² However, as the HRAW were never adopted, the main relevance of the Rules is a source for customary international law. With the adoption of the *Chicago Convention*, the HRAW do not reflect customary international law in peacetime concerning marking of aircraft. However, those parts of the HRAW concerning marking of military aircraft do appear to reflect the relevant customary international law applicable during an international armed conflict.⁷³

As briefly mentioned above, the importance of satisfying the requirement for being a “military aircraft” under the law of armed conflict is that during an international armed conflict, “[m]ilitary aircraft are alone entitled to exercise belligerent rights.”⁷⁴ While “belligerent rights” are not defined, those rights include engaging in hostilities, as well as firing on the enemy and attacking military objectives.⁷⁵ “The term ‘hostilities’ includes the transmission during flight of military intelligence for the immediate use of a belligerent.”⁷⁶ This last point needs to be understood in context. The issues concerning the transmission of military intelligence are whether the person doing so is taking a direct part in hostilities⁷⁷ and/or whether the person is a spy.⁷⁸ The more legally interesting issue is probably the spy issue, as a civilian operator of an RPA that is transmitting “military intelligence for the immediate use of a belligerent” is probably taking a direct part in hostilities regardless of whether or not the RPA has military markings.

Notwithstanding the conclusion above concerning the marking of military aircraft, one view has been expressed that while military aircraft are “required to be marked with appropriate signs of their nationality and military character.... circumstances may exist where such markings are superfluous and are not required.”⁷⁹ The example given is “where no other aircraft except those belonging to a single state are flown.”⁸⁰ It is arguable that where an aircraft silhouette is so distinctive that both the nationality and military nature of the aircraft can be deduced from the silhouette alone, then no markings are required. The marking requirement originally arose at a time when military and civilian aircraft had

71. *Id.* art 5.

72. *Id.*

73. See Ward, *supra* note 13, at 12.

74. HRAW, *supra* note 51, art. 13; see also UK MINISTRY OF DEFENCE, *supra* note 30, ¶¶ 4.1, 4.4.1; ROYAL AUSTRALIAN AIR FORCE, *supra* note 11, ¶ 2.4; Ward, *supra* note 13, at 9. While Ward refers to only civil and military aircraft, that is probably due to the context in which he was writing.

75. See HRAW, *supra* note 51, art. 16.

76. *Id.*

77. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, arts. 51(1), (3), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

78. See *Id.* art. 46.

79. DEP'T OF THE AIR FORCE, *supra* note 13, ¶ 7-4.

80. *Id.* While the 1976 Air Force Pamphlet is no longer in force, a similar position is expressed in U.S. AIR FORCE JAG SCHOOL, *supra* note 24, at 23.

similar designs and when civilian aircraft were adopted for military use.⁸¹ The problem is that the requirement for military markings has become firmly entrenched in customary international law. Practically, a problem exists in that the silhouette would have to be distinctive from above, below and each side. Also, an issue with relying on silhouette rather than markings arises with captured aircraft. There have been many occasions where an enemy has flown captured aircraft.⁸² To avoid allegations of treachery, the captured aircraft should be clearly marked “with the same markings as the captor’s military aircraft.”⁸³ Finally, as aircraft cannot be operated solely by a coalition but must be attributable to a single nation, an aircraft type would have to be operated by only one nation.⁸⁴ Accordingly, for both legal and operational reasons, the better view is that military aircraft should be marked, and not rely on silhouette. If, however, a State were of the view that legally it could rely on a silhouette providing the required level of distinction, then it would be highly desirable to notify the other belligerent parties that that is the State’s position.⁸⁵

The above applies only during an international armed conflict. In a non-international armed conflict, there is no customary international law requiring the marking of military aircraft. As long as the government forces operate within the other rules of international law applicable during a non-international armed conflict, the government forces may use any type of aircraft with or without markings — noting that misuse of symbols of protection, like the red cross/crescent/crystal (the distinctive emblem), is still prohibited. Use of the distinctive emblem on a RPA that fulfilled the criteria for being a medical aircraft, not including combat search and rescue, would not be misuse.⁸⁶

As the non-state actors in a non-international armed conflict have no legal rights to participate in a conflict in the first place, the issue of the marking of an aircraft operated by a non-state actor is a legal irrelevancy. Regardless of whether a non-state actor wears a uniform or operates a “marked” aircraft, the non-state actor has no legal right to participate in belligerent acts.⁸⁷

Cheng appears to be of the view that an aircraft can be an “aircraft in military service, though not technically a military aircraft.”⁸⁸ This would mean that the aircraft would be a State aircraft under ICAO, but not an aircraft that could

81. See DEP’T OF THE AIR FORCE, *supra* note 13, ¶ 2-4(c).

82. Ward, *supra* note 13, at 15.

83. *Id.*; SPAIGHT, *supra* note 67, at 89–91.

84. Examples of more than one nation in a coalition operating the same RPA type are provided at note 94 *infra*.

85. HRAW, *supra* note 51, art. 8. “The external marks, prescribed by the rules in force in each state, shall be notified promptly to all other Powers.” *Id.*

86. Use of an RPA in a medical role is not hypothetical. The Israel Defense Forces are planning the use of an RPA for evacuation of wounded. Sapphire Itscovich, *Unmanned Aerial Vehicle to Evacuate Injured During Combat*, ISRAEL DEFENSE FORCES (Aug. 6, 2009, 3:46 pm), <http://dover.idf.il/IDF/English/News/Tech/09/08/0601.htm>.

87. This issue is dealt with in greater detail in Henderson, *supra* note 1, at 15.

88. Cheng, *supra* note 9, at 235.

exercise belligerent rights. This is similar to a related but distinct position that an aircraft can be a civil aircraft for the purposes of the *Chicago Convention* but concurrently a "state aircraft" (used in a broad sense of the term) for non-*Chicago Convention* purposes.⁸⁹ This type of aircraft has been referred to as auxiliary aircraft in the *San Remo Manual*⁹⁰ and some military manuals.⁹¹ The Commentary to the *Air and Missile Warfare Manual* prefers to draw no further distinction and notes that such aircraft can be simply thought of as state aircraft.⁹² One example is a transport aircraft. If the aircraft was owned and operated by the military with only national markings and no military markings, the aircraft would be a state aircraft for the purposes of the *Chicago Convention* (as an aircraft being used in military service) but would not be a military aircraft for the purposes of the law of armed conflict.⁹³

The markings, or lack thereof, on RPAs provide a useful way to illustrate the above points. Publicly available pictures of RPAs operating in Afghanistan show that the practice of the United States of America, the United Kingdom, and Australia on markings varies from platform type to platform type — with some platforms bearing military markings and others having no such markings.⁹⁴

89. ICAO Study, *supra* note 10, ¶ 5.2.6.

90. SAN REMO MANUAL, *supra* note 10, §5(13)(k).

91. UK MINISTRY OF DEFENCE, *supra* note 30, ¶ 12.5.

92. MINISTRY PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 30, at 52.

93. U.S. AIR FORCE JAG SCHOOL, *supra* note 24, at 23-24.

94. For the USA see: Image of a Global Hawk, THE OFFICIAL WEBSITE OF THE U.S. AIR FORCE, <http://www.af.mil/shared/media/photodb/photos/061003-F-7441T-003.jpg> (last visited May 9, 2011); Image of a Raven, THE OFFICIAL WEBSITE OF THE U.S. AIR FORCE, <http://www.af.mil/shared/media/photodb/photos/070706-f-6751b-204.jpg> (last visited May 9, 2011); Image of a Reaper, THE OFFICIAL WEBSITE OF THE U.S. AIR FORCE, <http://www.af.mil/shared/media/photodb/photos/090127-F-7383P-001.JPG> (last visited May 9, 2011). For the UK see: Image of a Reaper, MINISTRY OF DEFENCE, <http://www.mod.uk/DefenceInternet/Templates/LargeImageTemplate.aspx?img=/NR/rdonlyres/99A0430A-A361-47C2-9E26-07DD0B8F71B5/0/reaper.jpg&alt=Reaper%20UAV> (last visited May 9, 2011); Image of an Hermes 450, MINISTRY OF DEFENCE, <http://www.mod.uk/DefenceInternet/Templates/LargeImageTemplate.aspx?img=/NR/rdonlyres/DD6ECD25-DE1B-4F41-9A03-092EF12B92FB/0/3.jpg&alt=Hermes%20450%20unmanned%20air%20vehicle%20at%20an%20airfield> (last visited May 9, 2011). For Australia see: Image of a Scan Eagle, AUSTRALIAN GOVERNMENT – DEPARTMENT OF DEFENCE, http://www.defence.gov.au/opEx/global/opcatalyst/images/gallery/20061222/20061206adf8205214_0011.jpg (last visited May 9, 2011); Image of a Scan Eagle, AUSTRALIAN GOVERNMENT – DEPARTMENT OF DEFENCE, <http://www.defence.gov.au/news/armynews/editions/1174/images/14%20-%20UAV%20launch%20pad.jpg> (last visited May 9, 2011); Image of a Scan Eagle, AUSTRALIAN GOVERNMENT – DEPARTMENT OF DEFENCE, http://www.defence.gov.au/op/afghanistan/gallery/2010/20100201c/20100125adf8246638_374.jpg (last visited May 9, 2011); and Image of a Scan Eagle, AUSTRALIAN GOVERNMENT – DEPARTMENT OF DEFENCE, http://www.defence.gov.au/op/afghanistan/gallery/2010/20100201c/20100125adf8246638_370.jpg (last visited May 9, 2011). See also Image of a Heron, NATIONAL DEFENCE AND THE CANADIAN FORCES, <http://www.cefc-comfec.forces.gc.ca/pa-ap/potd/photos-eng.asp?id=346> (last visited May 9, 2011) (The Heron is also operated by Canada in Afghanistan, and can be seen here showing the distinctive maple-leaf mark).

Indeed, there is even variation among the same type.⁹⁵ Publicly available pictures of the Australian Scan Eagle on one occasion show a low-visibility kangaroo (a standard military marking on Australian Army military aircraft), but this marking does not appear on the other pictures.⁹⁶ Based on this small sample, what can be deduced is that the majority of the RPAs have markings, but some of the smaller RPAs are not marked.

The reasons for this are not known; however, a few observations can be made. First, the conflict in Afghanistan is, at most, a non-international armed conflict.⁹⁷ Accordingly, military aircraft operating in Afghanistan are not required by the law of armed conflict to be marked. Second, the manner of operation of the RPA may be evidence of State practice towards an evolving customary international law norm that smaller RPA that are not armed need not be marked. If this is an accurate assessment, such practice makes operational sense. There is a point at which markings no longer serve a useful purpose. The United States Air Force currently operates an RPA called Wasp III with a wingspan of only 72.3 cm and a length of 25.4 cm (weighing 453 grams).⁹⁸ A RPA called the Delfly Micro is under development that is just “3 grams and has a size of 10 cm from wing tip to wing tip.”⁹⁹ Any marking on such RPA, even if “as large as possible,”¹⁰⁰ would be practically unobservable in flight.

VI. CONCLUSION

Markings on aircraft are important indicators of an aircraft’s status. Particularly in peacetime, international law makes a distinction between civil and state aircraft. During an international armed conflict, the primary distinction is between military aircraft and other aircraft. Where an RPA is used in military service, an RPA can be a state aircraft, a military aircraft, or both.

Whether an aircraft is a state aircraft is principally a functional test. Strictly speaking, an aircraft need not have any particular markings to have the status of a state aircraft. Nonetheless, the lack of markings is likely to prejudice the finding that an aircraft is a state aircraft — particularly by States other than the operating State. For example, where an aircraft lacks national markings, a State may have problems with successfully asserting the rights usually associated with state aircraft (e.g. sovereign immunity from foreign search and inspection).

An aircraft can only have the nationality of one State and there is no concept of a state aircraft having the “nationality” of an international organization.

95. *Id.*

96. AUSTRALIAN GOVERNMENT – DEPARTMENT OF DEFENCE, *supra* note 94.

97. Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1408 (2007).

98. *Factsheets: Wasp III*, U.S. AIR FORCE (Nov. 19, 2009), <http://www.af.mil/information/factsheets/factsheet.asp?id=10469>.

99. *Delfly Micro*, DELFLY, <http://www.delfly.nl/?site=DIII&menu=home&lang=en> (last visited May 5, 2011). While it has been referred to here as an RPA, the goal is for fully autonomous flight. As such, it will ultimately be a misnomer to call it *remotely* piloted.

100. HRAW, *supra* note 51, art. 7.

However, an aircraft can have the nationality of one State while at the same time displaying markings showing its relationship to an international organization.

Unlike for state aircraft, the law is much clearer on the requirement that aircraft have markings in an international armed conflict for that aircraft to have the status of a military aircraft. This is important, because in an international armed conflict, only military aircraft should exercise belligerent rights. The law of marking for military aircraft is customary in nature, and the law may be evolving toward not requiring such markings on small RPA where the size of the RPA means that any markings will be so small as to serve no practical purpose.

CURRENT U.S. AIR FORCE DRONE OPERATIONS AND THEIR CONDUCT IN COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW—AN OVERVIEW

AARON M. DRAKE¹

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I. INTRODUCTION

They are most commonly referred to as “drones.” The United States Air Force (USAF) calls them “Remotely Piloted Aircraft” (RPAs) or “Unmanned Aircraft Systems” (UASs).² Pilots and operators might call them “Reapers” or “Preds.” No matter the name or acronym, these remotely-controlled machines have risen dramatically during the last decade to the forefront of war fighting capabilities—and international law debate. However, the employment of drones on the battlefield is not new. During at least the last 50 years, the United States (U.S.) military has employed drones and RPAs principally as a platform for reconnaissance—allowing operators, far removed from danger, to safely observe the battlefield.³ Over the last decade, however, RPAs have evolved into a comprehensive “combat support asset,” being used for both reconnaissance operations and targeting operations, among other functions.⁴

Remotely Piloted Aircraft targeting operations, sometimes called strikes, have become a prominent feature of the U.S.’s worldwide battle against individual terrorists and terrorist organizations. One of the U.S.’s first notable strikes of this modern RPA era occurred in Yemen on November 3, 2002.⁵ The U.S. and Yemeni Governments had been tracking several men who were allegedly involved in the bombing of the USS *Cole* in October 2000.⁶ On several occasions, officials attempted to apprehend the men, but were unsuccessful.⁷ The priority target among them, Ali Qaed Senyan al-Harithi, was believed to be the top al Qaeda operative in Yemen.⁸ Wanted and pursued by both governments, Harithi had been hiding amongst and moving between armed tribal villages.⁹ On at least one occasion, villagers had demonstrated their willingness and ability to forcefully

2. In 2009, Secretary of the Air Force, Michael Donley, officially replaced the name Unmanned Aerial Vehicle, or UAV, with Remotely Piloted Aircraft, or RPA. The change was to emphasize the fact that UAV operations are anything but “unmanned.” Bruce Rolfsen, *Unmanned a Misnomer When it Comes to UAVs*, AIR FORCE TIMES (June 11, 2010), http://www.airforcetimes.com/news/2010/06/airforce_uav_personnel_061110w/; *A Drone by Any Other Name...*, REUTERS SUMMIT NOTEBOOK (Dec. 14, 2009) <http://blogs.reuters.com/summits/2009/12/14/a-drone-by-any-other-name/>. Numerous acronyms exist to describe drones of varying sizes and capabilities. The most common among them are: Unmanned Aircraft System (UAS), Unmanned Combat Air Vehicle (UCAV), Micro Aerial Vehicle (MAV), Remotely Piloted Aircraft (RPA), Force Protection Aerial Surveillance System (FPASS), Small Unmanned Aircraft System (SUAS), and Lethal Miniature Aerial Munitions System (LMAMS).

3. U.S. AIR FORCE, THE U.S. AIR FORCE REMOTELY PILOTED AIRCRAFT AND UNMANNED AERIAL VEHICLE STRATEGIC VISION 1 (2005), [hereinafter STRATEGIC VISION], available at <http://www.globalsecurity.org/military/library/policy/usaf/afd-060322-009.pdf>.

4. *Id.* at 2.

5. *Report of the Special Rapporteur*, U.N. Econ. & Soc. Council [ECOSOC], *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Report of the Special Rapporteur*, ¶ 37, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (prepared by Asma Jahangir).

6. *Id.* ¶ 38.

7. *Id.*

8. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 3, 41(2008); *CIA ‘Killed Al-Qaeda Suspects’ in Yemen*, BBC NEWS (Nov. 5, 2002), http://news.bbc.co.uk/2/hi/middle_east/2402479.stm.

9. *CIA ‘Killed Al-Qaeda Suspects’ in Yemen*, *supra* note 8.

repel Yemeni government security forces, turning back a raid and killing 18 Yemeni soldiers in the process.¹⁰

It was against this backdrop that the U.S., with cooperation from the Yemenis, tracked, targeted, and killed Harithi and five of his associates using a Predator drone armed with Hellfire missiles.¹¹ The strike took place in Yemen as the men traveled in a vehicle near a tribal stronghold.¹² The strike was notable because in conducting so-called “covert action,”¹³ the U.S. took an unmanned reconnaissance aircraft, attached missiles to it, and used it to kill people in a country where arguably no armed conflict existed.¹⁴ This was not the first time an RPA had been used to deliver a lethal strike in this manner and it certainly would not be the last. In December 2008, then-CIA Director Michael Hayden briefed President-elect Barack Obama on the numerous covert activities then underway at the CIA.¹⁵ Reportedly, foremost among the activities discussed was the multitude of RPA strikes “on terrorists and terrorist camps worldwide.”¹⁶ “80 percent” of the CIA’s worldwide RPA strikes, Director Hayden told the president-elect, were taking place in Pakistan.¹⁷ A 2009 congressional report noted that

[t]he accelerated drone campaign in western Pakistan that began in mid-2008 appears to have taken a significant toll on Al Qaeda operatives....According to Pakistani intelligence officials, who reportedly are now providing targeting information to the United States, drone attacks have eliminated more than half of the top 20 Al Qaeda “high-value targets” in western Pakistan since mid-2008.¹⁸

Even by al Qaeda members’ own admissions, RPAs have been critical to knocking out top leaders in the Taliban and al Qaeda organizations.¹⁹ In January

10. *Id.*

11. *Id.*

12. *Id.*

13. Paragraph 3.5(b) of Executive Order 12333, defines “covert action” as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly” Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), *amended by* Exec. Order No. 13, 470, 73 FR 45, 325 (Jul. 30, 2008), *available at* <http://www.fas.org/irp/offdocs/eo/eo-12333-2008.pdf>.

14. Anonymous U.S. officials who were cited attributed the Yemen strike to the U.S. Central Intelligence Agency (CIA), although the CIA did not comment publicly on the strike. *CIA ‘Killed Al-Qaeda Suspects’ in Yemen*, *supra* note 8.

15. BOB WOODWARD, *OBAMA’S WARS* 50-56 (2010).

16. *Id.* at 52.

17. *Id.*

18. K. ALAN KRONSTADT, CONG. RESEARCH SERV., RL 33498, *PAKISTAN-U.S. RELATIONS* 34 (2009), <http://fpc.state.gov/documents/organization/127297.pdf>; *but see* David Kilcullen & Andrew McDonald Exum, Op-Ed., *Death From Above, Outrage Down Below*, N.Y. TIMES, May 16, 2009, <http://www.nytimes.com/2009/05/17/opinion/17exum.html> (arguing that using the unseen, unheard RPAs often with collateral damage actually serves to further destabilize these regions and turn power to insurgents).

19. *Al-Qaida Leader Admits Facing Pressure from Drones*, FOXNEWS.COM (Jan. 27, 2011), <http://www.foxnews.com/world/2011/01/27/al-qaida-leader-admits-facing-pressure-drones/>.

2011, al Qaeda's chief of media and preaching in Pakistan admitted in a broadcast to his followers that its network is losing territory, people, and resources as "drones are flying in the sky."²⁰ The USAF has described RPAs and their effects as "one of the most 'in demand' capabilities the USAF provides...."²¹ In the fall of 2010, the U.S. government revealed that RPAs had proven the key to success in Afghanistan against U.S. troops' formidable foe, the Improvised Explosive Device (IED).²² In less than a two-week period, an RPA task force contributed to the killing of at least 26 individuals who were taking part in planting IEDs.²³ Among this and various other operational benefits that will be discussed in this article, RPAs also provide the USAF reduced operation and maintenance costs²⁴ and, of course, the ability to keep pilots and operators out of harm's way as they control their aircraft from remote locations.

Strikes like the Yemen strike described above, often referred to as "targeted killings,"²⁵ began largely under President George W. Bush and have increased significantly under President Barrack Obama.²⁶ These strikes now occur regularly

20. *Id.*

21. U.S. AIR FORCE, UNITED STATES AIR FORCE UNMANNED AIRCRAFT SYSTEMS FLIGHT PLAN 2009-2047, 3 (2009), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA 505168&Location=U2&doc=GetTRDoc.pdf> [hereinafter FLIGHT PLAN].

22. Yochi J. Dreazen, *Using Drones to Counter IEDs*, NAT'L J. (Oct. 2, 2010), http://www.nationaljournal.com/njmagazine/id_20101002_1678.php; Terry McCarthy, *Afghanistan's Most Dangerous Job: Finding IEDs*, CBS NEWS (Aug. 19, 2010), <http://www.cbsnews.com/stories/2010/08/19/eveningnews/main6788192.shtml> (citing an exponential increase in US fatalities caused by IEDs, with as many as 60% of fatalities caused by IEDs in Afghanistan during 2010).

23. Dreazen, *supra* note 22.

24. STRATEGIC VISION, *supra* note 3, at 15.

25. MELZER, *supra* note 8, at 3. Melzer, a legal advisor to the International Committee of the Red Cross, has explained targeted killings as having five essential elements. Those are first, the "use of lethal force" against a person; second, that the targeting was done with "premeditation and deliberation to kill;" third, that the targeting is of "individually selected persons" as opposed to "collective, unspecified, or random targets;" fourth, that the actor lacked "physical custody" of the targeted person; and fifth, that the act is attributable to a "subject of international law," which refers to "primarily States," but also includes certain "non-State actors." *Id.* at 3-4. Various other definitions exist, although no definition seems to be widely agreed upon under IHL. One international law scholar suggests a more restrictive definition, describing a targeted killing as "the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or non-international armed conflict." GARY D. SOLIS, *THE LAW OF ARMED CONFLICT*, 538 (2010).

26. While exact numbers are elusive, as most of these attacks are not publicly acknowledged or discussed by the U.S. government, rough estimates indicate the attacks at a rate of just a few during 2007, steadily increasing to as many as twenty per month in 2010. See Ishtiaq Mahsud, *Al-Qaida Figure Believed Killed In US Drone Strike*, THE WASH. TIMES (Feb. 21, 2011), <http://www.washingtontimes.com/news/2011/feb/21/al-qaeda-figure-believed-killed-us-drone-strike/> (discussing strikes in Pakistan during 2011 occurring about once per week); Mark Mazzetti & Eric Schmitt, *C.I.A Steps Up Drone Attacks On Taliban In Pakistan*, N.Y. TIMES (Sept. 27, 2010), <http://www.nytimes.com/2010/09/28/world/asia/28drones.html> (citing seventy-four attacks year-to-date in September 2010); Interview by Ari Shapiro with Peter Bergen, Senior Fellow, New American Foundation (Sept. 28, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=130180992> (citing roughly twenty drone strikes along the Afghan border during September 2010); Eric Schmitt, *Pakistan's Failure to Hit Militant Sanctuary Has Positive Side for U.S.*, N.Y.

along and inside Pakistan's northwestern border with Afghanistan.²⁷ For reasons to be discussed in this article, some war fighters, politicians, and scholars praise the relatively new weapon system and its many capabilities—including targeted killings.²⁸ However, questions exist as to whether the U.S. has the legal right, domestic or international, to resort to the use of force outside the traditional battlefield, especially to the extent the CIA is involved.²⁹ Some have condemned targeted killings as “extrajudicial executions” and failing to comply with international human rights law,³⁰ as well as international humanitarian law (IHL).³¹ The U.S., however, maintains that being in a state of “armed conflict with al-Qaeda, as well as the Taliban and associated forces” justifies using “force consistent with its inherent right to self-defense under international law.”³² The

TIMES (Jan. 17, 2011), <http://www.nytimes.com/2011/01/18/world/asia/18terror.html> (explaining that number of strikes in North Waziristan was 104 in 2010, up from 22 in 2009); Craig Whitlock, *In Hunt for Bin Laden, a New Approach*, WASH. POST (Sept. 10, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/09/AR2008090903404.html> (discussing three strikes reported by Pakistani officials in 2007 and eleven strikes in 2008).

27. Mahsud, *supra* note 26; Mazzetti & Schmitt, *supra* note 26; Shaprio, *supra* note 26; Schmitt, *supra* note 26; Whitlock, *supra* note 26.

28. Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 276 (2010); Kenneth Anderson, *Predators Over Pakistan*, THE WEEKLY STANDARD, Mar. 2010, at 26, available at <http://www.weeklystandard.com/articles/predators-over-pakistan>; Noah Shachtman, *CIA Chief: Drones 'Only Game in Town' for Stopping Al Qaeda*, WIRED (May 19, 2009), <http://www.wired.com/dangerroom/2009/05/cia-chief-drones-only-game-in-town-for-stopping-al-qaeda> (CIA Director Leon Panetta describes UAV operations as “the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership”).

29. MARY ELLEN O'CONNELL, *Unlawful Killing with Combat Drones, A Case Study of Pakistan, 2004-2009*, in *Shooting to Kill: The Law Governing Lethal Force in Context* (forthcoming Simon Bronitt ed., Hart Publishing), available at <http://www.ssrn.com/abstract=1501144>; Noah Shachtman, *Call Off Drone War, Influential U.S. Adviser Says*, WIRED.COM (Feb. 10, 2009), <http://www.wired.com/dangerroom/2009/02/kilcullen-says/>; but see Barton Gellman, *CIA Weighs "Targeted Killing" Missions*, WASH. POST (Oct. 28, 2001), <http://www.washingtonpost.com/ac2/wp-dyn/A63203-2001Oct27> (Apparently based on certain classified documents, “the Bush administration has concluded that executive orders banning assassination do not prevent the president from lawfully singling out a terrorist for death by covert action.”).

30. In situations where no armed conflict exists and where a state may not lawfully use lethal force in self-defense, international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), prohibits the arbitrary taking of life. Article 6 of that covenant states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” International Covenant on Civil and Political Rights art. 6, Mar. 23, 1976, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm#part3>.

31. *Report of the Special Rapporteur*, *supra* note 5, at 37-39 (Special Rapporteur concluding that the Yemen strike was a “clear case of extrajudicial killing.”); Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR C. REV. 127, 134-35 (2007) (stating that targeted killing only takes place “in the context of an international or non-international armed conflict”).

32. Harold H. Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>. Long recognized in customary international law, a State's right to self-defense is also provided for in Article 51 of the Charter of the United Nations. U.N. Charter art. 51, available at <http://www.un.org/en/documents/charter/chapter7.shtml>. However, the U.S. position seems to be at odds with certain aspects of the following decisions reached by the

U.S. further maintains that even lethal force is justified inasmuch as it is used in compliance with the IHL principles of distinction and proportionality.³³

This article does not further address the U.S.'s legal basis for use of force in current conflicts,³⁴ nor does it address RPA operations conducted by the CIA.³⁵ Rather, this article focuses specifically on U.S. Air Force (USAF) RPA operations. The first section gives an overview of a typical USAF RPA operation in terms of command and control. The first section also addresses compliance with IHL principles which govern the use of force—particularly distinction and proportionality. The next section addresses the evolution of semi or fully autonomous drones and their implications for command and control on the battlefield. The final section identifies command responsibility as the principle under IHL that holds accountable those commanders and military members who might fail to comply with IHL during RPA operations.

II. COMMAND AND CONTROL DURING USAF RPA OPERATIONS

"Command and control" is a term of art in the military.³⁶ The military is trained to understand that uncontrolled force or indiscriminate application of force is nothing more than violence. The U.S. Marine Corps teaches that "[w]ithout command and control, campaigns, battles, and organized engagements are impossible, military units degenerate into mobs, and the subordination of military force to policy is replaced by random violence."³⁷

International Court of Justice; *but see, e.g., Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, at ¶¶ 191-96 (June 27), available at <http://www.icj-cij.org/docket/files/70/6503.pdf>; *see, e.g., Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 at ¶ 301, available at <http://www.icj-cij.org/docket/files/116/10455.pdf>; *see, e.g., Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 at ¶ 51, available at: <http://www.icj-cij.org/docket/files/90/9715.pdf>.

33. *See Koh, supra* note 32.

34. ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 1 (2000) ("The reason for this lies in the cardinal principle that *jus in bello* applies in cases of armed conflict whether or not the inception of the conflict is lawful under *jus ad bellum*").

35. This article discusses USAF RPA operations specifically, as opposed to CIA RPA operations. However, conclusions drawn here regarding RPA weapon systems are not necessarily specific to the operator who employs those systems. The author has no personal knowledge of CIA RPA operations other than that information which is found in open or publicly available sources. According to those sources, the CIA uses the same RPA systems as the USAF—namely MQ-1 Predator and MQ-9 Reaper RPAs. Thus, conclusions drawn as to these particular weapons systems could apply equally to the USAF and to the CIA.

36. The U.S. Department of Defense defines command and control as:

"The exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission. Command and control functions are performed through an arrangement of personnel, equipment, communications, facilities, and procedures employed by a commander in planning, directing, coordinating, and controlling forces and operations in the accomplishment of the mission."

U.S. DEP'T OF DEF., DEP'T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 65 (2010) [hereinafter *Terms*].

37. DEP'T OF THE NAVY, U.S. MARINE CORPS, COMMAND AND CONTROL 35 (1996), http://www.dtic.mil/doctrine/jel/service_pubs/mcdp6.pdf.

The U.S. Air Force defines command and control as “the exercise of authority and direction by a properly designated commander over assigned and attached forces...performed through an arrangement of personnel, equipment, communications, facilities, and procedures employed...in the accomplishment of the mission.”³⁸ Accordingly, command and control is required at all times and over all aspects of the military mission. This is no less true when it comes to RPA operations. As a former RPA pilot for a small research team at the U.S. Air Force Academy, this author can provide a personal account of the requirement for continuous command and control, even during small-scale RPA research flights. The next several paragraphs will detail the command and control experience.

With final ground safety checks complete, an operator inside the ground control station (GCS)³⁹ gives control of the aircraft to me, the “aircraft commander.”⁴⁰ During takeoffs and landings, I stand outside the GCS and fly the RPAs by sight, using a hand-held controller. I add power to the RPA, direct it down the runway and lift off. Once airborne, I ensure the RPA is functioning properly, fly the RPA to a specific altitude, and say, “Passing off RPA 1.” When the operator inside the GCS verifies that he (via the autopilot software on his computer) has control of the aircraft, command and control goes to this operator in the GCS, who is accountable for the remainder of that portion of the mission. We follow the same process for each aircraft until all aircraft are airborne and controlled by the GCS (usually two or three at a time for each research mission). Once the flying objective or experiment is complete, we follow a similar process in landing the aircraft. The GCS directs the RPA to a designated point in the airspace and I say, “Taking RPA 1.” I take control of the aircraft and land them in the same order I took them off.

Current USAF RPA operations on the battlefield are similar in that commanders at various levels exercise command and control during their corresponding mission segment. At no time during the operation is there a command and control void, where the RPA might command itself. The following overview of current USAF RPA operations illustrates this point.

38. U.S. AIR FORCE, COMMAND AND CONTROL: AIR FORCE DOCTRINE DOCUMENT 2 (2007).

39. The GCS here (specific to the U.S. Air Force Academy research team and as opposed to that of a larger-scale RPA) is a small enclosed trailer with several computers, several very smart computer scientists, and a collection of communications equipment such as antennas, receivers, and transmitters.

40. The “aircraft commander” in any USAF air operation, manned or unmanned, is personally responsible for the aircraft commanded by that person. They cannot delegate or otherwise abrogate that responsibility—similar to the way the driver of a car cannot abrogate responsibility for the car he or she is operating. The U.S. Department of Defense defines “aircraft commander” as “[t]he aircrew member designated by competent authority as being in command of an aircraft and responsible for its safe operation and accomplishment of the assigned mission.” U.S. DEP’T OF DEF., DEP’T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2011), http://www.dtic.mil/doctrine/dod_dictionary/data/a/2309.html (follow “aircraft commander” hyperlink).

A. Overview of Current USAF RPA Operations

During the summer of 2010, the USAF operated as many as 40 RPA combat air patrols (CAPs) at any given time in Iraq and Afghanistan.⁴¹ As of March 2011, the worldwide total for the USAF was 48.⁴² A CAP signifies one aircraft—and more specifically, one aircraft fulfilling a flying mission, or patrol, usually dedicated to monitoring or protecting an assigned battle pace, whether overland, oversea, or in the air.⁴³ These CAPs can consist of various RPAs, including the MQ-1 Predator, the MQ-9 Reaper, and in a much more limited and specialized reconnaissance role, the RQ-4 Global Hawk.⁴⁴ Smaller scale hand-launched or catapult-launched Small Unmanned Aircraft Systems, such as the RQ-11B Raven and the Scan Eagle are not included in these CAPs but instead are dedicated almost exclusively to providing commanders “situational awareness” in a smaller battle space.⁴⁵

Predators and Reapers are similar in that they are both “multi-role” aircraft.⁴⁶ The principal strength of both these RPAs is their ability to perform various intelligence, surveillance, and reconnaissance (ISR) tasks.⁴⁷ The U.S. Department of Defense defines ISR as “[a]n activity that synchronizes and integrates the planning and operation of sensors, assets, and processing, exploitation, and

41. Bruce Rolfen, *Unmanned a Misnomer when it Comes to UAVs*, AIR FORCE TIMES, June 11, 2010, http://www.airforcetimes.com/news/2010/06/airforce_uav_personnel_061110w.

42. Robert M. Gates, Secretary of Defense, U.S. Air Force Acad. (Mar. 4, 2011), <http://www.defense.gov/speeches/speech.aspx?speechid=1543> (“The Air Force now has forty-eight Predator and Reaper combat air patrols currently flying—compared to eighteen CAPs in 2007”).

43. UNITED STATES DEPARTMENT OF DEFENSE, *supra* note 36, at 60.

44. The Global Hawk is a high-altitude, long-endurance RPA dedicated entirely to specialized ISR missions. It has a ceiling of 60,000 feet and can remain aloft for as many as thirty-six hours. See U.S. AIR FORCE, RQ-4 GLOBAL HAWK (2009), <http://www.af.mil/information/factsheets/factsheet.asp?id=13225>.

45. See U.S. AIR FORCE, RQ-11B RAVEN (2010), <http://www.af.mil/information/factsheets/factsheet.asp?id=10446>; See U.S. AIR FORCE, SCAN EAGLE (2009), <http://www.af.mil/information/factsheets/factsheet.asp?id=10468>.

46. The “M” designator in MQ-1 Predator and MQ-9 Reaper signifies “multi-role.” See U.S. AIR FORCE, MQ-1B PREDATOR FACT SHEET (2010), <http://www.af.mil/information/factsheets/factsheet.asp?id=122>; See U.S. AIR FORCE, MQ-9 REAPER (2010), <http://www.af.mil/information/factsheets/factsheet.asp?id=6405>.

47. For an argument that the Obama administration, based on political expediency, prefers to kill targets as opposed to track and capture them, see Kenneth Anderson’s Blog. Kenneth Anderson, *Why Targeted Killing? And Why is Robotic So Crucial an Issue in Targeted Killing?*, KENNETH ANDERSON’S L. OF WAR AND JUST WAR THEORY BLOG (Mar. 27, 2009, 12:36 PM) (“Moreover, the political costs for any U.S. administration taking and holding detainees are now enormous. Once you hold them, over time they will likely be accorded quasi-Constitutional protections by the courts, at least some version of habeas corpus. Politically, the most powerful institutional incentive today is to kill rather than capture them. The intelligence losses of killing rather than capturing in order to interrogate them are great. But since the U.S. political and legal situation has made interrogation a questionable activity anyway, there is little reason to seek to capture rather than kill. And if one intends to kill, the incentive is to do so from a standoff position, because it removes messy questions of surrender.”), <http://kennethandersonlawofwar.blogspot.com/2009/03/why-targeted-killing-and-why-is.html>; See Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 13, 2011, available at <http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html>.

dissemination systems in direct support of current and future operations.”⁴⁸ The USAF describes ISR as the means of providing “accurate, relevant, and timely intelligence to decision makers...the life blood of effective decision making.”⁴⁹ In addition to ISR capabilities, both aircraft are capable of carrying munitions and delivering those munitions on a selected target.⁵⁰

RPAs are successful in their multiple roles largely because they fly as high as 50,000 feet (well out of sight or earshot of those on the ground) and loiter over an objective for as many as 22 hours at a time—or less, depending on payload weight.⁵¹ This kind of “persistent surveillance,” as it is called, gives operators the ability to watch points of interest almost indefinitely, considering multiple RPAs can rotate in and out of airspace to hand off surveillance tasks.⁵² Increased time aloft also means fewer sorties (a take-off, flight, and landing), which minimizes strain on operators, ground crew, and the aircraft.⁵³

However important prolonged loiter time might be, the key enabler of RPAs is the “suite of sensors” or “targeting system” included onboard each RPA.⁵⁴ These sensors allow operators from miles away to zoom in on unsuspecting subjects.⁵⁵ The high-definition images provide operators a detailed picture of the battlefield and more importantly, of specific individuals on the battlefield. Included in a typical sensor package on a Reaper, for example, are an “infrared sensor [to provide night vision], a color/monochrome daylight TV camera, an image-intensified TV camera, a laser designator and a laser illuminator...”⁵⁶ Regardless of primary mission, RPAs might also carry sensors for weather data collection or other communications purposes—all designed to enhance commanders’ situational awareness on the battlefield.⁵⁷

Deployed in early 2011, and carried by Reaper RPAs, is the U.S. Air Force’s newest and most powerful sensor system—the “Gorgon Stare.”⁵⁸ This 1,100

48. UNITED STATES DEP’T OF DEF., *supra* note 36, at 183.

49. U.S. AIR FORCE, INTELLIGENCE, SURVEILLANCE, AND RECONNAISSANCE OPERATIONS: AIR FORCE DOCTRINE DOCUMENT 1 (2007).

50. Compare MQ-1B Predator, U.S. Air Force (July 20, 2010), <http://www.af.mil/information/factsheets/factsheet.asp?id=122> (explaining that the Predator will carry no more than two AGM-114 Hellfire missiles—which is a payload capacity of 450 pounds), with MQ-9 Reaper, U.S. Air Force (Aug. 18, 2010), <http://www.af.mil/information/factsheets/factsheet.asp?id=6405> (explaining that the Reaper’s payload capacity rivals that of the more traditional fighter aircraft, the F-16. The Reaper has a payload capacity of almost 4,000 pounds. With this capacity, the Reaper can be armed with various combinations of AGM-114 Hellfire missiles, GBU-12 Paveway II laser guided munitions, and GBU-38 Joint Direct Attack Munitions).

51. FLIGHT PLAN, *supra* note 21, at 26-27.

52. STRATEGIC VISION, *supra* note 3, at 5.

53. *Id.*

54. MQ-9 Reaper, *supra* note 50.

55. Lara Logan, *Drones: America’s New Air Force*, CBS NEWS: 60 MINUTES (Aug. 14, 2009), <http://www.cbsnews.com/stories/2009/05/08/60minutes/main5001439.shtml>.

56. MQ-9 Reaper, *supra* note 50.

57. STRATEGIC VISION, *supra* note 3, at 9.

58. Ellen Nakashima & Craig Whitlock, *With Air Force’s Gorgon Drone ‘We Can See Everything’*, WASH. POST, Jan. 2, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/>

pound 15 million dollar system is capable of viewing a five-mile diameter area at one time, as opposed to the “soda-straw” perspective offered by some previous sensor systems.⁵⁹ It accomplishes this by stitching together images from multiple cameras aimed at various points within the viewing area. This one sensor system can also simultaneously broadcast one viewpoint to one user—perhaps a ground commander on the battlefield; another view point to another user—perhaps an intelligence analyst at a base in the United States; a third viewpoint to another user—perhaps a decision maker at the Pentagon or the White House; and so on. This is critically important during USAF RPA operations because a successful mission may involve a team composed of multiple individuals, each with their own specialties, perspectives, roles, and geographic locations. Furthermore, one can imagine greater control of the battlefield, as well as situational awareness, given multiple sets of eyes focusing on multiple points.

1. A Typical USAF RPA Combat Air Patrol⁶⁰

A USAF RPA Combat Air Patrol (CAP) might be responsible for any number of tasks including monitoring and covering (providing close air support for) friendly forces’ movements or positions, tracking and observing enemy forces’ movements or positions, protecting a defended target, observing and defending a boundary or border, searching for missing, downed, or captured friendly forces, or finding, tracking, and targeting an enemy combatant or objective.⁶¹

These missions typically begin at an overseas location where a ground crew readies the RPA for flight. The ground crew fuels, arms, and otherwise prepares the RPA for its mission. While at or near the launch base, the RPA is controlled by a crew of operators working from a ground control station (GCS) located at the launch base. That aircrew is responsible for getting the RPA airborne and preparing it for handoff to the crew of operators (working from a base other than the launch base—often located in the U.S.) who will complete the operational mission.

At the designated time, the remotely-located aircrew takes control of the RPA and proceeds with the mission, which could last upwards of 22 hours.⁶² At this point, the mission is considered a “remote split operation.”⁶³ The aircrew now in control of the RPA is comprised of several operators, including at a minimum, a

01/01/AR2011010102690. html?sid=ST2011012204147.

59. Michael Hoffman, *New Reaper Sensors Offer a Bigger Picture*, AIR FORCE TIMES, Feb. 16, 2009, http://www.airforcetimes.com/news/2009/02/airforce_WAAS_021609/.

60. Information used in the following section, unless otherwise noted, was taken from interviews with two U.S. Air Force RPA pilots (including one RPA Squadron Commander) who, while working from bases in the continental U.S., have spent considerable time conducting RPA operations in the Middle East and Southwest Asia. In addition to piloting RPAs, these pilots also fly, respectively, the F-16 multirole fighter and the KC-135 tanker. Interview notes are on file with the author.

61. FLIGHT PLAN, *supra* note 21, at 26-27.

62. Given the long duration of RPA flights, multiple crews in shifts will work the GCS for any given CAP. At shift change, command of the RPA and of the CAP is passed from the outgoing pilot to the incoming pilot.

63. FLIGHT PLAN, *supra* note 21, at 26.

pilot, a sensor operator, and a mission intelligence coordinator.⁶⁴ The pilot serves as the aircraft commander and at all times controls the RPA—even if the RPA happens to be flying with an “auto-pilot” function.⁶⁵ The pilot is solely responsible for the safe operation of the RPA and for the appropriate and legal use of force during operations. The sensor operator is responsible for operating the suite of sensors aboard the RPA. The mission intelligence coordinator, or MIC, who is trained as an imagery analyst, oversees the immediate analysis, collection, and flow of intelligence gathered and used during the mission. The mission intelligence coordinator also assists with airspace coordination, compliance with rules of engagement during use of force, and mission reporting.

In addition to the aircrew working the GCS, any number of intelligence analysts and military decision makers might also take part in the mission. Available at all times in the GCS are at least three voice lines—one to military forces on the battlefield and two lines linking headquarter elements overseas and command centers at various places around the world—whether airborne or land-based. In addition to the voice lines, individuals at all levels of military operations, including in the GCS, have access to “chat rooms,” as they are called, where “secure” networks are used to discuss, share, compare, and further analyze intelligence data.

The various types of intelligence used and discussed might include human intelligence (information gained directly from human sources),⁶⁶ communications intelligence (information gained from intercepted communications),⁶⁷ or electronic intelligence (information gained from exploitation of an adversary’s electronic systems),⁶⁸ to name a few. All of this information, or intelligence, is in addition to that gained by the RPA operators during the particular mission.

By comparison, an F-16 pilot relies almost entirely on instinct and training in analyzing a given situation. This is due to significant time constraints during battlefield engagements. The pilot takes into account whatever can be observed through the canopy with the naked eye, whatever can be observed in the cockpit on a small screen displaying images obtained with the targeting pod system attached to the aircraft, and any additional information the pilot might learn from a controller at an operations center. An F-16’s array of sensors often includes an infrared detector, a CCD-TV camera, a laser rangefinder and a laser designator.⁶⁹ Notably, however, an F-16 pilot is alone in operating all flight controls, sensors, communications equipment, and munitions. The pilot’s job is further complicated

64. *Id.* at 28-29.

65. Currently, the pilot is restricted to operating a single aircraft although USAF plans call for a single pilot to control four aircraft simultaneously during “benign operations.” FLIGHT PLAN, *supra* note 21, at 55.

66. *Terms, supra* note 36, at 167.

67. *Id.* at 70.

68. *Id.* at 120.

69. See U.S. Air Force, *Fact Sheet*, http://www.af.mil/information/factsheets/factsheet_print.asp?fsID=114&page=1.

by the fact that the F-16 will likely have only enough fuel to loiter over a target for 60-90 minutes.⁷⁰

Due to these limitations, F-16 pilots might find themselves in situations where choosing not to engage a target and returning for fuel will discontinue observation of the target—meaning the target will likely be lost. In discussing the many people with many perspectives and specialties collaborating during USAF RPA operations, a former F-16 pilot with considerable combat experience in the F-16—now also an RPA pilot—spoke of RPA operations saying, “You get better answers at every turn with all these people in the room.” With “better answers at every turn,” RPA pilots are uniquely able to comply with core IHL principles that govern the use of force—particularly the principles of distinction and proportionality.⁷¹

70. See U.S. Air Force, *Fact Sheet F-16 Fighting Falcon* (Oct. 30, 2009), <http://www.af.mil/information/factsheets/factsheet.asp?id=103>.

71. This is not to say that USAF RPA operations do not allow for compliance with other core IHL principles of military necessity and humanity. A U.S. Navy handbook for commanders explains that the goal of military necessity is “to limit suffering and destruction to that which is necessary to achieve a valid military objective.” U.S. DEP’T OF HOMELAND SEC., *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* (2007), http://www.usnwc.edu/getattachment/a9b8c92d-2c8d-4779-9925-0defea93325c/1-14M_%28Jul_2007%29_%28NWP%29_. The weapon system itself has little relevancy in the analysis of what comprises a valid military objective. The weapon system becomes relevant only to the extent it causes more suffering and destruction than is necessary to achieve a valid military objective. This is similar to the analysis under the IHL principle of humanity, or human suffering. Humanity, as addressed in Article 35(2) of AP I, prohibits employing “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 35 ¶ 2, Dec. 7, 1978, 1125 U.N.T.S. 3, available at <http://www.icrc.org/IHL.NSF/COM/470-750113?OpenDocument> [hereinafter Protocol I]. This limitation is similarly stated as a principle of customary international humanitarian law: “The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering” is prohibited. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES 237* (2005); see also Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 424 (1987). USAF RPAs currently employ the same precision-guided munitions that have been employed for years by other conventional manned aircraft. The MQ-9 Reaper, for example, employs the GBU-12 Paveway II bomb, the GBU-38 Joint Direct Attack Munition bomb, and the AGM-114 Hellfire missile. See U.S. Air Force, *Joint Direct Attack Munition GBU 31/32/38* (Nov. 21, 2007), <http://www.af.mil/information/factsheets/factsheet.asp?id=108>. The weapon platform from which these munitions are employed does not change the nature of the injury or suffering caused by the munitions. Therefore, any analysis as to military necessity or humanity does not change relative to the platform from which the munitions are deployed—in this case, an RPA.

2. USAF RPA Operations in Compliance with Distinction and Proportionality⁷²

Regardless of the classification of any particular armed conflict, certain fundamental principles of IHL govern the use of force.⁷³ The principles of distinction and proportionality are memorialized in treaty, long accepted as customary international humanitarian law, and applicable during targeting operations.⁷⁴ These principles apply whether targeting is conducted with manned aircraft, long-range cruise missiles, small arms, or RPAs.

In the International Committee of the Red Cross (ICRC) study on customary international humanitarian law, distinction is literally “Rule 1.”⁷⁵ It states: “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”⁷⁶ Article 57 of Additional Protocol I to the Geneva Conventions of 1949,⁷⁷ as well as customary international humanitarian law,

72. Similar to a previous footnote regarding the previous section, the information used in the following section, unless otherwise noted, was taken from interviews with two U.S. Air Force RPA pilots (including one RPA Squadron Commander) who, while working from bases in the continental U.S., have spent considerable time conducting RPA operations in the Middle East and Southwest Asia. In addition to piloting RPAs, these pilots also fly, respectively, the F-16 multirole fighter and the KC-135 tanker. Interview notes are on file with the author. *See supra* note 60.

73. This statement recognizes an understanding in IHL that certain laws and types of law apply in certain contexts depending upon classifications of armed conflict. For example, during an international armed conflict, as described by common article two of the Geneva Conventions of 1949, Additional Protocol I to the Geneva Conventions of 1949 (AP I) would be applicable. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol I, *supra* note 71. Similarly, in a non-international armed conflict, as described by common article three of the Geneva Conventions of 1949, Additional Protocol II to the Geneva Conventions of 1949 (AP II) would be applicable. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Non-International Armed Conflicts, June 8, 1977, 6 U.S.T. 3516, 1125 U.N.T.S. 609 [hereinafter Protocol II]. In addition to various provisions of treaty law, another body of international law applies during both types of armed conflict described by the Geneva Conventions of 1949. Int’l Comm. of the Red Cross, *Treaties and Customary Law: Overview* (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm>. This law is known as customary international humanitarian law. Thus, certain treaty provisions are referred to in remaining sections of this article with the understanding that although they may not apply in one type of armed conflict or another, unless otherwise stated they are nonetheless customary international humanitarian law and binding upon nation States employing RPAs in armed conflict.

74. *See* Protocol I, *supra* note 71, at arts. 35, 51.

75. HENCKAERTS & DOSWALD-BECK, *supra* note 71, at 3.

76. At the heart of the principle of distinction is the protection of civilians and civilian objects. Distinction has been described as “the foundation on which the codification of the laws and customs of war rests.” *Id.* at 427. According to the principle of distinction, attack may be directed against a person who is a “combatant” or against “civilians...for such time as they take a direct part in hostilities.” *Id.* at 3, 19. These same core concepts are codified in several articles of AP I, including 48, 51(2), 51(3) and 52(1) and Article 13 of Additional Protocol II to the Geneva Conventions of 1949 (AP II). Protocol I, *supra* note 71, at arts. 48, 51 ¶¶ 2-3, 52 ¶ 1; Protocol II, *supra* note 73, at art. 13.

77. Although the U.S. has not ratified AP I, it apparently recognizes a majority of its articles as customary international law. In 1987, a U.S. Department of State Deputy Legal Advisor, Michael Matheson, gave a speech in which he outlined very specifically the many articles and principles of AP I

prescribes “precautionary measures” that one must take in planning or deciding upon an attack.⁷⁸ Prior to launching any attack, one who plans or decides upon an attack must “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects....”⁷⁹ It seems, therefore, that IHL would favor a weapon system that enhances an operator’s ability to verify that an objective to be attacked is a combatant, as opposed to a civilian.

One criticism levied against RPAs, however, is that operators, finding themselves far from the battlefield, must rely on what they see via the RPA’s sensors and that perhaps the decision to use lethal force has become “too easy.”⁸⁰ Commentary on AP I states that “those who plan or decide upon...an attack will base their decision on information given them, and they cannot be expected to have personal knowledge of the objective to be attacked and of its exact nature.”⁸¹

Although perhaps not possessing first-hand “in-person” knowledge of their targets, RPA pilots are often better able to distinguish between civilians and combatants on the battlefield—more so than pilots of other manned aircraft—due to an RPAs’ capabilities. As previously discussed, RPAs can observe a potential target from altitudes as high as 50,000 feet, where the RPAs are neither seen nor heard. This unedited, uninterrupted observation of the unaware subject takes place during day or night and can go on for hours and even days at a time, as RPAs rotate in and out of airspace, handing off observation of a particular target if necessary to allow for more deliberate consideration of a decision to use force.

When analyzing a potential attack, an RPA pilot has at his or her fingertips a collection of intelligence data and information regarding the target, including the live video feed of events in progress. The pilot is also able to rely on the assistance of fellow crew members, intelligence analysts, ground forces, and other operators that are all linked to the operation. Most importantly, at all times during RPA operations the aircrew’s conduct is governed by rules of engagement. Rules of engagement (ROE) are a set of internal rules governing the use of force in compliance with IHL.⁸² Remotely Piloted Aircraft operators rely on ROE in

that the U.S. considered customary international law. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 422-29 (1987). Since that time, the U.S. has not repeated, refined, or otherwise retracted Mr. Matheson’s statements. With the exception of Articles 36 and 48, all of the AP I articles referenced or relied on by the author in this current article were included in Mr. Matheson’s comments as having been accepted by the U.S. as customary international law. *Id.*

78. HENCKAERTS & DOSWALD-BECK, *supra* note 71, at 336-44.

79. Protocol I, *supra* note 71, at art. 57 ¶ 2(a)(i).

80. Chris Cole, *Growing Concern over Drone Attacks*, THE GUARDIAN (Jun. 9, 2010), <http://www.guardian.co.uk/world/2010/jun/09/growing-concern-over-drone-attacks>; Eric Hagerman, *Point. Click. Kill: Inside The Air Force’s Frantic Unmanned Reinvention*, POPULAR SCIENCE (Aug. 18, 2009, 1:43 PM), <http://www.popsoci.com/drones>.

81. HENCKAERTS & DOSWALD-BECK, *supra* note 71, at 680.

82. The U.S. Department of Defense defines “rules of engagement” as: “Directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.” *Terms*, *supra* note 36, at 393. ROE are specific to a particular fighting force engaged in a particular armed conflict in

making decisions that might ultimately lead to the decision to use force. Current USAF ROE for RPA operations requires a person, as opposed to artificial intelligence, to authorize the use of force.⁸³

In the event that operators believe use of force against a particular target is necessary, the resort to force is never instantaneous or automatic. Occasionally, the use of force might be rushed in order to meet an emerging target or emergency situation on the battlefield but even in these situations operators are bound to fully comply with ROE. More often than not, operators have considerable time to monitor and track a target while ensuring full compliance with ROE prior to a strike because of an RPA's ability to observe a target undetected over a long period of time.

In preparation for a strike, the pilot positions the RPA for optimal observation of the target and deployment of weapons. The sensor operator might switch to a different sensor or adjust the viewing angle on a sensor to enhance images of the target and surrounding area. The mission intelligence coordinator analyzes the images, looking to verify the identity of the target and gauge possible collateral damage. At all times, all members of the aircrew, as per their ROE, are looking for civilians, civilian objects, and other protected objects, such as religious or medical facilities. Depending on the ROE, a less-than-favorable collateral damage estimate might require the pilot to seek approval to carry out a particular strike.

At issue in procuring approval for these airstrikes is the IHL principle of proportionality, which seeks to minimize or eliminate collateral damage during armed conflict. This principle, recognized in treaty as well as customary international humanitarian law, prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated...."⁸⁴ Although relevant portions of current ROE are classified and cannot be discussed here, it appears that ROE take into account that operators at lower levels, including RPA operators, might not be in a position to determine the excessiveness of collateral damage relative to the direct

a particular theatre of war and often to a particular mission. Currently, U.S. fighting forces in Afghanistan operate under ROE promulgated by a unified geographic commander who commands the International Security Assistance Force. Although ROE is not itself IHL, the "competent military authority" who promulgates ROE is responsible for ensuring that force used in accordance with ROE is also necessarily used in accordance with IHL. Thus, proposed ROE undergo several levels of review by commanders, operators, legal advisors and senior politicians before they become effectual. ROE may be more restrictive on the use of force than IHL otherwise would be. A subordinate's violation of ROE might result in military discipline administered by a commander.

83. USAF Colonel Eric Mathewson is quoted in a February 2010 *Popular Mechanics* article as saying, "If you look at the way we employ unmanned aircraft in the current fights, the rules of engagement require that someone [in charge at the rear] has to approve it, to say, 'Yes, indeed, you're cleared hot' for every single case." Joe Pappalardo, *The Future For UAVs in the U.S. Air Force*, *POPULAR MECHANICS*, Feb. 26, 2010, <http://www.popularmechanics.com/technology/aviation/military/4347306>.

84. HENCKAERTS & DOSWALD-BECK, *supra* note 71, at 46, 621-22.

military advantage anticipated from a strike.⁸⁵ In other words, such a determination likely entails more than simply a tactical assessment of the battlefield; compliance with proportionality typically entails larger operational, strategic, and policy considerations.

For example, during the initial invasion of Iraq in 2003 and for some time after, ROE required Secretary of Defense, Donald Rumsfeld, to personally authorize any strike that had the potential to result in more than 30 civilian casualties.⁸⁶ In the current conflict in Afghanistan, it appears, based on statements from the top U.S. commander in Afghanistan, that at least some form of approval could be required for a strike that might cause any collateral damage at all.⁸⁷

Obtaining this approval, regardless of the source of the approval, is almost seamless during USAF RPA operations. If such an approval is required, the mission intelligence coordinator instantly shares the video feed and other known intelligence with the approval authority. This real-time sharing of information can take place whether the approval authority happens to be on the ground in the battle, at an operations center, at a command headquarters, or at the White House or Pentagon.⁸⁸ Furthermore, operators, analysts, and approvers alike have access to chat rooms where data, intelligence, analysis, and observations can be shared. The advantage of the chat rooms, of course, is that all participants in the chat rooms have equal access to the flow of information.

Once in compliance with ROE, the RPA pilot is authorized to use force. An RPA provides several options for striking targets and ultimately, the RPA pilot decides on the specific application of force. Depending on availability of weapons

85. For some commentators, compliance with the principle of proportionality seems to come down to numbers alone. Occasionally, "numerous civilian casualties" can be seen as "excessive civilian casualties" without the relative comparison of the direct military advantage anticipated through the strike. See David Kilcullen & Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. TIMES, Mar. 17, 2009, <http://www.nytimes.com/2009/05/17/opinion/17exum.html> ("Press reports suggest that over the last three years drone strikes have killed about fourteen terrorist leaders. But, according to Pakistani sources, they have also killed some 700 civilians. This is fifty civilians for every militant killed...."); but see YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 131 (2004) (Dinstein states that the principle of proportionality applies even where a belligerent uses a civilian objective to shield its military forces or weapons from attack. "However," he adds, "even if that is the case, the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that -- if an attempt is made to shield military objectives with civilians -- civilian casualties will be higher than usual.")

86. HUMAN RIGHTS WATCH, *OFF TARGET: THE CONDUCT OF THE AIR WAR* 19 (2003), <http://www.hrw.org/en/node/12207/section/1>.

87. Jason Motlagh, *Petraeus Toughens Afghan Rules of Engagement*, TIME, Aug. 6, 2010, <http://www.time.com/time/world/article/0,8599,2008863,00.html> ("General Petraeus has reportedly expanded the ban on air strikes and artillery fire to all types of buildings, tree-lined areas and hillsides where it is difficult to distinguish who is on the ground.")

88. David Zucchino, *U.S. report faults drone crew, command posts in Afghan civilian deaths*, L.A. TIMES, May 29, 2010, <http://articles.latimes.com/2010/may/29/world/la-fg-predator-20100530> (Although this seamless sharing of information clearly did not happen in the situation referred to in this news article, it supports the premise that such sharing of information is not only possible during RPA operations but vital.).

and desired effects, a pilot might use laser-guided missiles, or laser-guided or gps-guided bombs.⁸⁹ RPAs also provide the ability to “buddy-laze” a target, which occurs when the pilot uses the RPA’s laser designator to guide a weapon fired from a separate platform, such as an attack helicopter.⁹⁰ In all cases, RPA systems are capable of striking targets with high accuracy using precision-guided munitions, thereby reducing collateral damage.

Current USAF RPA operations are such that, absent operator error, operator misconduct, or malfunction of equipment, it is difficult to launch a strike without first distinguishing between civilians and combatants—assuming intelligence provided to RPA operators by other sources is accurate.⁹¹ Due to RPAs’ enhanced capabilities, the USAF actually has an increased burden in doing “everything feasible” to avoid targeting civilians and civilian objects.⁹² Certainly, “everything feasible” is a much higher burden now than it was even just a decade ago.⁹³

B. USAF RPA Systems’ Vulnerabilities

The U.S. Department of Defense defines “vulnerability” as “[t]he characteristics of a system that cause it to suffer a definite degradation (incapability to perform the designated mission) as a result of having been subjected to a certain level of effects in an unnatural (man-made) hostile environment.”⁹⁴ Military planners and war fighters assess and mitigate vulnerabilities on a regular basis due to the dramatic effects that systems’ vulnerabilities can have on military outcomes. In a related vein, the assessment of a system’s vulnerabilities becomes relevant here to the extent that a system’s “degradation” or “incapability to perform the designated mission” might cause noncompliance with IHL. More specifically, an RPA system’s vulnerabilities are

89. USAF REAPER FACT SHEET, http://www.af.mil/information/factsheets/factsheet_print.asp?fsID=6405&page=1 (last visited April 22, 2011).

90. FLIGHT PLAN, *supra* note 21, at 26.

91. The International Criminal Tribunal for the former Yugoslavia addressed the issue of mistake, or negligence, as opposed to intentional or reckless abandon in the context of distinction. The Tribunal stated: “The parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons or property.... Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.” *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶ 180 (Int’l Crim. Trib. For the Former Yugoslavia Mar. 3, 2000).

92. In commentary on AP I, it was recognized that “the identification of objectives depended to a large extent on the technical means of detection available to the belligerents.” An example was given that “some belligerents might have information owing to a modern reconnaissance device, while other belligerents might not have this type of equipment.” HENCKAERTS & DOSWALD-BECK, *supra* note 71.

93. It seems that given the requirements of “precautionary measures” and the increased capabilities provided by RPAs, that the USAF might be obliged to use this technology (i.e., track a target for hours, confirm the identity of the target with multiple analysts, view the target with an enhanced image, etc.) in every targeting scenario. However, there is no basis in law to suggest that once a capability is possible that it must be used in every scenario. In other words, “everything feasible” does not necessarily mean “everything possible.” See generally, Danielle L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; but is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage*, 26 GEO. WASH. J. INT’L L. & ECON. 109 (1992).

94. *Terms*, *supra* note 36, at 393.

relevant in that like other medium and larger sized manned aircraft, an RPA has the potential to significantly harm civilians and civilian objects—especially when in a degraded state.⁹⁵ In May 2009, the USAF released its most comprehensive written guidance to date on RPA policy and technology—the *United States Air Force Unmanned Aircraft Systems Flight Plan 2009-2047*.⁹⁶ However, the version of the report released to the public says nothing of RPA systems' vulnerabilities. Rather, in place of the page that would otherwise address vulnerabilities is the word "Classified."⁹⁷ Even with little public acknowledgment or discussion of existing vulnerabilities by the USAF, something can be learned of these vulnerabilities through inference, assumption, and history.

For example, the USAF recently published a document soliciting vendor participation in test flights for vehicles that would meet the USAF's needs for a small hand-launched aircraft capable of delivering lethal force—the Lethal Miniature Aerial Munitions System.⁹⁸ Included in the solicitation is a list of questions that must be answered before a vendor may conduct test flights for the Air Force.⁹⁹ Of the 45 questions asked, 26 of them directly address the "command link" for controlling the vehicle.¹⁰⁰ Among the questions are: "What frequency will you use?" "What happens when the command link is lost?" "How does the vehicle recognize that loss of command link has occurred?" "Is there a backup command transmitter and receiver?" "Does this vehicle have an automatic "return home" (also called "reversion mode") in the event of loss of link?"¹⁰¹ By inference, it seems that losing control of the vehicle is foremost among the USAF's concerns.

The command link has historically been the "Achilles heel of unmanned systems," as the Air Force has previously put it.¹⁰² Think back to the "remote control" toy car you got for your sixth birthday—where the car was literally tethered to the controller by a wire. Yes, you could control the car "remotely" but the fun only lasted about five minutes: the amount of time it took for you to realize no surprise attacks on little brother, no chasing the cat, and certainly no racing. The problem was you were never truly "remote." Such was the case when, during World War II, Germany deployed remote controlled mini tanks laden with

95. In addition to lethal munitions carried as payload, "these platforms have significant kinetic energy based on their weight and speed, [and] they can cause significant damage." FLIGHT PLAN, *supra* note 21, at 36.

96. *Id.* at 21.

97. Among the topics in the document that are listed as classified are "threats," "vulnerabilities," and "application of gaps and shortfalls." FLIGHT PLAN, *supra* note 21, at 21, 23. This classification is not only understandable but expected, given military members' desire to mitigate known threats, vulnerabilities, and shortfalls. To publicize these in detail would be to invite exploitation by adversaries.

98. Dep't of the Air Force, Lethal Miniature Aerial Munitions System (Sept. 10, 2010), *available at* https://www.fbo.gov/?s=opportunity&mode=form&id=50e5c113e29c09b2d7c3c8d5f5dd3_b01&tab=core&_cview=0 [hereinafter BAA].

99. *Id.* at § D.

100. *Id.*

101. *Id.*

102. STRATEGIC VISION, *supra* note 3, at 5.

explosives. The “Achilles heel,” of course, was the fact that to disable the tanks, Allied forces simply had to cut (or otherwise sever) anywhere along the 2,000 feet of cable connecting the vehicle to the controller!¹⁰³

While command link technology has evolved exponentially since World War II, the inherent weakness remains. Cut the “virtual wire” and the drone could be lost. Or at least direct control of the drone is lost. In the event the command link is lost, most RPAs are pre-programmed to try to reconnect the lost link, return to base autonomously, or complete the mission autonomously.¹⁰⁴ Understandably, flying autonomously or completing the mission autonomously—especially where use of force is involved—only enhances concerns relating to the vehicle’s loss of control.¹⁰⁵

This vulnerability was dramatically exposed when a U.S. Navy drone helicopter flew “autonomously” through restricted airspace near Washington D.C. During a 2010 demonstration flight, a U.S. Navy “Fire Scout” unmanned helicopter lost contact with controllers at Naval Air Station Patuxent River in southern Maryland.¹⁰⁶ In what the U.S. Navy described as a “software issue,” the helicopter flew its own course for approximately 30 minutes during which it traveled 23 miles, flew within 40 miles of Washington D.C., and entered restricted airspace.¹⁰⁷

Another example, while not of a command link loss, illustrates a similar vulnerability in the context of current U.S. RPA operations. Using \$26 dollar (USD) off-the-shelf software, militants were able to intercept live video feed from U.S. RPAs in Iraq in 2009.¹⁰⁸ U.S. officials maintained the intercept never affected control of the RPAs or otherwise affected their mission.¹⁰⁹ Nonetheless, the breach of the RPA system exposed the vulnerability for what it was.

In addition to intercepting data transmission from RPAs, adversaries may seek to otherwise jam, hack, interfere with or interrupt the communications link, including by physical attack of the communication nodes (e.g., antennae, receiver, satellite, or other hardware node).¹¹⁰ Furthermore, current USAF RPA operations rely for their communications “almost exclusively” on leased bandwidth from commercial satellites, which is an “open commodity.”¹¹¹ This leased bandwidth is subject to interference and attack; but this also means that the USAF must compete

103. The vehicle was called the “Goliath” and was of limited effect during the war—due significantly to the fact that they were relatively easily disabled and captured by the Allies. U.S. WAR DEP’T, HANDBOOK ON GERMAN MILITARY FORCES 411-13 (1945).

104. STRATEGIC VISION, *supra* note 3, at 17.

105. This also brings with it a host of legal and ethical issues. These issues are briefly discussed in the next two sections of this article.

106. Elisabeth Bumiller, *Navy Drone Violated Washington Airspace*, N.Y. TIMES (Aug. 25, 2010), <http://www.nytimes.com/2010/08/26/us/26drone.html>.

107. *Id.*

108. Siobhan Gorman et al., *Insurgents Hack U.S. Drones*, WALL ST. J. (Dec. 17, 2009), <http://online.wsj.com/article/SB126102247889095011.html>.

109. *Id.*

110. FLIGHT PLAN, *supra* note 21, at 45; *see also*, STRATEGIC VISION *supra* note 3, at 17.

111. FLIGHT PLAN, *supra* note 21, at 43.

for bandwidth with a number of other communications users, including TV, phone, and data users.¹¹² This reliance on commercial satellites appears to be of significant concern for the USAF, as it recognizes that in “using remote split operations, it is critical that communications be as robust and assured as possible.”¹¹³

RPA's also suffer some of the same vulnerabilities and limitations as manned aircraft, such as effects of extreme weather, kinetic and non-kinetic weapon threats, and “reliability” issues.¹¹⁴ During the last four years, dozens of RPA's have crashed due to pilot error, mechanical failure, and/or electrical failure.¹¹⁵ The USAF refers to these “human and material factors” as the “root causes leading to mishaps.”¹¹⁶ Also like other manned aircraft, RPA crashes occur most often during the takeoff and landing sequences of the flight.¹¹⁷ Not surprisingly then, the USAF's short-term projections for RPA's include the ability to take off and land autonomously.¹¹⁸ The USAF has also projected other advances in RPA technology to address or overcome current vulnerabilities or limitations. Many of these advancements will include, at least to some degree, increasing levels of vehicle autonomy.

III. ADDRESSING VULNERABILITIES WHILE ADVANCING TOWARD AUTONOMY

In a 2009 address, the Chief of Staff of the Air Force said, “[T]oday, the evolution of the machine is beginning to outpace the capability of the people we put in them. We now must reconsider the relationship of man and woman, machine, and air.”¹¹⁹ In reconsidering that relationship, the USAF finds the value of RPA's particularly “compelling where human physiology limits mission execution (e.g. persistence, speed of reaction, contaminated environment).”¹²⁰ Given the evolving nature of the relationship between humans and machines, it seems the thrust of advancing RPA technology is a move toward fully autonomous drones. While relative autonomy is certainly important, there is much more to the evolution of drone warfare than automation.

At least for now, U.S. RPA's have their place in airspace over rugged battlefields in underdeveloped countries like Afghanistan and Pakistan, where air superiority¹²¹ is virtually guaranteed. However, in more advanced battlefields where air superiority is anything but certain, RPA systems must continually evolve

112. *Id.*

113. *Id.* at 44.

114. STRATEGIC VISION, *supra* note 3, at 11-12.

115. *Drone Crash Database*, DRONE WARS UK, <http://dronewarsuk.wordpress.com/drone-crash-database/> (compilation of reports on RPA crashes since 2007).

116. FLIGHT PLAN, *supra* note 21, at 81.

117. *Id.* at 58.

118. *Id.* at 17-18.

119. General Norton Schwartz, Chief of Staff, Air Force Ass'n Convention (Sept. 15, 2009), available at <http://www.af.mil/shared/media/document/AFD-090915-240.pdf>.

120. FLIGHT PLAN, *supra* note 21, at 14.

121. Air superiority, as defined by the U.S. Department of Defense, is “[t]hat degree of dominance in the air battle of one force over another that permits the conduct of operations by the former and its related land, maritime, and air forces at a given time and place without prohibitive interference by the opposing force.” *Terms*, *supra* note 36, at 17.

to meet the many mission demands of a modern military. A few of the key capabilities of future USAF RPA systems include secure, proprietary communications links, radar avoidance or jamming, increased sensor capabilities, interoperability between drones, extended loiter time, and of course, increased autonomy.

To reduce dependence on leased commercial satellite bandwidth, the USAF has already begun transitioning RPA system communications to a military constellation of satellites—the Wideband Global SATCOM (WGS) constellation.¹²² By 2016, almost half of Predator and Reaper CAPs will count on WGS for secure communications.¹²³ The USAF is also exploring a “surrogate satellite” system.¹²⁴ This high altitude lighter-than-air system (also known as a blimp) would function essentially as a satellite, relaying voice, video and data over a secure network—although not in a space orbit and functioning at a fraction of the cost of commercial or proprietary satellites.¹²⁵

Three RPAs—the Global Observer, the X-47B, and the Phantom Ray—are in testing phase in early 2011 and already promise to fulfill many USAF projections for enhanced RPA capabilities.¹²⁶ The Global Observer flies as high as 65,000 feet for several days at a time and can survey an area of 280,000 square miles in an instant.¹²⁷ Obviously, this constitutes an ISR capability entirely unrivaled by aircraft in use today. The X-47B and the Phantom Ray are both jet-powered and built to evade enemy radar using stealth technologies.¹²⁸ Both will perform precision attacks behind enemy lines, including attacks of enemy air defenses.¹²⁹ To meet geographical mission demands, the X-47B is designed to take off from and land on an aircraft carrier.¹³⁰

The U.S. has also participated in development of nanotechnology. Among recent advances is a six-inch flying vehicle called the Nano Hummingbird, which is capable of hovering in small spaces for as long as eight minutes.¹³¹ Additionally, the USAF in March 2011 launched its X-37B unmanned spacecraft on only its second acknowledged space flight.¹³² The first flight began in April

122. FLIGHT PLAN, *supra* note 21, at 43–44.

123. *Id.* at 44.

124. *Id.*

125. *Id.*

126. W.J. Hennigan, *Drones Becoming Speedier, Deadlier*, L.A. TIMES (Jan. 11, 2011, 12:57 PM), <http://www.standard.net/topics/business/2011/01/11/drones-becoming-speedier-deadlier>.

127. *Id.*

128. *Id.*

129. *Id.*

130. Nathan Hodge, *Drone Will Call Aircraft Carriers Home*, WALL ST. J. (Feb. 8, 2011), <http://online.wsj.com/article/SB10001424052748703507804576130493035362556.html>.

131. W.J. Hennigan, *It's a Bird! It's a Spy! It's Both*, L.A. TIMES (Feb. 17, 2011), <http://articles.latimes.com/2011/feb/17/business/la-fi-hummingbird-drone-20110217>.

132. W.J. Hennigan, *Air Force X-37B Space Plane Launched into Orbit*, L.A. TIMES (Mar. 6, 2011), <http://www.latimes.com/news/nationworld/nation/la-na-space-plane-launch-20110306,0,7354977.story> [hereinafter *Air Force X-37B*].

2010 and lasted 224 days—concluding with a fully autonomous landing.¹³³ According to the USAF, the X-37B is capable of orbiting earth for 270 days and is said to be a platform for testing new technologies in space.¹³⁴

As for autonomy, the USAF plans to include autonomous capabilities in RPA systems “where it increases overall effectiveness....”¹³⁵ The immediate future will include RPAs with the ability to autonomously takeoff and land, as well as “swarm,” which is to fly autonomously in a group while “sensing” each other to avoid collisions.¹³⁶ “Medium-sized” RPAs, such as the Reaper, are expected by 2020 to be able to employ air-to-air weapons.¹³⁷ By 2030, RPAs would be able to conduct air refueling of other RPAs.¹³⁸ Larger RPAs of the future are expected to incorporate autonomous takeoff and landing, cargo transport, air refueling, humanitarian assistance airlift, strategic attack, global strike, and even ground operations such as pallet loading and ground refueling.¹³⁹ The role of humans in these future ground operations would be that of “monitoring of autonomous actions.”¹⁴⁰

The concern, however, is that as drone technology evolves, commander involvement will become marginalized—not just during ground operations but during all aspects of RPA operations. Most disconcerting, of course, is the marginalized human (or commander) involvement during RPA operations that entail the use of force. As drone technology advances toward increasing autonomy, especially in the context of armed conflict, the single most important military function is and will always be command and control.

A. Command and Control during Deployment of Fully Autonomous Vehicles

Much has been made of the danger of including semiautonomous, autonomous, and other robotic weapons in military arsenals. One recent publication asserted that “[e]very time you hear about a ‘drone attack’... that’s an unmanned robot dropping bombs.... Push a button and it flies away, kills, and comes home.”¹⁴¹ Another author concludes that “if contact is lost with the drones, they begin making their own decisions.”¹⁴² Yet another author asserts that a fully

133. *Id.*

134. Leonard David, *Secretive Air Force X37-B Robotic Space Plane May Be Nearing Mission's End*, SPACE.COM (Nov. 22, 2010, 2:45 PM), <http://www.space.com/9575-secretive-air-force-37b-robotic-space-plane-nearing-mission.html>.

135. FLIGHT PLAN, *supra* note 21, at 33.

136. *Id.* at 33-34; see also William Matthews, *Project Would Empower UAVs to Fly Themselves*, A.F. TIMES (Oct. 10, 2010, 2:05 PM), <http://www.airforcetimes.com/news/2010/10/air-force-uavs-to-fly-themselves-101010/>.

137. FLIGHT PLAN, *supra* note 21, at 38.

138. *Id.*

139. *Id.* at 40.

140. *Id.*

141. Johann Hari, *The Age of the Killer Robot is no Longer a Sci-Fi Fantasy*, THE INDEPENDENT (Jan. 22, 2010), <http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-the-age-of-the-killer-robot-is-no-longer-a-sci-fi-fantasy-1875220.html>.

142. Jane Mayer, *The Predator War: What are the Risks of the C.I.A.'s Covert Drone Program?*, THE NEW YORKER (Oct. 26, 2009), <http://www.newyorker.com/reporting/2009/>

autonomous robot is a “weapon[...] so abhorrent”, its use should be discontinued immediately.¹⁴³ And finally, another author suggests that current RPA systems are becoming de facto autonomous as human pilots tend to “defer” to conclusions reached by a computer, even over their own judgment, given the many decisions pilots are required to make in “split seconds.”¹⁴⁴

A former USAF RPA squadron commander laughed when asked about “fully autonomous” drones and the idea, in particular, that an operator could push a button as if to “unleash” a drone to go hunt and kill a target. “I’m ok with my vacuum being fully autonomous,” he replied, flippantly.¹⁴⁵ He clarified that he knows of no RPA or drone that autonomously and unilaterally selects, tracks, and kills targets. When asked why such a weapon was not employed, he stated simply, “The ROE wouldn’t allow it—nothing in the ROE would allow for those decisions to be automated.” Pressed further on his understanding of the Rules of Engagement (ROE), he described them as very specific rules for using force that he and his operators were obligated to follow. Of note, he did not cite a lack of technology as a barrier to employing a fully autonomous capability—only a concern that it would violate the ROE.¹⁴⁶

The USAF has planned for the potential use of force using autonomous weapons systems, recognizing that “advances in [artificial intelligence] will enable systems to make combat decisions and act within legal policy constraints without necessarily requiring human input.”¹⁴⁷ Assuming political and military leaders resolve ethical, legal, and policy issues in favor of allowing varying degrees of autonomy in RPA operations, the USAF believes that

commanders must retain the ability to refine the level of autonomy the systems will be granted by mission type, and in some cases by mission phase, just as they set rules of engagement for the personnel under their command today. The trust required for increased autonomy of systems will be developed incrementally. The systems’ programming will be based on human intent, with humans monitoring the execution of operations and retaining the ability to override the system or change the level of autonomy instantaneously during the mission.”¹⁴⁸

In other words, the USAF is committed to retaining command and control of all RPA operations, regardless of the relative autonomy of the vehicles. This concept is not new. Several weapons already in use by the U.S. military are

10/26/091026fa_fact_mayer.

143. The Editors, *Terminate the Terminators*, SCI. AM. (June 29, 2010), <http://www.scientificamerican.com/article.cfm?id=terminate-the-terminators>.

144. O’Connell, *supra* note 29, at 6. (suggesting that this tendency to rely on conclusions reached by a computer will increase as RPA pilots are required to command multiple aircraft—stating that “while the computer is not technically ‘autonomous’ in deciding to strike, that is becoming the reality.”).

145. Neither offense to nor endorsement of any robotic carpet cleaning system is intended.

146. See *supra* note 80 and accompanying text on ROE.

147. FLIGHT PLAN, *supra* note 21, at 41.

148. *Id.*

capable of operating, essentially, in fully autonomous modes. However, the specific methods in which they are employed by commanders ensure their compliance with IHL.

The U.S. Navy's Phalanx Close-In Weapons System, for example, is a 20-mm Gatling Gun mounted on the deck of U.S. Navy ships that autonomously performs "search, detect, evaluation, track, engage and kill assessment functions."¹⁴⁹ The Phalanx is employed to confront "Anti Ship Missiles (ASM), aircraft, and littoral warfare threats that have penetrated other fleet defenses."¹⁵⁰ It accomplishes this mission by autonomously identifying a target as it moves toward the defended ship, tracking the target with radar, and eliminating the target by firing hundreds of rounds of armor piercing ammunition at the incoming target.¹⁵¹ This entire process requires mere seconds to accomplish, obviously exceeding human abilities. Use of this autonomous weapon system complies with IHL because commanders utilize the system only after having already analyzed its employment in terms of compliance with IHL. Commanders can be certain that any object speeding toward and threatening their ship is indeed a valid military objective. Furthermore, given that U.S. Navy battles are fought over open water, commanders are certain that the Phalanx's armor piercing rounds will cause little or no collateral damage as they fall to the ocean. Of course, while in littoral waters or in port, a commander would need to further assess the implications of employing this weapon.

During the last six years, the U.S. Army has employed a variant of the Phalanx—the Counter Rocket, Artillery, and Mortar (C-RAM). The C-RAM is essentially the same system but is employed on land as a defense against incoming rocket and mortar rounds.¹⁵² The C-RAM was introduced in 2005 at U.S. bases in Iraq and was shown in tests to have a 60-70% shoot-down capability.¹⁵³ As the C-RAM is employed on land, collateral damage is a concern. To address that concern and thereby comply with IHL, the C-RAM fires self-destructing (exploding) munitions, as opposed to hardened, armor piercing munitions.¹⁵⁴ Consequently, the danger to civilians on the ground is that of falling fragments from the exploding rounds or from a detonated mortar or rocket—which can be deemed by commanders to not be excessive in relation to the anticipated military advantage of taking out an incoming threat. Thus, these "autonomous" weapon systems comply with IHL principles of distinction and proportionality.

The essence of complying with IHL in employing autonomous weapons is the retention of command and control by commanders. A fully autonomous drone

149. MK 15 Phalanx Close-In Weapons System (CIWS), United States Navy Fact File (Nov. 5, 2010), http://www.navy.mil/navydata/fact_display.asp?cid=2100&tid=800&ct=2.

150. *Id.*

151. Phalanx Close-In Weapon System, Raytheon (Mar. 2008), http://www.raytheon.com/capabilities/products/stellent/groups/public/documents/content/cms04_019379.pdf.

152. Counter Rocket, Artillery, and Mortar (C-RAM), GlobalSecurity.org (Feb. 10, 2006), <http://www.globalsecurity.org/military/systems/ground/cram.htm>.

153. *Id.*

154. *Id.*

could be programmed to complete a battlefield mission and yet still be controlled by commanders. However, in the event an autonomous weapon takes an action not intended by its commander, command and control is lost and that commander who has lost control risks violating IHL if his or her weapon system becomes indiscriminate. This same risk is true for a commander who loses control of his or her troops. The bottom line is that a commander's duty is to command, whether the movement and action of troops or the employment of weapon systems on the battlefield.

Apart from losing control of a weapon system, a commander or operator can also misuse a fully autonomous drone or weapon. In case of misuse, commanders and operators risk violating IHL. The potential for misuse of a weapon, however, does not necessarily render that weapon system incompatible with IHL. Commentary on Article 36 of Additional Protocol I confirms this, providing that "[a] State is not required to foresee or analyze all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited."¹⁵⁵ Thus, the risk of misuse exists for RPAs just as it does for any weapon.

Notwithstanding the ability to employ autonomous weapons in compliance with IHL, drafters of Additional Protocol I provide the following warning on the subject of automated warfare:

The use of long distance, remote control weapons, or weapons connected to sensors positioned in the field, leads to the automation of the battlefield in which the soldier plays an increasingly less important role. The counter-measures developed as a result of this evolution...exacerbates the indiscriminate character of combat. In short, all predictions agree that if man does not master technology, but allows it to master him, he will be destroyed by technology."¹⁵⁶

In other words, even though advanced technology may allow autonomous weapons to be used in compliance with IHL, commanders or operators must nonetheless retain command and control.

B. Indiscriminate Weapons and Attacks

So as to not violate the principle of distinction, "indiscriminate attacks" and "indiscriminate weapons" are prohibited under IHL. Article 51(4) of Additional Protocol I prohibits indiscriminate attacks, describing such an attack as one "not directed at a specific military objective," or one which employs "a method or means of combat which cannot be directed at a specific military objective," or one that employs a "method or means of combat the effects of which cannot be limited as required by the Protocol."¹⁵⁷ The rationale for these prohibitions is that these described attacks are "of a nature to strike military objectives and civilians or civilian objectives without distinction."¹⁵⁸ The ICRC study on customary

155. Protocol I, *supra* note 71, at art. 36, ¶ 1469.

156. *Id.* at art. 36 ¶ 1476.

157. *Id.* at art. 51 ¶ 4 (a, b, c).

158. *Id.* at art. 51 ¶ 4 (c).

international humanitarian law states that "[t]he use of weapons which are by nature indiscriminate is prohibited."¹⁵⁹ Such a weapon is described as one that "cannot be directed at a military objective or whose effects cannot be limited as required by international humanitarian law."¹⁶⁰

Some have argued that RPAs are inherently indiscriminate weapons and a per se violation of IHL, based apparently in part on multiple civilian casualties (collateral damage) in the vicinity of targeted individuals.¹⁶¹ One author even claims that "[m]issiles from errant drones have already killed as many as 1,000 civilians in Iraq, Afghanistan and Pakistan."¹⁶² On the contrary, it is precisely because of these advanced RPA systems that it is difficult for RPA operators to say after an ill-advised attack that it was a "case of mistaken identity," assuming intelligence provided to RPA operators by other sources is accurate.¹⁶³

Indeed, certain weapons are by their very nature indiscriminate (e.g., chemical, biological, and nuclear weapons). The United Nations General Assembly described chemical and biological weapons as "inherently reprehensible because their effects are often uncontrollable and unpredictable."¹⁶⁴ RPAs, as currently employed by the USAF, do not in any way fit this profile.

The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions agreed, stating that "a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles."¹⁶⁵ "The critical legal question..." he added, is "whether its specific use complies with IHL."¹⁶⁶ In the event an operator employs an RPA in an uncontrollable or unpredictable manner, such that civilians or civilian objects are indiscriminately attacked, that operator, or even the superior commander of that operator, can be held accountable under the IHL principle of command responsibility.

IV. COMMAND RESPONSIBILITY: ACCOUNTABILITY FOR COMPLIANCE WITH IHL

The primary duty of a military commander is to exercise command. Inherent in exercising command, a commander creates within an armed force a hierarchical regime through which the commander ensures internal discipline.¹⁶⁷ Military

159. HENCKAERTS & DOSWALD-BECK, *supra* note 71, at 244.

160. *Id.*

161. Murray Wardrop, *Unmanned Drones Could be Banned, Says Senior Judge*, THE TELEGRAPH, July 6, 2009, <http://www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html>.

162. The Editors, *Terminate the Terminators*, SCIENTIFIC AMERICAN (June 29, 2010), <http://www.scientificamerican.com/article.cfm?id=terminate-the-terminators>.

163. Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, INT'L COMM. OF THE RED CROSS, 455 (Sept. 2005), http://www.icrc.org/eng/assets/files/other/irc_859_schmitt.pdf.

164. G.A. Res. 2603 (XXIV), U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630, at 16 (Dec. 16, 1969).

165. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Comm'n, ¶ 79, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston).

166. *Id.*

167. Protocol I, *supra* note 71, art. 87.

members know this hierarchy as the chain of command. Using this chain of command, commanders properly have command and control of subordinates and are thereby empowered to ensure compliance with IHL during armed conflict. A commander is of course held accountable for his or her own actions that violate IHL—the same as all other individuals on the battlefield.¹⁶⁸ However, pursuant to the principle of command responsibility, a commander might also be accountable for a subordinate's violation of IHL.¹⁶⁹

Article 87(1) of Additional Protocol I provides that High Contracting Parties must “require military commanders...to prevent and, where necessary, to suppress and report” breaches of IHL. Commanders must also “ensure that members of the armed forces under their command are aware of their obligations” under IHL.¹⁷⁰ And finally, commanders must “initiate disciplinary or penal action against violators” of IHL.¹⁷¹ These duties are also recognized as customary international humanitarian law, which certainly pre-dates Additional Protocol I, as evidenced by the trial of Japanese General Tomoyuki Yamashita.¹⁷²

A. The “Yamashita” Standard for Command Responsibility

On December 7, 1945, a military commission sentenced Japanese General Tomoyuki Yamashita to death by hanging¹⁷³ in what has been described as “the first time a military commander had been found guilty of war crimes committed by his soldiers because of his failure to adequately supervise them.”¹⁷⁴ The findings and decisions by the military commission were subsequently reviewed by the Supreme Court of the United States, which upheld the Commission.¹⁷⁵ The original charge during the military commission was that Yamashita,

while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the

168. HENCKAERTS & DOSWALD-BECK, *supra* note 71, at 551.

169. See generally Major William H. Parks, *Command Responsibility For War Crimes*, 62 MIL. L. REV. 1 (1973) (discussing war crimes involving command responsibility and including in his “examination a view of the criminal responsibility of the combat commander, possible offenses, and the degree of intent required under both domestic and international law”).

170. Protocol I, *supra* note 71, at art. 87(2).

171. *Id.* at art. 87(3).

172. HENCKAERTS & DOSWALD-BECK, *supra* note 71, at 556-63; see *In re Yamashita*, 327 U.S. 1 (1946) (holding it is a violation of the laws of war when a commander fails to control the operations of members of his command who commit atrocities).

173. *Yamashita*, 327 U.S. at 5.

174. Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 177 (2000); see also U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS VOLUME IV 4 (1948), available at http://www.loc.gov/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf [hereinafter LAW REPORTS]; see generally *Yamashita*, 327 U.S. 1 (1946) (holding it is a violation of the laws of war when a commander fails to control the operations of members of his command who commit atrocities).

175. *Yamashita*, 327 U.S. at 25-26.

members of his command, permitting them to commit brutal atrocities and other high crimes... thereby violat[ing] the laws of war.¹⁷⁶

A bill of particulars filed by the prosecution alleged 123 specific acts committed by General Yamashita's subordinates.¹⁷⁷ Among the acts alleged was the carrying out of "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population... and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed...."¹⁷⁸ Other acts alleged included "beating, wounding, torturing, mutilating, maiming, raping, attempting to rape, killing, attempting to kill, executing, burning alive, massacring and exterminating."¹⁷⁹

Yamashita argued that the charge against him did not constitute a violation of the law of war because it neither alleged that he committed nor alleged that he directed the specific acts described in the bill of particulars.¹⁸⁰ Notably, the charge did not even allege that Yamashita had knowledge of the commission of the acts alleged.¹⁸¹ In considering this issue, the Supreme Court found that "the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."¹⁸² Referencing several provisions of international law regarding duties of commanders, the Supreme Court further found that Yamashita had "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."¹⁸³ In essence, the Commission held Yamashita accountable for his subordinates' violations of IHL based on the fact that he must have known of those violations and failed to prevent or repress them.¹⁸⁴

This standard for command responsibility has since been reiterated and further refined in multiple instances under IHL.¹⁸⁵ Each instance reflects, with

176. *Id.* at 13-14; LAW REPORTS, *supra* note 174, at 3-4.

177. *Yamashita*, 327 U.S. at 14; LAW REPORTS, *supra* note 174, at 4.

178. *Yamashita*, 327 U.S. at 14; LAW REPORTS, *supra* note 174, at 5.

179. U.N. COMM'N, *supra* note 174, at 5.

180. *Yamashita*, 327 U.S. at 14.

181. *Id.* at 28. Justice Murphy, in a vigorous dissent, noted perceived insufficiencies in the charge. He wrote: "[Yamashita] was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him... The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge." *Id.*

182. *Id.* at 15.

183. *Id.* at 16.

184. U.N. COMM'N, *supra* note 174, at 35. The Commission's judgment read as follows: "General Yamashita: The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command... that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances." *Id.*

185. The standard for command responsibility has been codified in numerous instances, to include: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of

slight variation, the standard set out and recognized as customary international humanitarian law—which is:

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish persons responsible.¹⁸⁶

Generally speaking, as summarized in a 1994 United Nations Security Council letter, responsibility for a subordinate's conduct attaches 1) where the commander knew of a subordinate's criminal behavior and failed to take steps to prevent it, 2) where the commander showed "serious personal dereliction" such as to "constitute a willful and wanton disregard of the possible consequences" of a subordinate's criminal behavior, or 3) where "despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein."¹⁸⁷

B. Command Responsibility during USAF RPA Operations

We assume the requirements of command responsibility apply at the highest levels of command, but might they also apply to a commander of an RPA squadron? To the aircraft commander (pilot) of an RPA? To the ground commander of a special forces team calling in strikes by an RPA? Absolutely! Commentary on article 87 of Additional Protocol I explains:

There is no member of the armed forces exercising command who is not obliged to ensure the proper application of the Conventions and the Protocol. As there is no part of the army which is not subordinated to a military commander at whatever level, this responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task.¹⁸⁸

Commanders then, at all levels of command, are accountable for the weapons they employ, the method in which they employ them, and the consequences resulting from such employment.

This is the case during RPA and other drone operations as a drone, at most, is a weapon or part of a weapon system employed on the battlefield either by

Victims of International Armed Conflicts (Protocol I), art. 86; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(3); Statute of the International Tribunal for Rwanda, U.N. SCOR, 49th Sess., art. 6(3), U.N. Doc. S/Res/955 (1994); and finally, Rome Statute of the International Criminal Court, art. 28, U.N. Doc. A/CONF.183/9 (Jan. 16, 2002).

186. HENCKAERTS & DOSWALD-BECK, *supra* note 71, at 558.

187. Letter, United Nations Security Council, Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, U.N. Doc. S/1994/674, ¶ 58 (May 27, 1994).

188. HENCKAERTS & DOSWALD-BECK, *supra* note 71.

commanders or at the direction of commanders.¹⁸⁹ Regardless of the mission or weapon system employed, every member of an armed force who commands, at whatever level, must be held accountable under the principle of command responsibility. No legal or military regime exists to place accountability on machines, drones, androids, or RPAs—nor should it exist.

For example, if a soldier used a pistol to kill a surrendering adversary, no one would suggest that the pistol committed a war crime. Clearly, the soldier committed the war crime. Further, if the crime was ordered by, acquiesced in or ignored by a commander, that commander also committed the war crime. A drone, no matter how technologically advanced, is similar to the pistol. Someone must use it before it can take any effect. If during the course of its use a war crime is committed, responsibility for the results will be on the person who employed it—and certainly not on the machine itself. IHL, by design, properly holds individuals and commanders accountable for their behavior during armed conflict. A recent case from the U.S. military demonstrates this principle.

In February 2010, a failed U.S. RPA operation took the lives of as many as 23 civilians in Afghanistan.¹⁹⁰ A report found that a Nevada-based Predator crew gave incomplete and inaccurate reports to a ground commander in Afghanistan.¹⁹¹ The Predator crew ignored numerous indications that the people they were tracking during three and a half hours were, at least in part, civilians.¹⁹² They also failed to acknowledge or forward messages from their intelligence analysts noting that children were visible among the individuals being tracked.¹⁹³ Based on the faulty reports (and lack of reports), the ground commander authorized and assisted in a missile strike by a nearby attack helicopter.¹⁹⁴ The missile strike took the lives of the Afghan civilians.¹⁹⁵ Upon completion of a thorough investigation, General Stanley McChrystal “issued formal letters of reprimand to four high-ranking officers, including brigade and battalion commanders, and letters of admonishment to two junior officers,” almost certainly career-ending administrative actions, especially for the commanders.¹⁹⁶

Two aspects of this case are noteworthy in demonstrating the principles of command responsibility. First, commanders even at lower levels who failed to comply with IHL were punished for their dereliction. Second, a commander at nearly the highest level, General McChrystal, complied with his obligations under

189. ZACHARY TUMIN ET AL., UNMANNED AND ROBOTIC WARFARE: ISSUES, OPTIONS, AND FUTURES 10 (President and Fellows of Harvard 2008), http://www.boozallen.com/media/file/Unmanned_and_Robotic_Warfare.pdf. This Harvard study pointed out that “unmanned warfare is now, and has always been, in fact a *hybrid system* comprising many individual actors and platforms.” *Id.*

190. Dexter Filkins, *Operators of Drones Are Faulted in Afghan Deaths*, N.Y. TIMES, May 29, 2010, available at <http://www.nytimes.com/2010/05/30/world/asia/30drone.html>.

191. Zucchini, *supra* note 88.

192. *Id.*

193. *Id.*

194. Filkins, *supra* note 190.

195. Zucchini, *supra* note 88.

196. *Id.*

command responsibility in holding his subordinates accountable for their noncompliance with IHL. Given that he knew nothing of the violations before they happened or as they happened, his obligation was to “punish the persons responsible,” as required under IHL.¹⁹⁷

V. CONCLUSION

Drones and other automated war-fighting capabilities have existed for at least the last 50 years.¹⁹⁸ It is therefore appropriate to refer to this past decade as a “modern” era of robotic warfare. However, “modern” has already given way to the newest advances, as we are only at the beginning of this technological revolution. The USAF admits to being in the “early stages” of drone warfare and technology, adding that “[a]rming the RQ-1 Predator with Hellfire missiles can be compared to the mounting of guns on biplanes early in the last century.”¹⁹⁹ Already, the USAF “is training more pilots for advanced UAVs than for any other single weapons system.”²⁰⁰

Without a doubt, technology will someday exist which would allow a Soldier, Sailor, Airman, or Marine to completely automate the dirty business of fighting wars. In preparation for that coming evolution, it has been suggested that IHL should appropriately evolve. It is true that with evolution of warfare often comes the need for evolution in IHL. The Additional Protocols to the four 1949 Geneva Conventions have been attributed to the fact that “developments in the character of warfare led to the growing realization that the laws of war required further adaptation to the conditions of contemporary hostilities.”²⁰¹

However, given the fact that RPA technology is developmentally comparable to mounting guns on biplanes in the early 20th century, an adjustment to IHL at this point would likely be incomplete, uninformed, and shortsighted. Notwithstanding best efforts at predicting future drone technologies, the rapid evolution of these technologies suggests that we cannot accurately predict the various implications of such advancements. IHL drafted specifically to address concerns related to drone warfare would likely be outdated even before it is promulgated.

For the moment, current IHL, especially long-standing customary international humanitarian law concepts, seem well-poised to address foreseeable issues relating to employment by military members of drone technology on the battlefield. At all times, commanders must exercise command and control over their troops and weapon systems. Furthermore, force under a commander’s control must be used in compliance with core IHL principles—including distinction and

197. HENCKAERTS & DOSWALD-BECK, *supra* note 71, at 58.

198. THOMAS P. EHRHARD, AIR FORCE UAVS: THE SECRET HISTORY 4 (2010), http://www.afa.org/mitchell/reports/MS_UAV_0710.pdf.

199. STRATEGIC VISION, *supra* note 3, at 6.

200. Robert M. Gates, Secretary of Defense, Speech delivered at the United States Air Force Academy (Mar. 4, 2011), <http://www.defense.gov/speeches/speech.aspx?speechid=1543>.

201. DOCUMENTS ON THE LAW OF WAR 419 (ADAM ROBERTS & RICHARD GUELFF eds., 3d ed. 2000).

proportionality.²⁰² And finally, in the event a commander fails to comply with these principles, that commander should be held accountable under the IHL principle of command responsibility.

202. Undoubtedly, RPAs comprise a highly-advanced, highly-effective weapon system for military commanders. Furthermore, USAF RPA operations as described in this article (RPA's unique capabilities coupled with the USAF's internal policies and ROE) enable operators to conduct a broad spectrum of military missions in full compliance with IHL. (As mentioned previously throughout the article, compliance with IHL using RPAs assumes accurate intelligence provided to RPA operators by outside sources.)

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

Molly McNab and Megan Matthews*

I. INTRODUCTION

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

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

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

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

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

II. BACKGROUND

In the mid-1600's, Hugo Grotius, the Dutch scholar widely considered the father of international law,³ recognized the paramount principle of territorial sovereignty, and that all sovereigns are perpetually either in a state of peace governed by human rights law or a state of war governed by humanitarian law.⁴ These revelations were considered to be new concepts of international law designed to reflect new legal realities.⁵ Such a paradigm shift is now termed a "Grotian Moment."⁶ Some scholars argue that September 11th created a Grotian Moment regarding the use of force to combat terrorism,⁷ while others argue the traditional bipartite legal paradigm of humanitarian law and human rights law ensconced by Grotius' original Grotian Moment prevails⁸ and the fundamental principle of territorial sovereignty⁹ remains inviolable.¹⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

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

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

III. THE BASIC LEGAL PARADIGMS

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

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

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

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

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

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

21. *Id.* ¶ 77.

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

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

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

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

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

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

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

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

26. U.N. Charter art. 53.

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

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

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

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

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

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

33. *See infra* Section VI.

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

IV. THE RELEVANCE OF DEFINING TERRORISM

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

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

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

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

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

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

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

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

40. BECKER, *supra* note 39, at 89; BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 198 (2008); *11 Israelis, 4 Arabs, German Die in Munich Olympics Terrorism*, PITT. POST-GAZETTE, Sept. 6, 1972, at 1.

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

struggles of self-determination.⁴² Because this proposed instrument arrived during an era of political upheaval in developing States attempting to cast off the chains of colonialism, the draft was not adopted and vehement disputes ensued between developed and developing States concerning an accurate definition of terrorism.⁴³ In place of a united approach, States attacked the task of addressing terrorism in a “sectoral” method⁴⁴ by drafting and adopting conventions to combat terrorism for very specific situations, such as an airplane hijacking or extortion.⁴⁵

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

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

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

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

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

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

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

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

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

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

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

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

V. ANALYZING JUS AD BELLUM

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

A. Human Rights Law

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

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

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

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

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

53. *Id.* ¶¶ 31-33.

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

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

1. The Law Enforcement Model

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

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

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

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

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

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

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

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

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

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

63. *Id.*

O'Connell's argument is grounded in State practice and evidence of *opinio juris* demonstrated by States treating terrorism as a crime. A sufficient body of State practice exists evidencing that States regularly employ law enforcement tactics against terrorists.⁶⁴ For example, when combating terrorist attacks perpetrated by the Irish Republican Army (IRA), the United Kingdom (U.K.) used its police force to conduct surveillance and execute arrests. Even when a suit was brought against the U.K. questioning the lethal force used against suspected IRA terrorists carrying out a plot to bomb British interests, the court applied the arbitrariness standard under human rights.⁶⁵ Additionally, the U.K. employed law enforcement measures to locate and target the perpetrators (later discovered to be members of al Qaeda) of the London subway and bus bombings in 2005.⁶⁶ Similarly, the Spanish successfully captured and tried the individuals responsible for the Madrid train bombing of March 2004.⁶⁷ The Security Council has likewise used its Article 42 powers⁶⁸ on several occasions requiring States to respond to terrorism with law enforcement measures, such as calling upon States to extradite terrorists,⁶⁹ freeze the bank accounts of suspected terrorists,⁷⁰ and even to domestically prosecute terrorists.⁷¹

Further, a wealth of evidence establishes States' *opinio juris* that terrorism is a crime and does not fall under the scope of IHL. The U.K. and France expressly stated in their reservations to the Additional Protocols of the 1949 Geneva Conventions⁷² their understanding that "the term 'armed conflict' denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."⁷³ Similarly, the

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

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

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

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

68. U.N. Charter art. 42.

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

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

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

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

73. Reservation of France (Apr. 11, 2001) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument>; Reservation of United Kingdom (July 2, 2002),

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

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

The use of force under human rights law is laid out primarily in Article 6 of the International Covenant on Civil and Political Rights (ICCPR), prescribing an “arbitrary” standard.⁷⁵ Under Article 6, “[e]very human being has the inherent right to life . . . [and] [n]o one shall be arbitrarily deprived of his life.”⁷⁶ Within the human rights context, the use of lethal force is permissible only as a last resort. Only killing that is “strictly and directly necessary to save life”⁷⁷ is permitted;⁷⁸ killing that is arbitrary⁷⁹ or not necessary to save a life is an illegal killing.⁸⁰

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

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *available at* <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>.

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

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

76. *Id.*

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

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

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

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

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

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

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

84. *Id.*

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

3. Targeted Killings

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

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

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

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

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

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

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

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

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

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

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

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

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

Both the ICCPR and ICESCR are limited in scope territorially, binding only upon State parties, requiring them to extend human rights protections to their citizens or persons within that State’s sovereign territory. However, because the requirement that a State not arbitrarily deprive individuals of the right to life is an *erga omnes* duty⁹⁷ (an obligation owed to all States by all States)⁹⁸ and most likely a *jus cogens* norm,⁹⁹ States are obligated to ensure individuals the right to life regardless of a State’s jurisdiction, actual power, or effective control of an individual. Therefore, any targeted killing of an individual committed by a State outside of the context of lawful self-defense or an armed conflict, and when no individual is imminently threatened, including those carried out by weaponized drones, implicate human rights violations.

B. The Law Governing the Right of Self-Defense

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

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

94. Mayer, *supra* note 92.

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

96. *Id.* at 573-74.

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

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

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

100. U.N. Charter art. 51.

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

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

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

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

102. *Id.*

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

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

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

106. *Id.* at ¶¶ 202, 254.

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

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

1. Armed Attack

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

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

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

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

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

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

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

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

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

114. U.N. Charter art. 51.

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

116. See *supra* note 109.

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

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

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

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

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

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

120. *Id.* ¶ 195.

121. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In contrast to O’Connell’s argument for attribution based on I.C.J. jurisprudence, this stance relies heavily on State practice. During the *Caroline Incident* of 1837, Canada faced an armed insurrection mounted from U.S. soil led by non-State actors. The United Kingdom, Canada’s sovereign at that time, responded to the armed insurrection by sinking the insurgent’s supply ship, the *Caroline*, while it was in U.S. waters.¹⁴⁰ Both States recognized that self-defense was appropriate when an armed attack emanated from a non-State actor acting alone, and neither State attempted to attribute the insurgent’s actions to the U.S.¹⁴¹ More recently, the U.S. based its use of force in Afghanistan against al Qaeda for the 1998 embassy bombings on the right to self-defense under Article 51.¹⁴² Additionally, after the attacks of September 11th, Security Council Resolutions 1368 and 1373 recognized “the inherent right of . . . self-defence as recognized by the Charter” in response to “any act of international terrorism,” regardless of attribution to a State.¹⁴³

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

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

L. 559, 563-64 (1999).

138. U.N. Charter art. 51.

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

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

141. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

150. *Id.*

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

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

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

The general affirmative obligation that every State not knowingly allow "its territory to be used for acts contrary to the rights of other States" was first articulated by the I.C.J. in the *Corfu Channel* case.¹⁵⁵ This concept was confirmed in the context of transnational terrorism in Security Council Resolution 1373, passed shortly after September 11, 2001.¹⁵⁶ Security Council Resolution 1373 confirms that a State's failure to prevent its territory from being used as a safe haven triggers the right to self-defense against the non-State actors located within the host State's territory.¹⁵⁷ The exercise of self-defense in this context is an exception to the host State's right to territorial integrity, waived because of its failure to comply with international obligations.¹⁵⁸

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

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

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

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

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

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

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

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

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

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

The principle of *necessity* in the context of self-defense requires that force only be used when there is no other alternative course of action to deter the attacks against the State.¹⁶⁴ If the State cannot rely on diplomatic¹⁶⁵ or law enforcement measures¹⁶⁶ to stop the attacks, it may respond with necessary force. This restriction on self-defense essentially requires that a State use force only when no other viable option exists to deter the attacks.¹⁶⁷

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

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

161. *See infra* Section VI.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Scholars in favor of a preemptory or anticipatory right to self-defense maintain that any other interpretation would render the right to self-defense meaningless¹⁷⁹ by requiring States to “assume the posture of ‘sitting ducks’” in the face of an imminent threat.¹⁸⁰ This is often asserted in the context of self-defense against terrorists because their attacks are designed to be undetectable until they are launched.¹⁸¹ Between attacks, terrorists continue to plan future attacks, creating a threat which is “underway, not simply potential.”¹⁸² Under this theory, the principle of imminence is satisfied when there is a group with the avowed purpose of carrying out attacks and the group possesses the means to carry out the attack.¹⁸³ Such a situation creates a continuous attack and a State may use self-defense to ward off the imminent and ongoing terrorist attacks.¹⁸⁴

On the other side of the issue, scholars argue that such a broad interpretation of imminence is dangerous, allowing for the overly aggressive use of force when not absolutely necessary, and thus violating the previously described principle of necessity. Proponents of a narrow interpretation of imminence usually rely upon the *Caroline* Incident and contend that any act of self-defense must be in response to a threat that “is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”¹⁸⁵ Any preemptive right of self-defense is limited to interceptive prevention, requiring that an attack be already mounted¹⁸⁶ and corroborated by “substantiated evidence.”¹⁸⁷

C. Armed Conflict

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

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

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

181. *Id.* at 173.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

192. *Id.*

193. *Id.*

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

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

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

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

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

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

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

The International Committee of the Red Cross, responsible for drafting the Geneva Conventions and the Additional Protocols, intended Common Article 3 governing non-international armed conflicts to be read broadly and have the widest possible application.²⁰¹ The development of criteria for establishing the existence of a non-international armed conflict has occurred at a customary level, rather than conventional, primarily at the United Nations' *ad hoc* criminal tribunals. In determining whether a non-international armed conflict exists, the primary focus of the analysis must be on the actions of the non-State actor, rather than State actor.²⁰² A non-international armed conflict exists where: 1) sufficiently organized armed groups carry out armed violence; 2) in an intense; and 3) protracted manner against a State.²⁰³ A non-State actor only needs a minimal degree of organization²⁰⁴ sufficient to facilitate collective, armed, anti-government actions.²⁰⁵ A State's use of its military against the non-State actor can be *indicia* of sufficient organization.²⁰⁶

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

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

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

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

203. *Id.* ¶¶ 561-62.

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

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

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

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

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

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

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

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

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

Koh made no remarks as to whether "al-Qaeda, the Taliban and associated forces" comprises a single sufficiently organized armed group or multiple armed groups carrying out this violence. Further, there is controversy in the legal community over whether the violence carried out by these groups individually or in concert meets the requisite level of intensity or duration to constitute a non-international armed conflict. O'Connell maintains that these justifications are "mutually contradictory"²¹⁹ because the U.S. must be either responding to ongoing²²⁰ *armed attacks* implicating the right to self-defense or engaged in violence that rises to the requisite level constituting an *armed conflict*.

the Former Yugoslavia May 7, 1997).

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

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

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

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

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

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

216. *See infra* Section VI.

217. Koh speech, *supra* note 154.

218. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

After several failed attempts to eliminate Mehsud, the U.S. military finally located him at his father-in-law's house.²³¹ At the time of the attack, Mehsud was on the roof of the house with his wife, receiving medication via drip infusion for a kidney ailment caused by diabetes.²³² The drone strike, carried out by a U.S. Predator Drone equipped with Hellfire missiles²³³ killed Mehsud and eleven other civilians, including his wife and doctor.²³⁴ This section will articulate the *jus in bello* analysis and the applicable IHL principles as applied to this particular drone strike against Mehsud.

A. Necessity

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

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

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

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

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

232. *Id.*

233. Mayer, *supra* note 92.

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

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

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

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

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

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

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

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

B. Proportionality

The principle of proportionality acts as a check on the broader principle of necessity. The *expected* collateral damage must not be *excessive* in relation to the anticipated military advantage.²⁴¹ The first step in a proportionality analysis is a prospective assessment that considers the anticipated collateral damage²⁴² rather than a post-execution evaluation of how the military operation actually unfolded.²⁴³ While always regrettable, civilian casualties are lawful in this analysis,²⁴⁴ and “the general immunity that civilians enjoy is not absolute.”²⁴⁵

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Distinction

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

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

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

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

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

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

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

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

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

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

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

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

256. *Id.* § 1917.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. CONCLUSION

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

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

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

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

THE NEED FOR SPECIAL VETERAN COURTS

Samantha Walls*

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹

- Oliver Wendell Holmes

A Reflection:

This summer I had the privilege to work for the Colorado Public Defenders Office under the Colorado Student Practice Act. I managed my own misdemeanor caseload, under the supervision of an attorney. To my surprise, I discovered that the majority of my clients were veterans, from both the Operation Iraqi Freedom, Operation Enduring Freedom wars, and the Vietnam War. Furthermore, most of the veterans stated that they suffered from Post-Traumatic Stress Disorder (PTSD).

I was unaware of the number of veterans in our criminal justice system. I made it a point to discuss with these clients their service and their readjustment back into society. We discussed their substance abuse issues, their social network, housing, and employment situations.

I, believing I was being innovative, thought that these veterans needed a special court, similar to a drug court. Little did I know that many others shared these same ideas, and in fact, Veteran Courts were spreading across the United States. I was able to shadow the Colorado Public Defender, Sheilagh McAteer, who helped create and run the recently established Veterans Trauma Court, in Colorado Springs, CO. It is from my experience this summer that I write this paper about the problems our veterans face when returning from war with psychological wounds, and the grave need for specialty Veteran Courts across our nation. The United States is not alone in its struggle to address the needs of veterans suffering from psychological wounds. In the current state of international affairs, many countries are joining forces to fight the same war. Therefore, the international community could benefit from addressing the psychological issues of soldiers as a collective group. The United States, in the implementation and progression of Veteran Courts, could lead the international community in providing appropriate treatment and care for its soldiers.

* Article by Samantha J. Walls, Denver Sturm College of Law, Juris Doctorate May 2011. In memory of William Frantz.

1 OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963).

We are taught history so that we do not repeat the mistakes of the past. Yet here we are as a Nation, unequipped to care for our returning veterans, in a situation hauntingly reminiscent of the Vietnam War. We are allowing history to repeat itself. Instead of preempting the inevitable stress disorders that afflict soldiers when they return from war, we are now trying as best we can to pick up the pieces. The latest attempt: Veteran Specialty Courts.

The United States has sent approximately 1.64 million voluntary soldiers to serve in the Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) wars since 2001.² Some of those men and women have returned and some have yet to return home. We welcome soldiers home with open-arms;³ unfortunately, soldiers often find those arms empty and unwelcoming, lacking the sufficient resources and understanding to assist the soldier in his or her transition back into civilian life.⁴ We, as a Nation, have been ignorant to the deep psychological wounds inflicted upon soldiers by the trauma of war.⁵ While there are mounting policy concerns and attempts, both by the government and by the public, to become knowledgeable about the psychological wounds endured from war, for many troops it is too late. The basic fact is that many of our troops have lost their lives to suicide, are already behind bars, or are currently involved in the criminal justice system.⁶

The soldiers' psychological wounds, mainly Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), affect every aspect of their daily life.⁷ The veterans' behavior, resulting from the symptoms of these psychological wounds, often involves the veteran with the criminal justice system. Once within the criminal justice system, these symptoms may interfere with the veteran-defendant's ability to appropriately interact with the court system. To deal with

2. RAND, CENTER FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 3 (Terri Tanielian & Lisa H. Jaycox eds., 2008) [hereinafter RAND]. The RAND Corporation is a non-profit institution whose mission is to improve policy and decision-making through research and analysis. See http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf.

3. Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 107 (2010).

4. Erica Goode, *Suicide's Rising Toll: After Combat, Victims of an Inner War*, N.Y. TIMES, Aug. 2, 2009, available at <http://www.nytimes.com/2009/08/02/us/02suicide.html>.

5. See Kristi A. Estrada, *Welcome Home: Our Nation's Shameful History of Caring for Combat Veterans and How Expanding Presumptions for Service Connection can Help*, 26 T.M. COOLEY L. REV. 113, 116-139 (2009).

6. Goode, *supra* note 4 (noting that in 2008, there were 192 suicides deaths among active-duty soldiers and soldiers in inactive reserve status, and that from January to mid-July of 2009, 129 suicides were confirmed or suspected); see RAND, *supra* note 2, at 128 (noting that "male veterans face roughly twice the risk of dying from suicide as their civilian counterparts").

7. Hafemeister, *supra* note 3, at 95; see C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 312 (1984).

the concerning number of veterans in the criminal justice system, some jurisdictions have recently implemented specialty courts for veterans with criminal charges. These courts are in lieu of the traditional criminal prosecution method, which provide treatment instead of incarceration, as a means to heal the veterans' psychological wounds.⁸

While the effects of TBI on the mental processes are potentially as serious as the effects of PTSD on the mental processes of the returning soldiers, this article will exclusively discuss the relation between PTSD, service in combat, and criminal behavior. Due to the recent medical diagnosis of TBI as a result of war, the extent of the effects of TBI is relatively unknown to medical researchers.⁹ At this point, medical researchers do not have a solid understanding of how TBI affects a veteran's functional activity or how it relates to criminal behavior.¹⁰

The criteria of PTSD include "exposure to a life-threatening or other traumatic event [like combat, rape, or experiencing a natural disaster], a subjective response involving fear, helplessness, or horror, and symptoms from each of the following symptom clusters: intrusive recollections, avoidant/numbing symptoms, and hyper-arousal symptoms."¹¹ A veteran's exposure to a traumatic event during combat causes the development of PTSD. As opposed to civilians who suffer from PTSD after encountering a traumatic experience, PTSD is more severe for veterans because they are exposed to a greater number of traumatic experiences through continuous and unrelenting combat.¹² PTSD symptoms affect the way veterans interact within their social environments.¹³ Anytime an individual suffering from PTSD is reminded of the initial trauma (i.e. through sounds, taste, smells) their body re-experiences the initial stress response.¹⁴ PTSD causes the body to be constantly in an anxious stressed state which has a "deleterious effect on the brain."¹⁵ An individual who suffers from PTSD commonly suffers from other

8. Judge Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW. ENG. J. CRIM. & CIV. CONFINEMENT 357, 363-64 (2009).

9. RAND, *supra* note 2, at summary xx.

10. *Id.*

11. Hafemeister, *supra* note 3, at 94-95.

12. Constantina Aprilakis, *The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD*, 3 GEO. J.L. & PUB. POL'Y 541, 545 (2005).

13. RAND, *supra* note 2, at 149.

14. Hafemeister, *supra* note 3, at 94-95.

15. Erin M. Gover, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 564 (2008). See Hafemeister, *supra* note 3, at 4 (discussing the chemical process that occurs in the brain of an individual suffering from PTSD as "When an individual experiences a highly traumatic event, the body undergoes a physiological change, that is, a stress response. This stress response begins in the reticular activating system and then progresses to the hypothalamus. The hypothalamus, in turn, signals the pituitary gland to secrete a hormone called adrenocorticotrophic hormone (ACTH). This hormone generates adrenaline, which triggers rapid heartbeat, desensitization, and hyperalertness. Although this is a natural response to a stressful situation, individuals with PTSD may experience a stress response every time there is a reminder of the earlier stressful event.")

comorbid diseases such as depression, substance abuse or an anxiety disorder.¹⁶ In fact, individuals who suffer from PTSD have an average of 2.7 other mental health diagnoses.¹⁷ Moreover, individuals with PTSD commonly abuse substances in an attempt to self-medicate.¹⁸

Individuals who suffer from PTSD require immediate and continuing treatment. The effects of PTSD grow more severe the longer an individual suffers from the traumatic symptoms.¹⁹ Without treatment, people continue to experience symptoms for decades, a condition known as PTSD with lifetime prevalence.²⁰ Fortunately, the effects of PTSD can be reversed through treatment to address the initial traumatic event(s) and by helping the sufferer cope with the stressors of daily life without re-experiencing the feelings associated with the initial trauma.²¹

Part 1 of this article discusses the occurrence of PTSD in veterans, the contributing elements that limit the availability of treatment of veterans with PTSD, and lastly the prevalence of veterans in the criminal justice system. Part 2 discusses the recognized link, both by researchers and courts, between a PTSD diagnosis which results from service in combat and criminal behavior. Part 3 of this article describes and analyzes the proposed adequate way to deal with a veteran-defendant suffering from PTSD: Veteran Specialty Courts.

I. THE PROBLEM

An increasing number of soldiers are returning home from war with substance abuse problems, psychological issues, rising rates of suicide, homelessness, and resulting criminal behavior.²² In recent years, governmental and non-governmental interest groups have begun to study the effects of service in the OEF and OIF wars on the returning soldiers. The RAND group, on behalf of the Center for Military Health Policy Research, completed the first large-scale, non-governmental assessment of the psychological and cognitive needs of soldiers who have served in either the OEF or OIF wars.²³ The researchers concluded that "a major national effort is needed to expand and improve the capacity of the mental health system to provide effective care to service members and veterans."²⁴ Additionally, the Department of Defense Task Force on Mental Health has studied the current available health care for returning soldiers and veterans and concluded that "the

16. RAND, *supra* note 2, at 125.

17. *Id.*

18. *Id.* at 134.

19. *Id.* at 54.

20. GLENN SCHIRALDI, THE POST-TRAUMATIC STRESS DISORDER SOURCEBOOK 40 (Lowell House 2000).

21. RAND, *supra* note 2, at 9.

22. See Gover, *supra* note 15, at 561-62.

23. RAND, *supra* note 2. RAND researchers conducted this studying by surveying 1,965 veterans from across 24 communities. RAND assessed their exposure to traumatic events, studied current symptoms of psychologically illnesses, and evaluated whether they had received proper care for their injuries sustained while in combat. See www.RAND.org.

24. *One in Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression*, RAND CORP., April 17, 2008, <http://www.rand.org/news/press/2008/04/17/> [hereinafter *One in Five*].

system of care for psychological health that has evolved over the recent decades is *insufficient* to meet the needs of today's forces and their beneficiaries and will not be sufficient to meet their needs in the future."²⁵

Current treatment and care facilities for veterans and soldiers need to be expanded and improved in order to meet the growing number of soldiers and veterans with PTSD. Some have called the significant increase in the number of soldiers and veterans suffering from PTSD a social crisis.²⁶ The numbers vary depending on the study and its relevant assessment group,²⁷ however, it is estimated that of the current 2.3 million U.S. Veterans, approximately twenty to thirty percent, exhibit the symptoms associated with mental health disorders or cognitive impairments.²⁸ This breaks down to approximately 300,000 of the returning soldiers, or one in five, will likely suffer from PTSD.²⁹ Another study found that out of 100,000 soldiers returning from the OEF and OIF wars that the Department of Veterans Affairs (VA) treated between 2001 and 2005, almost one-third suffered from a mental health problem, most commonly diagnosed as PTSD.³⁰ In that study, more than half of the veterans suffered from a comorbid mental health problem along with PTSD, such as major depression, anxiety or substance abuse.³¹ In fact, one in six soldiers suffers from a substance abuse problem.³² The RAND study concluded that the prevalence of PTSD was highest among soldiers of the Army, Marines and the Reserves because these military forces operate in combat areas more often than other military forces.³³ This finding is consistent with studies that find a recognizable correlation between repeated exposure to combat and the greater likelihood of developing PTSD.³⁴

25. DEPT. OF DEFENSE TASK FORCE ON MENTAL HEALTH, *An Achievable Vision: Report of the Department of Defense Task Force on Mental health*, at ES-1 (2007), *available at* <http://www.health.mil/dhb/mhtf/MHTF-Report-Final.pdf> (emphasis added); Judge Russell, *supra* note 8, at 360.

26. *See One in Five*, *supra* note 24 (discussing the individual and societal health and financial costs associated with veterans and soldiers not receiving the appropriate and effective treatment for PTSD).

27. RAND, *supra* note 2, at 105 (noting the discrepancies in study numbers of veterans suffering from PTSD are due to several factors such as: most studies focused on active duty or enlisted soldiers; the studies under-represent individuals at the highest rates for PTSD, i.e. persons separated from service; most research has been surrounding the deployments prior to the escalation in Iraq insurgency, in 2002-2004; studies only provide information of mental health condition of veteran/soldier at one time, however studies have shown that PTSD symptoms fluctuate over time).

28. *One in Five*, *supra* note 24.

29. *Id.*

30. Sami Beg, *Mental Problems Plague Returning Troops*, ABC NEWS, March 12, 2007, <http://abcnews.go.com/print?id=2944619>.

31. *Id.*

32. *One in Five*, *supra* note 24.

33. *Id.*

34. Karestan C. Koenen et al., *Risk Factors for Course of Posttraumatic Stress Disorder Among Vietnam Veterans: A 14-Year Follow-Up of American Legionnaires*, 71 J. CONSULTING & CLINICAL PSYCHOL. 980, 985 (2003).

A. Elements that Exacerbate the Number of Veterans suffering from PTSD

This section will address the elements, such as the improper care of returning Vietnam Veterans, an arguably different war environment, and significant barriers to treatment that combine to exacerbate the trauma caused by war and effectively increase the number of veterans suffering from PTSD. First, the prevalence of PTSD among Vietnam veterans was not properly addressed after the Vietnam War, and therefore the United States is still trying to provide adequate treatment for Vietnam veterans. The continuing treatment of the Vietnam War veterans is hampering the ability of the United States to focus the treatment resources on the OEF and OIF veterans. Second, the OEF and OIF wars are different from past wars in terms of longevity and enemy tactics. This arguably different war environment has increased the prevalence of PTSD. Lastly, significant barriers prevent veterans from receiving treatment; these failures consist of social stigmatic associations with mental illnesses and systematic failures by the government.

1. PTSD and the Vietnam War

PTSD is a new name for a phenomenon that is as old as war itself.³⁵ The stress related to combat and its resulting psychological effects has been a recognized consequence of warfare.³⁶ During the Civil War, the psychological impact of war was termed "nostalgia."³⁷ In World War I, it was referred to as "shell shock" or "combat neurosis."³⁸ In World War II, the psychological impact of war was called "combat fatigue," "operational fatigue," "old sergeant syndrome," or "gross stress reaction."³⁹ Due to the differing titles and medical diagnosis of combat stress throughout the historical wars, statistics relating to the historical prevalence of the psychological impact of combat stress is difficult to track.

Although society recognized combat stress as a natural consequence of war, the effects of combat stress on veterans was not a focus of societal concern until the end of the Vietnam War. In 1970, Congress held its first hearing to address the issue of veterans' readjustment back into civil society.⁴⁰ It was not until four years following the end of the Vietnam War, in 1979, that the American Psychological Association (APA) officially defined PTSD as a mental disorder.⁴¹ Medical professionals rely on the APA to arrive at a clinical diagnosis.⁴² Thus, Vietnam

35. *Returning Veterans Involved in the Criminal Justice System* 3, Seminar and Training sponsored by Vet Center, Veterans Village of San Diego, Department of Veterans Affairs et al., Sept. 12, 2009 [hereinafter *Returning Veterans*].

36. RAND, *supra* note 2, at 4.

37. Estrada, *supra* note 5 at 134.

38. *Id.*

39. *Id.*

40. RAND, *supra* note 2, at 5.

41. *Id.*

42. Barry L. Levin, *Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder*, 46 AM. JUR. TRIALS 441, § 20 (2010).

soldiers who returned from war and sought treatment for their psychological issues within this four-year gap were not properly diagnosed and did not receive appropriate medical treatment. This contributed to the lack of understanding regarding the proper treatment for these returning veterans.

The United States and the VA did not respond appropriately or with any urgency to the mental conditions of the returning Vietnam veterans.⁴³ The community vilified the returning soldiers for their service, and the media portrayed them as substance-abusing dangerous individuals.⁴⁴ The psychological state of the Vietnam veteran was misunderstood, and many thought that individuals who served as soldiers were predisposed to mental health issues, substance abuse, and criminal behavior.⁴⁵ The current motto for the Vietnam Veterans of America, who are supporters of Veteran Specialty Courts, is: "Never again shall one generation of veterans abandon another."⁴⁶ This motto exemplifies the way in which Vietnam veterans perceived the sufficiency of their care and the general attitude of Americans towards their coming home.

It was not until 1983, eight years after the end of the Vietnam War, that Congress mandated a study to investigate PTSD and other post-war psychological problems among Vietnam veterans.⁴⁷ This study, titled The National Vietnam Veterans Readjustment Study (NVVRS), found that higher levels of war-zone exposure directly increased the rate of PTSD.⁴⁸ Furthermore, it found that 30.9% of Vietnam veterans had PTSD with lifetime prevalence, meaning that Vietnam veterans were, for decades, suffering from PTSD symptoms.⁴⁹

While the results of the NVVRS study primarily put the PTSD diagnosis on the social radar, the federal government did not implement effective treatment services for those Vietnam veterans who were suffering from PTSD. This lack of effective treatment is reflected in the fact that by 1985, almost one-fourth of the federal and state prison populations were veterans.⁵⁰ The government's failure to properly address the mental health problems of the returning Vietnam veterans effectively increased the number of current war veterans needing medical

43. Estrada, *supra* note 5, at 122.

44. Erlinder, *supra* note 7, at 306-07.

45. *Id.* at 314.

46. Thomas J. Berger, *U.S. Sentencing Commission: Regarding Mental Health & Substance Abuse Issues Facing Returning Veterans Relating to Criminal Justice and Alternatives to Incarceration*, Public Hearing, March 17, 2010, http://www.ussc.gov/AGENDAS/20100317/Hearing_Transcript.pdf.

47. Jennifer L. Price, *National Center for PTSD: Findings from the National Vietnam Veterans' Readjustment Study*, U.S. DEP'T OF VETERANS AFF., Jan. 1, 2007, <http://www.ptsd.va.gov/professional/pages/vietnam-vets-study.asp>.

48. *Id.*

49. *Id.*

50. Thomas J. Berger, *Statement for the Record of Vietnam Veterans of America*, before the U.S. Sentencing Commission Regarding Mental Health & Substance Abuse Issues Facing Returning Veterans Relating to Criminal Justice and Alternatives to Incarceration, Public Hearing, March 17, 2010, http://www.ussc.gov/AGENDAS/20100317/Berger_testimony.pdf [hereinafter *Statement for the Record*].

treatment and is exacerbating the current strain on the system. Instead of focusing governmental resources on soldiers and veterans from the OEF and OIF wars, the government is still attempting to treat Vietnam veterans. Vietnam veterans are included in the current statistics of both veterans and soldiers with PTSD, and are included in the statistics concerning the veterans in our criminal justice system.

2. Special Aspects of the OEF and OIF Wars

Changes in the United States military operations have arguably increased the number of mental health related injuries, or "invisible wounds" as described by the RAND study.⁵¹ Some of these changes can be attributed to changes in military operations due to the shortage of volunteer soldiers. The year 2010 marks the ninth straight year of sustained combat for the United States.⁵² Due to the length of the war, coupled with the shortage of volunteer soldiers, more soldiers are experiencing extended and multiple deployments.⁵³ Soldiers often only receive short periods off during deployments, if they receive time off at all.⁵⁴ The government has tapped into the Reserve resources, such as the National Guard, and is deploying Reserves into combat areas without appropriate military training.⁵⁵ Reserve soldiers are more likely to suffer from PTSD due to their lack of traditional military training, which includes psychological conditioning.⁵⁶

Enemy tactics have been changing and fluctuating throughout the OEF and OIF wars which may also increase the prevalence of PTSD. Soldiers must deal with many unknown enemies, because adversaries do not maintain one exclusive identity. The enemy attacks at anytime and anywhere. It is necessary for soldiers to be in a constant vigilante state due to the use of suicide bombers, roadside bombs and improvised explosive devices (IEDs).⁵⁷ A recent news article relayed the views of a sergeant regarding the fluctuating warfare:

Enemy forces are moving away from small-unit infantry attacks against coalition forces. Regime holdouts are moving toward more hit-and-run attacks, using IEDs [improvised explosive devices], mortars or rocket propelled grenades. They are using different tactics so they do not need to engage our forces directly. The number of attacks fluctuates... October saw an average that fluctuated between the mid-teens to low 20's. I think all we need to understand is that with some of these IEDs, all that is required is someone with a paper bag or plastic bag to drop it

51. RAND, *supra* note 2, at 5-6.

52. *Statement for the Record*, *supra* note 50.

53. *Returning Veterans*, *supra* note 35, at 5.

54. RAND, *supra* note 2, at 5-6; see *Responding to the Needs of Justice-Involved Combat Veterans with Service-Related Trauma and Mental Health Conditions: A Consensus Report of the CMHS National GAINS Center's Forum on Combat Veterans, Trauma, and the Justice System*, THE CMHS NATIONAL GAINS CENTER, August 2008, http://www.gainscenter.samhsa.gov/ext/veterans/Responding_to_Needs_8_08.asp [hereinafter GAINS].

55. Aprilakis, *supra* note 12, at 547.

56. *Id.*

57. RAND, *supra* note 2, at 5.

as a walk-by. *I think what it requires is for us to remain vigilant constantly, which is what we are trying to do.*⁵⁸

To deal with the chaos that is modern warfare, the United States has begun using Unmanned Aerial Vehicles (UAVs), or drones. These UAVs have changed the traditional arena of front-line combat into virtual combat. The United States has extensively used drone warfare since the September 11th attacks to suppress enemy army defenses, to support counterinsurgency operations, and to locate and kill enemy targets.⁵⁹ United States Air Force UAV operators remotely control the armed drones, which are located in Iraq and Afghanistan, from military bases within the United States.⁶⁰

While PTSD has primarily been considered a result of face-to-face physical combat, UAV operators may also experience psychological trauma from their “virtual” combat.⁶¹ While the use of drone warfare may appear to be a form of video-game like combat, UAV operators report that the intensity and realness of their work mirrors that of field combat.⁶² Col. Pete Gersten, a commander of the Unmanned Aerial System at the Creech Air Force Base in Nevada, reported:

There’s no detachment. Those employing the system are very involved at a personal level in combat. You hear the AK-47 going off, the intensity of the voice on the radio calling for help. You’re looking at him [a fellow soldier], 18 inches away from him, trying everything in your capability to get that person out of trouble.⁶³

Therefore, although UAV operators are not physically on the front-lines of combat, their work captures all of the traumatic aspects of combat: firing weapons, visually perceiving the effects of combat, hearing the cries of combat, and experiencing the feelings associated with combat. UAV operators also express the psychological difficulties associated with the stress of the job and the quick transition back to a civilian lifestyle, which has been described as a “whiplash transition.”⁶⁴ Furthermore, UAV operators do not have a support network of unit

58. Jim Garamone, *Number of Attacks in Iraq Constant, Enemy Tactics Change*, DEFENSE.GOV, AMERICAN FORCES PRESS SERVICE, Oct. 6, 2003 (emphasis added).

59. Andrew Callam, *Drone Wars: Armed Unmanned Aerial Vehicles*, Int’l Affairs R., Feb. 21, 2010, available at <http://www.iar-gwu.org/node/144>.

60. *Id.*

61. Nic Robertson, *Remote Warfare Ushers New Kinds of Stress*, CNN WORLD, July 23, 2009, available at http://articles.cnn.com/2009-07-23/world/wus.warfare.pilots.uav_1_drones-post-traumatic-pilots?_s=PM:WORLD.

62. David E. Anderson, *Drones and the Ethics of War*, PBS.ORG RELIGION & ETHICS NEWSWEEKLY, May 14, 2010, available at <http://www.pbs.org/wnet/religionandethics/episodes/by-topic/international/drones-and-the-ethics-of-war/6290/>.

63. Maryann Cusimano-Love, *A Troubling Disconnection*, AM. MAG., Mar. 15, 2010, available at http://www.americamagazine.org/content/article.cfm?article_id=12180.

64. Associated Press, *Remote-Control Warriors Suffer War Stress: Predator Operators Prone to Psychological Trauma as Battlefield Comrades*, MSNBC.COM, Aug. 7, 2008, available at <http://www.msnbc.msn.com/id/26078087/>.

cohesion and camaraderie to debrief from the stresses of their jobs.⁶⁵ Due to security controls, UAV operators cannot even discuss the work with their families.⁶⁶ The psychological effects of drone warfare are currently unknown and a potential focal point for future study. However, P.W. Singer, the author of the book *Wired for War: The Robotic Revolution and 21st Century Conflict*, stated “[w]e have 5,000 years in one kind of combat, and we don’t really understand all of the stresses of it, so it’s a little bit arrogant to think that we would understand the stresses of this new kind of combat after only four or five years.”⁶⁷

Higher survival rates in OEF and OIF are the final characteristic that differentiates these conflicts from previous ones. The downside of this good news is the fact that mental health injuries are increasing due to the higher survival rights of wounded soldiers. Advances in technology, advances in body armor, the use of combat medics, faster evacuation times, and the placement of combat support hospitals nearby means that soldiers are surviving from wounds that would have been fatal in previous wars.⁶⁸ The OEF and OIF wars are producing the highest ratio of wounded-to-killed in the United States history.⁶⁹ The ratio of the number of deaths to the number of wounded has dropped from 24% in the Vietnam War, to 13% in the OIF war.⁷⁰ However the wounded, after treatment, are returning to combat zones on average within 72 hours, only three days later, a fact which may also contribute to the onset of PTSD.⁷¹

3. Barriers to Treatment: Stigmatic and Systematic

An increasing number of returning soldiers and veterans suffer from PTSD because of the stigmatic mental health barriers to treatment and the systematic failures by the government. While no easy solution will rectify these problems, simply recognizing they exist is the first step towards eliminating them.

i. Stigmatic Obstacles

The primary barrier to receiving treatment, beyond the time-consuming bureaucratic method of receiving support from the VA, is the stigma associated with mental health issues in both general society and in the military.⁷² Terri Tanielina, author of the RAND study stated in response to the study’s findings, “[w]e need to remove the institutional cultural barriers that discourage soldiers from seeking care. It’s going to take system-level changes to improve treatment for these illnesses.”⁷³ The RAND study concluded that of the 300,000 soldiers

65. *Id.*

66. *Id.*

67. Cusimano-Love, *supra* note 63 (emphasis added).

68. Manav Tanneeru, *Advances Helping More Soldiers Survive Attacks*, CNN.COM, May 22, 2007, available at <http://www.cnn.com/2006/US/11/13/war.wounded/index.html>.

69. RAND, *supra* note 2, at 6.

70. Tanneeru, *supra* note 68.

71. RAND, *supra* note 2, at 6.

72. *Returning Veterans*, *supra* note 35, at 10.

73. Kathleen Kingsbury, *Stigma Keeps Troops from PTSD Help*, TIME, May 1, 2008, available at <http://www.time.com/time/health/article/0,8599,1736618,00.html>.

from the OEF and OIF wars who have reported symptoms of PTSD, only a little more than half have sought treatment either by the VA or other private resources.⁷⁴ Furthermore, the researchers from the RAND group deemed the soldiers' treatment as only "minimally adequate" to properly treat PTSD.⁷⁵

The societal stigma stems from the way society, in general, views mental health treatment. Most of the reported reasons why soldiers will not receive treatment fall into the following categories: they are not convinced treatment will help;⁷⁶ they do not want to be branded as someone with a mental health disorder;⁷⁷ they believe others will think less of them;⁷⁸ or they think a spouse would resent them for seeking treatment.⁷⁹ In fact, one-fourth of the soldiers that participated in the RAND study stated that they did not believe that the mental health treatment would be effective due to the military culture of pushing medications rather than counseling.⁸⁰

The military perpetuates and reinforces the societal stigma against seeking necessary mental health treatment. The military focuses on toughness in both combat training and in survival techniques.⁸¹ The required toughness does not end in training; the military requires soldiers to remain tough throughout their service. The military views anything less than toughness as unacceptable.⁸² For example, in a recent news article, the requisite toughness is evident:

Troop morale *has not* been affected by the increase in casualties. The troops have a tough job and are proceeding to accomplish their missions. These soldiers go out every single day for a year. That's a long time. And in this case, 15 months. That's a lot, that's a lot of pressure over time... So you have to be *mentally and physically tough*, and they *are*.... We have the best noncommissioned officers and soldiers in the world, and they *will* adapt to this. And they *will* continue to do their job.⁸³ – Army Lt. Gen. Raymond Odierno – Commander of Multinational Corps Iraq.

The RAND study also reported that many soldiers believe that admitting their mental health concerns during service to a psychologist or unit command officer would cause problems, such as differential treatment by leadership, a loss of

74. *One in Five*, *supra* note 24.

75. *Id.*

76. *Returning Veterans*, *supra* note 35, at 10.

77. *Id.* at 17.

78. Kingsbury, *supra* note 73 (stating that more than half of the 200 military men interviewed by APA said that they believe others would think less of them if they received counseling, and the majority of surveyed military men stated that they rarely-to-never speak with loved ones about their mental health issues).

79. *Id.*

80. RAND, *supra* note 2, at 278.

81. *Id.* at 276.

82. *Id.*

83. Jim Garamone, *Troops Continue to Adapt to Enemy Tactics in Iraq*, GLOBALSECURITY.ORG, May 31, 2007, available at <http://www.globalsecurity.org/military/library/news/2007/05/mil-070531-afps02.htm> (emphasis added).

confidence by others in their unit, and harmful effect on their future careers.⁸⁴ One soldier shared his view that, "it would be dishonest to promise that 'coming out of the PTSD closet' will be life enhancing."⁸⁵ Others have reported that the unit command officers do not take mental health problems seriously.⁸⁶

While mental health issues are ideally supposed to remain confidential, the unit dynamics makes confidentiality almost impossible. For example, each soldier of a unit must be accounted for.⁸⁷ The on-site facilities for those seeking psychological treatment are only open during the day. One must tell his or her unit officer where they are going at all times. Furthermore, if a soldier seeks a mental health evaluation, another soldier must escort the treatment-seeking soldier to the mental health clinic.⁸⁸ Lt. Justin D'Arienzo, a psychiatrist on an aircraft carrier, speaks about soldiers being hesitant to talk with him in his office for fear of others seeing them.⁸⁹ Instead of office meetings, the soldiers would often casually run in to him in the lunchroom to have a quiet five-minute conversation about their troubles.⁹⁰

Lastly, many soldiers do not seek the appropriate treatment because they fear treatment will have a negative impact on their career. The APA interviewed approximately 200 men and women and an overwhelming 60 percent stated that seeking mental health care would negatively influence their future careers both during and after the military.⁹¹ These perceived harmful effects can have very real effects on soldiers, for example individuals could face stigmatization within the military, their future security clearances could be endangered, promotions could be effected by a history of mental health issues, and it could effectively limit their ability to carry weapons.⁹² Furthermore, soldiers labeled as having PTSD have difficulties in the workplace, even outside of the military. Popular media stigmatizes PTSD as being associated with violence and unstable lifestyles.⁹³

84. RAND, *supra* note 2, at 277.

85. *Returning Veterans*, *supra* note 35, at 17.

86. RAND, *supra* note 2, at 279.

87. *Id.*

88. *Id.*

89. Sadie F. Dingfelder, *The Military's War on Stigma*, AM. PSYCHOL. ASS'N, June 2009, available at <http://www.apa.org/monitor/2009/06/stigma-war.aspx>.

90. *Id.* The DoD Task Force on Mental Health's 2007 Report noted numerous DoD goals to increase the availability and quality of the psychological care for soldiers and veterans. One of those goals was to work towards building a culture of support for psychological health, which include proposals to dispel stigma, increase the accessibility of mental health professionals to service members, to increase training regarding psychological health issues throughout military life, to revise the DoD policies to reflect current knowledge about psychological health, and lastly to make psychological assessments an effective, efficient, and normal part of military life. DEPT. OF DEFENSE TASK FORCE ON MENTAL HEALTH, *An Achievable Vision: Report of the Department of Defense Task Force on Mental health*, at ES-1 (2007), available at <http://www.health.mil/dhb/mhtf/MHTF-Report-Final.pdf>.

91. Kingsbury, *supra* note 73.

92. Dingfelder, *supra* note 89; RAND, *supra* note 2, at 279.

93. *Silent Barriers – On Job Trail, Veterans with PTSD Fight Stigma, Misconceptions*, ALLBUSINESS.COM, 2010, <http://allbusiness.com/print/14064661-1-22eeq.html>.

Therefore, some employers are unwilling to hire someone who admits to having PTSD.⁹⁴

ii. Systematic Obstacles

Systematic failures by the government and military operations hinder the treatment of soldiers and veterans suffering from PTSD, thereby causing the effects of the PTSD to grow more severe over time. Unless soldiers actively seek out treatment during service, at the detriment of their reputation and career, the only time the military screens the soldiers for a mental illness is upon their post-deployment.⁹⁵ As a Department of Defense mandate, the military administers a Post-Deployment Health Assessment to all service members prior to returning home.⁹⁶ The assessment requires completing an online health-screening questionnaire prior to an interview with a mental healthcare provider.⁹⁷ If the mental healthcare provider deems necessary, a referral is made for the soldier to seek outside mental health services.⁹⁸ While this system may be good in theory, many soldiers do not answer the questions accurately or follow the referral because they know it may delay their return home.⁹⁹ The RAND report noted that of those soldiers who received a referral, only approximately one-half sought treatment.¹⁰⁰ Three to six months later the assessment is re-administered to the soldiers through the mail.¹⁰¹ One study reported that from the time of initial assessment to re-assessment, positive screens for PTSD jumped to 42% for those who served in the Army's active duty and 92% for those who served in the Army National Guard and Army Reserve.¹⁰² This jump indicates that it is critically important that the assessments be answered properly and the referrals followed because the longer PTSD goes untreated, the symptoms become more severe.

The VA is the primary avenue for post-deployment care and treatment. However, this administrative agency has arguably been poorly-administered, under-funded, and under-staffed.¹⁰³ A thorough review of the systematic failures of the VA would be a lengthy topic within itself and other authors have extensively analyzed the failures.¹⁰⁴ Nevertheless, in general, the administration of the VA's resources causes significant barriers to treatment for veterans in need.

For example, a veteran's right to VA health benefits is not statutorily authorized but is wholly dependent upon a discretionary budget.¹⁰⁵ Due to the

94. *Id.*

95. GAINS, *supra* note 54.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. RAND, *supra* note 2, at 252.

101. GAINS, *supra* note 54.

102. *Id.*

103. See Estrada, *supra* note 5, at 119-30.

104. *Id.* at 117-141.

105. RAND, *supra* note 2, at 264.

fixed budget, the VA provides treatment based upon a priority system.¹⁰⁶ The priority system establishes accessibility to VA care upon eight priority levels, priority level one being the highest priority to care.¹⁰⁷ Veterans who served in the OEF and OIF wars are automatically eligible to receive cost-free health care through the VA up to five years after military service.¹⁰⁸ These veterans enter the VA system at a priority level of 6.¹⁰⁹ Strategically, in order to receive VA health care as soon as possible, the returning veteran would either attempt to show that PTSD qualifies as a service-connected disability to achieve a first priority ranking, or to qualify as a low-income veteran to obtain a fifth priority ranking. Fortunately, the VA no longer requires the veteran to document his or her traumatic experience which caused the PTSD. Now, the veteran just must prove that he or she served in combat. While this undoubtedly is a step in the right direction, the current priority system is hampering treatment.

Furthermore, the great influx of soldiers returning from war who need mental health treatment is causing a backlog of claims in the VA.¹¹⁰ Veterans often face long waitlists for an appointment.¹¹¹ The Department of Defense has reported that a 30-day delay for an initial mental health appointment is the norm.¹¹² During the wait, veterans still suffer from mental health issues.

Beyond arguably being under-funded, the VA is currently understaffed. The Department of Defense, in 2007, stated, "[t]he DoD [Department of Defense] currently lacks the resources – both funding and personnel – to adequately support the psychological health of servicemembers and their families."¹¹³ For example, on the U.S.S. Kitty Hawk aircraft carrier, there was only one psychiatrist, Lt. D'Arienzo, on board to attend to approximately 8,000 soldiers.¹¹⁴

B. Lack of PTSD Treatment Correlates with Increase of Veterans in Criminal Justice System

The RAND study suggests that "post combat mental health conditions can be compared to ripples spreading outward on a pond."¹¹⁵ Without treatment, over time, the symptoms and effects of PTSD on one's life becomes more severe. Untreated PTSD becomes a substantial interference in an individual's life.

106. *Id.*

107. *Id.* (explaining priority levels as follows: veterans with service-connected disabilities (priority 1-3); veterans who were prisoners of war (priority 3); veterans with catastrophic disabilities unrelated to service (priority 4); low-income veterans (priority 5); veterans who meet specific criteria such as serving in the first Gulf War (priority 6); veterans with a higher-income who do not qualify for other priority groups (priority 7-8).

108. *Id.*

109. *Id.*

110. *Id.* at 259.

111. *Id.*

112. *Id.*

113. *Id.* at 260.

114. Dingfelder, *supra* note 89.

115. RAND, *supra* note 2, at 149.

Veterans often find themselves in the criminal justice system due to the combination of untreated PTSD and the comorbid substance abuse issues.¹¹⁶

The number of veterans in the United States criminal justice system is substantial. In 2007, approximately 1.6 million inmates were in either state or federal prisons and another 780,000 inmates were confined in local jails.¹¹⁷ Approximately 9.4 percent of those inmates, or roughly 223,000, were veterans.¹¹⁸ Of those veterans in jails or prisons, approximately 60 percent have a substance abuse problem.¹¹⁹

Veterans who are incarcerated in jails and prisons have similar characteristics. The Bureau of Justice conducted the most recent reports in 2000 and 2004. The 2000 report, titled *Veterans in Jail or Prison Report*, concluded that of the prison and jail veteran population sampled, the majority were soldiers who had served in the Army.¹²⁰ It further noted that veterans were more likely to be first-time offenders, more likely to have less extensive criminal histories, and less likely to be recidivists.¹²¹ Lastly, incarcerated veterans were more likely to report alcohol abuse and a mental illness than non-veterans.¹²²

At this point, statistics do not clearly indicate the number of OEF and OIF returning soldiers in the criminal justice system.¹²³ In the 2004 *Veterans in State and Federal Prison*, Stated that only four percent of the prison and jail population was comprised of OEF and OIF war veterans.¹²⁴ Presently, soldiers are still returning from the OEF and OIF wars and therefore the 2004 report does not accurately reflect the current trend of OEF and OIF war veterans involved in the criminal justice system. A more up to date study is necessary to accurately calculate how many OEF and OIF veterans are in the criminal justice system today.

II. RECOGNIZED LINK BETWEEN CRIMINAL BEHAVIOR AND PTSD

Veteran Specialty courts are based upon a premise that veterans' culpability for their criminal behavior is different from the average citizen-defendant. Their culpability is reduced due to their unique experience in combat war, the associated PTSD diagnosis caused by their service, and the behavioral symptoms of that diagnosis that often serve as the catalyst for their criminal behavior.¹²⁵

116. Judge Russell, *supra* note 8, at 358, 362.

117. GAINS, *supra* note 54 (applying statistics from the 2004 Department of Justice Report, released in 2007)

118. *Id.*

119. *Statement for the Record*, *supra* note 50.

120. Christopher J. Mumola, *Bureau of Justice Statistics Special Report: Veterans in Prison or Jail* 3, U.S. DEP'T OF JUST., January 2000, revised Sept. 29, 2000.

121. *Id.* at 7.

122. *Id.* at 9-10.

123. GAINS, *supra* note 54.

124. Margaret E. Noonan and Christopher J. Mumola, *Bureau of Justice Statistics Special Report: Veterans in State and Federal Prison*, U.S. DEP'T OF JUST., May 2004

125. Judge Russell, *supra* note 8, at 363-64.

A. Effect of PTSD on Veterans' Behavior

The effect of PTSD on a veteran's emotional and physical state relates directly to his or her involvement with the criminal justice system. The effects of PTSD impact every element of an individual's daily life.¹²⁶ The initial traumatic event and the re-experiencing of the initial stress response of that traumatic event cause damage to the hippocampus of the brain.¹²⁷ In turn, this damage affects an individual's ability to "manage fear responses [or] to appropriate[ly] react to environmental stimuli."¹²⁸ Therefore, the associated symptoms of PTSD affect the way veterans perceive and respond to their social environment.¹²⁹

Symptoms of PTSD affect three specific domains of functioning: cognition, physiological arousal and emotions.¹³⁰ The noted changes in the three domains of functioning directly link PTSD symptoms to criminal behavior. Some of these common changes are flashbacks of the traumatic event, perceived threats, anger and irritability, avoidance, heightened emotions and emotional numbing.¹³¹ One effect of PTSD is the physiological state, termed Allostasis, wherein someone is constantly hyperactive, aroused, and aware.¹³² This hyperactivity causes an immense strain on the nervous system.¹³³

Furthermore, the veteran's reintegration into civilian life creates complications.¹³⁴ Behavior that is socially acceptable in combat areas may actually be criminal behavior in a civil society. Some veterans have difficulty reintegrating into civilian life because they are used to experiencing extreme highs and lows in combat.¹³⁵ Veterans often become detached and numb once back in civil society.¹³⁶ Many veterans feel that there are very few individuals in his or her immediate social network who could fully comprehend what the soldier's life was like during combat.¹³⁷ Due to the lack of community understanding, combined with the aforementioned stigma associated with mental health issues and the systematic obstacles to treatment, many veterans avoid dealing with their PTSD symptoms.

126. Erlinder, *supra* note 7, at 312.

127. Hafemeister, *supra* note 3, at 96-97. Researchers have concluded, in general, that different brain imaging techniques can prove that an individual suffers from PTSD by showing brain reactivity. However, this has yet to be utilized in clinical settings. Researchers propose that one day this technology will be used to aid in the objective diagnosis of PTSD and assist in monitoring treatment responses for PTSD. Nobumasa Kato et al., *PTSD: Brain Mechanisms and Clinical Implications* 207-08, Springer Pub. (2006).

128. *Id.*

129. U.S. Dep't of Veteran Affairs, *Criminal Behavior and PTSD: an Analysis*, National Center for PTSD (June 01, 2010).

130. *Id.*

131. *Id.*

132. Aprilakis, *supra* note 12, at 551.

133. *Id.*

134. Hafemeister, *supra* note 3, at 104-05.

135. *Id.*

136. Aprilakis, *supra* note 12, at 555.

137. Goode, *supra* note 4.

To overcome the mood-altering symptoms noted above, veterans act out in certain ways that lead to involvement with the police.¹³⁸ Researchers have concluded that some seek out exhilaration by engaging in risky behavior to satisfy their need for stimulation.¹³⁹ Some PTSD sufferers are overwhelmed with anger and irritability; thus, when they are in a situation they perceive to be threatening, the sufferer snaps and overreacts.¹⁴⁰ The NVVRS study reported that veterans with PTSD committed significantly more violent acts than veterans without a PTSD diagnosis, 13.3 violent acts in one year compared to 3.53 relatively.¹⁴¹

A veteran is most likely to engage in criminal behavior during a dissociative state,¹⁴² or while abusing a substance.¹⁴³ During a dissociative state, the veteran behaves as if he is in combat and reacts to elements in his environment in survivor-mode.¹⁴⁴ The veteran's behavior is often strange and violent due to the veteran's distorted reality.¹⁴⁵ Moreover, the veteran is not aware of the morality of his behavior, or the consequences of his actions.¹⁴⁶

Substance abuse and a mental disorder diagnosis go hand-in-hand.¹⁴⁷ Researchers found that between 15%–40% of people with mental disorders also have substance abuse problems.¹⁴⁸ This statistic substantially increases in relation to PTSD, 75% of veterans with PTSD also have a substance abuse problem.¹⁴⁹ Veterans often turn to abusing substances in an attempt to self-medicate to deal with both their psychological state and their physical chronic pain.¹⁵⁰ Others become heavily involved with drugs and alcohol to deal with the stress and guilt associated with survival.¹⁵¹ Traumatic stress, the initial cause of PTSD, also causes relapses in individuals who have overcome substance abuse.¹⁵² A noted symptom of PTSD is re-experiencing the initial traumatic stress. Therefore, this creates a cycle of abusing substances as a means to cope with the PTSD symptoms, and a relapse back into using due to re-experiencing the initial traumatic stress.

The number of veterans with a substance abuse problem is significant. As noted earlier, one in six veterans have a substance abuse problem.¹⁵³ This substance abuse problem directly relates to criminal behavior. In recent years,

138. Erlinder, *supra* note 7, at 311.

139. Gover, *supra* note 15, at 567.

140. Erlinder, *supra* note 7.

141. *Id.*

142. Erlinder, *supra* note 7, at 311.

¹⁴³ *Id.*

144. Hafemeister, *supra* note 3, at 116-117.

145. *Id.*

146. *Id.*

147. RAND, *supra* note 2, at 134.

148. *Id.*

149. *Id.*

150. Erlinder, *supra* note 7.

151. Aprilakis, *supra* note 12, at 555.

152. *Statement for the Record*, *supra* note 50.

153. *Id.*

there has been an increase in the number of veterans involved in alcohol and drug related crimes, such as Driving under the Influence, Reckless Driving, and Disorderly Conduct.¹⁵⁴ One study found that between 2005 and 2006, the rate of veterans involved in the above-noted crimes rose from 1.73 per 1000 soldiers, to 5.71 per 1000 soldiers.¹⁵⁵

B. Recognized Link Between Criminality and PTSD

The behavioral link between criminal behavior and the diagnosis of PTSD is well-recognized by researchers and psychologists. A study of Vietnam veterans noted that the anger and violence by Vietnam veterans was “a reaction stress rather than simply another outburst of a notoriously sociopathic population.”¹⁵⁶ Furthermore, a substantial majority of criminal defendants who are veterans have no criminal records prior to their service.¹⁵⁷ The majority of veterans who commit violent crimes or crimes related to drugs and alcohol are first-time offenders; therefore, these individuals are arguably not criminally predisposed.¹⁵⁸

Courts have recognized and incorporated the research that acknowledges a substantial link between criminal behavior and a PTSD diagnosis when assessing the culpability of a veteran criminal defendant.¹⁵⁹ This is most obvious in the language of *Porter v. McCollum*, a recent United States Supreme Court case, which stated that the United States has a “long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines.”¹⁶⁰ In this case, the Court held that the defendant’s extensive combat exposure was relevant “not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took upon [the defendant].”¹⁶¹

In the above case, the Court recognized the link between PTSD and criminal behavior in terms of an element of consideration for mitigating a criminal defendant’s sentence. Likewise, in *State v. Denni*, at the sentencing trial for a 1st degree murder charge, the defendant presented evidence that he suffered from PTSD since returning from Iraq and testified that his actions were a result of the extreme mental disturbance due to PTSD.¹⁶² The jury convicted the defendant for

154. Judge Russell, *supra* note 8, at 363.

155. *Id.*

156. David M. Benedek & Thomas A. Grieger, *Post-Deployment Violence and Antisocial Behavior: The Influence of Pre-Deployment Factors, Warzone Experience, and Posttraumatic Stress Disorder*, 13(3) PRIMARY PSYCHIATRY 51, 52 (2006).

157. Mumola, *supra* note 120, at 7. Table 6 exemplifies that of the state prison population in 1997, 64.1% of veterans had no criminal justice status (i.e. criminal history) at time of current arrest. *Id.*

158. *Id.* (reporting that “nearly a third of veterans were first-time offenders;” and in State prisons “veterans had less extensive criminal histories than other inmates;” “veterans in State prison were less likely than nonveterans to be recidivists”).

159. See Gover, *supra* note 15, at 562-63, 570-81.

160. *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009).

161. *Id.* (emphasis added)

162. Gover, *supra* note 15, at 579-80.

the lesser charge of 2nd degree murder.¹⁶³ In fact, some legislatures have recognized the importance of PTSD as a consideration for mitigation by statutorily allowing judges to consider a defendant's PTSD diagnosis during a sentencing trial and to afford appropriate treatment alternatives when necessary.¹⁶⁴

The judiciary has recognized the importance of PTSD as more than just mitigation in sentencing. Some courts have recognized PTSD as negating the required *mens rea* of the charged crime.¹⁶⁵ *Mens rea* is the measurement used by the courts to determine whether the defendant had the requisite culpable mental state to be guilty of the alleged crime.¹⁶⁶ The criminal justice system has recognized that an individual who suffers from a severe mental illness that renders them legally insane does not have the requisite mental state and therefore is entitled to an insanity defense.¹⁶⁷ The same line of argument arguably applies to individuals diagnosed with PTSD. A PTSD diagnosis could support a mental status defense because, as scientific studies have shown, PTSD has a substantial altering affect on an individual's mind.¹⁶⁸

Lawyers have been litigating the PTSD mental health defense since the late 1970s.¹⁶⁹ To raise the defense, counsel for the defense must prove that "but for the PTSD, the crime would not have occurred."¹⁷⁰ This requires many different offers of proof. Counsel must establish that the defendant actually suffers from PTSD.¹⁷¹ To prove that the veteran defendant has PTSD, counsel will have to pinpoint the traumatic event that instigated the PTSD.¹⁷² Many veterans with PTSD do not report their symptoms or seek medical attention; therefore, a medical record to prove PTSD might be difficult to secure.¹⁷³ Evidence to prove the initial traumatic event might be difficult to find due to a lack of documentation of combat occurrences and security measures.¹⁷⁴ Therefore, it might be impossible for the defense to prove the traumatic event without forcing the defendant to waive his right against self-incrimination and testify regarding his traumatic event. Then, counsel must establish that the defendant was suffering from a PTSD symptom at the time the crime occurred. Lastly, counsel must establish the causal link between the experienced symptom and the criminal act.¹⁷⁵

Furthermore, even if counsel successfully completes the above-required steps, it is ultimately up to the jurors to decide whether they believe the defendant's

163. *Id.* at 579-80.

164. Erlinder, *supra* note 7, at 339 (discussing Cal. Penal Code § 1170.9 (1984)).

165. Hafemeister, *supra* note 3, at 123-25.

166. BLACK'S LAW DICTIONARY 1006 (8th ed. 1999).

167. Gover, *supra* note 15, at 570-75.

168. Hafemeister, *supra* note 3, at 96-97.

169. Gover, *supra* note 15, at 562.

170. Levin, *supra* note 42, at § 17.5, 18.

171. Aprilakis, *supra* note 12, at 560-64.

172. Gover, *supra* note 15, at 568.

173. *Id.*

174. *Id.*

175. Aprilakis, *supra* note 12, at 560.

defense.¹⁷⁶ Although the psychiatric community and courts recognize the link between criminal behavior and a PTSD diagnosis, lay individuals may not be as knowledgeable of the link.¹⁷⁷ Furthermore, non-veteran jurors might not empathize or understand the psychological toll that war takes on an individual.¹⁷⁸ Jurors might not believe in a PTSD diagnosis or be weary of a PTSD defense due to the ability to feign mental illnesses such as PTSD.

In the cases where PTSD has been used as a mental health defense, it has primarily been successful where the defendant's criminal behavior could be attributed to a dissociative state.¹⁷⁹ In dissociative state cases, it is easier to prove the direct link between the PTSD symptom, the defendant's lack of mental capacity, and the criminal behavior. Usually a veteran in a dissociative state is acting in survivor-mode, and therefore his actions seem strange in correlation to the reality of the environment around him.¹⁸⁰ It might be easier for a jury to identify and understand this behavior. However, only the minority of criminal cases involve veterans who are in dissociative states.¹⁸¹

The recognition by the courts of a defendant's reduced culpability because of PTSD is a step in the right direction. Yet, it is not enough. For the aforementioned reasons, PTSD defenses are often difficult to prove and are arguably unlikely to gain acceptance by the jury. Sending a veteran to jail is not going to help the veteran's underlying PTSD mental-health issues that led to his or her criminal behavior because the veteran will not receive the necessary treatment. One author put it best:

Although constitutionally and statutorily legitimate, these convictions should be considered a moral blight on the legal justice system. As the Executive branch sends more and more young men and women to Iraq and Afghanistan, the Legislative and Judicial Branches should respond by providing special rules to govern veteran defendants.¹⁸²

III. VETERAN SPECIALTY COURTS

*"The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."*¹⁸³

Some state legislatures and state judicial branches have responded to the growing number of veterans in the criminal justice system by initiating Veteran

176. Gover, *supra* note 15, at 569.

177. Aprilakis, *supra* note 12, at 560-64.

178. Gover, *supra* note 15, at 569.

179. *Id.* at 573.

180. Hafemeister, *supra* note 3, at 116.

181. *See id.*

182. Aprilakis, *supra* note 12, at 566.

183. Thomas Jefferson to Maryland Republicans. 1809. ME 16:369; *see also* Honorable Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

Specialty Courts. Veteran Specialty Courts are courts that use alternative prosecution and sentencing methods to treat the underlying PTSD diagnosis and substance abuse problems. The Veteran Specialty Court does not use the traditional method of charge-conviction-incarceration as this method exacerbates the veteran's mental health issues. This idea has gained wide acceptance in the legal community, and across the United States different versions are springing up.

A. Use of Alternative Prosecution Methods

The Veteran Specialty Court's use of alternative prosecution methods is modeled upon the drug specialty court programs that began in the late 1980s. The year of 1989 offered hope to many veterans and drug offenders. That year exemplified an understanding by the community that the traditional method of prosecution was not helping the local veterans in San Diego, nor drug-users across the United States, to overcome their drug addictions. San Diego established the first Homeless Court Program in that year.¹⁸⁴ The program was instituted by the Misdemeanor Criminal Court to find alternatives to the traditional prosecution of homeless veterans involved in the criminal justice system who suffered from alcohol and drug addictions.¹⁸⁵

Also in that year, the legislature and judiciary in Florida created the first Drug Treatment Court (DTC).¹⁸⁶ After its creation, many drug specialty courts emerged in other urban centers.¹⁸⁷ Drug courts primarily arose due to the overwhelming increase in drug offender incarcerations during the '80's and early '90's. Social media and the government termed the rising drug use and incarceration in America as a "war on drugs."¹⁸⁸ The increase in cases placed an overwhelming burden on the court systems.¹⁸⁹ The legislature initially created drug specialty courts as an avenue to deal with the overwhelming caseload of drug crimes.

The enactment of drug specialty courts showed recognition, on behalf of the criminal justice system, that the traditional method of prosecuting drug crimes was not working to solve the drug-use problem in America. The enactment of drug courts also showed recognition that the prevalence of drugs in society created a public safety concern that needed a response. Recidivism for drug crimes was high,¹⁹⁰ and incarcerating individuals for drug crimes did nothing to curtail the use of drugs, or treat the underlying addiction to drugs.¹⁹¹ The drug specialty courts

184. Katrina J. Eagle & Steve R. Binder, *Veterans Facing Criminal Charges: How a Community of Professionals can Serve Those who Served our Country*, 16 NEV. LAW. 16, 18(2008).

185. *Id.*

186. Honorable Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 545-57 (1999).

187. Judge Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST J. CRIM. L. 563, 568 (2010).

188. Honorable Hora et al., *supra* note 186, at 456.

189. *Id.* at 456.

190. *Id.* at 456.

191. *Id.* at 456.

allowed non-violent drug offenders to choose to participate in an intensive supervision and treatment program, *in lieu* of the traditional prosecution method. The intensive supervision and treatment programs addressed the underlying drug addiction, and helped the individual confront and overcome the addiction through evidence-based treatment.¹⁹² Drug specialty courts produced positive outcomes by reducing costs associated with incarceration, decreasing the overwhelming caseload in misdemeanor courts, and most importantly decreasing the rates of recidivism.¹⁹³

When the drug courts were created, the system of treatment-over-incarceration was primarily viewed as a way to create greater efficiency in the processing of court cases.¹⁹⁴ However, the drug court system has become associated with a contemporary criminal justice ideology called therapeutic jurisprudence. Therapeutic jurisprudence is "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."¹⁹⁵ This jurisprudence analyzes through empirical research the direct relationship between the law, the legislature's goal in enacting the law, and the social effects created by the law.¹⁹⁶ This jurisprudence concept was first utilized in 1987 in mental health law.¹⁹⁷ Since then, the criminal justice system used therapeutic jurisprudence, primarily in regards to drug convictions, to justify the movement away from the traditional methods of prosecution, charge-convict-incarcerate, to a model of treatment-rehabilitate.¹⁹⁸ This movement was based upon the recognition that the legislature's goal of reducing recidivism among drug offenders was not being fulfilled, and in fact the court was seeing a rise in repeat drug offenders. The treatment-rehabilitate model worked to reduce recidivism by treating the underlying drug-addiction. The use of therapeutic jurisprudence to address the underlying issues of the criminal behavior necessarily emphasizes the responsibility of the individual to take an aggressive and self-motivated approach to treatment.

B. Foundation of Veteran Specialty Courts

Veteran Specialty Courts utilize the therapeutic jurisprudence ideology in creating the treatment-rehabilitate model. State legislatures have based the veteran courts' foundation on the established infrastructure of the drug courts.¹⁹⁹ These new courts can be considered a merger of both drug court and mental health court in that it provides treatment for both the underlying PTSD and the associated substance abuse concerns.²⁰⁰ Treatment of the mental and psychological well-

192. *Id.* at 463-68.

193. *Id.* at 502-04.

194. *Id.* at 449.

195. *Id.* at 443.

196. *Id.* at 444-48.

197. *Id.* at 443.

198. *Id.* at 449.

199. *See* SERV Act, S. 3379, 110th Cong. § 2 (2008).

200. Judge Russell, *supra* note 8, at 364-65.

being of the veteran-defendant is the number one concern.²⁰¹ In 2004, two judges in Anchorage Alaska established the first known Veteran Court in the United States.²⁰² The judges established the court in response to the concerning numbers of veterans who appeared before them.²⁰³ In 2008, Judge Robert Russell established the second Veteran Court, now the model program, in Buffalo, New York.²⁰⁴ The New York court system pioneered the treatment model for Veteran Specialty Courts. Since then, many state legislatures have created Veteran Specialty Courts incorporating the New York treatment model.²⁰⁵

Although Veteran Specialty Courts have gained support from state legislation, these courts have not been as fortunate on the federal level. During the 110th Congressional session, Senator John Kerry and Senator Lisa Murkowski introduced the SERV Act (Services Education & Rehabilitation for Veterans Act).²⁰⁶ The act sought to create federal funding for research and support of veteran courts through the National Drug Court Institute (NDCI).²⁰⁷ The bill signified federal recognition of a need to support the veterans who, due to their PTSD and substance abuse issues, end up facing criminal charges.²⁰⁸ However, on September 26, 2008, the SERV Act was referred to the House Committee on the Judiciary where it has effectively been stalled.²⁰⁹

The U.S. Department of Veterans Affairs supports the Veteran Court movement. It initiated the Veteran Justice Outreach Initiative, a program to help “avoid the unnecessary criminalization of mental illness and [the] extended incarceration among veterans.”²¹⁰ This outreach initiative seeks to help connect the VA medical services to state court programs that assist in the treatment of justice-involved veterans. Therefore, veterans regardless of their financial status can participate in the treatment program. This is important because if the veteran was sentenced to a term of probation or required to receive psychological treatment by court order, the veteran would typically have to find the means to afford those

201. Judge Hawkins, *supra* note 187, at 570.

202. *Id.* at 565.

203. *Id.* at 570.

204. Judge Russell, *supra* note 8, at 364.

205. *Id.* at 566 (noting that Tulsa, Oklahoma; Orange County, California, Connecticut, Illinois, Nevada have begun Veteran Courts).

206. SERV Act, S. 3379, 110th Cong. § 2 (2008).

207. *Id.*

208. *Kerry, Murkowski Bill will Create Veteran Treatment Courts*, JOHN KERRY.COM, July 31, 2008, [available at](http://www.johnkerry.com/news/entry/kerry_murkowski_bill_will_create_veteran_treatment_courts/) http://www.johnkerry.com/news/entry/kerry_murkowski_bill_will_create_veteran_treatment_courts/ (last visited on Nov. 14, 2010).

209. GovTrack.us, H.R. 7149: SERV Act, 110th Congress (2007-2008), [available at](http://www.govtrack.us/congress/bill.xpd?bill=h110-7149) <http://www.govtrack.us/congress/bill.xpd?bill=h110-7149>. Once a bill is assigned to a committee, the committee can either (1) consider the bill and report favorably or unfavorably or (2) not consider the bill, which effectively stalls the bill in the House. The bill will not move to the Senate if it stalls in the House.

210. *Veteran Justice Outreach Initiative*, U.S. DEP'T OF VETERANS AFF., June 23, 2010, <http://www1.va.gov/HOMELESS/VJO/asp>.

services. The VA's contribution of their medical services is essential to a successful Veteran Court because many veterans face the risk of homelessness upon returning home from war. In 2008, the government stated that there were over 200,000 homeless veterans in the United States, of which the majority were Vietnam veterans.²¹¹ Of those 200,000 homeless veterans, approximately 2,000 individuals served in Iraq or Afghanistan.²¹² The veterans' lack of financial means to afford treatment should not create an obstacle to receiving the necessary care.

C. How the Veteran Specialty Court Works

Admission into the veteran court program is based upon veteran status, service combat, and the filing of non-violent misdemeanor charges.²¹³ However, admission is not automatically based upon 'veteran status.' The prosecutor screens each candidate and has discretion regarding which veterans to place into the court program.²¹⁴ At the outset, the veteran-defendant must show a willingness to undergo treatment for his PTSD. Furthermore, the veteran-defendant must enter into a plea bargain with the prosecutor, admitting guilt to the charged offense. This plea is based upon the willingness of the veteran-defendant to enter into treatment for the underlying PTSD, and thus the prosecutor is willing to forgo requesting a jail sentence. The progress of the veteran defendant is a shared responsibility among many members of the criminal justice system, including the judge, the prosecutor, defense counsel, a probation officer, an individual from the local VA medical facility and a coordinator of the grant organization. This team works together to establish the best course of treatment for the veteran-defendant, and supports him or her in successfully completing the treatment program by overcoming PTSD and often the associated substance abuse.²¹⁵ Under this model, the veteran-defendant is surrounded by a support network of individuals who understand his or her military background, mental health background, and the current daily stressors. A critical element of the veteran court is the mentoring program.²¹⁶ Other veterans in the community volunteer to be the veteran-defendant's mentor. The mentor helps the defendant throughout the treatment process. Although the emphasis of this treatment model is on personal accountability, throughout the entire process the veteran-defendant is not alone.²¹⁷

Due to various state programs only recently initiating veteran court programs, there are currently no national statistics to comment on the success of veteran courts. However, the statistics of the New York Veteran Court are telling. In December of 2008, the Buffalo veteran court had 130 participants. Of those 130

211. Mike Mount, *Homeless Veterans Face New Battle for Survival*, CNN.COM, July 02, 2008, available at http://articles.cnn.com/2008-07-02/us/homeless.veterans_1_homeless-veterans-vietnam-veterans-veterans-affairs?_s=PM:US.

212. *Id.*

213. See Judge Russell, *supra* note 8 at 367-68.

214. *Id.* at 367-68.

215. *Id.* at 365.

216. Judge Hawkins, *supra* note 187, at 569; Judge Russell, *supra* note 10, at 369-70.

217. Judge Russell, *supra* note 8, at 369.

participants, in 2009 the Buffalo court reported that there were fourteen graduates and no recidivists.²¹⁸

D. Arguments Supporting Veteran Courts

The prevalence of state veteran courts signifies the general acceptance of allowing veterans to be subject to different prosecutorial methods than non-veterans. There are four prevalent reasons why many states governments support the veteran court movement: a societal sense of duty to provide support in return for their service; a need to reconcile for the government's insufficient reaction to the return of Vietnam veterans; as a means to provide public safety; and a cost-benefit analysis.

The most common reason for supporting veteran courts is recognition that it is society's duty to care for returning veterans because they fought to maintain our liberties.²¹⁹ The government, through military training and deploying troops into combat, forever morphs civilians into soldiers. On the other end, when the war is completed the government's attempts, albeit unsuccessfully, to aid in the veterans' reintegration into society. The government then punishes the veteran when he or she does not behave as expected in a civil society. Veterans voluntarily choose to sacrifice their lives to fight for the freedom of all Americans, and therefore they should be entitled to differential treatment upon return for their actions that stem from their experiences of war.

Incorporated into this entitlement-responsibility argument is the argument that our Nation failed to provide support for past veterans, and therefore it is now time to start doing the appropriate, just action by providing the appropriate treatment.²²⁰ Research results exemplify that societal support of veterans upon homecoming is an influential element affecting the success of PTSD treatment.²²¹ For example, the NVVRS study found that "social support plays a critical role in reducing PTSD symptoms and increasing one's level of functioning."²²²

Thirdly, many believe that veteran courts work to enhance public safety. If we do not provide treatment for individuals suffering from PTSD and substance abuse, then there will be high levels of veteran recidivists. On the other hand, if we provide treatment and rehabilitate these individuals, then there would be more productive members of society.²²³ A similar argument was put forth to support the drug court movement. It is based upon recognition that the traditional prosecution model is not an effective way to create productive members of society because it does nothing to treat the underlying problems causing involvement in the criminal

218. Judge Hawkins, *supra* note 187, at 566.

219. *Id.* at 569.

220. *See id.* at 569.

221. Koenen et al., *supra* note 35, at 980, 984-85.

222. Price, *supra* note 49; *see also* Koenen et al., *supra* note 35, at 984 (stating that "[t]hose that were involved in community in 1984 were also more likely to show remission in PTSD than were those with less community involvement").

223. *One in Five*, *supra* note 24.

justice system, thereby resulting in recidivism.

Lastly, veteran courts find support based upon a cost-benefit analysis argument. In short, it is cheaper for society to treat and rehabilitate veteran-defendants than to continuously pay for their repeated incarceration in the criminal justice system or to pay for the costs associated with supporting an unproductive member of society.²²⁴ Society, through taxes, bears the cost of caring for veterans of war through treatment of physical and psychological wounds and by providing social services to the veterans whom do not seek care and suffer from prolonged PTSD symptoms, such as homelessness, suicides, drug abuse, or incarceration.²²⁵ The RAND study concluded that it is *more* expensive for society to deal with an unproductive member of society than provide adequate treatment services to veterans in need.²²⁶ The RAND study estimated that in the current state of available mental health care,²²⁷ within two years following deployment, PTSD and depression among veterans would cost the United States approximately 6.2 billion dollars.²²⁸ This dollar amount includes both direct medical costs and indirect costs, such as the cost for the loss of productivity among veterans in society and the costs of suicide.²²⁹ Veteran courts provide an alternative means of treatment for veterans, beyond the VA, that do not necessarily require more taxpayer funds for support. The VA Justice Outreach Initiative aids in the state court veteran programs by providing the required resources for treatment. Therefore, the establishment and proliferation of the veteran courts is not creating an additional cost for society to bear. In fact, by offering treatment to get to the source of the criminal behavior recidivism will decline and eventually result in fewer veterans interacting with the criminal justice system.

Since veteran courts are nascent, statistics regarding the amount of money saved by incarcerating fewer veterans is unavailable. However, statistics of drug court savings are telling: a study of the New York drug courts found that by allowing 18,000 individuals into the drug court program, instead of incarceration, the state saved approximately \$254 million dollars in incarceration costs.²³⁰ The treatment provided by the veteran courts and the reduction in incarcerating veterans will save both the state and federal government money. Due to different political views regarding the propriety of war and the use of military forces, many can disagree with the responsibility/entitlement arguments. However, regardless of differing ideological views, the public safety and cost-benefit arguments benefit society as a whole.

E. Opposition to Veterans Courts

224. *One in Five*, *supra* note 24; RAND *supra* note 2, at 170-71, 438-40.

225. RAND *supra* note 2, at 170-71, 438-40.

226. *Id.*

227. *Id.*

228. *Id.* at 171.

229. *Id.* at 170-71.

230. Judge Russell, *supra* note 8, at 371.

The establishment of veteran courts has not gone without opposition. Some disagree with allowing the criminal justice system to treat veterans differently than other criminal defendants.²³¹ Inherent in this opposition is the belief that the government, through creation of specialty courts, is beginning to create a class-based criminal justice system. Civil liberties groups, such as the ACLU, object to the creation of veteran courts because admission into the program requires a veteran status.²³² The groups view the veteran court as creating advantages for veterans that non-veterans cannot utilize. Therefore, it creates a disadvantage to those who are not veterans but still suffer from PTSD, and who would benefit from treatment over incarceration. About eight percent of the American population suffers from PTSD with lifetime prevalence.²³³ The government is arguably creating a first-class and second-class criminal-justice system, based upon determining who is more deserving of treatment: non-veterans who suffer from PTSD or veterans who suffer from PTSD. However, the counterargument is that individuals who are not veterans, but who suffer from mental illnesses or PTSD, along with substance abuse, can take advantage of the drug-court programs that almost all judicial jurisdictions within states now maintain.

Others believe that veteran courts are unnecessary due to the already present leniency towards veterans in the court process. For example, judges have the discretion to take into account the veterans' military disabilities, including PTSD, during sentencing.²³⁴ However, the scope of the courts' relief, when considering a veteran-defendant's PTSD, is not far-reaching. As discussed in Part 2, mental health defenses based upon PTSD are typically unsuccessful. Furthermore, PTSD as a consideration of mitigation usually only minimizes the sentence and the veteran-defendant still faces incarceration. If incarcerated, these veteran-defendants will not receive the necessary psychological treatment.

Lastly, some argue that the legislative creation of special prosecution alternatives that follow the therapeutic jurisprudence ideology, such as drug courts or veteran courts, is solely a way for the government to displace its responsibility upon the criminal defendants.²³⁵ For example, drug courts emerged due to the increase of drug use in urban areas of America. The high rate of drug use in urban areas is due to a lack of general social services in these communities to aid the poor in attaining a higher economic status.²³⁶ Instead of accounting for the government's failure to increase the availability of resources (i.e. access to education, available healthcare, housing, or employment opportunities), the drug court model made the defendant take responsibility for his or her life choices and

231. Judge Hawkins, *supra* note 187, at 570; see *Returning Veterans*, *supra* note 35, at 14.

232. Judge Hawkins, *supra* note 187, at 570; Dahlia Lithwick, *A Separate Peace: Why Veterans Deserve Special Courts*, NEWSWEEK, Feb. 11, 2010, <http://www.newsweek.com/2010/02/10/a-separate-peace.html>.

233. Gover, *supra* note 15, at 565.

234. Judge Hawkins, *supra* note 1787, at 571.

235. Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 Stan. L. & Pol'y Rev. 417, 437.

236. *Id.* at 432-35.

made it the defendant's goal to overcome his or her environment on their own.²³⁷ This is called the 'responsibilization' strategy, where the government places the responsibility on the individual to change their individual conduct, rather than addressing the lack of general rights and availability of governmental social services that affect the lifestyle of the individual.²³⁸

The same argument is applicable to veteran courts. Like the drug courts, state judiciaries and legislators initiated veteran courts by recognizing the increase of veterans in our criminal justice system. However, the increase of the number of veteran defendants directly relates to their lack of treatment.²³⁹ As noted above, the stigmatic mental health and the systematic barriers surrounding the access to mental health care creates obstacles to receiving treatment. The Department of Defense has recognized that the available treatment it is providing American veterans is "insufficient."²⁴⁰ The creation of veteran courts could be a political decision on behalf of the government to displace its responsibility for failing to provide adequate treatment for veterans' mental health issues caused by their service onto the individual defendant-veteran.

While this argument is persuasive, it does not take into account the pressing need to treat PTSD or the potential length of time it would take the government to implement positive and noticeable changes in the availability and sufficiency of the social services provided to veterans. The establishment of the veteran court, although arguably allowing the government to pass-the-buck might be the best option available.*F. International Guidance: Are Veteran Specialty Courts the Right Solution?*

Thus far, this paper has primarily focused on the effects of PTSD on American soldiers. Despite this emphasis, American soldiers are not alone in their battle to overcome the psychological wounds endured from war. As mentioned previously, the psychological wounds of war are an inherent part of the very act of war. Therefore, soldiers from any conflict, which includes combat, will likely battle with a variety of psychological wounds.

In the current state of international affairs, many countries are joining forces to fight the same causes, whether it be the global war against terrorism or global efforts to provide humanitarian aid to countries in need. The numerous countries whose soldiers fight in combat, and as a result have PTSD, may benefit from addressing the issue as an international community. The United States, in the implementation and progression of Veteran Specialty Courts, could lead the international community in providing appropriate treatment and care for its soldiers.

How do other countries respond to the needs of returning veterans? Speaking

237. *Id.* at 423.

238. *Id.* at 425.

239. *See One in Five*, *supra* note 24.

240. Judge Russell, *supra* note 8, at 360.

in generalized terms, there is not a plethora of literature relating to the prevalence and treatment of PTSD among non-U.S. armed forces. However, from the academic or news articles available, there are noticeable trends in the way that non-U.S. military forces view the veterans' difficulties with PTSD.

Before discussing the trends, it is important to note that the amount of armed forces the U.S. military utilizes in armed conflicts is, in general, exponentially greater than most non-U.S. military forces. For example, since 2001 the United States sent approximately 1.6 million soldiers to serve in the OEF and OIF wars.²⁴¹ Germany reports that it has sent approximately 3,400 German army troops to Afghanistan.²⁴² This discrepancy in size and utilization does affect the prevalence of PTSD and therefore the amount of concern a country places upon this problem.

The first notable trend is that many non-U.S. militaries, such as Germany, France, and Britain, turn to the United States for guidance on the method of addressing and treating PTSD among their troops.²⁴³ The United States began researching the psychological effects of war after the Vietnam War, and the APA made it an official diagnosis in 1979.²⁴⁴ The United States is arguably ahead of other countries in academic research, statistics, and treatment methods of PTSD.

France, for example, has not conducted any research that has produced statistics regarding the prevalence of PTSD among its armed forces.²⁴⁵ Rather, it looks to the United States statistics when deciding to implement mental health programs.²⁴⁶ However, France's procedure for dealing with veterans returning from combat is somewhat different from that used in the United States. France passed a new rule in June of 2010 that requires all returning soldiers to spend three days with Cispata, the French Army's psychological intervention unit, prior to returning to their civilian lifestyles.²⁴⁷ The justification for the three-day time-span is to provide the armed forces with a buffer period between combat and returning home to assist in addressing possible mental health issues.

Unlike France, Germany has conducted studies of its soldier population and determined that the number of German soldiers with PTSD has tripled in the last two years.²⁴⁸ Due to this concerning rise, Germany is in the initial process of

241. RAND, *supra* note 2, at 3.

242. Marcus Klockner, *Germany Army PTSD Cases on Rise*, STARS AND STRIPES, March 2009, available at <http://www.stripes.com/news/german-army-ptsd-cases-on-rise-1.89317>.

243. See e.g., *id.*; Perrine Mouterde, *Soldiers Confront the Psychological Cost of War*, FRANCE24.COM, Nov. 2010, available at <http://www.france24.com/en/20101125-french-soldiers-confront-psychological-issues-battlefield-afghanistan-trauma-military>; Aaron Levin, *Combat Reactions Oceans Apart for British, U.S. Soldiers*, 45 PSYCHIATRIC NEWS No. 24, Dec. 2010, available at <http://pn.psychiatryonline.org/content/45/24/6.1.full>.

244. RAND, *supra* note 2, at 5.

245. Perrine Mouterde, *Soldiers Confront the Psychological Cost of War*, FRANCE24.COM, Nov. 2010, available at <http://www.france24.com/en/20101125-french-soldiers-confront-psychological-issues-battlefield-afghanistan-trauma-military>.

246. *Id.*

247. *Id.*

248. Klockner, *supra* note 242.

researching the causes and effects of PTSD among its soldiers. Germany turned to the United States for guidance on the methods of treatment and the administration of financial aid to support the health care of its suffering soldiers.²⁴⁹ A member of the German parliament expressed how impressed he was with the treatment and the amount of financial aid the United States provides for its returning soldiers.²⁵⁰ While research regarding the proper treatment of PTSD is underway, the German military utilizes a "Warrior Adventure Quest" program that assists soldiers' transition back into civilian life after serving in war.²⁵¹ This program allows soldiers to participate in adventure activities such as rock climbing, whitewater rafting and mountain biking. These activities build mental resilience in soldiers by introducing them to a stressful event and assisting the soldiers in overcoming the stress through utilization of different coping strategies.²⁵² The soldiers usually attend the program with other soldiers whom they have served and the soldiers participate in the program one time a month, for a few months. Beyond assisting soldiers in coping with the stresses of war, Germany recently introduced a law that guarantees post-service employment for soldiers who are severely wounded in war.²⁵³ It is unclear at this stage of the development of the law whether 'severely wounded' also includes mental inflictions.

Britain has also conducted a study that compared the psychological combat reactions of British soldiers and American soldiers.²⁵⁴ British researchers utilized the comparison to research the contributing factors of PTSD because the two armed forces have many similarities.²⁵⁵ For example, both armed forces are western armies whom fight against the same enemy, in the same environment. The two armed forces also report the same mortality casualties.²⁵⁶ Despite these similarities, the rate of PTSD among British soldiers is strikingly lower than that of United States soldiers. Approximately 2% to 3% of British soldiers suffer from PTSD while approximately 12% to 15% percent of American soldiers suffer from the mental illness.²⁵⁷

The research concluded that the differences in the prevalence of PTSD between the two countries are attributable to the cultural traditions of the two

249. *Id.*

250. *Id.*

251. Seth Robinson, *Army uses Adventure Activities to Fight PTSD*, STARS & STRIPES, Jan. 2009, available at <http://www.militaryconnection.com/articles%5Chealth%5CCarmy-adventure-fight-ptsd.html>.

252. *Id.*

253. EUROMIL Workshop: Challenges of European Soldiers in the Field: The Human Factor in Modern Military Missions, Paris, Oct. 25, 2007, available at <http://www.acmpcpgm.be/Documenten/Euromil/EUROMIL%20WORKSHOP.pdf>.

254. Aaron Levin, *Combat Reactions Oceans Apart for British, U.S. Soldiers*, 45 PSYCHIATRIC NEWS No. 24, Dec. 2010, available at <http://pn.psychiatryonline.org/content/45/24/6.1.full>.

255. *Id.*

256. *Id.*

257. *Id.*

countries and the different types of stressors.²⁵⁸ For example, the United States military uses more reservist soldiers than Britain.²⁵⁹ The United States deploys its soldiers for a longer period of time than Britain.²⁶⁰ Lastly, the United States soldiers do not have as much dwell time (time in between deployment, home stay, and return to combat) as British soldiers. In Britain, once returning from deployment, the soldiers stay at home twice as long as their deployment period.²⁶¹ In America, the majority of soldiers are home for approximately one year or less before returning to the war.²⁶²

Despite the reduced percentage of British soldiers suffering from PTSD, the research concluded that substance abuse problems were fewer among United States soldiers than among British soldiers.²⁶³ Approximately fifteen to twenty percent of British active soldiers suffer from alcohol abuse problems.²⁶⁴ The research attributed this high percentage of alcohol abuse to the lack of a cultural stigma against alcohol.²⁶⁵ The study also recognized that both cultures have a stigma surrounding the use of mental health to treat psychological problems.²⁶⁶ Both soldiers are reluctant to seek and utilize mental healthcare.²⁶⁷

An interesting side-note of the research is that the British researchers found an increase in the rates of psychological problems among British soldiers when their service in Iraq was spontaneously extended without warning.²⁶⁸ It was determined that surprise and unsatisfied expectations contributed to the rise in the PTSD rate.²⁶⁹

The second noticeable trend is that European countries are joining forces in a multi-national effort to address the problem of PTSD among its soldiers. Thirty-six military associations have unified to create EUROMIL (the European Organisation of Military Associations).²⁷⁰ The mission of EUROMIL is for European countries to work together to promote the social and professional interests of approximately 500,000 soldiers from twenty-four different countries, which includes the promotion of mental health.²⁷¹ EUROMIL recognizes PTSD as an occupational sickness and therefore is working together to guarantee long-term medical treatment of the participating countries' soldiers.²⁷² Similar to the United States,

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. See e.g., RAND *supra* note 3, at 23-24.

263. Levin, *supra* note 257.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. Levin, *supra* note 42.

269. *Id.*

270. EUROMIL, *supra* note 253.

271. *Id.*

272. *Id.*

EUROMIL believes that a soldier's physical health and psychological health are pre-requisites for military effectiveness.²⁷³

Lastly, the United States is not alone in its concern of the number of veterans in its criminal justice system. Britain has reported that an alarming large number of its veteran population is in the British criminal justice system.²⁷⁴ In its 2009 report titled *Armed Forces and the Criminal Justice System*, the National Association of Probation Officers (NAPO)²⁷⁵ reported that at any one time, there are approximately 8,500 British veterans in custody following a criminal conviction.²⁷⁶ Furthermore, the report noted that there are approximately 12,000 British veterans under supervision of probation officers, which includes community sentences and individuals on parole.²⁷⁷ The majority of the incarcerated British veterans were convicted of violent offenses with a "direct link to drug or alcohol misuse."²⁷⁸ While NAPO did not provide any statistical evidence regarding how many of the 8,500 suffered from PTSD, it did note that "most of the soldiers who had served in either Gulf War or Afghanistan were suffering from PTSD."²⁷⁹

NAPO criticized the lack any systematic psychological support and treatment methods available to the returning British veterans.²⁸⁰ NAPO argued for an increase of psychological support through the availability of support services both at the time of discharge and at the initial encounter with the criminal justice system.²⁸¹ If these support services were available, and the underlying PTSD and/or substance abuse was addressed early on, NAPO noted that custody of veterans would not be necessary.²⁸² NAPO argued that an increase in support services to British veterans would be in the best interest of the public and would reduce taxpayer money both in the short and long term.²⁸³ The unspoken British "military covenant," the military's guarantee that the soldiers will receive fair treatment in return for putting their lives on the line, also supports the increase of psychological services for the veterans.²⁸⁴

273. *Id.*

274. Harry Fletcher, *Armed Forces and the Criminal Justice System: A Briefing from NAPO, the Trade Union and Professional Association for Family Court and Probation Staff September 2009*, NAPO, Sept. 2009, available at <http://www.napo.org.uk/about/veteransincjs.cfm>. NAPO is a non-governmental trade union, professional association and campaigning group. The group works to provide policy briefs in support or opposition to various parliamentary acts.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. Ben Leach, *Thousands of War Veterans Locked in British Prisons*, THE TELEGRAPH, Aug. 30, 2008, available at <http://www.telegraph.co.uk/news/newsttopics/onthefrontline/2651148/Thousands-of-war-veterans-locked-in-British-prisons.html>.

In response to the NAPO criticism of the available health care, a Ministry of Defense spokesman noted “[r]obust systems are in place to treat and prevent PTSD and other stress disorders. Counseling is available to service personnel at all times and all troops receive pre- and post-deployment briefings to help recognise the signs of stress disorders.”²⁸⁵

However, not all members of the parliamentary share the Ministry of Defense spokesman’s view. In response to the NAPO report, the following year the Veterans Parliamentary Group produced the *Coordinated National Action Plan* (Plan) to implement a national strategy to deal address the large number of British forces that are incarcerated or are in probation’s control.²⁸⁶ The goal is to reduce the large number of British veterans in the criminal justice system and to reduce recidivism through providing adequate treatment.²⁸⁷ The aims of this national movement were to provide adequate psychological services at two stages: (1) during and after military service, and (2) at the initial contact with the criminal justice system and while incarcerated or on probation.²⁸⁸ The Plan listed specific strategies for the criminal justice system to implement. For example, at the veteran’s initial encounter with the criminal justice system, the officials should ask if he or she has a service record.²⁸⁹ If so, the veteran’s service record should be a part of the court record and given to all participants in his or her case.²⁹⁰ Once identified as a veteran, the veteran should be referred to relevant treatment and counseling agencies.²⁹¹ If as a result of the veteran’s charged crime, he is sentenced to incarceration, while in incarceration the veteran should be provided with knowledge of where to seek counseling and treatment services while incarcerated.²⁹² Furthermore, while incarcerated the veteran should be given the opportunity to attend monthly group meetings discussing substance abuse.²⁹³ To effectively implement the above changes to the criminal justice system, the Plan proposed funding for a “National Veteran Support Officer” for each prison and probation office in order for the veteran to have a services liaison.²⁹⁴

It is clear from researching the different responses to PTSD that the United States is ahead of the rest of the world in its response to PTSD among its soldiers. This is arguably attributed to the higher frequency of involvement of the United States in armed conflict compared to other countries. Despite the media and societal critique of the United States adequacy of treatment for its wounded troops,

285. *Id.*

286. NAPO et al., *Veterans in the CJS: Coordinated National Action Plan*, Justice Unions Parliamentary Group, June 2010, available at <http://www.telegraph.co.uk/news/newsttopics/onthe frontline/2651148/Thousands-of-war-veterans-locked-in-British-prisons.html>.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

the United States, through the VA and now through the judiciary, arguably offers the best overall treatment of PTSD among the international community.

CONCLUSION

This article is a call to recognize and address the invisible. All too often PTSD is overlooked and ignored because it is an invisible wound on the mind. Neglecting PTSD drives our veterans to the margins of society, where they become invisible to the community as they are incarcerated or beset by extreme poverty. Thus, the only visible manifestations of PTSD are reports containing statistics about the number of veterans succumbing to suicide, homelessness, and crime. It is only by recognizing the invisible wounds of the mind that we can begin to adequately recognize and thank our veterans.

PTSD, as a stressor of war, is as old as war itself. It is not a new phenomenon, yet surprisingly the United States, and other countries around the world, have yet to find a workable solution to address the health care needs of veteran's inflicted with PTSD. This lackadaisical approach to providing treatment for veterans returning from war with a mental infliction is no longer acceptable. The lack of available and adequate treatment for veterans suffering from PTSD undoubtedly contributes to the severity of the PTSD and the resulting criminal liability. As mentioned previously, the symptoms of PTSD grow more severe the longer one suffers without treatment. Courts and researchers recognize a valid link between the suffering from PTSD and their related criminal behavior. These veterans are not predisposed career-criminals, and typically do not have a criminal record prior to service.

The United States government has attempted to provide services to the returning soldiers, however, for the reasons stated in this article, those services have fallen short. Furthermore, only recently has the government and society recognized the rising numbers of veterans in the criminal justice system. Treating the veteran's underlying PTSD upon return from combat is an imperative prerequisite to preventing substance abuse and criminal behavior.

While the current system requires comprehensive changes, the United States simply cannot begin to re-build and re-administer the VA. This would not address the current treatment needs of the veterans from the OEF, OIF and Vietnam wars. To go down this route, would be to leave another generation of veterans in the shadows. However, the creation of Veteran Specialty Courts across the country is an immediate response to what has been described as a social crisis. Potentially, with the increase of drone warfare and the ongoing researching of TBI and its affects upon the mind, the gravity of this social crisis could exponentially increase.

The Veteran Specialty Courts are workable and cost-effective solutions to the current problem. Modeled after the drug-court system, the Veteran Specialty Courts will address the underlying PTSD of the veteran-defendant. Theoretically, these courts will stop the domino effect of a veteran suffering from PTSD, abusing substances, and acting out in criminally liable ways which has produced the current state of affairs. Veteran Specialty Courts will save the financial toll of society in incarceration costs. But most importantly, Veteran Specialty Courts will

save the quality of a veteran's life, the same veteran who fought to save American lives and liberties.



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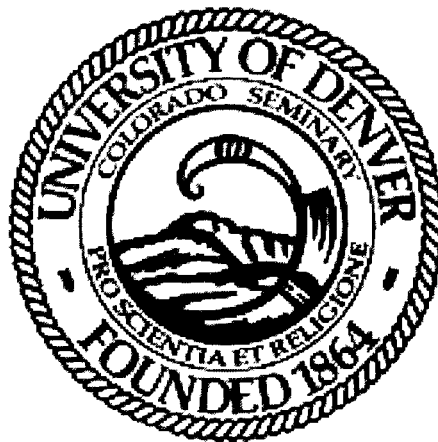
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