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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 . . . 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-guora-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.

