

2010

Self-Defense Targetings of Non-State Actors And Permissibility of U.S. Use of Drones in Pakistan

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Paust, Jordan J. (2010) "Self-Defense Targetings of Non-State Actors And Permissibility of U.S. Use of Drones in Pakistan," *Florida State University Journal of Transnational Law & Policy*. Vol. 19: Iss. 2, Article 1.

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**SELF-DEFENSE TARGETINGS OF NON-STATE ACTORS
AND PERMISSIBILITY OF U.S.
USE OF DRONES IN PAKISTAN**

JORDAN J. PAUST*

TABLE OF CONTENTS

INTRODUCTION	237
I. SELF-DEFENSE IS PERMISSIBLE AGAINST ARMED ATTACKS BY NON-STATE ACTORS	238
II. NEITHER CONSENT FROM NOR ATTRIBUTION TO THE FOREIGN STATE IS REQUIRED.....	249
III. RESPONSIVE MEASURES OF SELF-DEFENSE DO NOT NECESSARILY CREATE A STATE OF WAR.....	258
IV. TYPES OF PERMISSIBLE TARGETINGS AND CAPTURES	261
A. <i>Targeted Killings and Captures During Self-Defense</i>	261
B. <i>The Relative Human Right to Life</i>	263
C. <i>Principles of Reasonable Necessity and Proportionality</i>	270
V. THE QUESTION OF USE OF DRONES AND INDISCRIMINATE TARGETINGS	274
CONCLUSION	279

INTRODUCTION

The United States has used unmanned aerial vehicles (UAVs) or drones over portions of Pakistani territory for reconnaissance and the targeting of members of al Qaeda and the Taliban who have in various ways taken a direct and active part in extensive and ongoing armed attacks against U.S. military personnel and other U.S. nationals in Afghanistan.¹ Some have argued that the

* Mike & Teresa Baker Law Center Professor, University of Houston. This article formed the basis for the Richard B. Lillich Memorial Lecture on International Law in March, 2010. I am indebted to those who participated in an on-line chat concerning some of the topics addressed in this article. For the earlier discussion, see <http://www.ejiltalk.org/the-united-states-use-of-drones-in-pakistan> and <http://www.ejiltalk.org/are-us-attacks-in-pakistan-an-armed-attack-on-pakistan-a-response>.

1. On general use of drones and other unmanned systems and the requirement of selective and proportionate targeting during war, see generally Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 414, 422 n.61, 431, 441, 444-45 (2009). For a glimpse of the history of development of the U.S. targeted killing program and use of drones by the C.I.A., see, for example, NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 41-42 (2008); A. John Radsan, *An Overt Turn On Covert Action*, 53 ST. LOUIS U. L.J. 485, 488-89, 539-42 (2009); Mohammed Khan & Douglas Jehl, *The Reach of War: Anti-Terrorism: Attack Kills a Top Leader of Al Qaeda, Pakistan Says*, N.Y. TIMES, Dec. 4, 2005, at 24; Josh Meyer, *CIA Expands Use of Drones in Terror War*, L.A. TIMES, Jan. 29, 2006, at A1; James

U.S. use of drones in Pakistan appears to have violated international law.² Is the use of drones within Pakistan merely to target non-state actors under such circumstances violative of international law? Must the United States obtain the express consent of Pakistan before targeting non-state actors who engage in ongoing armed attacks against United States military personnel? Does such a use of armed force against non-state actors necessarily require a conclusion that the United States is at war with either the state from which non-state actor armed attacks are emanating or the non-state actor? Does the selective use of force in self-defense violate the human right to life of human targets who take an active part in the armed attacks? Does use of drones necessarily constitute indiscriminate targeting in violation of the general principle of proportionality?

Before addressing these questions, one should consider relevant international legal norms concerning the permissibility of selective self-defense in response to armed attacks by non-state actors emanating from another state.

I. SELF-DEFENSE IS PERMISSIBLE AGAINST ARMED ATTACKS BY NON-STATE ACTORS

The vast majority of writers agree that an armed attack by a non-state actor on a state, its embassies, its military, or other nationals abroad can trigger the right of self-defense addressed in Article 51 of the United Nations Charter, even if selective respon-

Risen & Mark Mazzetti, *C.I.A. Said to Use Outsiders to Put Bombs on Drones*, N.Y. TIMES, Aug. 21, 2009, at A1.

2. See, e.g., 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 (Simon Bronitt ed., forthcoming 2010) (Notre Dame Legal Studies Research Paper No. 09-43, Nov. 2009) [hereinafter O'Connell, *Unlawful Killing 1*], (on file with author). Professor O'Connell had stated: "U.S. attacks violated fundamental law"; use of drones is "use [of] an unlawful . . . tactic"; and "[t]he only conclusion is there is no legal right to use drone attacks against Pakistan under the law of self-defense." *Id.* (manuscript at 3, 21). This article has used the Dec. 20th version in certain places as well as her newest version online (dated Aug. 7, 2010, from a "final draft" of July 2010), which changed the wording of the first quotation to read "appears to have violated." 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 (Simon Bronitt ed., forthcoming 2010) (Notre Dame Legal Studies Research Paper No. 09-43, July 2010) (manuscript at 2), <http://ssrn.com/abstract=1501144>. [hereinafter O'Connell, *Unlawful Killing 2*]; see also *infra* notes 34, 37. The newest version also changed the third quoted language to read "[t]he strongest conclusion to draw . . ." *Id.* (manuscript at 21). The introductory abstract on SSRN declares, "[t]hese attacks cannot be justified under international law." O'Connell, *Unlawful Killing 2, supra* (manuscript intro.). Her book chapter is an important criticism of the U.S. use of force in Pakistan without special Pakistani consent. It rests mostly on preferences concerning the permissibility of self-defense against non-state actors that are addressed in this article in Parts II and IV *infra*.

sive force directed against a non-state actor occurs within a foreign country.³ Article 51 of the Charter expressly affirms the right of a

3. See, e.g., THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 336 (4th ed. 2007); ANTONIO CASSESE, INTERNATIONAL LAW 354-55 (2d ed. 2005); LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 1191 (5th ed. 2009) (“[S]elf-defense against [“non-state actor”] terrorist attacks is not in doubt”); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 183-85, 204-06, 208 (4th ed. 2005); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 150 (2004) (discussing the relevancy of “instancy” or “immediacy” as a requirement of responsive force “particularly in the context of sustained insurgent activities”); JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 490 (2d ed. 2005); Sophie Clavier, *Contrasting Perspectives on Preemptive Strike: The United States, France, and the War on Terror*, 58 ME. L. REV. 565, 571-72 (2006); Thomas M. Franck, Editorial Comment, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839, 840 (2001); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L.J. 7, 16-18, 21-23, 37 (2003); Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State’s Duty to Protect Its Citizens*, 15 TEMP. INT’L & COMP. L.J. 195, 211, 213-17 (2001); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 323-26; 330 (2004); John W. Head, *Essay: The United States and International Law After September 11*, 11 KAN. J.L. & PUB. POL’Y 1, 3 (2001); Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 821 (2005); Derek Jinks, Remarks, *Self-Defense in an Age of Terrorism*, 97 AM. SOC’Y INT’L L. PROC. 144, 146 (2003); Timothy Kearley, *Raising the Caroline*, 17 WIS. INT’L L.J. 325, 325 (1999); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 24-25, 27-28 (2002); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT’L L. 537, 540, 547 (1999); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’L L. 62, 62-69 (2005); Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 50 (2002); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1343-45 (2004) [hereinafter Paust, *Overreaction*]; Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 715-16, 723, 729 (1986) [hereinafter Paust, *Responding*]; Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 534-35 (2002) [hereinafter Paust, *Use of Force*]; Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT’L L. & FOREIGN AFF. 331, 333-34, 348-49, 353 (2003); Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1003, 1007-09, 1011 (2007); Natalino Ronzitti, *The Expanding Law of Self-Defence*, 11 J. CONFLICT & SEC. L. 343, 344, 348 (2006); Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT’L L. 309, 311-12 (1989); Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case*, 16 EUR. J. INT’L L. 963, 972-73 (2005); Kimberly N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defense Against Non-State Actors*, 56 INT’L & COMP. L.Q. 141, 151 (2007); Kimberly N. Trapp, *The Use of Force Against Terrorists: A Reply to Christian J. Tams*, 20 EUR. J. INT’L L. 1049, 1049 (2009) [hereinafter Trapp, *Reply*]; Robert F. Turner, *Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power*, 22 HOUS. J. INT’L L. 77, 87, 89 (1999); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT’L L. 52, 57-58 (2005); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT’L L. 559, 564-65 (1999); Elizabeth Wilmschurst et al., *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L & COMP. L.Q. 963, 965-71 (2006) (consensus documentation of principles by Chatham House study participants Berman, Gow, Greenwood, Lowe, Roberts, Sands, Simpson, Warbrick, Wheeler, Wilmschurst, and Wood); Robert A. Caplen, Note, *Mending the “Fence”: How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense*, 57 FLA. L. REV. 717, 757 (2005); Franz W. Paasche,

Note, *The Use of Force in Combating Terrorism*, 25 COLUM. J. TRANSNAT'L L. 377, 386 & n.40, 392-93 (1987); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at Annual Meeting of the American Society of International Law: The Obama Administration and International Law, pt. III.B (Mar. 25, 2010) [hereinafter Koh, Obama Administration], <http://www.state.gov/s/l/releases/remarks/139119.htm>; see also Michael D. Banks, *Addressing State (Ir-)Responsibility: The Use of Military Force as Self-Defense in International Counter-Terrorism Operations*, 200 MIL. L. REV. 54, 57, 77-78, 84, 88-90, 98, 105-06 (2009); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 565-67, 590 (2002); Tom J. Farer, Editorial Comment, *Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT'L L. 359, 359 (2002); Terry D. Gill, *The Eleventh of September and the Right of Self-Defense in TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS* 23, 25-29 (Wybo P. Heere ed. 2003) (there is no reason why self-defense cannot be permissible against non-state actor armed attacks despite a prior "Statist presumption" among a minority of state-oriented positivists that was partly to the contrary); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 173, 179-83, 188 (2005) (targeted killings in a foreign state can be permissible if it is "not feasible" to apprehend or arrest a terrorist who "is involved in executing or planning a terrorist attack" and "other means of preventing that attack are likely to fail"); 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. . . . [A]nd if killings are sought outside the area of hostilities the 'proportionality' element be strictly adhered to, and that if terrorists can be apprehended killings should be a last resort."); Andreas Paulus, *Realism and International Law: Two Optics in Need of Each Other*, 96 AM. SOC'Y INT'L L. PROC. 269, 271-72 (2002); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 48-49 (1999); Raphaël Van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in Light of Recent State Practice: A Step Forward?*, 23 LEIDEN J. INT'L L. 183 (2010); Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 634-35 (2003) (noting that the Security Council and NATO recognized the permissibility of self-defense against non-state terrorists, "law enforcement" is not sufficient, and responses "may also require the appropriate and selective use of military force"); Myres S. McDougal & W. Michael Reisman, *Entebbe*, N.Y. TIMES, July 19, 1976, at A20, reprinted in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 876-77 (1981) (regarding the propriety of the Israeli Entebbe raid into Uganda in 1976 in self-defense against non-state actor hostage-takers in order to protect nationals from imminent death); other authors and materials cited *infra* notes 5, 9, 15, 23, 29, 30, 31, 34, 51; *infra* text accompanying notes 9 & 30. But see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (*Advisory Opinion on the Wall*) 2004 I.C.J. 136, 189, 194 (July 9) (¶ 139: "Article 51 . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State," adding that "Israel exercises control" of occupied territory from which "the threat . . . originates," and that "[t]he situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001)," concerning the U.S. right of self-defense against non-state actor armed attacks that occurred on 9/11. Concerning an important insight by Professor O'Connell into the probable meaning of these seemingly inconsistent statements, see also *infra* note 39. The majority may have used a severely restrictive reading of Article 51 if it thought that attacks must be by a state. The phrase "attack by one State," whether meant to be exclusive or most likely merely inclusive, was used in a sentence that was remarkably terse and set forth without citations); MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 319 (2d ed. 2009) ("If the state or states where the terrorist group is found happens to be making a good faith effort to stop the terrorist group and has some basic ability to do so, then the victim state cannot hold the territorial state responsible for the acts of terrorism and may not respond with armed force on the territory of that state."); Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 356-57 (2004) (arguing that

state to respond defensively “if an armed attack occurs,”⁴ and nothing in the language of Article 51 restricts the right to engage in self-defense actions to circumstances of armed attacks by a “state.”⁵ Moreover, nothing in the language of the Charter requires a conclusion lacking in common sense that a state being attacked can only defend itself within its own borders. General patterns of practice over time and general patterns of legal expectation concerning the propriety of self-defense confirm these recognitions.

Early in the Nineteenth Century, a prominent debate between the United States and Great Britain (which had control of Canada) involving the famous *Caroline* incident in 1837, affirmed the propriety of use of force in self-defense against armed attacks by non-

Israel had no right of self-defense against non-state actor attacks); O’Connell, *Unlawful Killing 1*, *supra* note 2.

In the case *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19), Judges Kooijmans and Simma recognized that self-defense can be permissible against non-state actor armed attacks whether or not the state from whose territory an attack emanates is involved. *See Armed Activities on the Congo*, 2005 I.C.J. at 313-14, ¶¶ 26-30 (separate opinion of Judge Kooijmans); *Armed Activities on the Congo*, 2005 I.C.J. at 336-37, ¶¶ 7-12 (separate opinion of Judge Simma). The majority opinion also impliedly recognized that consent of the state is not necessary and that such forms of self-defense can be permissible. *See infra* note 36.

4. U.N. Charter art. 51. The French version is potentially broader, since it uses the phrase *agression armée* (i.e., armed aggression). *See also* Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT’L & COMP. L. 767, 816, 819 (1997) (debate during formation of the Charter addressed self-defense responses to armed attacks as well as aggression); Wilmshurst et al., *supra* note 3, at 970 n.23 (*agression armée* is more limited than other forms of aggression by a state); *cf.* THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACK* 50 (2002) (stating that the creators of the U.N. Charter “deliberately closed the door on any claim of ‘anticipatory self-defense’”).

5. *See, e.g.*, BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 992 (5th ed. 2007); DINSTEN, *supra* note 3, at 184-85, 204-08; MOORE & TURNER, *supra* note 3, at 490; Banks, *supra* note 3, at 89-90; Franck, *supra* note 3, at 840; Greenwood, *supra* note 3, at 16-17; Paust, *Use of Force*, *supra* note 3, at 534 & n.3; Richemond, *supra* note 3, at 1007; *supra* note 3; *see also Advisory Opinion on the Wall*, 2004 I.C.J. at 215, ¶ 33 (separate opinion of Judge Higgins), 2004 I.C.J. at 229-30, ¶ 35 (separate opinion of Judge Kooijmans), 2004 I.C.J. at 242-43, ¶ 6 (declaration of Judge Buergenthal); Yoram Dinstein, Remarks, *Humanitarian Law on the Conflict in Afghanistan*, 96 AM. SOC’Y INT’L L. PROC. 23, 24 (2002); Wilmshurst et al., *supra* note 3, at 970. *But see Advisory Opinion on the Wall*, 2004 I.C.J. at 194, 195 ¶¶ 139, 142; Trapp, *Reply*, *supra* note 3.

The word “state” does not appear as a limit in Article 51, although it appears elsewhere in the United Nations Charter, especially in Article 2(4) with respect to restrictions on the right of member states to use armed force against the territorial integrity or political independence of another state. U.N. Charter art. 2, para. 4. It is evident, therefore, that the drafters knew how to use the word “state” as a limitation and chose not to do so with respect to armed attacks and the “inherent right” of self-defense addressed in Article 51 of the Charter. Importantly, despite a self-imposed blindness among a minority of state-oriented positivists, it is widely known that there have been and are many actors in the international legal process other than the state. *See, e.g.*, LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW* 25-38 (2d ed. 2000); MELZER, *supra* note 1, at 71; JORDAN J. PAUST ET AL., *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 5-20 (3d ed. 2009); Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT’L L. 1229 (2004).

state actors.⁶ The *Caroline* incident arose after a British-Canadian use of armed force in the United States in self-defense against prior and ongoing armed attacks against British rule by local insurgents who initially tried to capture Toronto, grew to nearly one thousand strong and styled themselves the "Patriot Army," had taken control of Navy Island in Canada and proclaimed a government, were carrying out armed attacks in Canada at least since early December, were operating partly from within the United States and from Navy Island in Canadian territory, and were being supported by certain persons and supplies from the United States, including by the vessel *Caroline*, which had made three trips on December 29 to and from Navy Island.⁷ The British use of force against the *Caroline* during the evening of December 29, 1837 "resulted in the death of [at least] one U.S. citizen, the wounding of several others, one person being missing, and loss of the burning vessel [*Caroline*] over Niagara Falls."⁸ The incident led to disagreement between the United States and Great Britain whether particular acts of self-defense were proper, but there was no disagreement whether non-state insurgent armed attacks could trigger the right of self-defense under international law " 'within the territory of a power at peace.' "⁹ The United States had argued for a very strict limitation on particular methods of responsive force when claiming that when the countries are "at peace, nothing less than a clear and absolute necessity can afford ground of justification,"¹⁰ and that use of a particular means of self-defense should only be permissible when the " 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation;'"¹¹ "since the act, justified by the

6. See, e.g., Paust, *Overreaction*, *supra* note 3, at 1345-46; Paust, *Use of Force*, *supra* note 3, at 535 & n.6.

7. See, e.g., R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-84 (1938); Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 494-95 (1990).

8. PAUST ET AL., *supra* note 5, at 1099; see Jennings, *supra* note 7, at 82-84; Rogoff & Collins, *supra* note 7, at 495. The British force was composed of some forty-five to fifty men in five to seven boats (writers use different numbers) under the command of British Navy Commander Andrew Drew. *United Kingdom Webster-Ashburton Treaty*, in 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 363, 443-45 (Hunter Miller ed., 1934).

9. Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton (July 27, 1842), in 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, *supra* note 8, at 446, 446.; see PAUST ET AL., *supra* note 5, at 1099; Paust, *Overreaction*, *supra* note 3, at 1345-46; see also DINSTEIN, *supra* note 3, at 184-85.

10. Rogoff & Collins, *supra* note 7, at 497 (quoting Letter from Daniel Webster, U.S. Sec'y of State, to Henry S. Fox, British Minister in Wash., D.C. (Apr. 24, 1841), reprinted in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906)).

11. Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton (Aug. 6, 1842), in 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, *supra*

necessity of self-defence, must be limited by that necessity, and kept clearly within it.”¹² The United States claimed that the British attack on the ship *Caroline* in U.S. waters at night did not meet that test, presumably because in those days the British could have waited until the vessel entered Canadian waters and “it would not have been enough to seize and detain the vessel.”¹³ Additionally, it was not shown “that there was a necessity, present and inevitable, for attacking her, in the darkness of night, while moored to the shore . . . and, careless to know whether there might not be in her the innocent with the guilty.”¹⁴

Although some have misunderstood,¹⁵ all that had been addressed was a claimed right of “ ‘self-defense’ ” and “ ‘self-preservation’ ” against prior and ongoing armed attacks.¹⁶ There was no recognition of a right of preemptive self-defense or even a right of what some term anticipatory self-defense prior to the existence of an actual armed attack or the initiation of a process of armed attacks.¹⁷ Moreover, it is important to note that the United

note 8, at 454, 455.

12. Letter from Daniel Webster, U.S. Sec’y of State, to Henry S. Fox, British Minister in Wash., D.C. (Apr. 24, 1841), in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906); Rogoff & Collins, *supra* note 7, at 498 (quoting Letter from Daniel Webster, *supra* note 10). An extract of the letter was also sent to Lord Ashburton on July 27, 1842. See Letter from Daniel Webster, *supra* note 9, at 446, 449. In response, Ashburton, who agreed with the standard articulated by Webster with respect to particular measures of self-defense, wrote that although “ ‘respect for the inviolable character of the territory of independent nations’ ” is of great importance, “ ‘a strong overpowering necessity may arise when this great principle may and must be suspended,’ ” and such occurs when self-defense is necessary and is “ ‘strictly confined within the narrowest limits imposed by that necessity.’ ” Rogoff & Collins, *supra* note 7, at 498 (quoting Letter from Lord Ashburton, to Daniel Webster, U.S. Sec’y of State (July 28, 1842)) (also noting that Ashburton had argued that the British action fit the standard); *id.* at 499.

13. Reisman, *supra* note 3, at 45 (quoting U.S. Secretary of State Webster); see Paust, *Use of Force*, *supra* note 3, at 535 n.6; Letter from Daniel Webster, *supra* note 10.

14. Jennings, *supra* note 7, at 89; Reisman, *supra* note 3, at 45; Letter from Daniel Webster, *supra* note 10.

15. See, e.g., Greenwood, *supra* note 3, at 12-13; Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209 (2003) (providing a very useful exposition of the *Caroline* incident, but arguing that the exchange of views between the United States and Great Britain somehow justifies preemptive use of force, i.e., use of armed force in response to a perceived threat long before a threat of imminent attack and prior to the existence of an actual armed attack, although rightly noting that most international lawyers do not accept the permissibility of mere preemptive self-defense); cf. Reisman, *supra* note 3, at 46-47 (apparently missing the point that non-state actor armed attacks had already occurred and were continuing); International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), reprinted in 41 AM. J. INT’L L. 172, 205 (1947) (stating that “preventative action in foreign territory is justified only” under *The Caroline* text announced by Webster).

16. Compare James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT’L & COMP. L. 429, 439 (2006), and authorities cited *supra* notes 9-12, with Reisman, *supra* note 3, at 43-46, and Sofaer, *supra* note 15.

17. See, e.g., Paust, *Overreaction*, *supra* note 3, at 1345-46. There is also widespread agreement today that under express language in Article 51 of the Charter an “armed at-

States did not have effective control of the insurgents or direct involvement in their operations and the British did not claim that the conduct of the insurgents could be imputed to the United States. Nonetheless, it was recognized that a British measure of self-defense within the territory of the United States during peace between the two countries directed against non-state actors directly involved in the ongoing armed attacks could have been permissible if the method used had met international legal standards, which was the primary point of contention between the United States and Great Britain. Today, the limits that exist on the type of self-defense response employed (e.g., under principles of reasonable necessity and proportionality) are more malleable than the United States had preferred during the time of the incident.¹⁸ It is also worth noting that the United States and Britain were not at war, and the British responsive use of force was directed against the *Caroline* as such and those directly involved in insurgent attacks, and not against the United States. Clearly, it was understood that self-defense could be permissible outside the context of war and without consent of the territorial state from which non-state actor attacks emanate.

Prior to the *Caroline* incident, the United States had used military force partly in self-defense to clear islands off the coast of Florida from non-state actor pirates, smugglers, and privateers and to temporarily occupy Amelia Island in 1817, while relying partly on Spain's inability to control misuse of its islands to prevent armed attacks on U.S. territory and shipping emanating from

tack" must be initiated before the right of self-defense exists. See, e.g., Paust, *Use of Force*, *supra* note 3, at 534 & n.2. Many argue that anticipatory self-defense should be tolerated when an armed attack is imminent, but textwriter and state support for preemptive self-defense when an attack is not imminent is misplaced and rare. See, e.g., FRANCK, *supra* note 4, at 4, 9, 50, 107-08, 191; Greenwood, *supra* note 3, at 12-16; Paust, *Use of Force*, *supra* note 3, at 537, 538 & n.15; Wilmshurst et al., *supra* note 3, at 968; Mary Ellen O'Connell, *UN Resolution 1441: Compelling Saddam, Restraining Bush*, JURIST, Nov. 25, 2002, <http://jurist.law.pitt.edu/forum/forumnew73.php> ("states may only use force . . . in the face of an armed attack," and "[o]nce an attack is underway or will be imminently"); see also *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 223-24, ¶ 148 (Dec. 19) ("Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security threats beyond these parameters."). But see Sofaer, *supra* note 15.

18. See *Armed Activities on the Congo*, 2005 I.C.J. at 223, ¶ 147 (Dec. 19) (dictum that Ugandan use of force did "not seem proportionate to the series of transborder attacks" by irregular forces); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6), ¶¶ 72-78; GARDAM, *supra* note 3, at 141-48; MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 217, 222-24, 242-43 (1961); Green, *supra* note 16, at 473-74; Schachter, *supra* note 3, at 313-16. In the *Oil Platforms* case, the U.S. could not identify the entity that had attacked a U.S. warship and, without attribution of the attack "by an unidentified agency" to Iran, the U.S. had no right to attack Iran as such or its vessels and aircraft. 2003 I.C.J. 161, ¶ 77.

the islands and assuring Spain that even the temporary control of Amelia Island was not a threat to its sovereignty.¹⁹ Clearly, the U.S. had not been at war with the pirates and privateers or with Spain. Also prior to the *Caroline* incident, the United States claimed self-defense in partial justification for use of force against Seminole Indians and former slaves in 1814, 1816, and 1818 in response to their attacks emanating from Spanish Florida.²⁰ Neither Spain nor the United States considered that they were at war. Clearly also, in both circumstances consent from Spain was not necessary.

In 1854, following an attack on a U.S. diplomat in Nicaragua during a period in which the community of San Juan del Norte (Greytown), Nicaragua had forcibly taken possession of the town, erected a government not recognized by the United States, and engaged in other acts of violence against U.S. nationals, the U.S. Secretary of the Navy ordered the bombardment of the town after refusal of a U.S. demand for redress.²¹ While on circuit, Justice Nelson of the U.S. Supreme Court decided a case involving the presidential authorization of military force used at Greytown and recognized in his opinion that the President had the power to order the responsive use of armed force as part of a power of "protection" of U.S. nationals abroad against "[a]cts of lawless violence" and "an irresponsible and marauding community."²² The U.S. did not con-

19. See, e.g., James W. Garner, *Some Questions of International Law in the European War*, 9 AM. J. INT'L L. 72, 78 (1915); Green, *supra* note 16, at 440 & n.47; Sofaer, *supra* note 15, at 220 & n.33; Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 46 (1995). In 1801, President Jefferson dispatched a naval force with Marines to defend U.S. vessels attacked by Barbary "pirates," but hostilities mostly involved a defensive partial war against Tripoli (1801-1805) and Algiers (1815) after their breach of treaties with the United States that had provided immunity for U.S. vessels from attack. President Jefferson sent a message to Congress concerning the defensive response. See President Thomas Jefferson, First Message to Congress (Dec. 8, 1801), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 326 (1896); 11 ANNALS OF CONG. 11-12 (1801).

20. See, e.g., 2 MOORE, *supra* note 12, at 402-05; Green, *supra* note 16, at 440 & n.47; Sofaer, *supra* note 15, at 220 n.33; Rex J. Zedalis, *Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation?*, 25 TEX. INT'L L.J. 209, 241-42 (1990) (noting that in a letter to the U.S. Minister to Madrid on November 28, 1818, Secretary of State Adams claimed that U.S. conduct was "a necessary measure of self-defense"). Part of the U.S. motivation was nefarious, involving a growing desire to acquire Spanish Florida and a related purpose to eradicate a safe haven for former slaves from Georgia and South Carolina. See HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* 387-89 (2008).

21. See, e.g., *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186). Due to lack of recognition of the putative government, the community can be classified as a non-state actor.

22. *Id.* at 112. Domestically, the constitutionally-based duty of the President to faithfully execute the laws, including international law regarding self-defense, provides a competence for the President to authorize measures of self-defense consistent with international law. In this sense, presidential power is enhanced by international law. See U.S. CONST. art. II, § 3; *The Prize Cases*, 67 U.S. (2 Black) 635, 665, 671 (1862); PAUST ET AL., *supra* note 5,

sider that it had been at war with the community at Greytown or its unrecognized government.

U.S. use of force in 1916 against Francisco "Pancho" Villa in Mexico was authorized by President Wilson and justified in part because of attacks by Pancho Villa's bands on towns in Texas and Columbus, New Mexico.²³ A second U.S. use of force occurred later that year against Mexican marauders who had attacked Glen

at 271-73, 1201-03. While answering its question "[h]ad the President a right to institute a blockade . . . on the principles of international law," the Supreme Court declared in *The Prize Cases* "that the President had a right, *jure belli*," and was "bound" to act by using armed force. 67 U.S. at 665, 671. The Court also addressed prior congressional authority contained in 1795 and 1807 legislation wherein the President had been "authorized to . . . use the military and naval forces . . . in case of invasion by foreign nations, and to suppress insurrection." 67 U.S. at 668; Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 ("[W]here it is lawful for the President . . . to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ . . . such part of the land or naval force of the United States, as shall be judged necessary."); Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424 ("[W]henever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President . . . [a]nd in case of an insurrection in any state . . ."). Under the 1807 Act, the President can use U.S. military personnel to duly execute the competence delegated in the 1795 Act in case of invasion, i.e., to cause "the laws to be duly executed." Ch. 39, 2 Stat. at 443; see also William C. Banks, *Providing "Supplemental Security" – The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SECURITY L. & POL'Y 39, 60-62 (2009) (concerning the early legislation and historic developments). The Constitution also requires that "[t]he United States shall . . . protect each of . . . [the States] against invasion . . ." U.S. CONST. art. IV, § 4; see also *id.* art. I, § 8, cl. 15 (establishing congressional power "[t]o provide for calling forth the militia to . . . repel invasions," a power delegated to the President in the early legislation). It was the prior general legislative authority and perhaps Article II, Section 3 of the Constitution that the Court was referring to and not some inherent presidential power when the Court declared that if there is an invasion, "the President is not only authorized but bound to resist force . . . without waiting for any special legislative authority." See 67 U.S. at 668. Too many textwriters have misread the case by ignoring the general statutory authority that the Court had addressed immediately prior to its statement about the lack of a need for new "special" authority. As noted, international law also provided authority for the President. Today, relevant international law that the President can execute on behalf of the United States includes Article 51 of the United Nations Charter.

23. See, e.g., Zedalis, *supra* note 20, at 243 (noting that the U.S. justification was based primarily on a right of "hot pursuit," but that this was understood to involve a claim of self-defense); see also John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 270-72 (2004) (also addressing remarks of President Wilson and a Senate resolution concerning the expedition that had involved some 3,000 U.S. soldiers); Yoram Dinstein, *Ius ad Bellum Aspects of the 'War on Terrorism,' in TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS*, *supra* note 3, at 13, 21 (Professor Dinstein also reiterated his affirmation that states can respond in self-defense against non-state actor armed attacks "launched from a foreign State" whether or not the state is complicit or negligent. *Id.* at 17); George A. Finch, Editorial Comment, *Mexico and the United States*, 11 AM. J. INT'L L. 399, 399-400 (1917) (addressing the events). Three years earlier, the U.S. had detained Mexican nationals at Fort Bliss in El Paso, Texas and then at Fort Rosecrans in California who had been fighting in a Mexican civil war and fled to the U.S. from Naco, Mexico. A federal district court recognized that the President had a duty to execute a multilateral treaty relevant to the neutrality of the U.S. and that detention was not unreasonable under the circumstances. See *Ex parte Toscano*, 208 F. 939, 942-44 (S.D. Cal. 1913).

Springs, Texas.²⁴ Still later, there were clashes between Mexican and United States armed forces, which recognizably created a state of war between Mexico and the United States of short duration.²⁵

On August 20, 1998, President Clinton authorized some seventy-five cruise missile strikes against Usama bin Laden and other members of al Qaeda and their training camps in Afghanistan without consent of the Taliban government in response to al Qaeda bomb attacks on U.S. embassy compounds in Nairobi, Kenya, and in Dar Es Salaam, Tanzania that killed more than 250 persons (including 12 U.S. nationals) and injured more than 5,500 people.²⁶ The U.S. based its claim to do so partly on self-defense against groups and key terrorist leaders that “played the key role in the Embassy bombings,” had “executed terrorist attacks against Americans in the past,” and “were planning additional terrorist attacks against our citizens and others.”²⁷ In a letter to the United Nations, U.S. Ambassador Richardson stated that the United States had “acted pursuant to the right of self-defence confirmed by Article 51 of the Charter” in response to prior armed attacks and “to prevent these attacks from continuing.”²⁸ The United States also claimed that Afghanistan had been warned for years not to be a safe-haven for terrorists.²⁹ As in the case of the 1998 response to al

24. See, e.g., Zedalis, *supra* note 20, at 243.

25. See, e.g., *Arce v. State*, 202 S.W. 951, 951-52 (Tex. Crim. App. 1918); Cohan, *supra* note 23, at 271-72.

26. See, e.g., *Ceremony Honors U.S. Embassy Bombing Victims*, CNN.COM, Sept. 11, 1998, <http://www.cnn.com/US/9809/11/embassy.bomb.memorial/index.html>; Benjamin Weiser, *4 Are Sentenced to Life in Prison in U.S. Embassy Bombings*, N.Y. TIMES, Oct. 19, 2001, at A1.

27. Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460 (Aug. 20, 1998); see also Guiora, *supra* note 3, at 325-26; Reisman, *supra* note 3, at 48.

28. UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 20 AUGUST 1998 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/1998/780 (1998). Domestically, President Clinton could execute the competence of the U.S. to engage in self-defense under the U.N. Charter without prior approval from Congress. See *supra* note 22.

29. See, e.g., CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 115-19 (2000) (noting that “the response of the rest of the world was generally muted,” but opining that most states are opposed to “a veneer of legality” that exists with respect to claims to use self-defense “to protect nationals . . . and to respond to terrorist and other past attacks”) Yet, she offers very little evidence of such allegedly shared expectations of “the vast majority of other states” and apparently does not realize that every act of self-defense “if an armed attack occurs” will involve a response to a past attack (unless the attack is still occurring) and that the state responding to a series of armed attacks might also have a motive to prevent and deter their continuation. See also PAUST ET AL., *supra* note 5, at 1120; Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. INT'L L.J. 207, 221-222 (2001) (stating that “[t]he response from the rest of the world also indicates general acceptance of Article 51's application” to the responsive strikes against a non-state actor, with some dissent); Lobel, *supra* note 3, at 556 (most states were unconcerned and “acquiesced in the U.S. missile attacks”); Lucy Martinez, *September 11th*,

Qaeda attacks, most self-defense responses to prior armed attacks will involve the motive to prevent such attacks from continuing, but the existence of mixed motives will not limit the permissibility of otherwise lawful measures of self-defense against an ongoing process of armed attacks. It is also evident that in 1998 the United States was not at war with al Qaeda or Afghanistan, but claimed the right to use significant measures of self-defense under Article 51 of the Charter outside the context of actual war.

In 2001, the United Nations Security Council and NATO recognized that the non-state al Qaeda armed attacks on September 11, 2001 triggered rights of individual and collective self-defense under the United Nations Charter and the North Atlantic Treaty.³⁰ Use of force against al Qaeda by the United States on October 7, 2001 in Afghanistan was justified, and justifiable, as self-defense against ongoing processes of armed attack on the United States, its embassies, its military, and other U.S. nationals abroad,³¹ al-

Iraq, and the Doctrine of Anticipatory Self-Defense, 72 UMKC L. REV. 123, 143, 160-61 (2003); Mary Ellen O'Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT'L L. 446, 450 (2003) (book review); cf. Lori Fisler Damrosch, *Sanctions Against Perpetrators of Terrorism*, 22 HOUS. J. INT'L L. 63, 67-68 (1999) (considering use of the cruise missiles as a "strike against the territory of Afghanistan, on the ground that Osama bin Laden was allegedly being sheltered there or carrying out his activities from bases in that territory," but not addressing the difference between an attack on al Qaeda as such and an attack against Afghanistan); Reisman, *supra* note 3, at 19, 47-49 (noting the concomitant claim of permissibility to prevent use of training camps to prepare for future attacks). There was also a missile strike on a pharmaceutical company in the Sudan that had been based on faulty intelligence and was generally condemned. See, e.g., FRANCK, *supra* note 4, at 94-96; Hendrickson, *supra*, at 222; Lobel, *supra* note 3, at 543-47.

30. See, e.g., Franck, *supra* note 3, at 840; Paust, *Use of Force*, *supra* note 3, at 535 & nn.4-5 (citing S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001)); Wilmshurst et al., *supra* note 3, at 970; O'Connell, *supra* note 29, at 450-51; see also U.N. S.C. Res. 1373, pmbL, U.N. Doc. S/RES/1373 (2001) ("unequivocal condemnation of the terrorist attacks" that occurred on 9/11, "[r]eaffirming the inherent right of individual or collective self-defence," and "[r]eaffirming the need to combat by all means . . . terrorist acts"); *id.* ¶ 3 ("Calls upon all States to . . . [c]ooperate . . . to prevent and suppress terrorist attacks and take action against perpetrators of such acts."). The call to "suppress terrorist attacks," to "combat by all means," and to "take action" is close to creating a broader Security Council authorization to use armed force against terrorist attacks and perpetrators and is at least a significant recognition of the permissibility of suppression, combat, and responsive action when the right of self-defense is triggered by non-state actor "terrorist attacks." See, e.g., Paust, *Use of Force*, *supra* note 3, at 544-45; see also *infra* note 41.

31. Paust, *Use of Force*, *supra* note 3, at 533-36; see also Greenwood, *supra* note 3, at 21-23; Adam Roberts, *The Laws of War in the War on Terror*, in TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS, *supra* note 3, at 65, 68 ("As regards the *ius ad bellum* issues raised after 11 September, my own views are in favour of the legality . . . of the military action in Afghanistan."); O'Connell, *supra* note 29, at 450-51 ("[U]se of force in Afghanistan in 2001 was lawful self-defense. . . . September 11 attacks were part of a series of terrorist actions" that began in 1993 "and would include future attacks," and Security Council resolutions "reveal the Council's consensus that armed force in self-defense following terrorist attacks is lawful."); Jonathan Ulrich, Note, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1047-49 (2005).

though permissibility of the use of force against the Taliban at that time was “highly problematic” and, to be lawful, would have had to have hinged on some form of direct involvement by the Taliban in and control of the al Qaeda attacks that would have resulted in attribution of the 9/11 attacks to the Taliban government (which has never been proven) and not merely on an alleged tolerating, harboring, endorsing, or financing of al Qaeda by the Taliban that might merely lead to what is termed “state responsibility.”³² Neither the Security Council nor NATO expected that there must be geographic or time limits that might condition permissibility of U.S. measures of self-defense against al Qaeda, nor was there an expectation that measures of self-defense against al Qaeda in Afghanistan would require the consent of the Afghan government or the existence of an armed conflict with the United States.

II. NEITHER CONSENT FROM NOR ATTRIBUTION TO THE FOREIGN STATE IS REQUIRED

Nothing in the language of Article 51 of the United Nations Charter or in customary international law reflected therein or in pre-Charter practice noted in Part I requires consent of the state from which a non-state actor armed attack is emanating and on whose territory a self-defense action takes place against the non-state actor. In fact, with respect to permissible measures of self-defense under Article 51, a form of consent of each member of the United Nations already exists in advance by treaty. In contrast, consent generally would be required for ordinary law enforcement measures,³³ but selective use of armed force in self-defense is not

32. Paust, *Use of Force*, *supra* note 3, at 540-43. Permissibility of self-defense measures against the state on whose territory the non-state actor attacks originated (as opposed to those against the non-state actor as such) does not exist when the state merely has “state responsibility” for tolerating, harboring, or financing the attacks, which can lead to political, diplomatic, economic, or juridic sanctions against the state, but not a responsive use of military force against the state as such. *See id.* at 540-41. “State responsibility” is therefore not the same as “attribution” or “imputation,” whereby the acts of the non-state actor are attributed to the state as if the state had engaged in the armed attacks. Concerning the general test with respect to attribution justifying military force in self-defense against the state, see, for example, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 115, 195, 228, 230 (June 27); Paust, *Use of Force*, *supra* note 3, at 540-43; *see also* *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 222-23, 226, ¶¶ 146-147, 160 (Dec. 19). In the *Armed Activities* case, Judges Kooijmans and Simma rightly recognized that self-defense can be permissible against non-state actor armed attacks whether or not the state from whose territory an attack emanates is involved. *See supra* note 3. Importantly also, Article 2(4) of the Charter does not have to be violated by a state before a responding state can exercise its “inherent right” of self-defense against non-state actor armed attacks.

33. *See, e.g.*, *The Apollon*, 22 U.S. (9 Wheat.) 362, 370-71 (1824); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 432(2), 433(1)(a) (1987)

simplistically “law enforcement” whether the measures of self-defense are used in time of war or relative peace.

For these reasons, with respect to U.S. use of drones in Pakistan to target al Qaeda and Taliban leaders and fighters, it is clear that the U.S. would not need the express consent of Pakistan to carry out self-defense targeting.³⁴ It is also clear that the U.S. has the right to use drones in Pakistan under Article 51 of the Charter in self-defense to protect U.S. troops from a continual process of al Qaeda and Taliban attacks³⁵ on U.S. military personnel and others in Afghanistan that have emanated or been directed partly from

[hereinafter RESTATEMENT]; PAUST ET AL., *supra* note 5, at 658-65; *see also* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9), 34-35 (a state cannot intervene in foreign territorial waters in order to obtain evidence of a past wrong by the coastal state); *cf. infra* note 71 (concerning the special circumstance of occupied territory and the authority of an occupying power).

34. *But see* O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 18) (stating that the United States “could have joined” Pakistan in use of force “upon an invitation to do so,” and that “[w]ithout express, public consent . . . Pakistan is in a position to claim that the U.S. is acting unlawfully”); *id.* (manuscript at 21) (stating that “Pakistan has not expressly invited the United States”); *id.* (manuscript at 25-26) (stating that “Pakistan has neither requested U.S. assistance in the form of drone attacks nor expressly consented” and concluding that the United States does not “have a basis in the law of self-defense for attacking inside Pakistan.”). She even opines that the U.S. cannot rightly defend its troops in Afghanistan by use of force “from Afghan territory” unless it gets “consent” from the Afghan government. *See* O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 20-21) (claiming that “the U.S. needs Afghanistan’s consent to carry out such raids from Afghan territory.”). This preference for a special double-consent of states and the possibility of a single veto seems to rest on notions arising from a law enforcement or crimes paradigm operative amidst a rigid state-oriented system of law and power and, in any event, it is evident that acceptance of such an extreme viewpoint would cripple the right of self-defense. With respect to an alleged need for consent, *see* Jonathan Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, ASIL INSIGHTS, Aug. 24, 2006, <http://www.asil.org/insights/2006/08/insights060824.html> (arguing that “[i]f that State does not give its consent, then any use of force on its territory will be an illegal use of force according to the traditional Charter system”); *see also* Banks, *supra* note 3, at 66-67 (arguing that “the injured state must provide the host State with some warning, and either request that the host State handle the problem itself, or seek the host State’s permission”), *id.* at 93-94, 106-07 (preferring an alleged “duty to warn” the foreign state because of a concern for its “territorial integrity”—but seemingly missing the points (1) that force may not actually be directed against “territorial integrity” and the integrity of territory may not be directly thwarted by use of selective force against non-state attackers, and (2) “territorial integrity” must ultimately be subordinate to permissible self-defense unless the state being attacked can only defend itself within its own borders). *But see id.* at 77-78 (rightly noting that “the host State may not be aware of the terrorist infestation, or may be unable to operate against the terrorists” and requiring “attribution” of the attacks to the state “is a red herring when addressing a State’s right of self-defense when faced with an imminent or actual terrorist attack.”) Furthermore, “the force used is directed primarily against the terrorist organization itself, and not necessarily against host State forces or facilities.” (citing 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, 45 (Michael N. Schmitt ed., 2002)); Paust, *Use of Force*, *supra* note 3, at 540, *id.* at 84 (“[T]here is no need to attribute the terrorist attacks to the host State . . . [i]f the force used in self-defense is directed solely against the terrorist organization.”); *Armed Activities on the Congo*, 2005 I.C.J. at 222, ¶ 144 (quoted *infra* note 36).

35. *But see supra* notes 2 & 34.

territory in Pakistan for several years during a continuing international armed conflict and when al Qaeda and Taliban fighters move back and forth across the porous border that neither country effectively controls. Some might claim that Article 51 self-defense measures in response to attacks that involve “armed cross-border incursions” by “militant groups” that “remain active along a border for a considerable period of time” and cause continued death and destruction do not create a right of self-defense³⁶ and that, absent consent, self-defense measures involving significant force may only be used on the territory of a state that is responsible for an armed attack on the defending state.³⁷

In any event, it would be incorrect to claim that a state being attacked by non-state actors has no right to defend itself outside its own territory absent (1) consent from a foreign state from which

36. See O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 15). She considers that the ICJ *Armed Activities on the Territory of the Congo* case supports her view because the ICJ did not find imputation to the Congo of non-state acts of violence. See *id.* (manuscript at 15) (arguing further that cross-border incursions “are not considered attacks under Article 51 . . . unless the state where the group is present is responsible for their actions”). However, because the issue addressed by the ICJ involved use of force against a state the ICJ expressly declared that it had “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.” *Armed Activities on the Congo*, 2005 I.C.J. at 223, ¶ 147; see also Trapp, *Reply*, *supra* note 3; Wilmshurst et al., *supra* note 3, at 970-71 n.25 (ICJ did “not answer the question as to . . . an armed attack by irregular forces”). More importantly and compelling, the ICJ impliedly recognized that consent of the territorial state is not required and that such forms of self-defense can be permissible when it stated that Ugandan military operations on the territory of the Democratic Republic of the Congo (DRC) against a non-state actor allegedly “in self-defence in response to attacks that had occurred . . . cannot be classified as coming within the consent of the DRC, and their legality . . . must stand or fall by reference to self-defence as stated in Article 51 of the Charter.” *Armed Activities on the Congo*, 2005 I.C.J. at 222, ¶ 144.

37. See *supra* note 34; see also O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 14) (stating that “[t]he reference in Article 51 to self-defense is to the right of the victim state to use significant offensive military force on the territory of a state legally responsible for the attack” and that “a terrorist attack will almost never meet these parameters for the lawful exercise of self-defense. . . . [in part because they may not rise to the level of an attack and because they] are rarely the responsibility of the state where the perpetrators are located”); *id.* (manuscript at 21) (stating that “Pakistan is not responsible for an armed attack on the United States and so there is no right to resort to military force under the law of self-defense”); *id.* (manuscript at 26) (claiming that the United States does not “have a basis in the law of self-defense for attacking inside Pakistan”); O’CONNELL, *supra* note 3, at 319 (quoted *supra* note 3), 320 (quoted *infra* note 39); *supra* note 36. But see O’Connell, *supra* note 29, at 450-51 (quoted *supra* note 31 regarding permissible use of force on Afghan territory and Security Council recognition that “armed force in self-defense following terrorist attacks is lawful”). Ultimately, the result of such a preference would be to value territorial integrity over the right of self-defense against armed attacks and, where the foreign state has not provided special consent and non-state actor attacks are not imputed to the state, to 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.

continuing armed attacks emanate, (2) attribution or imputation of non-state actor attacks to the foreign state when that state is in control of the non-state actor and the foreign state is thereby directly responsible for the armed attacks as if it engaged in the attacks, or (3) a relevant international or non-international armed conflict.³⁸ There is no evidence of a consistent pattern of generally shared legal expectation in the international community that directly supports such a restrictive view of the right of self-defense against armed attacks³⁹ and it is inconsistent with pre-Charter

38. *But see supra* notes 2, 34, 36-37.

39. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); *see also supra* note 3; *cf.* O'CONNELL, *supra* note 3, at 320. In this regard, Professor O'Connell referred merely to a 1988 incident when "Israel sent a commando team to Tunisia to kill" a high level member of the PLO, which was condemned by the Security Council as an impermissible "assassination" (*see* U.N. S.C. Res. 611, U.N. Doc. S/RES/611 (Apr. 25, 1988), and the *Advisory Opinion on the Wall*, 2004 I.C.J. 136). *Id.* at 320. The 1988 Security Council resolution made no mention of an Israeli claim of self-defense against an armed attack, and the U.S. Ambassador at the time stated that the Israeli conduct was a "political assassination," not self-defense. *Id.* For this reason, the 1988 assassination is not actually an example of use of armed force in self-defense against an armed attack by a non-state actor.

With respect to the ICJ Advisory Opinion, Professor O'Connell recognized in an earlier writing that "the situation Israel faced at the time of the Advisory Opinion was more akin to terrorist attacks perpetrated by the state's own nationals within the state's own territory" (or a law enforcement paradigm when attacks emanate from occupied territory under Israeli control and the attacks have "been treated as criminal" acts) than self-defense against armed attacks originating from abroad, "because of the measure of control Israel exercises over the occupied territories." Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435, 451 (2005). Her important insight and compelling characterization in 2005 causes one to question whether the Advisory Opinion directly addressed the right of self-defense against non-state actor attacks emanating from the territory of another state where the victim state has no law enforcement authority, and whether the Advisory Opinion impliedly did so in a way that some textwriters have missed when it attempted to distinguish the permissibility of responses to the 9/11 attacks contemplated by Security Council resolutions 1368 and 1373 from the Israeli construction of a wall on occupied territory. *See Advisory Opinion on the Wall*, 2004 I.C.J. 136; *see also* MELZER, *supra* note 1, at 52 n.46 (the ICJ held that as an occupying power Israel had effective control over occupied territory and "could not base its security measures . . . on Art 51"); Wilmshurst et al., *supra* note 3, at 966 (asserting that the Advisory Opinion "may be read as reflecting the obvious point that unless an attack is directed from outside territory under the control of the defending State the question of self-defence in the sense of Article 51 does not normally arise"); *id.* at 969 ("[Article 51] should not be read as suggesting that the use of force in self-defense is not permissible unless the armed attack is by a State."). *But see* O'CONNELL, *supra* note 3, at 320 ("The Wall Case explains that where a state is not responsible for terrorist attacks, Article 51 may not be invoked to justify measures in self-defense.").

Earlier, when Israel attacked the headquarters of the PLO in Tunis, Tunisia on October 1, 1985, it was in a circumstance that was not justified by the necessity of self-defense against ongoing armed attacks, and the Israeli attack was condemned. *See, e.g.*, Paust, *Responding*, *supra* note 3, at 712-13, 723; U.N. S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985). However, the United States declared that in different circumstance "a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks." *See* Paust, *Responding*, *supra* note 3, at 712, 723 (quoting Press Release, U.S. Mission to the U.N., No. 106(85) (Oct. 4, 1985), extract *reprinted in* 80 AM. J. INT'L L. 166, 167 (1986)).

practice and patterns of expectation noted in Part I above that were undoubtedly known to some of the drafters of the U.N. Charter.

Professor O'Connell argues that "States are restricted from using military force outside" of self-defense or authorization from the Security Council;⁴⁰ that "drone attacks in Pakistan involve significant firepower," "have amounted to significant uses of force," and "[t]he right to use them must be found in the *jus ad bellum*" (which would clearly include the right of self-defense);⁴¹ and that "signifi-

40. O'Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 11). This misses the point that a regional organization can also authorize the use of "regional action" under Article 52 of the United Nations Charter and inquiry into permissible use of force under the Charter must be more nuanced. *See, e.g.*, PAUST ET AL., *supra* note 5, at 1092-93 (regarding O.A.S. authorization in 1962 with respect to the Cuban Missile interdiction and NATO authorization concerning Kosovo in 1999); Paust, *Use of Force*, *supra* note 3, at 545-47, 536-38 (concerning the preamble to the Charter and what are merely three forms of force prescribed in Article 2(4) of the Charter and the need to consider the character, gravity, and scale of force used and other features of context before concluding that a particular use of force is "against" territorial "integrity," "against" political independence or in any other manner inconsistent with the purposes of the Charter). Concerning the history of Article 52 and the desire to protect lawful regional action in opposition to completely concentrated power in the Security Council (and its five permanent members), see Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 30-31 (1987).

41. O'Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 13); *see also id.* (manuscript at 3 n.15) (claiming also that a U.S. selective strike against members of al Qaeda riding in a car in Yemen in November, 2002 "was an unlawful action because it was military force used outside of an armed conflict"); *id.* (manuscript at 19) ("There simply is no right to use military force against a terrorist suspect far from any battlefield."); O'Connell, *supra* note 29, at 454-55 (claiming that "the Predator strike was an extrajudicial execution prohibited by the [ICCPR]," but not addressing the limiting reach of the ICCPR set forth in Article 2(1) of the ICCPR that is addressed in Part IV.B *infra* or the fact that the test under relevant human rights law would involve inquiry whether a particular self-defense targeting was "arbitrary"); *cf.* MELZER, *supra* note 1, at 4 (lack of "physical custody . . . distinguishes targeted killings from . . . extrajudicial 'executions'"); *id.* at 224 (regarding the targeting in Yemen); Chris Downes, *Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SECURITY L. 277, 282-85 (2004) (also stating that U.N. S.C. Res. 1373 provided states with an unprecedented mandate to use force." *Id.* at 286). *But see* Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661, 677 (2007) (addressing the U.S. claim before the U.N. Commission on Human Rights); Printer, *supra* note 3, at 353, 354, 356-58 (arguing that the attack was justified by military necessity against ongoing attacks and that U.N. S.C. Res. 1373 provided an "imprimatur" in the context of U.S. notification to the Security Council of its use of self-defense against al Qaeda in Afghanistan on October 7, 2001, the lack of Security Council inquiry into the propriety of the action, and the specific language in the resolution calling for the combating of terrorist acts "by all means." *See also supra* note 30.).

A similar military strike by helicopter on a key al Qaeda operative in a car in Somalia on September 15, 2009 was authorized by President Obama. The al Qaeda "senior operative" was said to be tied to the U.S. Embassy bombings in Kenya and Tanzania. An Information Minister of Somalia said "[w]e welcome that attack." *See* Mohammed Amin Adow et al., *Key al Qaeda Operative Killed in U.S. Strike*, *Somalia Says*, CNN.COM, Sept. 15, 2009, <http://www.cnn.com/2009/WORLD/africa/09/15/somalia.strike/index.html>. We do not know what the al Qaeda persons in Yemen or Somalia were doing at or near the time of targeting. For example, were they directly participating in armed attacks on U.S. soldiers in Afghanis-

cant military attacks . . . [are] only lawful in the course of an armed conflict.”⁴² For these reasons, she seems to be of the opinion that use of significant military force in response to a significant armed attack by a non-state actor outside the context of war should be unlawful.⁴³ In any event, there is no evidence of widespread expectation or general patterns of practice that directly support such a view and it would not be policy-serving or realistic. Furthermore, she does not seem to fully consider the fact that continuing al Qaeda and Taliban armed attacks 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 are necessarily part of such an armed conflict and that the *de facto* theatre of war has expanded into parts of Pakistan at least since 2004,⁴⁴ although she recognizes

tan through use of cell phones or computers or in some other way? If so, they would be targetable under both the self-defense and law of war paradigms as direct participants in armed attacks (DPAA) or in hostilities (DPH). *See also infra* note 90. They would also be targetable regardless of their nationality. *See infra* note 60.

42. O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 25); *see also id.* (manuscript at 3 n.15) (claiming that “the Yemen strike was an unlawful action because it was military force used outside of an armed conflict”); *id.* (manuscript at 13) (claiming that drones “used in Pakistan are lawful for use only on the battlefield” but that permissibility is tested under “the *jus ad bellum*,” which necessarily includes the right of self-defense); *id.* (manuscript at 16) (claiming that where “there has been no armed conflict. . . even express consent by Pakistan would not justify” use of drones in self-defense); *id.* (manuscript at 17) (alleging that a “state may not consent to the use of military force on its territory in the absence of armed conflict hostilities”); *id.* (manuscript at 25) (“only lawful in the course of an armed conflict”); *supra* note 41. However, some prefer to recognize the existence of an armed conflict with respect to violence involving merely “organized armed groups” that are “[e]ngaged in fighting of some intensity” and, therefore, violence below the customary criteria for an insurgency and those set forth in Geneva Protocol II. *Compare id.* (manuscript at 8 n.32) with materials cited *infra* notes 52-53. This approach might result in recognition that an armed conflict exists between the United States and al Qaeda and that there is a greatly expanded theatre of “war.” *But see infra* note 53.

43. She also states in this regard that “[a]n armed response to a terrorist attack will almost never meet these parameters for the lawful exercise of self-defense” involving an attack constituting a “significant amount of force” and an attack for which some state is “legally responsible.” O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 14); *see also supra* note 36. Of course, this begs the question whether a particular “terrorist attack” is an armed attack that triggers Article 51 of the Charter. *See also supra* note 30. Since she considers that use of one drone’s missile will constitute a “significant” use of force, she must agree that use of a similar missile or rocket by a non-state actor group will constitute a significant use of force and, for example, that use of similar “firepower” from a terrorist bomb (as in the case of the al Qaeda armed attack on the U.S.S. Cole in Yemen that led to the death of 17 U.S. nationals and the al Qaeda attacks on U.S. embassies in Kenya and Tanzania that resulted in the death of some 250 persons) or destruction of a commercial aircraft in flight with some 300 persons on board will also be significant.

44. *See also* O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 16) (“For much of the period that the United States has used drones on the territory of Pakistan, there has been no armed conflict [and allegedly] . . . [t]herefore, even express consent by Pakistan would not justify their use.”); *id.* (manuscript at 21) (arguing that “the only armed conflict in Pakistan is an internal or non-international armed conflict” that occurred in the spring of 2009). *But see* Nanda, *supra* note 3, at 533 (recognizing that the theatre of war or “geographical region of conflict” necessarily includes parts of Pakistan); Koh, Obama Ad-

that “[a]pparently U.S. drone attacks in Pakistan aim at militants who attack U.S. troops in Afghanistan or join with al-Qaeda.”⁴⁵

Importantly, the theater can expand when the area of direct participation in hostilities expands and this can occur, for example, when al Qaeda or Taliban leaders use cell phones or computers inside Pakistan to directly participate in hostilities. Additionally, direct participation in a process of armed attacks that triggers the right of self-defense under Article 51 of the U.N. Charter and the right to target those who are directly participating in the process of armed attacks can occur outside of an area where the armed attacks are finally experienced.

Two hypothetical situations demonstrate why claims to change the law of self-defense by imposing new requirements of “express consent,” attribution, and/or the existence of an armed conflict are not compelling, policy-serving, or realistic. First, consider the circumstance where a non-state terrorist group acquires rockets capable of striking short-range targets and starts firing them from Mexico (without the consent of the Government of Mexico or prior foreseeability) into Fort Bliss, a U.S. military base near El Paso, Texas. Must the United States actually obtain a special expressed consent of the Mexican Government or already be engaged in a war with the terrorist group (if that is even possible) before resorting to a selective use of force in self-defense to silence the terrorist attacks on U.S. military personnel and other U.S. nationals? I

ministration, *supra* note 3, pt. B (claiming that “the United States is in an armed conflict with al-Qaeda, . . . and may use force consistent with its inherent right of self-defense . . . [and since] al Qaeda . . . continues to attack us . . . in this ongoing armed conflict, the United States has the authority under international law . . . to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks”). Professor Nanda’s apt recognition is important and alerts one to the complexities involved with respect to the nature of the international armed conflict and the realities of participation by various persons from inside Afghanistan and Pakistan, especially among Pashtuns and others with cross-border ties and loyalties that have existed long before the Soviet invasion of Afghanistan and the more recent use of armed force in Afghanistan since October 7, 2001 by the United States. Two of the dirty little secrets relevant to such interconnections involve the fact that thousands of members of the Pakistan military were aiding the Taliban in its war with the Northern Alliance when the United States first intervened (*see, e.g.*, Paust, *Use of Force, supra* note 3, at 539 n.19, 543 n.36) and that the “oil” in Afghanistan is opium destined mostly for Europe through the hands of organized crime that now helps to finance the Taliban war against the United States. Professor O’Connell notes that the United States has used drones in Pakistan since 2004. *See* O’Connell, *Unlawful Killing 2, supra* note 2 (manuscript at 4); *see also supra* note 1. It would not be surprising to learn that Special Operations units had been on the ground in Pakistan very early in the war as well. *See* STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW 71 (2007). Jane Mayer notes that “the C.I.A. has joined the Pakistani intelligence service in an aggressive campaign to eradicate local and foreign militants” and that the President of Pakistan now has “more control over whom to target.” Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 36, 37, 42.

45. O’Connell, *Unlawful Killing 2, supra* note 2 (manuscript at 19).

doubt that any state under such a process of armed attack would wait while the rocket attacks continue or expect that under international law it must wait to engage in selective self-defense against the attackers. Furthermore, I doubt that any state would expect that it cannot engage in measures of self-defense to stop such rocket attacks if it had not been and cannot be at war with non-state terrorist attackers or that it cannot take such defensive measures if it is not otherwise engaged in a relevant armed conflict.

Certainly the President of the United States would try to communicate as soon as possible with the President of Mexico and others concerning what is occurring, and the fact that the United States is not attacking Mexico, but the U.S. President would not have to wait for a formal response while rockets were raining down on U.S. soldiers. Additionally, although it would be polite, the United States would not have to warn Mexican authorities before engaging in selective measures of self-defense to stop continuing attacks. Under various circumstances, a warning can be impracticable, futile, and/or create complications threatening the success of a self-defense response,⁴⁶ especially in other contexts if a special operations unit is being used for reconnaissance or to carry out the self-defense action.

Such a form of selective self-defense would be an intervention and interference with the sovereignty of Mexico, but it begs the question at stake to conclude that the "sovereignty" of Mexico is "violated" or has been "attacked" (or if violated that an exception does not exist) when permissible measures of self-defense are used merely against non-state actors engaged in armed attacks. This is especially evident when it is realized that sovereignty of the state is not absolute under international law or impervious to its reach,⁴⁷ territorial integrity of the state is merely one of the values

46. See, e.g., Banks, *supra* note 3, at 93-94.

47. See, e.g., Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24-32 (Feb. 7); United States v. Von Leeb (The High Command Case), in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 489 (1950) ("International law operates as a restriction and limitation on the sovereignty of nations."); THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS 3-7 (3d ed. 2002); CHEN, *supra* note 5, at 314-17; RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 613-14 (3d ed. 1995); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed. 1973); MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 181-82, 208-15, 238-42, 670 (1980); FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 95 (Da Capo Press 1972) (1846) (sovereignty is not an absolute barrier to military intervention and cannot be exercised in a manner "inconsistent with the equal rights of other States"); Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and National Defense*, 126 MIL. L. REV. 89, 106 (1989) ("[T]erritorial integrity is not

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 impermissibility that attaches to armed intervention.⁴⁸ Moreover, members of the U.N. have consented in advance by treaty to permissible self-defense under Article 51 of the Charter. If Mexico communicates its special ad hoc consent during the process of armed attacks, hardly anyone would question the permissibility of a necessary and proportionate U.S. response.

Second, with respect to analogous inquiry into claims of self-defense under domestic law, if a person is firing a rifle from the back bedroom window of a house into another house and had killed a child in the other house, would the neighbor whose child had been killed and who is still under a rifle attack have to warn the shooter before using a weapon to kill the shooter, and isn't the shooter on notice of what can happen next? Would the neighbor have to wait for consent from the owner of the house from which

entitled to absolute deference."); *see also* RESTATEMENT, *supra* note 33, § 905 cmt. g (1987) ("It is generally accepted that Article 2(4) [of the U.N. Charter] does not forbid limited use of force in the territory of another state incidental to attempts to rescue persons whose lives are endangered there, as in the rescue at Entebbe in 1976."); Koh, Obama Administration, *supra* note 3, pt. B ("[W]hether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including . . . the sovereignty of the other states involved."). More specifically, the pretended cloak of state sovereignty ends where human rights begin (especially with respect to public, diplomatic, and juridic sanctions), although admittedly not all violations of international law by a state can lead to permissible use of force in response.

48. *See also supra* note 12 and accompanying text (recognitions of Ashburton and Webster during the *Caroline* incident); Letter of Daniel Webster, *supra* note 11, at 454, 455 ("Respect for the inviolable character of the territory of independent States is the most essential foundation of civilization. And while it is admitted, on both sides, that there are exceptions to this rule . . . such exceptions must come within the limitations stated and the terms used in a former communication from this Department to the British Plenipotentiary here. Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'"). It is also of interest that intervention is not absolutely prohibited. For example, intervention into "the affairs of" a state is impermissible. *See, e.g.*, U.N. Charter art. 2(7); Declaration on Principles of 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. 28, U.N. Doc. A/8028, at 121, (Oct. 24, 1970). But non-state actor armed attacks emanating from a state are not simplistically merely the "affairs of" that state. Within the Americas, self-defense "in accordance with existing treaties or in fulfillment thereof" is also permissible under Article 22 of the O.A.S. Charter. Charter of the Organization of American States, art. 22, Apr. 30, 1948, 2 U.S.T. 2394. Article 21 of the O.A.S. Charter declares that "territory of a State is inviolable" and "may not be the object . . . of . . . measures of force" (*id.* art. 21), but self-defense is an exception under the U.N. Charter and, therefore, Article 22, and in the hypothetical the territory of Mexico would not be "the object" of a selective self-defense strike against non-state attackers nor would the use of force be "against" its territory or its territorial "integrity" within the language of Article 2(4) of the U.N. Charter in view of its character, gravity, and scale.

the rifle fire is coming before using a weapon in self-defense or defense of his family? And if the neighbor was renting the house in which he and his family is being attacked, does he have to obtain consent from the owner of the house in order to respond in self-defense? What domestic law of any state within the United States or any country requires such a warning or consent or some similarly extreme limitation on the right of self-defense or defense of others? Certainly police could be called by the neighbor (assuming there is time to do that), but must the neighbor wait until the police arrive and take "measures necessary to maintain"⁴⁹ law and order while the neighbor and his family are still under rifle attack? The answers seem self-evident.

III. RESPONSIVE MEASURES OF SELF-DEFENSE DO NOT NECESSARILY CREATE A STATE OF WAR

If a state engages in legitimate self-defense in a selective and proportionate manner merely against non-state actors that are perpetrating, aiding, or directing ongoing armed attacks, such selective responsive targetings are not an attack on the state in which the non-state actors are located. Such a defensive use of force will not create a state of war or an armed conflict of any duration between the state engaged in self-defense and the state on whose territory the self-defense targetings take place.⁵⁰ Former Legal Adviser to the Secretary of State Abraham Sofaer has recognized, for example, that in a circumstance where U.S. units capture non-state actor terrorists who have taken hostages in a foreign state,

the President may decide to deploy specially trained anti-terrorist units in an effort to secure the release of the hostages or to capture the terrorists who pepe-

49. U.N. Charter art. 51 ("until the Security Council has taken measures necessary to maintain international peace and security"). In the domestic context, there are police that might arrive later, but in the international context waiting for the "police" while being subjected to ongoing armed attacks would be in vain. See Greenwood, *supra* note 3, at 22 (stating that no legal requirement exists for a state to wait for Security Council approval).

50. See, e.g., Paust, *Overreaction*, *supra* note 3, at 1341 & n.23, 1344; Paust, *Use of Force*, *supra* note 3, at 535 n.3; see also Banks, *supra* note 3, at 77-78, 84; Henkin, *supra* note 3, at 821; Roberts, *supra* note 31, at 69-70 ("Neither all terrorist activities, nor all counter-terrorist military operations, even when they have some international dimension, necessarily constitute armed conflict between States," state responses "outside its own territory" to some non-state terrorists do not necessarily constitute armed conflicts, and some terrorist organizations do not even trigger application of Geneva provisions concerning insurgencies); cf. DINSTEN, *supra* note 3, at 245 (arguing that such creates an "armed conflict" with the state but not a "war").

trated the act. . . . [W]here no confrontation is expected between our units and forces of another state. . . . such units can reasonably be distinguished from . . . “forces equipped for combat.” And their actions against terrorists differ greatly from the “hostilities” expressly contemplated by the [War Powers] resolution.⁵¹

Importantly, in the case of U.S. use of drones in Pakistan for several years without special Pakistani consent against members of al Qaeda and the Taliban in self-defense and in connection with the international armed conflict in Afghanistan and its expanded *de facto* theatre, neither Pakistan nor the United States have considered that it is at war with the other—nor does it seem that any other state or international organization considers Pakistan and the United States to be at war.

Additionally, it is error to assume that a state of war necessarily exists between a state and non-state actor whenever a state that has been subjected to an armed attack by a non-state actor responds against the non-state actor with military force, since the minimal level of war or armed conflict under international law involves an armed conflict not of an international character or an

51. *War Powers, Libya, and State-Sponsored Terrorism: Hearing Before the Subcomm. on Arms Control, International Security and Science of the H. Comm. on Foreign Affairs, 99th Cong. 6-7 (1986)* (statement of Abraham D. Sofaer, Legal Adviser, Department of State). As noted in another writing,

I am one of several scholars who also recognize that the use of reasonably necessary and proportionate force to rescue hostages abroad can be legally permissible. This is especially so when the use of force is reasonably necessary in order to defend one's nationals and/or others from imminent threat of death or serious bodily harm in violation of fundamental human rights, and when the overall effort is to extract hostages from such a circumstance of harm. Evacuation missions involve merely a temporary and proportionate use of force in order to withdraw the victims . . . [and they are] potentially the least destructive form of any of the self-help or sanction responses [that are permissible under the U.N. Charter].

Paust, *Responding*, *supra* note 3, at 728-29. The 1976 Israeli Entebbe raid into Uganda to rescue Israeli nationals being held hostage by non-state actors and under a threat of imminent death was an example mentioned in the writing. *See id.* at 728 n.60 (citing McDougal & Reisman, *Entebbe*, *supra* note 3, among other works). Professor Green notes that “Israel referred to the *Caroline* explicitly in relation to” the Entebbe rescue operation while defending its self-defense action before the U.N. Security Council. Green, *supra* note 16, at 446; *see also* Rogoff & Collins, *supra* note 7, at 507 (quoting Israeli Ambassador Herzog's remarks before the U.N. Security Council). Concerning the permissibility of such defensive rescue and evacuation measures as measures of self-defense, *see* Gill, *supra* note 3, at 27; Martinez, *supra* note 29, at 157-58; John F. Murphy, *State Self-Help and Problems of Public International Law*, in *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 553, 554-58, 563 (Alona E. Evans & John F. Murphy eds., 1978); Oscar Schachter, *Self-Defense and the Rule of Law*, 83 *AM. J. INT'L L.* 259, 271 (1989); Sofaer, *supra* note 47, at 107. Concerning the view that such a rescue is not prohibited under Article 2(4) of the U.N. Charter, *see*, for example, *RESTATEMENT*, *supra* note 33, § 905, cmt. g (quoted *supra* note 47).

insurgency⁵² and some non-state actors, such as al Qaeda, do not meet the test for insurgent status.⁵³ Moreover, the United States does not have to be at war with al Qaeda in order to target their members in self-defense. No one argues that self-defense under Article 51 of the Charter can only be engaged in during war.⁵⁴ For these reasons, Article 51 self-defense actions provide a paradigm that is potentially different than either a mere law enforcement or war paradigm, and it is understood that military force can be used in self-defense when measures are reasonably necessary and proportionate. The Charter-based “inherent right” of self-defense in case of an armed attack by a non-state actor and the self-defense paradigm are also partly outside the state-to-state use of force paradigm requiring attribution to a state of non-state actor attacks

52. See, e.g., JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 654 (3d ed. 2007), and references cited therein. Traditional criteria for existence of an insurgency include the need for (1) semblance of a government, (2) control of significant territory as its own, (3) an organized armed force with the ability to field military units in sustained hostilities, and (4) a population base of support. See *id.* at 646-48, 651; Paust, *Overreaction*, *supra* note 3, at 1341. But see MELZER, *supra* note 1, at 254 (arguing that Geneva common Article 3 conflicts do not require “territorial control or any other form of factual authority”).

An opinion of the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia chose a much lower threshold, stating that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995). The *Tadic* preference is shared by some writers but is generally without support in state practice and generally shared patterns of legal expectation and is even broader than Article 1(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted on June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II]. The Geneva Protocol requires an organized armed group to be “under responsible command, [and] exercise such control over a part of . . . [a state’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” *Id.* art. 1(1). Would the *Tadic* preference apply to continued violence between rival gangs in East Los Angeles or Chicago? If so, would local police become lawful targets during “war”? Would gang members who directly and actively participate in social violence be lawful targets under the laws of war? Concerning dangers with respect to lowering the threshold of armed conflict below insurgency levels of social violence, see, for example, PAUST ET AL., *supra*, at 837 (addressing a salient warning from the Supreme Court of India).

53. See, e.g., Paust, *Overreaction*, *supra* note 3, at 1340-42; Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 326-27 (2003). Al Qaeda has not even met the test set forth in Geneva Protocol II, since it never controlled territory as its own or engaged in sustained and concerted military actions. See Geneva Protocol II, *supra* note 52, art. 1(1). As the writings cited here note, for this reason the U.S. cannot be at “war” with al Qaeda as such, although the laws of war apply during the armed conflicts in Iraq and Afghanistan and members of al Qaeda in the theatre of war have rights and duties under the laws of war. But see MELZER, *supra* note 1, at 267 (but otherwise rightly noting that a common Article 3 insurgent group must be “sufficiently organized to carry out military operations reaching the threshold of intensity required for an armed conflict” to exist).

54. See Koh, Obama Administration, *supra* note 3, pt. B (“a state that is engaged in an armed conflict or in legitimate self-defense” can engage appropriate targets); cf. O’Connell, *Unlawful Killing* 1, *supra* note 2 (manuscript at 4 n.12, 19, 25) (arguing against use of “significant” or “military” force in self-defense outside the context of war); *supra* note 42.

before a responding state can target the military forces of the other state as opposed to targeting merely the non-state actors.

It should be noted, however, that if the non-state entity that initiated the armed attack has belligerent or insurgent status, an armed conflict between the responding state and the belligerent or insurgent can arise. An armed conflict involving use of armed force by the armed forces of a state outside its territory against an insurgent force should be recognized as an international armed conflict to which all of the customary laws of war apply.⁵⁵ It is in the interest of the United States and other countries to recognize the international character of such an armed conflict so that members of their armed forces have "combatant" status, prisoner of war status if captured, and "combatant immunity" for lawful acts of warfare engaged in during an international armed conflict.⁵⁶ An armed conflict between a state and a belligerent is an international armed conflict during which all of the customary laws of war apply.⁵⁷ The armed conflict between U.S. military forces and those of the Taliban inside and outside of Afghanistan since October 7, 2001 is an international armed conflict.⁵⁸

IV. TYPES OF PERMISSIBLE TARGETINGS AND CAPTURES

A. Targeted Killings and Captures During Self-Defense

With respect to permissible conduct engaged in during self-defense, measures of legitimate self-defense can include the targeting of what would be lawful military targets during war, like the head of a non-state entity (such as Usama bin Laden) or the head

55. See PAUST ET AL., *supra* note 52, at 661-62. Such a conflict is clearly not "internal" and realistically has been internationalized by the responding state. The armed conflict that has occurred in Afghanistan since October 7, 2001, is realistically international in several respects, including (1) participation by U.S. combat troops in sustained hostilities for more than eight years, (2) participation by Taliban forces (initially by armed forces of the *de facto* government of Afghanistan), (3) general control of large areas of Afghanistan by the Taliban, and (4) the expanded theatre of war into portions of Pakistan outside the effective control of the government of Pakistan.

56. Concerning "combatant" status and "combatant immunity," see, for example, MELZER, *supra* note 1, at 309, 329; PAUST ET AL., *supra* note 52, at 651-52; Paust, *supra* note 53, at 328-32.

57. See, e.g., The Prize Cases, 67 U.S. (2 Black) 635, 666, 669 (1862); U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 9, ¶ 11(a) (1956) [hereinafter FIELD MANUAL 27-10] ("The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents."); MELZER, *supra* note 1, at 248-49; PAUST ET AL., *supra* note 52, at 645, 651, 657, 661; Paust, *Overreaction*, *supra* note 3, at 1341 n.24. The Civil War between the United States and the Confederate States of America is an example of the classic civil war between a state and a "belligerent."

58. See, e.g., Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law*, 43 COLUM. J. TRANSNAT'L L. 811, 813 & n.3 (2005); *supra* note 44.

of a state directly participating in ongoing processes of armed attack on the United States, U.S. military, or U.S. nationals abroad. Such lawful targetings in self-defense would not be “assassinations” which, in times of armed conflict, are considered to be “treacherous” acts and war crimes.⁵⁹

Furthermore, as noted in another writing addressing the fact that targeted killing of certain persons is clearly lawful under the laws of war, during war the selective killing of persons who are taking a direct part in armed hostilities, including enemy combatants, unprivileged combatants, and their civilian leaders (and, thus, excluding captured persons of any status), would not be impermissible “assassination.”⁶⁰

The right of self-defense also justifies the capture of bin Laden or other members of al Qaeda during a permissible defensive military incursion into Afghanistan or some other country, in order to capture and arrest those directly responsible for, or who directly participate in the ongoing [armed] attacks.⁶¹

59. See Paust, *Use of Force*, *supra* note 3, at 538; see also FIELD MANUAL 27-10, *supra* note 57, at 17, ¶ 31 (the selective targeting of enemy combatants is not “treacherous” and is, therefore, not impermissible “assassination,” and the prohibition of assassination “does not . . . preclude attacks on individual soldiers or officers of the enemy whether in a zone of hostilities, occupied territory, or elsewhere” (emphasis added)); DYCUS ET AL., *supra* note 44, at 67-69, 75; MELZER, *supra* note 1, at 47-50; W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW. 4, 7-8 (Dec. 1989); Sofaer, *supra* note 47, at 117, 120-21; Turner, *supra* note 3, at 87, 90; Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677, 680-85, 690-92 (2005); Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 125, 129-31 (1991); Koh, Obama Administration, *supra* note 3, pt. B. *But see* Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR C. REV. 127, 134-35 (2007) (claiming that “[w]ithout an ongoing armed conflict the targeted killing of a civilian, terrorist or not, would be assassination—a homicide and a domestic crime”).

60. See, e.g., Paust, *Use of Force*, *supra* note 3, at 538 & n.17. Targeted killings have long included the killing of a particular enemy combatant with long-range sniper fire and it has been irrelevant whether that person’s name was known or whether the enemy combatant was a U.S. or foreign national. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (quoting *Ex parte Quirin*, 317 U.S. 1, 20, 37-38 (1942)) (U.S. citizenship does not change enemy combatant status and consequences under the laws of war).

61. See, e.g., Farer, *supra* note 3, at 359; Michael J. Glennon, *State Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT’L L. 746, 749, 755 (1992); Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT’L L. 736, 736 n.5 (1992); Paust, *Use of Force*, *supra* note 3, at 538-39 & n.18; see also Sofaer, *supra* note 47, at 107; *infra* note 62. In 1992, President Clinton’s administration claimed such a right of self-defense capture on behalf of the United States “in certain extreme cases, such as the harboring by a hostile foreign country of a terrorist who has attacked U.S. nationals and is likely to do so again.” See PAUST ET AL., *supra* note 5, at 689. Bin Laden could be brought to the United States and prosecuted in a federal district court for (1) any war crimes committed at his direction or that he aided and abetted during actual wars in Afghanistan or Iraq (see generally PAUST ET AL., *supra* note 5, at 160-64; Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971)), (2) relevant violations of the Antiterrorism Act (see, e.g.,

Clearly, self-defense captures would be less injurious than self-defense targetings that lead to the deaths of those targeted. The captured person would not have law of war protections if he or she was captured outside the theater of an actual war and was not directly participating in an actual war, but the captured person would have relevant customary and treaty-based human rights protections.⁶²

Importantly, a self-defense “capture” would not constitute an impermissible “abduction”⁶³ of the person captured or an “arbitrary” deprivation of liberty⁶⁴ in violation of human rights law, because the deprivation of liberty would be not merely rational and policy-serving, but also part of a reasonably necessary response in self-defense that would be less injurious than a lawful targeted killing.

B. *The Relative Human Right to Life*

An otherwise lawful targeted killing in self-defense during relative peace or during war would not constitute a violation of the human right to life, which merely guarantees freedom from being “arbitrarily” deprived of life,⁶⁵ since it would be rational with re-

18 U.S.C. § 2332(a) (regarding killings of U.S. nationals outside the U.S.), (b), and (c)), and (3) violations of other relevant federal statutes (*see, e.g.*, *United States v. bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000)). Moreover, his capture and detention would fit within the congressional authorization in the Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224, (2001), since he planned, authorized, and ordered the 9/11 attacks. *See also Hamdi*, 542 U.S. at 517-21 (2004).

62. Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U. L. REV. 759, 765 (2007); *see also Nanda*, *supra* note 3 (arguing for apprehension as an alternative to killings where that is feasible).

63. Concerning impermissible “abductions” as such, *see, for example*, S.C. Res. 579, U.N. Doc. S/RES/579 (Dec. 18, 1985); S.C. Res. 138, U.N. Doc. S/RES/138 (June 23, 1960) (condemnation of the Israeli kidnapping of Adolf Eichmann in Argentina); PAUST ET AL., *supra* note 5, at 446-47, 471, 499, 659, 669-70, 674, 676-77, 746. *See also* Carrie Schimz, *Italy Judge Convicts 23 Former CIA Agents in Rendition Trial*, JURIST, Nov. 4, 2009, <http://jurist.law.pitt.edu/paperchase/2009/11/italy-judge-convicts-23-former-cia.php>.

64. Concerning the prohibition of “arbitrary” arrest or detention of any person under human rights law, *see, for example*, International Covenant on Civil and Political Rights, art. 9(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 3, 9, U.N. Doc. A/RES/217 (III), (Dec. 10, 1948); Organization of American States, American Convention on Human Rights, art. 7(3), Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123; African [Banjul] Charter on Human and Peoples’ Rights, art. 6, Oct. 21, 1986, 1981 O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 1520 U.N.T.S. 217; *see also supra* notes 61, 63; *infra* note 92.

65. *See* ICCPR, *supra* note 64, art. 6(1). As I noted in another writing:

With respect to tests or limits concerning applicability of the right to life, it should be noted that the authoritative *General Comment No. 24* of the Human Rights Committee operative under the *International Covenant on Civil and Political Rights*, identifies the human right to life as one among many that are peremptory norms *jus cogens* but recognizes that peretra-

spect to a person actively participating in and taking a direct part in armed attacks (including a person who is planning or directing such attacks), policy-serving, and reasonably necessary. With respect to the application of protections under human rights law, there is an additional requirement that too many textwriters overlook. For example, under Article 2, paragraph 1, of the International Covenant on Civil and Political Rights, the critical question is whether a person being targeted by a drone flying in the airspace of a foreign country is within the jurisdiction, actual power, or effective control of the state using the drone.⁶⁶ Such a person is

tors cannot “arbitrarily deprive persons of their lives.” Necessarily, the right to life is conditioned by the word “arbitrarily,” and the word “arbitrarily” demonstrates that the right to life is a relative right and its proper application will depend upon contextual analysis concerning whether or not a particular death is arbitrary under the circumstances. Indeed, the ICCPR actually uses the conditioning word “arbitrarily” when affirming that “[n]o one shall be *arbitrarily* deprived of his life.” The Covenant also recognizes exceptions with respect to the death penalty and the *Covenant’s Protocol Aiming at the Abolition of the Death Penalty* recognizes a possible exception “in time of war.” Like the *International Covenant* and the Human Rights Committee Report, the *American Convention on Human Rights* recognizes that the right to life requires that “[n]o one shall be *arbitrarily* deprived of his life,” and thus impliedly recognizes that nonarbitrary deprivations of life can be permissible. The *American Convention* also recognizes exceptions with respect to capital punishment, and its *Protocol to Abolish the Death Penalty* also contains a possible exception “in wartime in accordance with international law.” Similarly, the *African Charter on Human and Peoples’ Rights* contains a relativist limitation on the right to life while affirming that “[n]o one may be *arbitrarily* deprived of this right.” Using these standards, nonderogability means that even in times of war or other public emergency, persons cannot be arbitrarily killed. It does not mean that no person can rightly be killed.

Jordan J. Paust, *The Right to Life in Human Rights Law and the Law of War*, 65 SASKATCHEWAN L. REV. 411, 414-16 (2002) (citations omitted); see also MELZER, *supra* note 1, at 92 (lawfulness of targeted killings under human rights law “depends entirely on the meaning of the term ‘arbitrary’”); *id.* at 93-101 (yet, growing practice within the institutional bodies set up under the auspices of such treaties addressing a law enforcement context within the territory of a state using force and outside the context of war tends to require use of principles of reasonable necessity and proportionality in connection with broad goals of protecting other persons “from imminent death or serious injury, to effect an arrest or prevent the escape of a person suspected of a serious crime, or to otherwise maintain law and order or to protect the security of all,” and “[a] deprivation of life is ‘arbitrary’ when the force used is disproportionate to the actual danger present”); *id.* at 384 (human rights law can allow use of lethal force against a broader category of persons than international humanitarian law).

66. See ICCPR, *supra* note 64, art. 2(1); United Nations, Human Rights Comm., General Comment No. 31[80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (the treaty rights apply to those within the territory, jurisdiction (which can include occupied territory), or actual “power or effective control of [a] [S]tate party”); PAUST ET AL., *supra* note 52, at 812-13; MELZER, *supra* note 1, at 4 (“lack of physical custody”), 123-25, 135-36, 139 (“must be determined by reference to the level of control actually exercised over the . . . person”); *cf.* MELZER, *supra* note 1, at 125-28 (regarding practice under the American Declaration of the Rights and Duties of Man, which “does not contain a jurisdiction clause”). *But see* MELZER, *supra* note 1, at 138 (arguing for a far looser standard of “effective control or . . . directly affected” and claiming that “every . . . targeted killing . . . outside the territorial jurisdiction

clearly not within the territorial jurisdiction of the state responding in self-defense (unless the person is within territory that is occupied by the responding state and is, therefore, within a related form of territorial jurisdiction) and such a person does not appear to be within the actual “power or effective control” of the responding state.⁶⁷ It is evident, therefore, that human rights protections do not pertain and that a human rights paradigm is not directly relevant.

Professor Philip Alston, acting as the U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, has expressed concern that predator drones might be used to carry out arbitrary executions⁶⁸ and has rightly affirmed that human rights obligations of states under the United Nations Charter and other treaty-based and customary international law apply during war,⁶⁹ despite

of the operating State brings the targeted person within the ‘jurisdiction’ of that State” and that all that should be required is that a state exercise “sufficient factual control or power to carry out a targeted killing.” With respect, the power to carry out an attack on a particular target (by drone, aircraft, artillery, or long distance sniper fire) is simply not the same as actual “power or effective control” over the individual, especially if the person cannot be relatively easily captured or otherwise detained, can attempt to run away, or can fight back).

A similar problem exists with respect to application of certain protections for persons under the 1949 Geneva Conventions and Geneva Protocol I if they are not “in the hands of” or “in the power of” a party to the conflict or subject to being “treated” or to “treatment” under common Article 3 (which assumes some control over the person being treated and who has the right to humane treatment). *See, e.g.*, PAUST ET AL., *supra* note 52, at 683. This is undoubtedly why Geneva Protocol I contains other provisions to protect most civilians from being directly targeted and from the effects of indiscriminate targetings. *See infra* Part IV.C.

67. MELZER, *supra* note 1, at 138.

68. *See* Amelia Mathias, *UN Rights Investigator Warns US Drone Attacks May Violate International Law*, JURIST, Oct. 28, 2009, <http://jurist.law.pitt.edu/paperchase/2009/10/un-rights-investigator-warns-us-drone.php>. This was an apparent change from a prior statement that the 2002 U.S. strike against members of al Qaeda in Yemen was “a clear case of extrajudicial killing.” *See* Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Rep. on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, Comm. on Human Rights, ¶ 39, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (by Asma Jahangir); O’Connell, *Unlawful Killing 1*, *supra* note 2 (manuscript at 4); *see also* Jane Mayer, *Predator Versus International Law?*, THE NEW YORKER NEWS DESK BLOG, Oct. 29, 2009, <http://www.newyorker.com/online/blogs/newsdesk/2009/10/jane-mayer-predator-versus-international-law.html> (quoting Mr. Alston: “While there may be circumstances in which the use of such techniques is consistent with applicable international law”).

Of course, all lawful killings in self-defense and during war are “extrajudicial” unless they follow from a lawful conviction and death sentence. Therefore, whether they are “extrajudicial” in the context of permissible self-defense targeting is not determinative. Admittedly, the circumstance where a person has been captured, is otherwise in “effective control,” or can easily be arrested presents a different context. *See also* MELZER, *supra* note 1, at 4 (“[L]ack of physical custody . . . distinguishes targeted killings from . . . extrajudicial ‘executions.’”); *infra* note 101.

69. Mathias, *supra* note 68. That human rights law applies during war, *see, for example*, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 242-45, 280 ¶¶ 216-20, 345(3) (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 177-78,

a clearly erroneous and troubling claim by the Obama Administration that U.N. Charter-based human rights do not apply in a war zone.⁷⁰ As noted, however, the significant question under general human rights law is whether a particular person is within the jurisdiction or actual “power or effective control” of the responding state and, even assuming applicability of human rights law to a particular person, the ultimate question would be whether a targeted killing is arbitrary. As noted above, if it occurs as part of a

¶¶ 104-106 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, 226, 239-40, ¶ 25 (July 8); BUERGENTHAL ET AL., *supra* note 47, at 331-32 (3d ed. 2002); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 299-306* (ICRC 2005); RICHARD B. LILlich ET AL., *INTERNATIONAL HUMAN RIGHTS* 216 (4th ed. 2006); MELZER, *supra* note 1, at 76-78; JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* 4, 140 n.35 (2007) [hereinafter PAUST, *BEYOND THE LAW*]; PAUST ET AL., *supra* note 52, at 640 (quoting Johann Bluntschli's recognition in 1866), 653, 676, 811, 813; Philip Alston et al., *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"*, 19 EUR. J. INT'L L. 183, 192-97 (2008) (also offering an extensive survey of international institutional recognitions); Kretzmer, *supra* note 3, at 184-86; O'Connell, *Unlawful Killing* 1, *supra* note 2 (manuscript at 12); Paust, *supra* note 58, at 820-23 & n.35; see also Coard v. United States, Case No. 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 39 (1999) (“[C]ore guarantees apply in all circumstances, including situations of conflict.”); G.A. Res. 63/166, pmbl., U.N. Doc. A/RES/63/166 (Feb. 19, 2009) (“[F]reedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance.”); G.A. Res. 62/148, pmbl., U.N. Doc. A/RES/62/148 (Mar. 4, 2008); G.A. Res. 60/148, pmbl., U.N. Doc. A/RES/60/148 (Feb. 21, 2006); G.A. Res. 59/182, pmbl. & ¶¶ 1-2, U.N. Doc. A/RES/59/182 (Mar. 8, 2005); S.C. Res. 1738, ¶ 9, U.N. Doc. S/RES/1738 (Dec. 23, 2006) (“violations of international humanitarian and human rights law in situations of armed conflict”); S.C. Res. 1265, ¶ 4, U.N. Doc. S/RES/1265 (Sept. 17, 1999); Council of Europe, Parliamentary Assembly, Res. 1433, ¶ 4 (2005), available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm>; General Comment No. 31[80], *supra* note 66, ¶ 11; United Nations Human Rights Comm., General Comment No. 29 States of Emergency (Article 4), ¶¶ 3, 9, 11, n.6, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); Alfred de Zayas, *The Status of Guantanamo Bay and the Status of the Detainees*, 37 U.B.C. L. REV. 277, 281-82, 309-10 (2004); Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1535-37 (2009) [hereinafter Paust, *Absolute Prohibition of Torture*] (human rights law applies in all social contexts, including contexts in which humanitarian law applies). More generally, the duty of states under the United Nations Charter to respect and observe human rights applies universally and without a war-context limitation. See U.N. Charter arts. 55(c), 56.

70. Alston et al., *supra* note 69, at 193-96. The erroneous claim arose during the Bush Administration's program of serial criminality. See, e.g., MELZER, *supra* note 1, at 79-80; PAUST, *BEYOND THE LAW*, *supra* note 69, at 4, 31-32; Alston et al., *supra* note 69, at 186-90. The human rights obligations of states under Articles 55(c) and 56 are expressly “universal” in scope and have no territorial or contextual limitation. See U.N. Charter arts. 55(c), 56; see also Secretary of State Hillary Clinton, Remarks on the Human Rights Agenda for the 21st Century at Georgetown University (Dec. 14, 2009) (transcript available at <http://www.state.gov/secretary/rm/2009a/12/133544.htm>) (noting that “a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves” and human rights are “rights that apply everywhere, to everyone”); *supra* note 69. However, those most relevant obligations apply where there is actual “power or effective control” over persons. United Nations Human Rights Comm., General Comment No. 31[80], *supra* note 66.

permissible self-defense response, such a targeting will be reasonably necessary, rational, and not arbitrary.

In 2005, the Supreme Court of Israel, quoting the European Court of Human Rights, stated that when targeting is not necessary because the person can be arrested (which must presume that foreign state consent to arrest on its territory exists or that the state using force is an occupying power with *de jure* authority under international law to arrest),⁷¹ “use of lethal force would be rendered disproportionate,”⁷² the Israeli Supreme Court adding that at times the possibility of arrest “does not exist” and “at times it involves a risk so great to the lives of the soldiers, that it is not required.”⁷³ It is worth noting that the most relevant permissible de-

71. Concerning the general need for foreign state consent during law enforcement efforts to arrest persons on foreign state soil, see *supra* note 33. The Israeli Supreme Court seems to have had in mind authority of an occupying power to arrest persons in areas generally under effective control, an authority under the laws of war that overrides the general need for foreign state consent. Concerning such powers, see FIELD MANUAL 27-10, *supra* note 57, at 141-43; Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 64-68, 71, 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

72. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Israel*, [2005] 46 I.L.M. 375, available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf (quoting *McCann v. United Kingdom*, App. No. 18984/91, 21 Eur. H.R. Rep. 97 (1995)). The *McCann* case involved the killing of “three Irish republican terrorists . . . by members of the British security forces in Gibraltar” who “honestly and reasonably believed” that the terrorists “had planted a car bomb in a crowded area and were likely to have been carrying a concealed detonator, which would have allowed them to explode the bomb by the touch of a button” if they were not shot. CLARE OVEY & ROBIN C.A. WHITE, JACOBS & WHITE: EUROPEAN CONVENTION ON HUMAN RIGHTS 43 (3d ed. 2002). “The Court accepted that the soldiers were not to blame,” but using the “strict test” under the European Convention, the Court found that the British authorities knew who the three men were and could have arrested them “as they entered Gibraltar, before there was any risk of them having set a car bomb.” *Id.* Therefore, *McCann* involved a circumstance where arrest was possible on territory under the control of the state using force and was like a law enforcement circumstance, unlike a self-defense paradigm or war paradigm where a state is under attack from non-state actors located in a foreign state and reliance on the strict test in *McCann* in a context of a state’s self-defense response to an armed attack would be misplaced. Significantly, even in a law enforcement context, there was recognition that the killings by the soldiers were not impermissible when they reasonably believed that force was needed for defense of others. See MELZER, *supra* note 1, at 105-07 (in a hybrid paradigm of law enforcement and insurgency within Russia, the European Court recognized that “‘the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack.’” *Id.* at 389 (quoting *Isayeva v. Russia*, App No. 57947-49/00 Eur Ct. H.R.(2000)). Melzer added that the Court shifted from a strict European Convention standard applicable in a law enforcement paradigm “to a more liberal interpretation . . . in accordance with the principle of military necessity” and, “[a]ccordingly, the use of lethal force is justified not only against immediate threats, but also where it can be ‘reasonably considered’ that there is ‘a risk of attack.’” *Id.*; Kretzmer, *supra* note 3, at 179 (“[T]he law-enforcement model’ assumes that the suspected perpetrator is within the jurisdiction of the law-enforcement authorities . . . so that an arrest can be effected.”).

73. Pub. Comm. Against Torture in *Isr. v. Israel*, [2005]. For a critical analysis of the final 2006 decision of the Israeli Supreme Court in this case and its lack of needed guidance, see MELZER, *supra* note 1, at 33-36.

privation of life listed under the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁷⁴ which was used by the European Court as a basis for its decision, would be limited to “the use of force which is no more than absolutely necessary . . . in defense of any person from unlawful violence.”⁷⁵ However, an important exception exists in Article 15, paragraph 2, which states that there is to be no derogation from the limits set forth in Article 2 “except in respect of deaths resulting from lawful acts of war.”⁷⁶ Because Article 15 creates an expressed “lawful acts of war” exception, it is evident that the absolute necessity standard attached to limits contained in Article 2 does not apply to “‘deaths resulting from lawful acts of war.’”⁷⁷

In any event, the European Convention’s general test of absolute necessity outside the context of war is far more restrictive than general human rights law reflected, for example, in Article 6, paragraph 1, of the ICCPR,⁷⁸ which, as a global multilateral human rights treaty created under the U.N. system, informs the meaning and reach of human rights obligations of U.N. members under Article 56 of the United Nations Charter. Moreover, the ICCPR is the primary human rights treaty for the United States, Afghanistan, and Pakistan, not the European Convention. Additionally, in case of a clash between limits contained in the European Convention and general human rights law incorporated through and based in Articles 55(c) and 56 of the United Nations Charter, the U.N. Charter will prevail.⁷⁹ Similarly, in case of a

74. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 [hereinafter European Convention], available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>.

75. *Id.* art. 2(2)(a). *But see id.* art. 15(2). Moreover, persons would benefit from the European Convention’s test only if they are within the “jurisdiction” of a party to the treaty. *Id.* art. 1.

76. *Id.* art. 15(2).

77. *See Paust, supra* note 65, at 417 (quoting European Convention); *see also MELZER, supra* note 1, at 121-22 (stating that the right to life under Article 2 “may indeed be derogated from, albeit only in situations of armed conflict”). *But see* Francisco Forrest Martin, *The Unified Use of Force Rule: Amplifications in Light of the Comments of Professors Green and Paust*, 65 SASKATCHEWAN L. REV. 451, 451-52 (2002).

78. *See ICCPR, supra* note 65, and accompanying text; Paust, *supra* note 65, at 417. *But cf.* Kretzmer, *supra* note 3, at 177 (preferring the strict European standard in Article 2 of the European Convention), 186 n.66 (noting possible application of the Article 15(2) exception during war and noting that if “killings are permitted” under the laws of war, “they will not be regarded as arbitrary deprivations of life under article 6 of the ICCPR”).

79. *See U.N. Charter* art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”). It should be noted, however, that the U.N. Charter would not trump applicable norms *ius cogens* because they recognizably prevail over any treaty. *See, e.g., PAUST ET AL., supra* note 5, at 58, 61-62.

clash between limits in the European Convention and the right of self-defense under Article 51 of the U.N. Charter, the right to engage in permissible measures of self-defense guaranteed in the U.N. Charter will prevail.⁸⁰ For these reasons, the test concerning permissibility of self-defense targeting under the ICCPR and U.N. Charter-based human rights law, assuming that they apply to particular targeted persons, should involve inquiry into whether a particular targeting is arbitrary and not whether it is absolutely necessary. Nonetheless, measures of self-defense under Article 51 of the Charter in time of relative peace or war must be reasonably necessary and proportionate with respect to the armed attack or process of armed attacks that trigger the right to engage in self-defense.⁸¹ Therefore, the test with respect to permissibility of particular measures of self-defense (*i.e.*, whether the measure is reasonably necessary and proportionate) actually has a higher threshold than that under general human rights law. It is interesting in this regard that while recognizing the “arbitrary deprivation” test concerning human rights law the International Court of Justice has declared that

whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [ICCPR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁸²

80. See U.N. Charter art. 103; see also Jan Wouters & Frederik Naert, *The European Union and 'September 11'*, 13 *IND. INT'L & COMP. L. REV.* 719, 767 (2003) (“[O]bligations under the UN Charter prevail over the EU and EC Treaty by virtue of Article 103.”).

81. See *supra* note 18; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 95, ¶ 41 (July 8) (“[S]ubmission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law.”); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 176 (June 27) (describing “measures which are proportional to the armed attack and necessary”), ¶ 194 (noting that whether the response to the attack is lawful is dependent on “observance of the criteria of the necessity and the proportionality of the measures taken”). Therefore, permissibility of self-defense involves more than the question whether a state can respond and also involves inquiry into whether the methods and means used are reasonably necessary and proportionate.

82. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 95, ¶ 25; see also MELZER, *supra* note 1, at 78 (quoting the Inter-American Commission on Human Rights for a similar recognition and that treaty-based and customary provisions of “humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments.”); *id.* at 81.

C. Principles of Reasonable Necessity and Proportionality

General principles of reasonable necessity and proportionality have been integrated into several provisions of Geneva law applicable during an international armed conflict that will condition the permissibility of actual measures taken in self-defense during an international armed conflict and they provide useful guidance with respect to methods and means of self-defense in other contexts because all measures of self-defense must comply with the same general principles. For example, 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”)⁸³ 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.⁸⁴ A customary prohibition related to the prohibition of “indiscriminate” attacks⁸⁵ is the more general prohibition of unnecessary death, injury, or suffering during war,⁸⁶ 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.”⁸⁷ Some “inci-

83. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), adopted on June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; see also *infra* note 90.

84. See Geneva Protocol I, *supra* note 83, arts. 48, 51-53; see also HENCKAERTS & DOSWALD-BECK, *supra* note 69, at 3-67.

85. See Geneva Protocol I, *supra* note 83, art. 51(4).

86. See, e.g., PAUST ET AL., *supra* note 52, at 639, 679-80, 697-99. 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., ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 79-80 (2009) [hereinafter ICRC, *Interpretive Guidance*], available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/\\$File/ICRC_002_0990.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.PDF).

87. See Geneva Protocol I, *supra* note 83, art. 51(5)(b); see also HENCKAERTS & DOSWALD-BECK, *supra* note 69, at 46-50 (concerning the principle of proportionality). A full inquiry using the general prohibition of unnecessary death, injury or suffering or the principles of necessity and proportionality could involve a weighing of the probable loss of U.S. lives and those of Afghan nationals against those killed in the drone attack, but the “incidental” loss test may not allow such a consideration unless one can use such a calculation in connection with the phrase “excessive in relation to the concrete and direct overall military advantage to be anticipated.” See HENCKAERTS & DOSWALD-BECK, *supra* note 69, at 49-50 (noting that the Rome Statute of the International Criminal Court added the word “overall” to read: “concrete and direct overall military advantage anticipated.” (quoting the Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998))). That is what several states apparently expect when claiming that the military advantage anticipated must be “considered as a whole and not only from isolated or particular parts of the attack,” but others opine that the military ad-

dental” loss of civilian life might be foreseeable but still permissible if the requirements of reasonable necessity and proportionality are met. As explained in *United States v. List*⁸⁸ during the subsequent Nuremberg proceedings, “[m]ilitary necessity . . . permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable.”⁸⁹

In the context of war, if the U.S. intentionally targets a civilian who is known not to be taking a direct and active part in hostilities, the targeting would violate the laws of war. The international community undoubtedly would agree that al Qaeda and Taliban fighters traversing 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,⁹⁰ but the community might not agree that drug lords and

vantage must be “substantial and relatively close,” although such a phrase is also somewhat ambiguous. See *id.*; see also Kretzmer, *supra* note 3, at 200-04. One hundred and sixty states met in Rome to create the Statute and consider that it generally reflects customary international law. See, e.g., PAUST ET AL., *supra* note 52, at 550. Nonetheless, the phrase “concrete and direct” must necessarily rule out claims of broad strategic necessity such as those used on all sides during World War II—claims that, if tolerated today, would obliterate the principle of distinction and the prohibition of direct attacks on civilians.

88. *United States v. List (The Hostage Case)*, in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 757 (1950).

89. *Id.* at 1253-54; see also INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS NO. 100, art. 15 (Apr. 24, 1863) [hereinafter LIEBER CODE] (“Military necessity admits of all direct destruction of life or limb of armed enemies and of other persons whose destruction is incidentally unavoidable in the armed contests of the war.”), art. 22 (stating that there must be a “distinction between the private individual . . . and the hostile country itself, with its men in arms” and “the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”), art. 155 (“[N]on-combatants . . . [are] unarmed citizens.”); ICRC, *Interpretive Guidance*, *supra* note 86, at 37, 40 (noting that civilians might risk “incidental death or injury” because of “[t]heir activities or location”); MELZER, *supra* note 1, at 278-86, 297-98.

90. An extremely restrictive view of direct and active participation might involve the claim that civilians who are members of a non-state organization engaged in armed attacks can only be targeted during the time that they actually carry out the attacks and when they move to and from an area of attack or, if they are leaders, when they issue orders or directly participate in other ways. See also Kretzmer, *supra* note 3, at 193, 199-200 (quoting Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5, rev. 1 corr. (Oct. 22, 2002), at ¶ 69, which noted that “[i]t is possible . . . [that the fighter who engaged in hostilities] cannot . . . revert back to civilian status or otherwise alternate between combatant and civilian status”). The more realistic and policy-serving view is that such persons who directly participate in a process of armed attacks over time *are* directly and actively taking a part in hostilities. It is not a question of formal status, but of direct and active participation over time. *But see* O’Connell, *Unlawful Killing* 2, *supra* note 2 (manuscript at 25) (claiming that “[a]t the time of the attack, the ‘bodyguards’ and ‘lieutenant’ were not directly participating in hostilities,” but noting that the ICRC “might . . . support targeting them if, as appears to have been the case[,] . . . they were engaged in a continuous combat function”). With respect to the targeting of guards who are found to be directly participating in hostilities, especially if they are guarding a lawful military target (like a top Taliban leader) see *infra* note 99. Importantly, the ICRC has recognized that such non-state fighters can be recognized as “members” of “organized armed groups . . . [that consist] of individuals whose continuous function is to take a direct part in hostilities (‘continuous combat function’) or ‘members of an organized armed group’ with a

other civilians who merely finance al Qaeda or the Taliban take a direct and active part in hostilities.⁹¹ If it is not generally expected that such a financier is taking a direct part in hostilities, the intentional targeting of such a financier during the war in Afghanistan who is known to be merely a financier would be illegal and arguably “treacherous” and, if so, an “assassination,” although such a killing might be rational and not “arbitrary” under applicable human rights law. One can recognize, therefore, that the threshold of permissibility under the laws of war concerning the intentional targeting of civilians is higher (requiring direct and active participation in hostilities) than that under general human rights law (requiring merely that a killing not be “arbitrary”). For this reason, it is apparent that application of general human rights law prohibiting “arbitrary” detention⁹² or killing⁹³ does not inhibit lawful

continuous combat function and that they are targetable. ICRC, *Interpretive Guidance*, *supra* note 86, at 16, 27, 36, 70-73. The ICRC adds that “members of organized armed groups . . . cease to be civilians . . . and lose protection against direct attack.” *Id.* at 17. 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.” *Id.* at 34. The latter are targetable when they directly participate in hostilities. Moreover, direct participation in hostilities by civilians includes “[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.” *Id.* at 17, 65-68; *see also* YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27-29 (2004) (preferring that civilians who are directly participating lose civilian status); MELZER, *supra* note 1, at 56, 310, 314, 317 (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 approximately equivalent to State armed forces” for targeting purposes), 319-20, 327-28 (those with “functional combatancy” are targetable), 345 (direct participation is “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 Pub. Comm. Against Torture v. Israel [2006] IsrLR (2) 459, ¶ 39, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf (“[A] civilian who has joined a terrorist organization . . . and within the framework of his role in position in that organization he carries out a series of hostilities, with short interruptions between them for resting, loses his immunity from being attacked.”).

A major problem with the ICRC’s preference concerning “sporadic” fighters is that military forces engaged in targetings might not be able to tell whether a fighter is a member of an organized group or only joins in sporadically. *See* MELZER, *supra* note 1, at 319 (stating that it may be “problematic in operational reality”).

91. *See* ICRC, *Interpretive Guidance*, *supra* note 86, at 51-52, 54 (economic or financial activities engaged in by civilians may be “war-sustaining activities,” but not direct participation in hostilities); MELZER, *supra* note 1, at 341, 345; *see also* HCJ 769/02 Pub. Comm. Against Torture v. Israel [2006] IsrLR (2) 459, at ¶ 35 (“[A] person who sells an unlawful combatant food products or medicines does not take a direct part, but merely an indirect one, in the hostilities. The same is true of someone who helps unlawful combatants with a general strategic analysis and grants them general logistical support, including financial support.”). *But see* Amos N. Guiora, *Proportionality “Re-Configured,”* in 31 A.B.A. NAT’L SECURITY L. REP. 9, 13 (2009) (arguing for a change in law to allow targeting of those who are merely “passive supporters” of hostilities). Professor David Luban notes why such an expansive form of targeting is unacceptable. *See* David Luban, *Was the Gaza Campaign Legal?*, 31 A.B.A. NAT’L SECURITY L. REP. 15-16 (2009).

92. Human rights law prohibits “arbitrary” detention, *see supra* note 64, but during

military conduct on the battlefield, or more generally, during an armed conflict; and the Obama Administration should not be reluctant to admit what the international community knows and expects—that human rights apply during war.⁹⁴

an international armed conflict detention or internment without trial of civilians who pose a significant security threat must be reasonably necessary, and the continued propriety of detention must be subject to periodic review. *See, e.g.*, Geneva Convention, *supra* note 71, arts. 5, 42 (detention in territory of a party to the conflict “if the security of the Detaining Power makes it absolutely necessary”) 43, 78 (detention in occupied territory if necessary “for imperative reasons of security”); HENCKAERTS & DOSWALD-BECK, *supra* note 69, at 344-45 (during an international armed conflict), 347-49 (prohibition of “arbitrary” detention during a non-international armed conflict); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 510-14 (2003) (quoted in part in *Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004)). The human right to freedom from arbitrary detention will apply to any person within the actual power or effective control of the detaining power. *See supra* note 66. With respect to the human rights standard of freedom from “arbitrary” detention, it should be noted that when applying such a standard there must not be discrimination on the basis of impermissible grounds, such as national origin or religion. *See e.g.*, ICCPR, *supra* note 64, arts. 2(1), 26. Moreover, the right of access to courts for review of the propriety of detention must be the same for citizens and aliens. *See, e.g., id.* arts. 2(3), 9(4), 14(1), 26; Paust, *Judicial Power, supra*, at 507-10, 514.

It should be emphasized that the standard for detention (*e.g.*, reasonable necessity to detain a civilian who poses a significant security threat) is far more lenient than the standard for targeting a civilian who is taking a direct and active part in hostilities and the standards should not be confused. For example, a civilian may pose a significant security threat without taking a direct and active part in hostilities and may be detained, but not targeted. *Cf. Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (Brown, J., opinion) (assuming in error that a “purposefully and materially supported” standard for detention and trial under the 2009 Military Commissions Act can be used to justify the targeting of civilians during war and arguing *per dicta*, contrary to numerous Supreme Court cases and in significant error, that the laws of war are not relevant regarding statutory interpretation, must be incorporated by Congress, have not been incorporated by Congress, do not limit presidential powers, are overridden by legislation that did not express a clear and unequivocal intent to override and ignoring Supreme Court opinions that recognize a “rights under” treaties and a law of war exception to the last-in-time rule); Faiza Patel, *Who Can Be Detained in the “War on Terror”? The Emerging Answer*, ASIL INSIGHTS, Oct. 20, 2009, <http://www.asil.org/insights091020.cfm> (noting that some U.S. district court opinions demonstrate needless confusion in this regard).

93. *See supra* note 65.

94. *See supra* note 69. The customary and treaty-based human rights prohibitions of torture and cruel, inhuman, or degrading treatment of any detained person anywhere and in any context (*see, e.g.*, ICCPR, *supra* note 64, art. 7) are matched by customary and treaty-based laws of war that apply to any detainee of any status during any armed conflict, and both sets of prohibition and right are absolute; and, therefore, they apply without any exception based on alleged necessity. *See, e.g.*, PAUST, *BEYOND THE LAW, supra* note 69, at 2-5. Therefore, application of such forms of human rights during war will not inhibit lawful military conduct during war concerning the treatment of detainees. In fact, I know of no relevant human right that would needlessly inhibit lawful conduct on the battlefield. Some claim that the laws of war are a superior *lex specialis*, but such Latinized nonsense is intellectually bankrupt and unacceptable. Some human rights are peremptory norms *jus cogens*—that is, they are superior and trump any inconsistent international law in any circumstance, including inconsistent laws of war. *See generally* PAUST, *BEYOND THE LAW, supra* note 69, at 4, 35, 37, 69; PAUST ET AL., *supra* note 5, at 61-64. Furthermore, some human rights are nonderogable—that is, they cannot be derogated from even in times of war or because of an alleged necessity. *See, e.g.*, ICCPR, *supra* note 64, art. 4(2); BUERGENTHAL & MURPHY, *supra* note 3, at 163; PAUST, *BEYOND THE LAW, supra* note 69, at 4, 141 n.38. Moreover, the phrase *lex specialis* has been made up and favored by a few textwriters and

V. THE QUESTION OF USE OF DRONES AND INDISCRIMINATE TARGETINGS

Application of the principles of reasonable necessity and proportionality and the prohibition of indiscriminate attacks requires nuanced choice and contextual inquiry with respect to the circumstances triggering the right of self-defense and circumstances in which responsive force is used. One claim of significant concern with respect to indiscriminate targeting has been raised by Professor O'Connell. Although she states that "[d]rones can be used for . . . precision attacks"⁹⁵ and, therefore, that they must necessarily not be inherently indiscriminate weapons, she claims that U.S. use of drones in Pakistan has resulted in a "high rate of unintended deaths."⁹⁶ She identifies a disturbing pattern of excessive deaths when reporting that "[b]etween 2006 and late 2009, about 20 suspected militant leaders have reportedly been killed . . . during strikes that killed between 750 and 1000 other persons."⁹⁷ She

jurists who do not seem to understand that norms *jus cogens* have primacy, not every type of law of war. Additionally, the phrase *lex specialis* appears in no known international agreement. It is nonsense to claim that every law of war will displace or prevail over every relevant human right in time of armed conflict. Additionally, human rights obligations are universal and apply in all social contexts under the United Nations Charter, and Article 103 of the Charter guarantees their primacy over inconsistent law of war treaties. *See supra* notes 69, 74. In any event, as this article notes, the United States has nothing to fear from application of relevant human rights law and U.S. military lawyers should be trained in relevant human rights law as well as in the laws of war.

Melzer notes that the proper consideration of *lex specialis* is not to "exclude the applicability" of human rights, "but merely" to determine "the interpretation" of applicable human rights law. MELZER, *supra* note 1, at 81, 176, 290. This would be acceptable. *But see id.* at 81, 382-83 (claiming that "[t]o the extent that the *lex specialis* provides a rule designed for the special situation at hand . . . it takes precedence" and "[o]nly where the *lex specialis* of IHL [international humanitarian law] does not provide any rule at all . . . will having recourse to the *lex generalis* of human rights law be justified" (citing Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 266-67 (2000), among other writings)). However, this latter theoretic preference for "precedence" and a lack of "recourse" is unacceptable concerning both *jus cogens* and non-derogable human rights and it ignores the potential primacy of all human rights under Article 103 of the U.N. Charter. Therefore, the better approach involves use of the law of war merely as an interpretive aid where there are gaps or ambiguities under human rights law or where human rights are not applicable because persons are not within the jurisdiction or actual "power or effective control" of a responding state. Melzer's important study also contains a detailed exposition of the *jus cogens* status of the right to life that he considers to be relevant to "the case of legitimate military targets, under the paradigm of hostilities." *Id.* at 212-21; *see also id.* at 290, 298-99 (concerning applicability of non-derogable human rights).

95. O'Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 5).

96. *Id.* (manuscript at 8); *see also id.* (manuscript at 6) ("large number of persons being killed"). It should be noted that criminal responsibility under the customary laws of war can occur when there is wanton or reckless disregard of consequences. *See, e.g.*, PAUST ET AL., *supra* note 52, at 696-99.

97. O'Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 9). She considers this to mean that "the U.S. was killing 50 unintended targets for each intended target." *Id.* (ma-

claims that intended targets are, “in general, surrounded by many persons not involved in hostilities, not suspected militants, and not intended targets.”⁹⁸ Thereafter, she addresses the killing of the top Taliban leader inside Pakistan in 2009, as well as his wife, his wife’s parents, his uncle, a lieutenant, and seven “‘bodyguards’”⁹⁹ as an arguably disproportionate use of force.¹⁰⁰ However, the killing of nine members of the Taliban, one of whom was a top leader, with a consequential loss of four persons, who may not have participated in hostilities (a ratio of some two targetable persons to one), would not appear to be disproportionate or indiscriminate. Clearly, the importance of the target must be weighed as part of a nuanced calculation. Moreover, part of the calculation should include consideration of equally effective alternative methods of targeting and readily available weaponry. In the context of ongoing attacks on U.S. military personnel in Afghanistan and the *de facto* expansion of the theatre of war, targeting the top Taliban leader and his guards was reasonably necessary. Would use of cruise missiles have resulted in less deaths, injury or suffering? Would use of fighter aircraft (with what weaponry?) that might have had to swerve to dodge local ground fire (including shoulder-held rockets firing at the aircraft)? Would use of a Special Operations team on the ground involve fewer deaths or less injury or suffering? Was use of a predator drone arguably more “smart,” controllable, and proportionate under the circumstances? Nils Melzer notes that while it is desirable to allow fighters on a conventional battlefield to surrender where that is realistically feasible, they “run the risk of being individually targeted” and, in reality, belligerents cannot reasonably be prevented “from resorting to surprise attacks of instantaneous lethality or to employ units and weapons systems which are incapable of taking prisoners, if such action is justified by military necessity and [is] otherwise in compliance with IHL.”¹⁰¹

nuscript at 1). Such a ratio is startling because, if correct, it raises a concern that some of the targetings might have involved wanton or reckless disregard of consequences, and a pattern of such unintended killings of such a proportion can also result in conclusions of dereliction of duty of military commanders and civilian leaders who knew or should have known of such a pattern and did not engage in reasonable corrective action. Concerning the test for leader responsibility, see, for example, PAUST ET AL., *supra* note 52, at 51-82, 88-100.

98. O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 10).

99. With respect to guards, the ICRC notes that even a “civilian” who engages in “the defense of military personnel and other military objectives against enemy attacks” is engaged in “direct participation in hostilities” and is targetable. See ICRC, *Interpretive Guidance*, *supra* note 86, at 38; MELZER, *supra* note 1, at 333.

100. See O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 10). This incident was reported by Jane Mayer, *supra* note 44, at 36.

101. MELZER, *supra* note 1, at 370, 413; see also *id.* at 397-98 (arguing that part of a nuanced contextual inquiry should involve consideration of “the actual level of control exercised over the situation by the operating State” and consideration of “required intensity or

In contrast to reports of high numbers of apparently excessive deaths, others report that some 600 people have been killed “in northwestern Pakistan since August 2008, including around 400 militants”¹⁰² (which would be a ratio of some two targetable persons to one), and Senator John Kerry has stated that drones had been successful in combating al Qaeda and have resulted in minimal collateral damage.¹⁰³ Still others claim that only ten percent of the persons killed are “civilians.”¹⁰⁴ Part of the problem involves access to all relevant facts and the characterization and later identification of persons as “civilians,” especially since civilians who take a direct and active part in hostilities can be targeted. Another problem involves proper application of the customary norm reflected in Article 51(7) of Geneva Protocol I. Article 51(7) recognizes that

[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attack or to shield military operations.¹⁰⁵

In view of this well-known admonition, if al Qaeda and Taliban fighters purposely intermix with civilians who take no active part in hostilities in an effort to shield themselves, they are violating

urgency may” involve “a generous standard of ‘reasonableness’ in traditional battlefield confrontations.” Further, there should be inquiry into qualitative, quantitative, and temporal necessity and whether methods and means “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”); cf. Amos N. Guiora, *License to Kill*, FOREIGN POL’Y, July 13, 2009, http://www.foreignpolicy.com/articles/2009/07/13/licence_to_kill (former Israeli IDF legal advisor to the commander of the Gaza Strip from 1994-1997 states that in an occupied territory “the commander must determine that any alternatives, such as capturing and detaining the individual, are not operationally possible” and “must also seek to minimize the collateral damage” to civilians).

102. See Mathias, *supra* note 68.

103. *Id.*; see also Koh, Obama Administration, *supra* note 3, pt. B (“Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality . . . are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.”).

104. See O’Connell, *Unlawful Killing 2*, *supra* note 2 (manuscript at 2 n.6).

105. Geneva Protocol I, *supra* note 83, art. 51(7).

the prohibition of use of human shields and resultant deaths of civilians can be their responsibility if targetings of al Qaeda and Taliban fighters are otherwise reasonably necessary under the circumstances. Nonetheless, Article 51(8) affirms that “[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians.”¹⁰⁶ Were some of the civilian deaths attributable to al Qaeda and Taliban fighters intermixing with civilians in order to shield themselves? Were some of the civilians even “voluntary shields?”¹⁰⁷ If so, were target selections and actual targetings in such circumstances adequately attentive to principles of reasonable necessity and proportionality? A mere listing of the number of civilian deaths during a given time period does not allow full consideration whether some “civilians” were taking a direct and active part in hostilities, whether some were intermixed with al Qaeda and Taliban fighters who used them as shields,¹⁰⁸ and whether other features of context were relevant with respect to application of principles of reasonable necessity and proportionality.

Professor O’Connell identifies another problem with respect to the use of drones that deserves the immediate attention of the Obama Administration: the status of the persons who fly them and engage in targetings. She rightly notes that under the laws of war if such persons are not members of the regular armed forces of a party to an international armed conflict, they are unprivileged fighters who, like members of al Qaeda, are not entitled to “combatant” status and “combatant immunity”¹⁰⁹ for what otherwise would be lawful targetings during war and they can be prosecuted under relevant U.S. or Pakistani domestic law for murder,¹¹⁰ sub-

106. *Id.* art. 51(8).

107. Concerning voluntary shields, see, for example, ICRC, *Interpretive Guidance*, *supra* note 86, at 56-57 (whether or not they can be considered to be taking a direct part in hostilities in particular circumstances, “through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks”); MELZER, *supra* note 1, at 346.

108. See also Mayer, *supra* note 44, at 44 (“After such attacks, the Taliban, attempting to stir up anti-American sentiment in the region, routinely claims, falsely, that the victims are all innocent civilians.”).

109. See ICRC, *Interpretive Guidance*, *supra* note 86, at 33 n.52, 83-84; Gary Solis, *America’s Unlawful Combatants*, WASH. POST, Mar. 12, 2010, at A17; *supra* note 56; *infra* note 110.

110. See O’Connell, *Unlawful Killing 1*, *supra* note 2 (manuscript at 8, 22, 26); *supra* note 56. It is not a violation of the laws of war merely because a C.I.A. civilian engages in combat activities or otherwise takes a direct part in hostilities, but such a person is subject to prosecution under relevant domestic law because the law of war does not provide combatant immunity to such a person. See, e.g., Paust, *supra* note 62, at 768, n.44, 770-71; see also LIEBER CODE, *supra* note 89, art. 57 (a privileged belligerent’s “warlike acts are not individual crimes or offenses”), art. 82 (but unprivileged fighters “who commit hostilities . . . with-

ject to any applicable domestic defense such as defense of others from death or serious bodily injury.¹¹¹ It is quite obvious that during an international armed conflict the better approach for the United States would be to require that only military personnel use drones for the targeting of persons.¹¹² If civilians who are presently engaged in such conduct are thought to be valuable, perhaps they could become members of the armed forces.

The problem is more complex, since Article 51 self-defense targetings can be lawful outside the context of an international armed conflict during which combatant immunity pertains. Does a similar immunity exist for those engaged in self-defense targetings that are permissible under the United Nations Charter? An implied self-defense immunity must logically follow or acts of permissible self-defense outside the context of an international armed conflict would be crippled when those who engage in otherwise permissible measures of self-defense are subject to domestic prose-

out commission, without being part and portion of the organized hostile army . . . are not entitled to the privileges of prisoners of war"). If domestic U.S. law allows a C.I.A. civilian to engage in combat activities during war, then it might be that such law would prevail over prior U.S. domestic law allowing prosecution for murder. However, U.S. domestic law would not be relevant in the case of prosecution in a foreign state or international tribunal. Of course, any person of any status who violates the laws of war is subject to prosecution in any country as a war criminal. *See, e.g.*, FIELD MANUAL 27-10, *supra* note 57, at 178, ¶¶ 498-499; Paust, *supra* note 62, at 771, n.54;

111. More than domestic law would be relevant if the right to defend others from unlawful death can be implied from the general human right to life. Killing "in defence of any person from unlawful violence" is an expressed exception to impermissible deprivation of life in Article 2(2)(a) of the European Convention. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 74, art. 2(2)(a). Self-defense and defense of others against imminent unlawful death or serious injury is also generally recognized in international criminal law. *See, e.g.*, Rome Statute, *supra* note 87, art. 31(1)(c); PAUST ET AL., *supra* note 52, at 126.

112. This is such an obvious point that one must assume that lawyers at the sites where pilots actually operate the drones (e.g., at Nellis Air Force Base in Nevada) and lawyers in the C.I.A. and at even higher levels in the Obama Administration must not be aware of some of the most basic principles of the laws of war. *See* Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 371-72, 377-79 (2003) (contrasting targetings by military commanders that have input from military lawyers with targetings by C.I.A. personnel); James Risen & Mark Mazzetti, *Blackwater Guards Tied to Secret Raids by C.I.A.*, N.Y. TIMES, Dec. 11, 2009, at A1 (C.I.A. and private contractor civilians were engaged in combat roles in Afghanistan and Iraq); *cf.* Professor Geoffrey Corn, *Remarks*, EJIL: TALK! (Sept. 29, 2009), <http://www.ejiltalk.org/the-united-states-use-of-drones-in-pakistan/> ("CIA General Counsel's office received LOAC [law of armed conflict] training from the ILAW Department at the [U.S. Army] JAG School."). Some top C.I.A. lawyers are leftover lawyers from the Bush Administration who have proven either to be remarkably ignorant of the laws of war or conveniently quiet and complicit during the Bush-Cheney program of serial and cascading criminality. *See, e.g.*, PAUST, BEYOND THE LAW, *supra* note 69; Paust, *Absolute Prohibition of Torture*, *supra* note 69. Given that President Obama has allowed them to stay and is not prosecuting them when they are reasonably accused of complicity is an outrage and continuing danger to the United States. The end result is that low level C.I.A. personnel and other civilians who are not members of the armed forces of the United States and who engage in targetings by drone are needlessly placed in harm's way.

cution.¹¹³ The problem is even more complex, however, because whether such an implied immunity under international law controls in a domestic legal process can depend on how international law is incorporated and whether it has a priority over ordinary domestic law. The general practice of states and evident patterns of expectation are opposed to prosecution of those engaged in lawful self-defense targetings, but self-defense immunity for lawful conduct engaged in as part of self-defense outside the context of war should be more clearly affirmed by the international community.

CONCLUSION

As this article affirms, self-defense can be permissible against non-state actor armed attacks, and measures of self-defense can occur in the territory of another state without special consent of the other state or imputation of the armed attacks to that state as long as the measures of self-defense are directed against the non-state actors. Additionally, when directed merely against the non-state actors, responsive force is not engaged in against the foreign state as such or as an attack "on" or "against" its territory. Responsive measures of self-defense in a foreign state would not necessarily create a state of war between the responding state and the foreign state, or between the responding state and the non-state actors; and whether or not an armed conflict exists to which the laws of war apply would be tested under normal criteria with respect to the existence of an international or non-international armed conflict. It is understandable, therefore, that a self-defense paradigm can be different than a war paradigm, and both are dif-

113. A famous domestic prosecution of a person who participated in self-defense actions outside the context of an international armed conflict occurred in connection with the *Caroline* incident. A Canadian deputy sheriff, Alexander McLeod, was arrested November 12, 1840, and prosecuted in New York for murder and arson during the incident. See, e.g., *People v. McLeod*, 25 Wend. 483 (N.Y. Sup. Ct. 1841); David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515 (1992); Green, *supra* note 16, at 434-35; Rogoff & Collins, *supra* note 7, at 495 (also noting that other British nationals had been arrested in 1838 in New York on charges of murder and arson in connection with "the *Caroline* incident, but all were eventually released after interrogation"). The British had argued that he was engaged in "a transaction of a public character" and should be immune, but he was prosecuted and, nonetheless, found not guilty "on proof of an alibi." Rogoff & Collins, *supra* note 7, at 496 (also noting that Secretary Webster had agreed with the British that McLeod should not be prosecuted and tried to intervene, but the Governor of New York protested the "unwarrantable interference by Webster in the internal affairs of the State of New York'"). *Id.* at 496, 519-20. In case of a clash between Article 51 of the U.N. Charter and a bilateral extradition treaty, the Charter should prevail. See U.N. Charter art. 103. This does not guarantee that foreign domestic prosecution will not proceed if foreign enforcement jurisdiction is acquired over an accused by means other than extradition.

ferent than a mere law enforcement paradigm.

During a lawful self-defense response, targeted killings and the capture of non-state actor fighters and others who are directly and actively engaged in non-state actor armed attacks can be permissible no matter where such forms of direct participation occur. Human rights law applies in all social contexts, but whether a particular person has protection can depend on whether that person is within the jurisdiction or “effective control” of a responding state. When a person is protected, the general human right to life is a right to freedom from arbitrary deprivation of life and does not provide a guarantee that would not otherwise result from the application of a higher standard of protection through use of general principles of reasonable necessity and proportionality that are applicable during war or in the context of self-defense outside of war. When engaging in permissible self-defense targetings, a state must comply with such general principles whether or not an armed conflict exists.

Textwriters and others disagree whether U.S. use of drones in Pakistan for the last several years has resulted in instances of indiscriminate use of armed force, reasonably necessary and proportionate targetings with incidental loss of civilian lives, or both. The mere listing of the number of overall “civilian” deaths does not provide full awareness of all relevant facts, but some of the alleged patterns of death are sufficient to raise concern and demonstrate the need for greater caution. Another issue involves the status of those who pilot predator drones. Under the law of war, combatant immunity for lawful acts of war is available for combatants during an international armed conflict (i.e., members of the regular armed forces) and is not available for most C.I.A. personnel or other civilians. An implied immunity for any person who engages in lawful acts of self-defense under the United Nations Charter in any context should be more clearly recognized by the international community. Additionally, all personnel who are permitted to engage in self-defense targetings should be adequately trained in the laws of war, especially with respect to proper application of the general principles of necessity and proportionality. More adequate training can save lives, assure U.S. compliance with international law, lessen the likelihood of criminal and civil liability of various U.S. nationals at home and abroad, support overall combat and anti-terrorist missions, and serve U.S. foreign policy interests.